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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10, Original

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA

Defendants

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Chief Counsel,
Arizona Interstate Stream Commission

BURR SUTTER
Assistant Counsel,
Arizona Interstate Stream Commission

PERRY M. LING
Special Counsel,
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FRED O. WILSON
Attorney General of Arizona

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Chief Assistant Attorney General of Arizona

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT

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Defendants

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of Arizona, appearing by its duly authorized attorneys, respectfully moves and prays the court for leave to file the bill of complaint submitted here-

with. The State of Arizona seeks to bring this suit under authority of Article III, Section 2, Clause 2 of the Constitution of the United States.

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STATEMENT IN SUPPORT OF MOTION

By this action Arizona seeks to quiet its title to the right to the use of certain water of the Colorado River System, as against the claims of the defendants, and to obtain ancillary injunctive relief.

The respective rights of the complainant and the defendants to the use of such water exist under and are controlled by the Colorado River Compact of 1922 (Exhibit A attached to complaint submitted herewith), the Boulder Canyon Project Act (45 Stat. 1057) and the California Limitation Act (Laws of California, 1929, ch. 16, pp. 38-39). For many years the complainant and the defendants have disagreed as to the interpretation, construction, and application of the Compact and the two mentioned Acts. The contending parties assert conflicting claims to the right to use certain quantities of Colorado River System water. These claims are mutually exclusive. As to each quantity of water involved a recognition of the Arizona claim requires a denial of the California claim and vice versa.

By act of its legislature California has limited its right to water apportioned by the Colorado River Compact to 4,400,000 acre-feet annually. This limitation was made for the benefit of Arizona, Nevada, New Mexico, Utah, Colorado, and Wyoming. Notwithstanding the limitation the defendants have made contracts for the delivery to them of 5,362,000 acre-feet annually of Colorado River water, have caused the construction of works of a capacity to divert more than 8,000,000 acre-feet annually, and are currently diverting water from the River at a rate which will result in the diversion from the Colorado River of a quantity of water greatly in excess of 4,400,000 acre-feet in 1952. In spite of the fact that it has no firm right to more than 4,400,000 acre-feet of Colorado River water annually, California asserts the right to take and threatens to take and use quantities of water greatly in excess of that amount to the injury and damage of Arizona.

Arizona needs to take and consume 3,800,000 acre-feet of Colorado River System water annually in order to

sustain its existing economy. It has ready for construction projects which will utilize such water. The successful financing, construction and operation of these projects are threatened by the claim of the defendants that Arizona has no right to such water.

Arizona and California have heretofore appeared before this Court in three cases involving rights to the use of Colorado River water. The decision in such cases and the dates when rendered are: 283 U. S. 423 (1931), 292 U. S. 341 (1934), and 298 U. S. 558 (1936). The issues presented by the complaint tendered for filing are different from the issues presented and considered in those cases. The factual situation now existing is different from that which existed at the time of the determination of each of those cases. During the period in which those cases were before the Court Arizona had not ratified the Colorado River Compact and had no contract with the United States for the use of Colorado River System water. Hence, Arizona could not then rely upon or receive any benefit from that Compact and its related documents. Now Arizona has ratified the Compact and has entered into a contract with the United States for the use of Colorado River System water. Accordingly, Arizona now relies on and asserts its rights under the Compact, the Boulder Canyon Project Act and the California Limitation Act.

California and the water users of that state are now diverting and using water from the Colorado River in quantities greatly in excess of the 4,400,000 acre-feet per annum to which it is limited by the Boulder Canyon Project Act and by the California Limitation Act. Arizona has definite projects for the use of its share of Colorado River water which it is not presently using and in furtherance thereof has initiated appropriation of water for such projects in accordance with the Statutes of Arizona.

For nearly thirty years there has been a fruitless effort to determine the controversy by compact. Because of such failure of compact negotiations, Arizona and California must look to this Court for a decision

which will define their respective rights. The prosperity and welfare of a large and important area of our Union are involved.

The case is, in essence, one involving conflicting claims of two states to the waters of an interstate stream. Under the decision in Nebraska v. Wyoming, 325 U. S. 589, 616, it is a proper case for the exercise by this Court of its original jurisdiction.

It is respectfully submitted that the motion for leave to file the complaint should be granted.

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, and COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

BILL OF COMPLAINT

The State of Arizona, by leave of Court, files this bill of complaint and respectfully says:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States.

II

In this behalf the complainant acts by and through the Arizona Interstate Stream Commission, an official state agency charged by statute with the duty and responsibility of prosecuting and defending all rights,

claims and privileges of the state with respect to interstate streams, and by and through the Attorney General of the State of Arizona.

III

The defendants, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District and Metropolitan Water District of Southern California are political subdivisions and agencies of the State of California, duly organized and existing under the laws of that State. The defendants City of Los Angeles and City of San Diego are municipal corporations duly organized and existing under the laws of the State of California. The defendant County of San Diego is a county duly created and existing under the laws of the State of California.

IV

(a) The Colorado River is a navigable stream with a total length of 1293 miles. It rises in the State of Colorado and flows through that State and Utah before entering Arizona near its northeast corner. The Colorado River flows for 292 miles through Arizona. Then for 145 miles it forms the boundary between Arizona and Nevada, for 235 miles the boundary between Arizona and California, and for 16 miles the boundary between Arizona and Mexico. For 688 miles, or more than one-half its length the Colorado River flows in Arizona or upon its boundary.

(b) The natural drainage basin of the Colorado River in the United States is divided among the States as follows:

Arizona	103,000	square miles,
California	4,000	square miles,
Nevada	12,000	square miles,
Utah	40,000	square miles,
New Mexico	23,000	square miles,
Colorado	39,000	square miles,
Wyoming	19,000	square miles.

Approximately 43% of the natural drainage basin of the Colorado River lies within Arizona. Approximately 90% of the total area of Arizona is within said natural drainage basin.

(c) The tributaries of the Colorado River have a total combined length of approximately 2164 miles of which 836 miles are in Arizona. No tributaries enter the Colorado River from California. California does not contribute any appreciable or measurable quantity of water to the River.

V

In the early years of the present century controversies arose among the seven Colorado River Basin States over the use of the waters of that river. Pursuant to appropriate Federal and State authorizations an interstate compact, known as The Colorado River Compact and hereinafter referred to as Compact, governing the use of the waters of the Colorado River, was negotiated, signed on November 24, 1922, ratified by the States, and consented to by the Congress of the United States. By virtue of the Boulder Canyon Project Act (December 21, 1928, 45 Stat. 1057), the compliance by California with the terms and provisions of that Act, and the ratification of the Compact by six states, it became effective as to all basin States except Arizona on June 25, 1929. Arizona ratified the Compact on February 24, 1944 (Arizona Laws, 1944, p.37). The Compact is now and for many years has been in full force and effect. A copy of the Compact is attached hereto, marked Exhibit A, and by this reference made a part hereof.

VI

Article II of the Compact contains the following definition of terms hereinafter used:

"As used in this compact:

(a) The term "Colorado River System" means that

portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River 1 mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power."

VII

The Compact did not apportion water of the Colorado River System among the signatory States. Instead, it

apportioned the beneficial consumptive use of stated quantities of water to the Upper Basin and the Lower Basin respectively. Such apportionment is made by Article III of the Compact. The pertinent provisions of that Article are these:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If . . . the United States . . . shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, . . .

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series. . . .

. . . .

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)."

VIII

After the Colorado River Compact was signed by representatives of the States and approved by the Federal representative on November 24, 1922, the defendant, the State of California, pressed strenuously for the ratification of the Compact by the respective State legislatures and the grant of the needed consent of the Congress of the United States. Arizona objected to the Compact and to the grant of Congressional consent because it deemed that the Compact adversely affected its rights unless it were protected by some determination of the quantum of water from the Colorado River System available under the Compact for use in Arizona and by some limitation on the quantum of such water available for use in California. California was desirous of securing the construction of a dam at Black or Boulder Canyon of the Colorado River to protect against floods, regulate stream flows, and generate hydroelectric power and of securing the construction of a canal which would be located entirely in the United States and which would carry water from the Colorado River to the Imperial Valley of California.

IX

(a) By the Boulder Canyon Project Act (Act of December 21, 1928, 45 Stat. 1057), hereinafter referred to as Project Act, Congress authorized the construction of a dam in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir with a capacity of at least twenty million acre-feet and the construction of the All-American Canal from the River to the Imperial and Coachella Valleys of California.

(b) Section 4(a) of that Act provides thus:

"This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no

water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall

provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada."

(c) Section 13 (a) of the Project Act gives the required consent of Congress to the Compact upon the satisfaction of the conditions set out in Section 4 (a).

(d) By Section 8 and Section 13 (b), (c), and (d), the United States subjects all of its rights, and the rights of those claiming under it, to the provisions of the Compact.

(e) Section 13 (c) of the Project Act reads thus:

"(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this act, the Federal water power act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact."

X

(a) In order to comply with the conditions precedent established by Section 4 (a) of the Project Act, California duly enacted a law hereinafter referred to as the California Limitation Act (Act of March 4, 1929; Ch. 16, 48th Sess; Statutes and Amendments to the Codes, 1929, pp. 38-39) which reads as follows:

"An Act to limit the use by California of the waters of the Colorado River in compliance with the act of Congress known as the "Boulder Canyon Project Act," approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the states signatory thereto.

The people of the State of California do enact as follows:

Section 1. In the event the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain

act entitled "An Act to ratify and approve the Colorado River Compact, signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice be given by the governor of such ratifications and approval," approved January 10, 1929 (statutes 1929, chapter 1), is not approved within six months from the date of the passage of that certain act of the Congress of the United States known as the "Boulder Canyon Project Act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado River Compact, then when six of said states, including California, shall have ratified and approved said Compact, and shall have consented to waive the provisions of the first paragraph of article eleven of said compact which makes the same binding and obligatory when approved by each of the states signatory thereto, and shall have approved said Compact without conditions save that of such six states approval and the President by public proclamation shall have so declared, as provided by the said "Boulder Canyon Project Act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said "Boulder Canyon Project Act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California including all uses under contracts made under the provisions of said "Boulder Canyon Project Act," and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph "a" of article three of the said Colorado River Compact, plus not more

than one-half of any excess or surplus waters unapportioned by said Compact, such uses always to be subject to the terms of said Compact.

Sec. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4 (a) of the said "Boulder Canyon Project Act" and this act shall be so construed."

(b) After the passage of the California Limitation Act and the ratification of the Compact by six of the Basin States, the Compact was proclaimed effective as of June 25, 1929.

XI

(a) After the Compact became effective the Secretary of the Interior promulgated general regulations under which the United States would contract for the disposition of Colorado River water. During the period 1930-1934 the Secretary of the Interior negotiated and entered into water contracts with the Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley County Water District, the Metropolitan Water District of Southern California, the City of San Diego, and the County of San Diego, all defendants herein.

(b) The quantities of Colorado River water which the contracting defendants were entitled to receive under such contracts were attempted to be determined by the California Seven Party Water Agreement of August 18, 1931. A copy of such agreement, marked Exhibit B, is attached hereto, and by this reference made a part thereof. The Seven Party Water Agreement was made and executed by all of the defendants except the State of California and has been acquiesced in and accepted by the State of California. It purports to allocate the California share of the waters of the Colorado River. The quantity of water so attempted to be allocated amounts to 5,362,000 acre-feet per annum. In so far as said agreement attempts to apportion among

the California water users any rights to the consumptive use of water in excess of 4,400,000 acre-feet per annum it was and is without any force, effect, or validity whatsoever.

(c) Paragraph 16 of the contract of December 1, 1932, between the United States and Imperial Irrigation District, provides in its Article 29 that:

> "This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress, approved August 19, 1921, entitled 'An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes' which compact was approved by the Boulder Canyon Project Act."

Substantially identical provisions are contained in the agreements between the other defendants and the United States. Said contracts are expressly subjected to the availability of water for use in California under the Compact and the Project Act.

(d) The contracts between the United States and the defendant California entities above mentioned wrongfully and unlawfully purport to recognize a right in California and its water users to take, divert, use, and consume a total of 5,362,000 acre-feet of Colorado River water annually. By the express terms of the Project Act and the California Limitation Act such right is limited to the use of 4,400,000 acre-feet annually of the water apportioned by Article III (a) of the Compact "plus not more than one-half of any excess or surplus water unapportioned by said compact, such uses always to be subject to the terms of said compact." Under the Compact, Article III (f), surplus waters may not be apportioned until after October 1, 1963.

XII

(a) After the execution of the contracts above mentioned the dam, now known as Hoover Dam, was built by the United States Bureau of Reclamation in the Black Canyon of the Colorado River to a size which will impound approximately 32,000,000 acre-feet of water. The Imperial Dam and the All-American Canal were built to take water from the Colorado River to the Imperial and Coachella Valleys of California. The All-American Canal has a capacity of 15,155 cubic feet of water per second of time, hereinafter referred to as c.f.s., from its point of diversion to Syphon Drop, 13,155 c.f.s., from there to Pilot Knob, and 10,155 c.f.s. beyond Pilot Knob. The United States pursuant to a contract between it and defendant Metropolitan Water District of Southern California constructed Parker Dam. Thereafter, the Metropolitan Aqueduct was constructed to carry Colorado River water to various Southern California communities. The Metropolitan Aqueduct has a designed capacity of 1,605 c.f.s. The United States Bureau of Reclamation constructed Davis Dam to re-regulate water released from Hoover Dam.

(b) All of the aforementioned facilities were constructed and are operated for the storage, diversion, and use of Colorado River water within the Lower Basin of that river and are governed by, and must be maintained, operated and administered in conformity with the Compact, the Project Act, and the California Limitation Act.

(c) Through the operation of such facilities, California and its water users can take, divert, and consumptively use quantities of Colorado River water greatly in excess of 4,400,000 acre-feet. The defendants and each of them claim that California and its water users have the right to take, divert, and consumptively use, by means of such facilities a minimum of 5,362,000 acre-feet of Colorado River water each year. Such claim and claims are contrary to the Compact, the

Project Act, and the California Limitation Act and are void and without effect as against the rights of the complainant.

XIII

(a) Arizona ratified the Compact on February 24, 1944, and at the same time entered into a contract with the United States for the annual delivery to Arizona and its water users from storage in Lake Mead of "so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet" subject to the availability of such water under the Compact and the Project Act. This delivery obligation applies and is intended to apply only to water from the main stream of the Colorado River. It does not apply to or affect the use of any water of the Gila River or its tributaries. The delivery obligation is subject to certain adjustments which are specifically mentioned in the contract. The United States also agrees to deliver to Arizona from Lake Mead storage one-half of the unapportioned surplus, subject to the availability thereof to Arizona under the Compact and subject to whatever rights Nevada, New Mexico, and Utah may be determined to have therein. A copy of the aforementioned contract, marked Exhibit C, is attached hereto and by this reference made a part hereof. The rights of Arizona to water from the Colorado River System are made subject to, and controlled by, the Compact and the Project Act.

(b) In ratifying the Compact as above set forth, Arizona acted in reliance upon the California Limitation Act and the provisions of Section 4 (a) of the Project Act. Arizona would not have ratified the compact had it not been for the protection which was and is provided to it by the California Limitation Act.

XIV

By contracts dated March 30, 1942 and January 3, 1944, the United States agreed to deliver annually to

Nevada from Lake Mead storage "so much water, including all other water diverted for use within the State of Nevada in the Colorado River System, as may be necessary to supply the State a total quantity not to exceed" 300,000 acre-feet, subject to the availability of such water under the Compact and the Project Act. The quantity of water to which Nevada is entitled under said contracts is the same as that specifically stated for Nevada in Section IV(a) of the Project Act.

XV

Portions of the States of New Mexico and Utah are located within the Lower Basin of the Colorado River. As stated in Paragraph 7 (g) of its February, 1944 contract with the United States, Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such Compact. Arizona expects to negotiate with New Mexico and Utah a compact which will define the respective rights of those states to participate as Lower Basin States in the use of Colorado River water apportioned now or hereafter to such Lower Basin. There is no controversy between Arizona and either New Mexico or Utah over their respective rights to the use of Colorado River water.

XVI

By treaty between the United States and the United States of Mexico, signed February 3, 1944 and proclaimed effective November 27, 1945 (Treaty Series 994), there is allotted to Mexico an annual quantity of 1,500,000 acre-feet of Colorado River water to be delivered in a specified manner and subject to reduction in periods of extraordinary drought. To an extent which is not as yet determined much of the Mexico allotment of water will be satisfied by return flows accruing to the Colorado River at a point too far down stream to permit the rediversion and use of such flows in the

United States. It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico.

XVII

(a) Subject to the availability of water under the Compact and the Project Act and subject to the rights of the States of New Mexico and Utah, Arizona has the right to take and divert from the Colorado River System annually so much water as may be necessary for the beneficial consumptive use in Arizona of 3,800,000 acre-feet. Such quantity is made up of 2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III (a) of the Compact plus the 1,000,000 acre-feet apportioned by Article III (b) of the Compact.

(b) Arizona is not now presently using all of the aforesaid 3,800,000 acre-feet of water to which it is entitled annually. In excess of 1,700,000 acre-feet out of the said 3,800,000 acre-feet is not being presently used and consumed in Arizona, and is available for such use and consumption under the Arizona Projects hereinafter mentioned.

XVIII

There are within the natural basin of the Colorado River System in Arizona certain Indians and Indian tribes. Article VII of the Compact provides that it shall not be construed as affecting the obligations of the United States to Indian tribes. There is no controversy which relates to the use of the waters of the Colorado River System by Indians or Indian tribes and which involves the complainant.

XIX

Arizona is an arid state. Irrigation is essential to its successful agriculture, and much water is needed for

domestic, municipal and industrial purposes. Precipitation is insufficient to satisfy the need for water. Arizona has no substantial source of water except the Colorado River System. There are in Arizona in excess of 725,000 acres of land presently irrigated with surface and underground water which need additional and supplemental water in order to sustain their productivity. Such additional and supplemental water can be obtained only from the main stream of the Colorado River. The underground water supply, tapped by wells for irrigation of a substantial portion of said acreage, is grievously depleted because the draft thereon is greatly in excess of the recharge. As a result the well depths are increasing and the well discharges are decreasing. Because of such diminution of the underground water supply there is now available in Arizona water sufficient to irrigate and cultivate approximately 500,000 acres of land only. Arizona desperately needs additional water from the main stream of the Colorado River. Without such additional water, approximately 31% of the 725,000 acres of land presently cultivated will go out of cultivation. Agricultural production will be reduced to a dangerous extent, population will decline, and the economy of the State will be destroyed in large measure. The only source of water to prevent such a catastrophe is the main stream of the Colorado River.

XX

At the request of Arizona, the United States Bureau of Reclamation has investigated a project to bring water to Central Arizona from the main stream of the Colorado River. Such project is known as the Central Arizona Project. Plans for such project are substantially as set out in House Document 136, 81st Congress. During the 79th and succeeding Congresses Arizona has endeavored to obtain Congressional authorization for the construction of the Central Arizona Project by the Bureau of Reclamation. The defendants have vigorously resisted such legislation upon the ground, among others, that there is no water from the Colorado River

System available for consumptive use in Arizona in addition to the quantities of such water now used. Bills to authorize the Central Arizona Project were passed by the United States Senate in the 81st and 82nd Congresses but failed of passage in the House of Representatives. On April 18, 1951 the House of Representatives Committee on Interior and Insular Affairs adopted a resolution that consideration of the bills relating to the Central Arizona Project "be postponed until such time as use of water in the lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the lower Colorado River basin" (see Hearings Before the Committee on Interior and Insular Affairs, House of Representatives, 82nd Congress, First Session, on H. R. 1500 and H. R. 1501, Part 2, pp. 739-761). Such Congressional action has been due to the wrongful assertion by the defendants of unwarranted and unlawful claims to the use of water of the Colorado River System. Unless and until the title of Arizona to the beneficial consumptive use annually of 3,800,000 acre-feet of water (subject to the rights of New Mexico and Utah) of the Colorado River System is confirmed and put at rest by decree of this court, the defendants will continue, improperly, unfairly and wrongfully to impugn such title of Arizona with the intent of preventing Arizona from using any additional water from the main stream of the Colorado River.

XXI

(a) Arizona has present projects for the beneficial consumptive use of waters from the Colorado River System to which it is entitled but which it is not now using. One of such projects is substantially the same as the Central Arizona Project above referred to. Arizona proposes to construct the Granite Reef Aqueduct and other appurtenant features of the Central Arizona Project, and in furtherance of such plans, has applied to the Secretary of the Interior for a right of way over the public domain for said Granite Reef Aqueduct.

Such right of way was granted by the Secretary of the Interior to the State of Arizona on the 18th day of July, 1952.

(b) Arizona has also applied for and been granted the necessary right of way over lands owned by the State of Arizona for Granite Reef Aqueduct. In addition thereto, Arizona is negotiating to purchase rights of way over privately owned lands and is proceeding to condemn additional rights of way over privately owned land. When such proceedings are completed, Arizona will have a right of way for the entire course of the Granite Reef Aqueduct.

(c) Various agencies and subdivisions of the State of Arizona have heretofore made application to appropriate sufficient water from the main stream of the Colorado River to the Central Arizona Project and said applications have been granted by the State Land Commissioner, the state official designated by statute for such purpose.

(d) Arizona intends to and will proceed with the construction of Granite Reef Aqueduct. The necessary diversion works, aqueducts, and power plants will cost several hundred million dollars. The improper and wrongful claims of the defendants to the waters of the Colorado River System prevent Arizona from financing the construction of its project and unless the rights of Arizona are confirmed, quieted, and put at rest by a decree herein the charges and interest which Arizona will have to pay to secure the necessary financing will be substantially increased.

(e) In order to obtain the power necessary to pump water into Granite Reef Aqueduct from Lake Havasu on the Colorado River, Arizona has heretofore negotiated with the Secretary of the Interior relative to Bridge Canyon Dam, plans for which are set forth in House Document 136, 81st Congress. The Secretary of the Interior has heretofore advised Arizona that when funds are provided by Arizona or an agency or subdivision thereof, the Department of the Interior, as permitted by the Reclamation laws, will take all necessary

steps to ascertain if Bridge Canyon Dam and related facilities can be constructed, and, if found authorized, construction thereof will be undertaken in accordance with the plans set forth in said House Document 136. The energy required to pump water from Lake Havasu to the Granite Reef Aqueduct and from thence to the places of use in Arizona will be received from hydroelectric power generated at Bridge Canyon Dam or from some other hydroelectric power plants, or, if no hydroelectric power is available, then from a plant or plants generating electricity by the use of steam.

(f) Arizona has spent to date approximately $400,000.00 in the study, investigation and planning of the diversion of waters from the main stream of the Colorado River into Central Arizona. For the same purpose, the United States Bureau of Reclamation has expended approximately $750,000.00.

XXII

A controversy exists between the plaintiff and the defendants as to the interpretation, construction and application of the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act. Such controversy relates to the following:

(1) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water? The complainant says that it is apportioned water and hence the Project Act and the California Limitation Act, which limits California's rights to 4,400,000 acre-feet annually of water apportioned by Article III (a) plus not more than one-half of the surplus unapportioned by that Compact, preclude California from any rights to water covered by Article III (b). Complainant further says that its position in this regard is sustained by the decision of this Court in the case of *Arizona v. California,* 292 U. S. 341.

(2) How is beneficial consumptive use to be measured? Article III of the Compact does not apportion

water. Rather it apportions the beneficial consumptive use of water. The Compact contains no definition of beneficial consumptive use and does not establish any method of measuring beneficial consumptive use. Arizona says that beneficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man. Water salvaged by man is not chargeable as a beneficial consumptive use. The point is most pertinent when applied to the use of waters of the Gila River, a tributary of the Colorado River. In a state of nature the Gila River was a losing stream with large quantities of water lost to the stream before its confluence with the Colorado River. Arizona has salvaged this water by putting it to beneficial consumptive use before it is lost and is chargeable only with the depletion of the stream at the state line. The amount of water involved in the controversy over the method of measurement of beneficial consumptive use exceeds 1,000,000 acre-feet annually.

(3) How are evaporation losses from Lower Basin main stream storage reservoirs to be charged? Such reservoir losses amount to over 700,000 acre-feet of water annually. Arizona says that such losses of water should be apportioned among the users of water from the main stream storage reservoirs in the Lower Basin in the same proportion as the consumptive use of each is to the total consumptive use of such storage water in the Lower Basin.

XXIII

There are or may be claims asserted by the defendants or some one or more of them, in addition to those relating to the controversial subjects stated in Paragraph XXII above, which adversely affect or may adversely affect the right of Arizona to the beneficial consumptive use of 3,800,000 acre-feet of water of the Colorado River System, all of which claims, including both

those relating to those questions stated in Paragraph XXII and those which the defendants may assert in addition thereto, are or may be in derogation of the title of the plaintiff in and to the beneficial consumptive use of 3,800,000 acre-feet of water annually from the Colorado River System. Such claims so adverse to the plaintiff are each and all in violation of the Compact, the Project Act, and the California Limitation Act and are wholly without force, effect or validity. The right and title of Arizona to the beneficial consumptive use of 3,800,000 acre-feet of water of the Colorado River System (except such quantities thereof as New Mexico and Utah are entitled to) is good and valid and is subject to no diminution by reason of any claims of the defendants whatsoever. Unless and until such right and title of Arizona is confirmed by this Court neither the Project heretofore mentioned nor any other Project to utilize desperately needed main stream Colorado River water in Arizona can be financed or constructed.

XXIV

Under the authority of the Compact, the Project Act and the California Limitation Act, Hoover, Davis, Parker and Imperial Dams, the Metropolitan Aqueduct, and the All-American Canal have been constructed. The defendants have used and profited from such facilities. None of such facilities would have been constructed had it not been for the Compact, the Project Act and the California Limitation Act. The defendants have accepted over a period of many years benefits consisting of many millions of acre-feet of water for beneficial consumptive use and of many billions of kilowatt hours of hydroelectric energy and they and each of them are now estopped and forever precluded from denying the validity and integrity of the Compact, the Project Act and the California Limitation Act.

XXV

In the second paragraph of Section 4 (a) of the Project Act the Congress of the United States stated

what it deemed to be a fair apportionment among California, Arizona, and Nevada of the beneficial consumptive use of water apportioned to the Lower Basin by the Compact. Such an apportionment was and is fair and equitable. Arizona accepts it and will be bound thereby. California after having secured, by virtue of the Compact, the Project Act, and the California Limitation Act, the facilities which it desires is now unwilling to accept such an apportionment. California passed its Limitation Act and accepted the aforesaid benefits accruing to it and its water users by reason of the construction of the facilities above mentioned with full knowledge that the Congress of the United States had given its approval to the aforesaid apportionment. The defendants, and each and all of them, are now estopped and forever precluded from claiming that the apportionment so approved by the Congress of the United States is not a fair and equitable apportionment among the States of California, Arizona, and Nevada.

XXVI

Facilities now constructed and in use to divert water from the Colorado River System for use in California have a capacity to take annual quantities exceeding 8,000,000 acre-feet. During the years 1946 to 1951 inclusive the defendants, through the use of such facilities, diverted water from the Colorado River System for use in California in the following quantities:

1946	3,381,000 acre-feet
1947	3,392,000 acre-feet
1948	3,714,000 acre-feet
1949	3,944,000 acre-feet
1950	4,229,000 acre-feet
1951	4,540,000 acre-feet

In the year 1952, according to estimates by the Bureau of Reclamation, based on requests made by defendant California users, the defendants, if they continue to divert water from the Colorado River System at the rate diversions have been made during the calen-

dar year to date, will divert at least 5,430,000 acre-feet. Defendants and each of them have threatened for many years to use and consume, and are now actually using and consuming, quantities of Colorado River water in excess of 4,400,000 acre-feet annually. Defendants will in the future, unless restrained and enjoined by this Court, continue to increase their diversions of Colorado River water. Defendants have no firm right to divert and take annual quantities of Colorado River water in excess of 4,400,000 acre-feet, and their use of such quantities of water in derogation of the rights of Arizona should be enjoined and forever restrained.

XXVII

The controversy between the complainant and the defendants as to their respective rights to the use of waters of the Colorado River System is a controversy of serious magnitude. The basic economy of the State of Arizona is threatened with destruction by reason of the matters and things complained of herein. The injury and resulting damage to Arizona and its people by reason of the actions, threats and claims of the defendants are so great that they are incapable of estimation.

XXVIII

The defendant, the State of California, has long recognized that a controversy of grave import and serious magnitude exists between it and the State of Arizona over the use of the waters of the Colorado River System. This has been established by testimony presented to Congressional committees by official representatives of California in hearings before the 79th, 80th, 81st and 82nd Congresses, by official actions of the Governor of California, and by resolutions adopted by the legislature of California.

XXIX

Arizona has no plain, speedy or adequate remedy at law and has no remedy whatsoever in any other court.

WHEREFORE, complainant, the State of Arizona, prays that:

1. Its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted, subject only to the rights of the States of Utah and New Mexico and to the availability of such water under the Colorado River Compact.

2. The title of the State of California to the annual beneficial consumptive use of the waters of the Colorado River System apportioned to the Lower Basin by the Colorado River Compact be fixed at and forever limited to 4,400,000 acre-feet and be made subject to the availability of such water under the Colorado River Compact.

3. The defendants and each and all of them and the attorneys, engineers, officers, representatives, and agents of them and each of them be forever enjoined and restrained from asserting against the plaintiff in any manner any claim to the waters of the Colorado River System which interferes or conflicts with the right of the complainant to the annual beneficial consumptive use of 3,800,000 acre-feet of the waters of the Colorado River System apportioned to the Lower Basin by the Colorado River Compact, subject only to the rights of the States of Utah and New Mexico and subject to the availability of such water under the Colorado River Compact.

4. As to surplus waters of the Colorado River System unapportioned by the Colorado River Compact, it be decreed that when and if such waters or any thereof are apportioned to the Lower Basin, the State of California shall be entitled to one-half thereof and the State of Arizona to the remainder less a quantity not to exceed one-twenty-fifth of the total to the State of Nevada and less whatever rights Utah and New Mexico may have in and to such surplus.

5. A decree be entered herein recognizing, confirm-

ing and establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of stream depletion.

6. Losses of water in and from reservoirs located in the Lower Basin on the main stream of the Colorado River shall be charged against the apportionment to Arizona and California respectively in the same proportion as the consumptive use of water in the State against which the charge is made currently bears to the total consumptive use of water in the Lower Basin.

7. The complainant have such other and further relief as the court may deem proper.

8. The complainant have judgment for its costs herein expended.

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Arizona Interstate Stream Commission

BURR SUTTER
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PERRY M. LING
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FRED O. WILSON
Attorney General of Arizona

ALEXANDER B. BAKER
Chief Assistant Attorney General of Arizona.

Attorneys for the State of Arizona

STATE OF ARIZONA }
County of Maricopa } ss.

HOWARD PYLE, being first duly sworn, upon his oath deposes and says: That he is the duly elected, qualified and acting Governor of the State of Arizona; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters alleged therein on information and belief, and as to those he believes it to be true.

HOWARD PYLE

Subscribed and sworn to before me this 8th day of August, 1952.

WESLEY BOLIN
Secretary of State,
State of Arizona

EXHIBIT A.

COLORADO RIVER COMPACT

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America approved August 19, 1921, (42 Statutes at Large, page 171) and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel for the State of Arizona
W. F. McClure for the State of California
Delph E. Carpenter for the State of Colorado
J. G. Scrugham for the State of Nevada
Stephen B. Davis, Jr., for the State of New Mexico
R. E. Caldwell for the State of Utah
Frank C. Emerson for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such water shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any

time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures

of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A.D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL
(Signed) W. F. MCCLURE.
(Signed) DELPH E. CARPENTER.
(Signed) J. G. SCRUGHAM.
(Signed) STEPHEN B. DAVIS, Jr.
(Signed) R. E. CALDWELL.
(Signed) FRANK C. EMERSON.

Approved:
(Signed) HERBERT HOOVER.

EXHIBIT B

AGREEMENT

REQUESTING THE DIVISION OF WATER RESOURCES OF THE STATE OF CALIFORNIA TO APPORTION CALIFORNIA'S SHARE OF THE WATERS OF THE COLORADO RIVER AMONG THE VARIOUS APPLICANTS AND WATER USERS THEREFROM IN THE STATE, CONSENTING TO SUCH APPORTIONMENTS, AND REQUESTING SIMILAR APPORTIONMENTS, AND REQUESTING SIMILAR APPORTIONMENTS BY THE SECRETARY OF THE INTERIOR OF THE UNITED STATES

This agreement, made the 18th day of August 1931, by and between Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

Witnesseth:

Whereas the Secretary of the Interior did, on November 5, 1930 request of the Division of Water Resources of California a recommendation of the proper apportionments of the water of and from the Colorado River to which California may be entitled under the provisions of the Colorado River compact, the Boulder Canyon project act, and other applicable legislation and regulations to the end that the same could be carried into each and all of the contracts between the United States and applicants for water contracts in California as a uniform clause; and

Whereas the parties hereto have fully considered their respective rights and requirements in cooperation with the other water users and applicants and the Division of Water Resources aforesaid;

Now, therefore, the parties hereto do expressly agree to the apportionments and priorities of water of and from the Colorado River for use in California as hereinafter fully set out and respectfully request the Division of Water Resources to, in all respects, recognize said

apportionments and priorities in all matters relating to State authority and to recommend the provisions of Article I hereof to the Secretary of the Interior of the United States for insertion in any and all contracts for water made by him pursuant to the terms of the Boulder Canyon project act, and agree that in every water contract which any party may hereafter enter into with the United States, provisions in accordance with Article I shall be included therein if agreeable to the United States.

ARTICLE I

The waters of the Colorado River available for use within the State of California under the Colorado River compact and the Boulder Canyon project act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said district as it now exists and upon lands between said district and the Colorado River, aggregating (within and without said district) a gross area of 104,500 acres, such waters as may be required by said lands.

SEC. 2. A second priority to Yuma project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

SEC. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District for beneficial consumptive use, 3,850,000 acre-feet of water per annum, less the beneficial consumptive use under the priorities designated in sections 1 and 2 above. The rights designated

(a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

SEC. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the coastal plain of Southern California, 550,000 acre-feet of water per annum.

SEC. 5. A fifth priority (a) to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the coastal plain of southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SEC. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SEC. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on map No. 23000 of the Department of the Interior, Bureau of Reclamation.

SEC. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said district and/or said city (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of re-

duced diversions by said district and/or said city; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said district and/or said city and such users resulting therefrom.

SEC. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said city and/or said county (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said city and/or said county; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said city and/or said county and such users resulting therefrom.

SEC. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said district and said city, and either or both may use said apportionments as may be agreed by and between said district and said city.

SEC. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclus-

ion of a supply for both said city and said county and either or both may use said apportionments as may be agreed by and between said city and said county.

SEC. 12. The priorities hereinbefore set forth shall be in nowise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

ARTICLE II

That each and every party hereto who has heretofore filed an application or applications for a permit or permits to appropriate water from the Colorado River requests the Division of Water Resources to amend such application or applications as far as possible to bring it or them into conformity with the provisions of this agreement; and each and every party hereto who has heretofore filed a protest or protests against any such application or applications of other parties hereto does hereby request withdrawal of such protest or protests against such application or applications when so amended.

ARTICLE III

That each and all of the parties to this agreement respectfully request that the contract for delivery of water between the United States of America and the Metropolitan Water District of Southern California under date of April 24, 1930, be amended in conformity with Article I hereof.

In witness whereof, the parties hereto have caused this agreement to be executed by their respective officers thereunto duly authorized, the day and year first above written. Executed in seven originals.

Recommended for execution:

PALO VERDE IRRIGATION DISTRICT,

By ED. J. WILLIAMS.

ARVIN B. SHAW, JR.

IMPERIAL IRRIGATION DISTRICT,
By CHAS. L. CHILDERS.
M. J. DOWD.

COACHELLA VALLEY COUNTY
WATER DISTRICT,
By THOS. C. YAGER.
ROBBINS RUSSEL.

METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
By W. B. MATTHEWS.
C. C. ELDER.

CITY OF LOS ANGELES,
By W. W. HURLBUT.
C. A. DAVIS.

CITY OF SAN DIEGO,
By C. L. BYERS.
H. N. SAVAGE.

COUNTY OF SAN DIEGO,
By H. N. SAVAGE.
C. L. BYERS.

(The agreement was thereafter ratified by each of the seven parties.)

EXHIBIT C

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA
CONTRACT FOR DELIVERY OF WATER

THIS CONTRACT made this 9th day of February 1944 pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter referred to as "United States," acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter referred to as the "Secretary," and the STATE OF ARIZONA, hereinafter referred to as "Arizona," acting for this purpose by the Colorado River Commission of Arizona, pursuant to Chapter 46 of the 1939 Session Laws of Arizona,

Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary acting under and in pursuance of the provisions of the Colorado River Compact and Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and

incidental works, creating thereby a reservoir designated Lake Mead of a capacity of about thirty-two million (32,000,000) acre-feet; and

3. Whereas said Boulder Canyon Project Act provides that the Secretary, under such general rules and regulations as he may prescribe, may contract for the storage of water in the reservoir created by Boulder Dam, and for the delivery of such water at such points on the river as may be agreed upon, for irrigation and domestic uses, and provides further that no person shall have or be entitled to have the use for any purpose of the water stored, as aforesaid, except by contract made as stated in said Act; and

4. Whereas it is the desire of the parties to this contract to contract for the storage of water and the delivery thereof for irrigation of lands and domestic uses within Arizona; and

5. Whereas nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes:

6. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit

DELIVERY OF WATER

7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, or agencies or water users therein, will accept under this contract each calendar year from storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet.

(b) The United States also shall deliver from storage in Lake Mead for use in Arizona, at a point or points of diversion on the Colorado River approved by the Secretary, for the uses set forth in subdivision

(a) of this Article, one-half of any excess or surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona under said compact and said act, less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article.

(c) This contract is subject to the condition that Boulder Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the United States and Arizona, and agencies and water users therein, shall observe and be subject to and controlled by said Colorado River Compact and the Boulder Canyon Project Act in the construction, management, and operation of Boulder Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other uses.

(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

(e) This contract is for permanent service, subject to the conditions stated in subdivision (c) of this Article, but as to the one-half of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) of Article III of the Colorado River Compact, such water is subject to further equitable

apportionment at any time after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(g) Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights.

(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

(i) Nothing in this contract shall preclude the parties hereto from contracting for storage and delivery above Lake Mead of water herein contracted for, when and if authorized by law.

(j) As far as reasonable diligence will permit, the water provided for in this contract shall be delivered as ordered and as reasonably required for domestic and

irrigation uses within Arizona. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered, for the purpose of investigation and inspection, maintenance, repairs, replacements, or installation of equipment or machinery at Boulder Dam, or other dams heretofore or hereafter to be constructed, but so far as feasible will give reasonable notice in advance of such temporary discontinuance or reduction.

(k) The United States, its officers, agents, and employees shall not be liable for damages when for any reason whatsoever suspensions or reductions in the delivery of water occur.

(l) Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract.

(m) Rights-of-way across public lands necessary or convenient for canals to facilitate the full utilization in Arizona of the water herein agreed to be delivered will be granted by the Secretary subject to applicable federal statutes.

POINTS OF DIVERSION: MEASUREMENTS OF WATER

8. The water to be delivered under this contract shall be measured at the points of diversion, or elsewhere as the Secretary may designate (with suitable adjustment for losses between said points of diversion and measurement), by measuring and controlling devices or automatic gauges approved by the Secretary, which devices, however, shall be furnished, installed, and main-

tained by Arizona, or the users of water therein, in manner satisfactory to the Secretary; said measuring and controlling devices or automatic gauges shall be subject to the inspection of the United States, whose authorized representatives may at all times have access to them, and any deficiencies found shall be promptly corrected by the users thereof. The United States shall be under obligation to deliver water only at diversion points where measuring and controlling devices or automatic gauges are maintained, in accordance with this contract, but in the event diversions are made at points where such devices are not maintained, the Secretary shall estimate the quantity of such diversions and his determination thereof shall be final.

CHARGES FOR STORAGE AND DELIVERY OF WATER

9. No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona. A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot.

RESERVATIONS

10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said

states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III (a) of the Colorado River Compact; (3) what part, if any, is within Article III (b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III (a) of the Colorado River Compact between the Upper Basin and the Lower Basin.

DISPUTES AND DISAGREEMENTS

11. Whenever a controversy arises out of this contract, and if the parties hereto then agree to submit the matter to arbitration, Arizona shall name one arbitrator and the Secretary shall name one arbitrator and the two arbitrators thus chosen shall meet within ten days after their selection and shall elect one other arbitrator within fifteen days after their first meeting, but in the event of their failure to name the third arbitrator within thirty days after their first meeting, such arbitrator not so selected shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit. The decision of any two of the three arbitrators thus chosen shall be a valid and binding award.

RULES AND REGULATIONS

12. The Secretary may prescribe and enforce rules and regulations governing the delivery and diversion of waters hereunder, but such rules and regulations shall be promulgated, modified, revised or extended from time to time only after notice to the State of Arizona and opportunity is given to it to be heard. Arizona agrees for itself, its agencies and water users that in the operation and maintenance of the works for diversion and use of the water to be delivered hereunder, all such rules and regulations will be full adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

13. This contract is made upon the express condition and with the express covenant that all rights of Arizona, its agencies and water users, to waters of the Colorado River and its tributaries, and the use of the same, shall be subject to and controlled by the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), as approved by the Boulder Canyon Project Act.

EFFECTIVE DATE OF CONTRACT

14. This contract shall be of no effect unless it is unconditionally ratified by an Act of the Legislature of Arizona, within three years from the date hereof, and further, unless within three years from the date hereof the Colorado River Compact is unconditionally ratified by Arizona. When both ratifications are effective, this contract shall be effective.

INTEREST IN CONTRACT NOT TRANSFERABLE

15. No interest in or under this contract, except as provided by Article 7 (1), shall be transferable by either party without the written consent of the other.

APPROPRIATION CLAUSE

16. The performance of this contract by the United States is contingent upon Congress making the necessary appropriations for expenditures for the completion and the operation and maintenance of any dams, power plants or other works necessary to the carrying out of this contract, or upon the necessary allotments being made therefore by any authorized federal agency. No liability shall accrue against the United States, its officers, agents, or employees by reason of the failure of Congress to make any such appropriations or of any federal agency to make such allotments.

MEMBER-OF-CONGRESS CLAUSE

17. No Member of or Delegate to Congress or Resident Commissioners shall be admitted to any share or part of this contract or to any benefit that may arise

herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

DEFINITIONS

18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract.

19. In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By (s) HAROLD L. ICKES,
Secretary of the Interior.

STATE OF ARIZONA, acting by and through its COLORADO RIVER COMMISSION,

By (s) HENRY S. WRIGHT, *Chairman.*

By (s) NELLIE T. BUSH, *Secretary.*

Approved this 11th day of February 1944:

(s) SIDNEY P. OSBORN,
Governor of the State of Arizona,

Office - Supreme Court, U.S.
FILED
DEC 8 1952
WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 10, Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, and COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

Return of Defendants to Rule to Show Cause and Brief in Support of Return.

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Civic Center,
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JAMES DON KELLER,
District Attorney,
Court House,
San Diego, California,
Attorney for Defendant,
County of San Diego, California.

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IN THE

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October Term, 1952

No. ..... Original.

STATE OF ARIZONA,

Complainant.

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, and COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

RETURN OF DEFENDANTS TO RULE TO SHOW CAUSE.

Come now defendants above named and, in response to the Rule to Show Cause issued by this Court on October 13, 1952, in the above entitled proceeding, submit the following Return:

1. Defendants desire that the above entitled action proceed to an effective judgment on the merits.

2. A prior decision of this Court (*Arizona v. California*, 298 U. S. 558) indicates that the United States is an indispensable party to the proposed action.

3. Defendants are advised that the Acting Solicitor General of the United States has represented to this Court, by letter dated October 8, 1952, that the United

States has decided to move for leave to intervene, and that if Arizona shall be granted leave to file its bill of complaint herein, such motion will be made at the appropriate time. This return is filed in reliance upon that representation of the Acting Solicitor General.

4. Defendants therefore interpose no objection to an order granting complainant's motion for leave to file the bill of complaint.

5. All defenses, including, but not limited to, the defense that indispensable parties, particularly the United States, are not joined herein, are hereby reserved.

Respectfully submitted,

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BRIEF OF DEFENDANTS IN SUPPORT OF RETURN TO RULE TO SHOW CAUSE.

Statement of the Case.

It is not considered that, for the purposes of this return and brief, any further statement of the case is required than that stated in connection with complainant's motion.

ARGUMENT.

I.

A Serious Interstate Controversy Should Be Ended.

Defendants earnestly desire that the controversy between the states be litigated and brought to final judicial determination. That controversy, the subject matter of which is the claims of the states to rights to use the waters of the Colorado River system, has persisted in varying form throughout more than 25 years. (See complainant's statement in support of its motion, p. 3.) It is grounded principally on the fact that the two states interpret differently a series of documents and statutes which collectively have been called the "law of the River." These writings include the Colorado River Compact, 45 Stat. 1057 (1922), the Boulder Canyon Project Act, 45 Stat. 1057 (1928), the California Limitation Act, Stats. Cal. 1923, p. 38 (1929), the Boulder Canyon Project Adjustment Act, 54 Stat. 774 (1940), the Mexican Water Treaty, Treaty Series 994 (1945), and a group of water contracts executed by the Secretary of the Interior under the authority of Section 5 of the Project Act with (a) five public agencies in California (1930-1934); (b) the State of Nevada (1942-1944); and (c) the State of Arizona (1944).

At the instance of Arizona, several facets of the problem have been submitted to this Court in *Arizona v. California, et al.*, 283 U. S. 423 (1931), *Arizona v. California, et al.*, 292 U. S. 341 (1934), and *Arizona v. California, et al.*, 298 U. S. 558 (1936). Each of these cases was disposed of by the Court with opinion on preliminary proceedings.

The subject matter of the controversy has not been comprehensively treated by the Court. There is consequently a variety of unsolved problems upon the solution of which depends the economic future of the basin of the Colorado.

In addition to the Court proceedings mentioned, Arizona and California have contested in the Congress for many years over legislative measures which were not enacted by the Congress, among other reasons, because of the fact that the issues between the states are undetermined. The Secretary of the Interior, in his official report entitled "The Colorado River Basin" (House Doc. 419, 80th Cong. p. 5), states:

> "That further development of the water resources of the Colorado River Basin, particularly large-scale development, is seriously handicapped, if not barred, by lack of determination of the rights of the individual states to utilize the waters of the Colorado River system."

The controversy between the states is longstanding, grave and deep seated. Efforts to adjust it by negotiation have been made in scores of interstate conferences without avail. The only forum in which the questions at issue can be determined is that of this Court. (Const. U. S., Art. III, Sec. 2, Cl. 2.)

II.

The United States as an Indispensable Party.

Notwithstanding defendants' desire that the litigation proceed, they conceive it to be their duty to the Court to bring to the Court's attention the fact that a prior decision of this Court indicates that the United States is an indispensable party, but it is not named as a party in the proposed bill of complaint. It was on that ground that this Court refused leave to file the bill of complaint in the last case between these states (298 U. S. 558) in 1936. That case was commenced by Arizona against the other six states of the Colorado River Basin, seeking an equitable apportionment of the waters of the River. In its opinion the Court lists the following factors bearing on the interest of the United States in such a suit:

(a) The Colorado River is navigable.

(b) The privilege to appropriate and use its water is "subject to the paramount power of the United States to improve it for the purpose of navigation." (P. 569.)

(c) The Boulder Canyon Project Act authorized the Secretary of the Interior to construct Boulder Dam (now Hoover Dam). It provides for control and management of the water by the United States, and declares that this authority is conferred subject to the terms of the Colorado River Compact "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for delivery of the stored

waters thereof, for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy . . ." (P. 569.)

(d) Section 5 of the Act provides that "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract" made by the Secretary of the Interior. The Secretary had made such contracts for delivery of 5,362,000 acre-feet of stored water to California agencies. The Secretary had also made contracts for financing and construction of Parker and Imperial Dams and the All-American Canal. (P. 570.)

(e) The Court concludes, "Every right which Arizona asserts is so subordinate to and dependent upon the rights and exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree entered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality." (Pp. 571-572.)

On that ground the Court denied leave to file the bill.

The chief factual difference between the case above mentioned and the bill of complaint presently proposed by Arizona is that in 1936 Arizona had not attempted to

ratify the Colorado River Compact, and on the contrary had refused to do so. In addition, Arizona had made no contract with the Secretary of the Interior for water under Section 5 of the Boulder Canyon Project Act. In the present bill, Arizona alleges (p. 8) that she ratified the Compact on February 24, 1944, and on the same date (p. 19) entered into a contract with the United States under Section 5.

The present proposed bill, while not seeking an "equitable share" of the use of waters of the River system, seeks to quiet Arizona's title to the use of a given amount of water per annum. The net objective is, therefore, substantially the same as that of the prior bill.

Since 1936 the following circumstances have supervened:

(a) The United States entered into a treaty (with 11 reservations) ratifications of which were exchanged November 8, 1945, for delivery to the United Mexican States of a large quantity of water of the Colorado River system (Executive A, 78th Cong., 2nd Sess., and protocol relating thereto) and, acting through the State Department, is delivering such water.

(b) As required by the Mexican Water Treaty, the United States has constructed Davis Dam on the Colorado River between Hoover Dam and Parker Dam, in part for the purpose of metering out water to Mexico.

(c) The United States has constructed for the benefit of the Colorado River Indian Reservation, Arizona, Headgate Rock Dam and an irrigation system which diverts water from the River near Parker, Arizona. It has also completed construction of Imperial Dam and the All-American Canal for the benefit of the Imperial and Coachella Valleys in California, and the Gila Project for the benefit of the Yuma Mesa and Wellton-Mohawk areas, Arizona.

(d) The Secretary of the Interior has executed additional contracts under Section 5 of the Project Act for delivery of water from storage behind Hoover Dam with:

1. State of Nevada (1942-1944);
2. State of Arizona (1944);
3. The Wellton-Mohawk Irrigation and Drainage District, Gila Project, Arizona (1952);

The Secretary has also made amendatory and supplemental contracts as follows:

4. San Diego County Water Authority (1946);
5. Yuma County Water Users Association (1951);
6. Imperial Irrigation District (1952).

(e) The Act of June 28, 1946 (60 Stat. 338), provides:

"That for the purpose of controlling the floods, improving navigation, and regulating the flow of the

Colorado River, there is hereby authorized to be appropriated, out of any moneys in the Treasury of the United States not otherwise appropriated, for the fiscal year ending June 30, 1928, and annually thereafter, such sums as may be necessary, to be spent by the Bureau of Reclamation under the direction of the Secretary of the Interior, to defray the cost of (a) operating and maintaining the Colorado River front work and levee system in Arizona, Nevada and California; (b) constructing, improving, extending, operating and maintaining protection and drainage works and systems along the Colorado River; (c) controlling said River, and improving, modifying, straightening and rectifying the channel thereof; and (d) conducting investigations and studies in connection therewith . . ."

The foregoing outline of the interests of the United States in the Lower Colorado River and the subject matter of the proposed suit finds ample support in the report of the Secretary of the Interior, dated May 13, 1948, and addressed to the Chairman of the Senate Committee on Interior and Insular Affairs (Hearings before Sub-Committee of Senate Committee on Interior and Insular Affairs, 80th Cong., 2nd Sess., on S. J. Res. 145, pp. 363, 367).

It is therefore indicated that, as in the 1936 case, the United States is an indispensable party to the proposed suit.

III.

The United States Has Decided to Move to Intervene.

The Acting Solicitor General of the United States, at the request of both the States of California and Arizona, has written the Clerk of the Court the following letter:

"October 8, 1952

Clerk, United States Supreme Court
Washington, D. C.

Re: State of Arizona v. State of California, *et al.*, No. Original.

Dear Sir:

It has been called to our attention that the State of Arizona has filed a Motion for Leave to File a Bill of Complaint against the State of California and certain irrigation and water districts and municipalities in California.

In view of the decision of this Court in *Arizona v. California,* 298 U. S. 558, on an earlier motion for leave to file a bill of complaint concerning water rights in the Colorado River, the question may arise as to whether the United States is an indispensable party to the new suit. In this connection it seemed advisable that the Court should be promptly notified that the interests of the United States in the questions sought to be raised are such that the United States has decided to move for leave to intervene in the pending case. Such a motion will be filed at the

appropriate time, if Arizona is granted leave to file its complaint. I would appreciate your bringing this letter to the attention of the Court.

Copies of this letter will be sent to counsel for the parties.

Sincerely yours,

ROBERT L. STERN,
Acting Solicitor General."

Defendants rely upon this letter in filing this return. They consider that the action that the United States has decided to take is eminently proper.

IV.

Defendants Therefore Do Not Oppose Complainant's Motion.

Defendants therefore interpose no objection to an order granting complainant's motion for leave to file the bill of complaint.

V.

All Defenses Are Reserved.

Under the circumstances hereinabove outlined the defendants find it necessary to reserve all defenses, including but not limited to the defense that indispensable parties are not joined herein. Obviously any judgment rendered herein should be final and controlling in the future administration of the Colorado River system. This

reservation is made so that the defendants will be at liberty to raise all issues which may be considered necessary to attain finality in the resulting decree.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1952

No. —, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

MOTION ON BEHALF OF THE UNITED STATES OF AMERICA FOR LEAVE TO INTERVENE

The Attorney General and Solicitor General, on behalf of the United States of America, respectfully move this Court for leave to intervene in the above-entitled cause, and for leave to file a petition for intervention for the following reasons:

I

The State of Arizona, as complainant, seeks to invoke the original jurisdiction of this Court pursuant to the provisions of Article III, Sec-

tion 2, Clause 2, of the Constitution of the United States of America in regard to the rights and interests which it asserts in the Colorado River, a navigable, interstate stream. By a letter dated October 8, 1952, Mr. Robert L. Stern, Acting Solicitor General, advised this Court that in the event the request of the State of Arizona for permission to file its complaint was granted, the United States would move to intervene in *the cause*. Premised upon that action by the United States, the State of California and the other defendants named in Arizona's complaint advised this Court on December 8, 1952, of their desire to have the case proceed to effective judgment on the merits and that they would not interpose an objection to Arizona's motion for leave to file its Bill of Complaint.

II

For many years there has been a most serious conflict between the State of Arizona and the State of California regarding their respective rights to the use of the water of the Colorado River. On three different occasions the State of Arizona has unsuccessfully sought relief from this Court in connection with that long-standing controversy.[1] The pending motion is Arizona's

[1] *Arizona* v. *California*, 283 U. S. 423 (1931); *Arizona* v. *California*, 292 U. S. 341 (1934); *Arizona* v. *California*, 298 U. S. 558 (1936).

fourth attempt to obtain an adjudication in this conflict. By it Arizona seeks to have the rights which it claims in the Colorado River quieted as against the named defendants; to have construed the Colorado River Compact, the Boulder Canyon Project Act,[2] related laws, contracts and documents. In addition it seeks injunctive and ancillary relief.

III

Important in regard to the dispute between the several claimants to rights in the Lower Basin of the Colorado River are the physical phenomena of that stream and the region traversed by it. Rising in the State of Colorado near the crest of the Continental Divide at an elevation of approximately nine thousand feet above sea level, it flows for a distance of 1293 miles, draining portions of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. More than half of the average annual yield of that stream is derived from the precipitation in the form of snow and rain which fall upon the high mountains in Colorado and Wyoming. The stream in question flows through the Western half of Colorado, the State of its origin, and then through the State of Utah where it has its confluence with the Green River which rises in Wyoming. After crossing the common boundary of Utah and Ari-

[2] 43 U. S. C. 617 et seq.

zona it proceeds in a south and westerly direction to a point where it forms the boundary between the State last mentioned and Nevada. For a distance of 145 miles it separates the two States. Thereafter for 235 miles it constitutes the boundary between Arizona and California; for 16 miles it is the boundary between the State of Arizona and the Republic of Mexico. For a distance of 75 miles it flows across Mexico terminating in the Gulf of California. For 688 miles, more than half its length, the Colorado River flows in or upon the boundary of the State of Arizona. Historically commerce was carried on in the navigable lower reaches of the stream.

IV

In its course the Colorado River traverses a semiarid area of approximately 240,000 square miles in which agriculture can be successfully practiced only through artificial irrigation. However, marked geographical and climatological differences exist between the upper reaches of the river and the lower. The former is an area of high elevations resulting in shorter growing seasons, lower demands for water and by reason of the conformation of the area, has a relatively high return flow. In the lower reaches of the stream large areas susceptible of irrigation are found. Due to the extreme aridity of climate and the long growing season the demand for water for each acre irrigated is high. Works of great mag-

nitude with commensurate costs are required to irrigate those lands.

Nearly 1,000 miles of canyon separate the lands upon which water may be beneficially applied in the upper States of the Colorado River Basin and those upon which water may be beneficially used in the Lower Basin.

V

Shortly after the turn of the present century the claims to rights to the use of water in the natural flow of the Lower Basin of the Colorado River exceeded the available supply during the latter summer months, with the attendant loss of crops due to the shortage of irrigation water. By way of contrast, early spring floods intermittently caused severe damage. Conservation of the run-off of the stream in the Lower Basin in high water periods, through regulatory dams and impounding reservoirs, was essential. That development in the lower reaches of the river was impeded, however, by the need for an apportionment of the available supply of water between the two reaches of the river alluded to in the preceding paragraph. Understandably the States of the Upper Basin viewed with concern the possible loss of their rights to the Lower Basin should that development take place without some assurance that their future needs in the river would be protected.

VI

To accomplish the required allotment and to insure the Upper Basin States that their rights would not be impaired by the development in the Lower Basin, the Colorado River Compact was formulated and signed November 24, 1922, by the several States of the Basin—Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. By specific act of Congress [3] and Presidential Proclamation,[4] the Colorado River Compact became effective June 25, 1929, though Arizona at that time failed to ratify it. One of the conditions to the requisite Congressional approval of the Compact was that "the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters appor-

[3] Boulder Canyon Project Act, 43 U. S. C. 617 et seq.
[4] 46 Stat. 3000.

tioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."[5] California complied with that condition.[6] It was not until February 24, 1944, that the State of Arizona ratified the Compact.

VII

By the Colorado River Compact there was apportioned in perpetuity from the Colorado River System to the Upper Basin and to the Lower Basin respectively, the exclusive beneficial consumptive use annually of 7,500,000 acre-feet of water. In addition there was given to the Lower Basin the right to increase annually its beneficial consumptive use of water by 1,000,000 acre-feet.[7] The point of division between the Upper

[5] 43 U. S. C. 617c.

[6] Statutes and Amendments to the Codes of California, 1929 Extra Session, c. 16 "An act to limit the use by California of the waters of the Colorado River in compliance with the act of Congress known as the 'Boulder canyon project act' * * *."

[7] Colorado River Compact, Article III (a), (b).

"Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River above Lee Ferry.

"Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from

and the Lower Basin is Lee Ferry, 23 miles below the common boundary of the State of Arizona and the State of Utah.[8] Provision is likewise made in the Compact that under prescribed conditions water unapportioned by the Compact will be allocated at any time subsequent to October, 1963.[9]

VIII

Though repeated efforts have been made amicably to apportion among the States of the Lower Basin the waters allocated to them by the Colorado River Compact, those efforts have failed. Thus as evidenced by the Bill of Complaint of the State of Arizona, there remains undecided the question of the share of the water each State is to receive under the Colorado River Compact and the Boulder Canyon Project Act. Further, as evidenced by the Bill of Complaint of the State of Arizona the construction to be placed upon certain provisions of the Compact is a matter of grave import having far-reaching effect upon the respective rights of the parties to the controversy. Until those disputed issues are resolved, neither the United States of America nor

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which waters naturally drain into the Colorado River System below Lee Ferry.

"Lee Ferry" as noted in the text means a point on the main stream of the Colorado River a short distance below the common boundary of the States of Utah and Arizona.

[8] Colorado River Compact, Article II (f), (g).

[9] Colorado River Compact, Article III (a), (b), (c), (f).

the State of Arizona nor the parties named in Arizona's Bill of Complaint may safely proceed with further construction of diversion works from the main channel of the Colorado River involving consumptive use (domestic, agricultural, industrial, municipal) of water in the Lower Basin of the Colorado River. How those issues are resolved will greatly affect the existing and future economy of the respective States of Arizona and California.

IX

On October 11, 1948, the States of Arizona, Colorado, New Mexico, Utah and Wyoming apportioned percentage-wise among themselves the 7,500,000 acre-feet allotted to the Upper Basin under the Colorado River Compact. Relying upon the quantity of water accorded to them by the Colorado River Compact and their more recent covenant, the Upper Basin States have, in cooperation with the United States, proceeded to construct, are now constructing, and plan to construct huge projects for the conservation and utilization of that water.

X

Pursuant to the Boulder Canyon Project Act, alluded to above, and to the Reclamation Act of 1902,[10] and acts supplementary to them, the Secre-

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[10] Act of June 17, 1902, Ch. 1093, 32 Stat. 388, 43 U. S. C. 391.

tary of the Interior undertook the construction of gigantic projects involving the expenditure of virtually one-half billion dollars. These are the objectives which have been expressed by Congress in connection with the development of the Colorado River in the Lower Basin—the controlling of the floods, improving navigation, regulating the flow of the Colorado River, providing for storage, for the delivery of the stored waters for reclamation of public lands, and other beneficial uses."[11] Included in that development of the Lower Basin of the Colorado River are the following components:

a. Hoover Dam, at Black Canyon, 325 miles above the Mexican boundary. This is the principal structure of the Lower Basin impounding the waters which comprise Lake Mead.

b. Davis Dam, which is located 67 miles below Hoover Dam. This structure implements the regulation of the river by Hoover Dam, impounds water for the generation of electricity and is in furtherance of the objectives of the Boulder Canyon Project Act. By express provision of the Mexican Water Treaty alluded to subsequently, the United States of America was required to construct Davis Dam to make possible the river regulation provided for in the Treaty.

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[11] 43 U. S. C. 617.

c. Parker Dam, situated 155 miles below Hoover Dam, creates Havasu Lake and is the diversion point of the Colorado River Aqueduct of the Metropolitan Water District of Southern California, which District cooperated in financing the building of the structure; waters impounded by it are utilized to generate electricity and it is operated in conjunction with Davis Dam under the Mexican Water Treaty.

d. Imperial Dam, 303 miles below Hoover Dam. It is the headworks for the All-American Canal, a Bureau of Reclamation Project in the State of California, the largest irrigation diversion system constructed in the Lower Basin development. It is likewise a diversion structure for the Gila Canal in the State of Arizona and for the Yuma Reclamation Project in the States of Arizona and California.

e. Laguna Dam, situated approximately 308 miles below Hoover Dam, a structure of the Yuma Reclamation Project mentioned above.

In addition to the principal structures mentioned, there has been constructed and is now operated a system of generators, diversion works, ditches and laterals all built and maintained to accomplish the purposes for which the Congress of the United States adopted the Reclamation Act of 1902, the Boulder Canyon Project Act, and acts amending and supplementing those acts.

XI

In accordance with the direction and authorization contained in the Boulder Canyon Project Act the Secretary of the Interior has entered into contracts for the delivery of water stored by Hoover Dam. Exercising that authority the Secretary on behalf of the United States entered into a contract dated February 9, 1944, with the State of Arizona, for the delivery annually of 2,800,000 acre-feet of water. Earlier contracts for the delivery annually of 5,362,000 acre-feet of water were entered into by the Secretary with the defendants named in the Bill of Complaint, Metropolitan Water District of Southern California, the Imperial Irrigation District, Palo Verde Irrigation District, and the Coachella Valley County Water District. Though a contract was originally entered into with the defendant City of San Diego by the Secretary of the Interior, subsequent arrangements with the Metropolitan Water District of Southern California by the City of San Diego caused the original contract to be superseded. Though the defendant City of Los Angeles does not have a contract with the Secretary of the Interior, it is a prime beneficiary of the above-mentioned contract of the defendant Metropolitan Water District of Southern California. In addition, premised upon the same authority, the Secretary of the Interior has contracted to deliver to the State of Nevada 300,000

acre-feet. Thus the contracts which the Secretary of the Interior has entered into in the Lower Basin for the delivery of stored water total 8,462,000 acre-feet annually. Contained in substance in each of the contracts is a provision that the United States shall, from storage available in the reservoir created by Hoover Dam, deliver water at a point on the Colorado River in accordance with the Colorado River Compact and the Boulder Canyon Project Act.

XII

In addition to the foregoing rights, interests and obligations of the United States of America in the Lower Basin of the Colorado River arising in connection with the Colorado River Compact and the Boulder Canyon Project Act, it has many others. Reference in that regard is made to the Colorado River Compact which provides that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[12] Thus there is excluded from the operation of the compact the rights of the United States to divert or to have diverted water from the Colorado River and its tributaries on behalf of the Indians. There is annually diverted for or by the Indians from the Colorado River and its tributaries in the Lower Basin in excess of 750,000 acre-feet and there are

[12] Colorado River Compact, Article VII.

asserted, in the ultimate, claims to a greater amount.

A principal structure across the main channel of the stream in question is the Headgate Rock Dam situated 14 miles below Parker Dam. That structure diverts water for use in the Colorado River Indian Reservation in the State of Arizona. Other large irrigation projects have been constructed for the benefit of the Indians on the tributaries of that stream.

XIII

In addition to the rights, interests, and obligations of the United States alluded to above, it has international responsibilities to Mexico pursuant to a treaty whereby there was "guaranteed" to Mexico an annual quantity of 1,500,000 acre-feet of Colorado River water.[13]

XIV

In addition to other responsibilities on the stream, flood control on the Colorado River is an important function of the United States. Not only is it required to operate Lake Mead in a manner which will afford flood control benefits but it is now building on the Bill Williams River and the Gila River large structures which will be operated primarily for that purpose.

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[13] Treaty, Executive A, 78th Congress, 2d sess.; Protocol, Executive A, 78th Cong., 2d sess. Pursuant to the Mexican Treaty Davis Dam was constructed by the United States.

XV

Large Fish and Wild Life projects are owned and operated by the United States on the Colorado River. Similarly, there are in the Lower Basin numerous recreational areas under the jurisdiction of the National Park Service. Administered by the Bureau of Land Management are large areas of public domain susceptible of cultivation only if artificially irrigated. All of those Federal functions in the Lower Basin of the Colorado River are dependent upon that source or its tributaries for water.

XVI

The aggregate of the various claims to rights to the use of water in the Lower Basin of the Colorado River far exceeds the eight million five hundred thousand acre-feet of water available to that Basin under the Colorado River Compact. Moreover, the State of Arizona asserts claims adverse to the rights to the use of water claimed and exercised by the named defendants and brings into question the rights and interests claimed and exercised by the United States in the Lower Basin. In addition, the adverse claimants seek different interpretations of the several provisions of the Colorado River Compact, the Boulder Canyon Project Act, related laws and documents.

Premised upon the adverse claims of the parties litigant to the waters allocated to the Lower

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Basin of the Colorado River, it is necessary and appropriate that the United States have declared its rights and interests in the Lower Basin of the Colorado River, and have them quieted as against those adverse claims. It is also necessary and appropriate that the United States have defined its obligations and responsibilities in the Lower Basin of the Colorado River and have such other and further relief as this Court may deem proper.

Wherefore, the United States of America respectfully prays this Court to permit it to file a petition for intervention in this case subsequent to the time that the defendants have filed their answers to the Bill of Complaint of Arizona.[14]

JAMES P. MCGRANERY,
Attorney General.

WALTER J. CUMMINGS, JR.,
Solicitor General.

DECEMBER , 1952.

[14] The United States is unable to formulate a proper and detailed petition for intervention until the defendants have made their formal claims and disclosed their positions in their answers to the Bill of Complaint.

In the Supreme Court of the United States

OCTOBER TERM 1952

No. —, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

BRIEF OF THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO INTERVENE

PRELIMINARY STATEMENT

In the motion to intervene of the United States of America, the long-standing controversy respecting rights to the use of water in the Lower Basin of the Colorado River is reviewed. As revealed in that motion, the State of Arizona has for the fourth time sought relief from this Court in regard to that controversy.[1] Reference there

[1] Motion on Behalf of the United States of America for Leave to Intervene, par. II.

was likewise made to the previous expression of intention on the part of the United States to intervene in the proceeding if Arizona's motion is granted; and to the declaration filed with this Court by the State of California and the other named defendants, which, having first referred to the need for a judicial determination of the controversy on the merits, declared, based upon the expression of intention by the United States, that they would interpose no objection to the granting of Arizona's motion.

By a letter dated October 15, 1952, this Court through its Clerk requested the United States of America to express its views in regard to jurisdiction. In the light of the facts contained in the motion of the United States and the Bill of Complaint of the State of Arizona, those views will be expressed in this brief.

To be emphasized at the outset is the fact that there has been apportioned by the Colorado River Compact from the Colorado River System in perpetuity to the Upper Basin of that stream the exclusive beneficial consumptive use of 7,500,000 acre-feet of water. Similarly, there has been apportioned from the Colorado River System in perpetuity to the Lower Basin of that stream the exclusive beneficial consumptive use of 7,500,000 acre-feet of water. In addition to this apportionment to the Lower Basin, the Colorado River Compact gives to the Lower Basin the right to increase its beneficial consumptive use of such

water by 1,000,000 acre-feet annually.[2] By its Bill of Complaint, the State of Arizona seeks only to have this Court assume jurisdiction in regard to rights to the use of water in the Lower Basin of the stream in question.

DISCUSSION

I. THIS COURT IS INVESTED BY THE CONSTITUTION AND CONGRESSIONAL ENACTMENTS WITH ORIGINAL JURISDICTION OF CASES OF THE GENERAL CHARACTER HERE INVOLVED

This Court has original and exclusive jurisdiction of cases of the character which the State of Arizona seeks to initiate against the State of California and the other named defendants, as is clear from the constitutional provisions pursuant to which the Nation's judiciary has been established,[3] and from express congressional enact-

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[2] Colorado River Compact, Article III (a) and (b).

"Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River above Lee Ferry.

"Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry.

"Lee Ferry" means a point on the main stream of the Colorado River a short distance below the common boundary of the States of Utah and Arizona. See par. VII of the Motion on Behalf of the United States of America for Leave to Intervene.

[3] Constitution of the United States, Article III, Section 2, Cl. 2.

ment: "The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States; * * *."[4]

Repeatedly, this Court has assumed jurisdiction where, as here, a controversy respecting an interstate stream has arisen.[5] Under circumstances resembling the present controversy, the Court exercised original jurisdiction over a controversy between the States of Wyoming and Colorado concerning their respective rights to divert and use water from an interstate stream.[6] Earlier, jurisdiction was assumed by this Court regarding a dispute between the States of Colorado and Kansas.[7] By Colorado's pleading, the question was presented as to whether it was empowered wholly to deprive the State of Kansas of the benefit of water from a stream which rises in the State of Colorado and by nature flows through Kansas.[8] Jurisdiction was likewise assumed in the injunctive proceeding initiated by the State of Wisconsin and others against the State of Illinois and a public corporation of that State to prevent the withdrawal of large quantities of water from Lake Michigan.[9] Original jurisdiction by this Court has been assumed in cases between States involving the pol-

[4] 28 U. S. C. 1251.

[5] See *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 26–7 (1950).

[6] *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

[7] *Kansas* v. *Colorado*, 185 U. S. 125 (1902).

[8] See also *Kansas* v. *Colorado*, 206 U. S. 46 (1907).

[9] *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929).

lution of an interstate stream.[10] More recently, this Court entertained the bill of complaint in an original proceeding by the State of Nebraska against the State of Wyoming to have determined the rights of the two States in the waters of the North Platte River.[11]

Moreover, Arizona's Bill of Complaint presents issues concerning the interpretation of the Colorado River Compact, an interstate agreement. Such questions of compact construction are federal in nature, and if the suit is otherwise within this Court's jurisdiction, are properly to be determined by this Court.[12] Since this is a suit by one State against another State—and thus within the Court's original jurisdiction—the issues of interpretation of the Compact are properly before it.[13]

From these authorities it is manifest that this Court has accorded judicial cognizance to controversies between States involving issues of the character presented by Arizona in its Bill of Complaint. In addition, however, to those deci-

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[10] *Missouri* v. *Illinois*, 180 U. S. 208 (1900).

[11] *Nebraska* v. *Wyoming*, 295 U. S. 40 (1935), 325 U. S. 589 (1944); see also *Texas* v. *New Mexico*, 343 U. S. 932, order entered December 23, 1952, No. 9 Orig. (1952).

[12] *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22 (1950); *Kentucky* v. *Indiana*, 281 U. S. 163 (1930); *Hinderlider* v. *La Plata Co.*, 304 U. S. 92 (1937).

[13] See *Kentucky* v. *Indiana*, 281 U. S. 163 (1930). In Part IV, *infra*, we discuss the reasons for taking jurisdiction of the present controversy.

sions, are those regarding the controversy which the State of Arizona seeks permission to bring before this Court for settlement. Those decisions are considered in some detail in the section which follows.

II. REVIEW OF EARLIER DECISIONS OF THIS COURT RESPECTING THE CONTROVERSY BETWEEN THE STATES OF ARIZONA AND CALIFORNIA

The earlier decisions respecting Arizona's efforts to have this Court resolve the long-standing controversy to which Arizona's Bill of Complaint relates and which California has expressed its desire to have determined on its merits, and the factors giving rise to them, will be reviewed in the order in which they were rendered by this Court.

On October 13, 1930, Arizona filed an original Bill of Complaint against the then Acting Secretary of the Interior, Ray Lyman Wilbur, and the other Colorado River Basin States of California, Nevada, Utah, New Mexico, Colorado and Wyoming.[14] Among other things, the Bill challenged the constitutionality of the Boulder Canyon Project Act.[15] Arizona likewise prayed that the Secretary of Interior and the other named defendants be permanently enjoined from carrying out the provisions of the last-mentioned Act. All of the defendants moved to dismiss Arizona's

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[14] *Arizona* v. *California*, 283 U. S. 423 (1931).

[15] Act of December 21, 1928 (45 Stat. 1057), 43 U. S. C. 617 et seq.

Bill on the grounds that: (1) the United States, not joined in the proceeding, was an indispensable party; (2) the Bill did not present a case of which this Court would take judicial cognizance; (3) the action of the defendants would not invade vested rights of Arizona or its citizens; (4) the Bill did not state facts which constituted a claim against any of the defendants.

Mr. Justice Brandeis, speaking for the Court, took judicial notice of the navigable character of the Colorado River and declared the Boulder Canyon Project Act to be constitutional. Continuing, the opinion declared that Arizona could not successfully contend that there was an actual or threatened invasion of its rights. In that connection, Mr. Justice Brandeis observed: "When the Bill was filed, the construction of the dam [Hoover Dam] and reservoir had not been commenced. Years must elapse before the project is completed."[16] In the light of those facts, Arizona's Bill was "dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same."[17]

Since that dismissal, immense changes have transpired in the Lower Basin of the Colorado

[16] *Arizona* v. *California*, 283 U. S. 423, 463 (1931).

[17] *Arizona* v. *California*, 283 U. S. 423, 464 (1931).

River. Reflecting that fact are the allegations contained in the motion of which this brief is in support.[18] There, in some detail, are reviewed the structures which have, with minor exceptions, been constructed since that dismissal. A stream which in a state of nature fluctuated with great violence is now a stream subject to virtually complete regulation. Hoover Dam and the other structures on the main channel have effectuated that control with the attendant drastic change in the regimen of the stream.

Following the dismissal of the action reviewed above, Arizona, on February 14, 1934, moved for leave to file in this Court an original Bill to perpetuate testimony in actions arising out of the Boulder Canyon Project Act it would commence in the future against the State of California.[19] In its opinion, the Court observed that while no Bill to perpetuate testimony had been previously filed with it, there is no reason why it did not have jurisdiction to entertain such a bill "in aid of litigation pending * * *, or to be begun here."[20] The Bill, however, was dismissed for there was no showing that the testimony involved was competent or material evidence.

At the time that the opinion just discussed was entered, sharp conflict arose over the proposed

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[18] Motion on Behalf of the United States of America for Leave to Intervene, par. X.

[19] *Arizona* v. *California*, 292 U. S. 341 (1934).

[20] *Arizona* v. *California*, 292 U. S. 341, 347, 360 (1934).

construction of Parker Dam,[21] now an integral part of the development of the Lower Basin of the Colorado River. That conflict culminated in the United States having recourse to this Court to enjoin Arizona's interference with the completion of the structure in question.[22] The complaint, however, was dismissed by reason of its failure to declare authority for the construction of the dam. Congress subsequently granted the required authority.

Continuing its effort to have reviewed its claim to Colorado River water, Arizona, on November 25, 1935, moved this Court for leave to file a bill of complaint which in substance sought an equitable apportionment of the rights to the use of the waters of the stream in question among the States of the Colorado River Basin.[23] In dismissing Arizona's motion, this Court reviewed at length the status occupied by the United States regarding the Colorado River. Emphasized was the fact that no decree equitably apportioning the rights to the water as prayed was possible without determining the rights of the United States. Such an apportionment, declared the Court, "could not be determined without ascertaining the rights of the United States to dispose of that water * * * without challenging the disposi-

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[21] Motion on Behalf of the United States of America for Leave to Intervene, par. X.

[22] *United States* v. *Arizona*, 295 U. S. 174 (1935).

[23] *Arizona* v. *California*, 298 U. S. 558 (1936).

tions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of Sec. 5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary [of the Interior]."[24] Declaring that those matters pertaining to the United States could not be determined in a proceeding to which it was not a party, the Court denied Arizona's motion since the bill of complaint "could only be dismissed because of the absence of the United States as a party."[25]

As this review shows, the State of Arizona has been repeatedly unsuccessful in securing judicial cognizance by this Court of the controversy which it asserts in its Bill of Complaint. But many elements which previously militated against that hearing are no longer present. In the succeeding section, certain of those factors are discussed.

III. PRESENT LEGAL STATUS AND DEVELOPMENTS WHICH HAVE BEARING UPON THIS COURT'S JURISDICTION

Since this Court denied Arizona's motion for leave to file a bill of complaint for the equitable apportionment of the Colorado River,[26] drastic and far-reaching changes have come about. Not the least of those changes are the willingness of

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[24] *Arizona* v. *California*, 298 U. S. 558, 571 (1936).
[25] *Arizona* v. *California*, 298 U. S. 558, 572 (1936).
[26] 298 U. S. 558.

the United States to intervene and the willingness of the State of California that the long-standing controversy be resolved on its merits.

Quite aside, however, from the revised attitude of the United States and California, other changes of significance have transpired. Arizona has ratified the Colorado River Compact and has contracted for water with the Secretary of the Interior under the terms of that Compact and the Boulder Canyon Project Act.[27]

Great impounding dams have been constructed in the main channel of the Colorado River and large diversion works have been constructed which withdraw annually from the stream millions of acre-feet of water.[28] Arizona charges that in the year 1951 there was diverted by the claimants to water in the State of California a quantity of water exceeding the 4,400,000 acre-feet and that anticipated diversion for 1952 will be greater than the quantity previously diverted. Arizona, in its Bill of Complaint, charges those diversions to be in derogation of its rights.[29] Moreover, there exist diversion works in California capable of an annual draught on the river

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[27] Motion on Behalf of the United States of America for Leave to Intervene, par. VI; par. XI.

[28] Motion on Behalf of the United States of America for Leave to Intervene, par. X.

[29] *Arizona* v. *California*, Pending Bill of Complaint, par. XXVI.

plaint relates solely to the Lower Basin. Similarly, the Motion of the United States is limited to that area.

Under the Compact and the Boulder Canyon Project Act, each Basin is proceeding to develop its respective areas in reliance upon that allocation. It is significant, however, that the Lower Basin of the Colorado River has developed far more rapidly than the Upper Basin.

The aggregate of the claims of rights to the use of water in the Lower Basin of the Colorado River greatly exceeds the firm quantities of water available to it. Otherwise stated, the 8,500,000 acre-feet accorded to the Lower Basin is insufficient to meet existing claims. Further development of consumptive uses of the Lower Basin of the Colorado River may not safely proceed until the long-standing dispute to which this suit pertains is resolved. Mr. Justice Brandeis in an earlier phase of this controversy summarized as follows the charges then made by Arizona respecting the need for a determination of rights in the Lower Basin: "The cost of installing the dams, reservoirs, canals, and distribution works required to effect any diversion, will be very heavy; and financing on a large scale is indispensable. Such financing will be impossible unless it clearly appears that, at or prior to the time of constructing such works, vested rights to the permanent use of the water will be ac-

quired."[36] That statement reveals the true character of the controversy here presented. For in the light of the present controversy, there can be no certainty in the Lower Basin respecting claims to vested rights to the permanent use of water from the Colorado River for consumptive purposes.[37]

It is recognized that this Court is reluctant to take and determine interstate water controversies unless the dispute is important, a judicial solution appears preferable, and other means of settling the controversy are, as a matter of reality, unavailable.[38] But it is likewise suggested that this case falls within the criteria for assuming jurisdiction which the Court has hitherto applied. For example, there is here presented every element which caused the Court to assume jurisdiction of another recent controversy involving an interstate stream.[39] Those factors were alluded to in the opinion in the following manner:

[1] "A genuine controversy exists." Manifestly, Arizona's pleading, the long-standing contentious struggle between the conflicting States, and the interests of the United States, resolve

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[36] *Arizona* v. *California*, 283 U. S. 423, 459 (1931).

[37] Motion on Behalf of the United States of America for Leave to Intervenue, par. VIII.

[38] See *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 27 (1950).

[39] *Nebraska* v. *Wyoming*, 325 U. S. 589, 608 (1944).

any doubt regarding the presence of the controversy.

[2] "The States have not been able to settle their differences by compact." That fact is indisputable in the present instance and it would appear futile to remit the parties to further negotiation.[40]

[3] "The areas involved are arid or semiarid. Water in dependable amounts is essential to the maintenance of the vast agricultural enterprises established on the various sections of the river." With greater emphasis that statement could have been written respecting the Lower Basin of the Colorado River.

[4] "The Kendrick Project plainly is an existing threat to senior appropriators downstream." With respect to this element of a present threat as a factor in determining the existence of a justiciable issue, reference is made to these facts: Diversion works in California are capable of diverting 8,000,000 acre-feet; Arizona has taken initial steps to construct the Granite Reef Project;[41] there has been guaranteed annually to Mexico 1,500,000 acre-feet; large claims are asserted on behalf of the Indians whose rights are excluded from the operation of the Colorado River Compact; contracts have been entered into by the

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[40] Motion on Behalf of the United States of America for Leave to Intervene, par. VIII.

[41] *Arizona* v. *California*, Pending Bill of Complaint, par. XXI.

Secretary of the Interior for the delivery of 8,462,000 acre-feet annually;[42] sharp conflict exists over the interpretations to be placed upon the Colorado River Compact and the basic laws upon which the Lower Basin of the Colorado River has been and is now being developed.

Those contentious elements must be viewed against the background of an available supply of 8,500,000 acre-feet apportioned to the Lower Basin. In the light of those factors, it is respectfully submitted that there is present a far more acute situation in the Lower Basin of the Colorado River than that which prevailed in the *Nebraska* v. *Wyoming* case concerning which this Court took judicial cognizance.

In still another case, jurisdiction was assumed by this Court over a controversy between States involving an interstate stream where the aggregate of the claims to water from the stream was found to exceed the supply available in the stream.[43] Respecting that case, this Court commented: "* * * where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land."[44] In the present case, numerous and varied claims are made which exceed the quantity of water available to the

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[42] Motion on Behalf of the United States of America for Leave to Intervene, par. XI.

[43] *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

[44] *Nebraska* v. *Wyoming*, 325 U. S. 589, 610 (1944).

Lower Basin under the Colorado River Compact. The entire economy of the Lower Basin of that stream is directly and immediately affected by the manner in which the present conflict is resolved. Few cases of this character have presented more complex questions in greater need of determination.[45]

Finally, the bar to jurisdiction which this Court found in the earlier suit[46]—the indispensability of the United States—has been removed. The United States is willing, if permitted, to intervene in the litigation and to file a petition for intervention seeking a declaration of its rights and obligations. That bar being removed, there is full jurisdiction of Arizona's suit against California and the other defendants.[47] There is no question, of course, that the Court has original jurisdiction of a claim or suit by the United States against a State.[48]

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[45] This case fully meets the standard laid down by Mr. Justice Holmes, speaking for the Court, in *Missouri* v. *Illinois*, 200 U. S. 496, 521 (1905): "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

[46] 298 U. S. 558 (1936).

[47] See *Arizona* v. *California*, 298 U. S. 558, 572 (1936); *Texas* v. *New Mexico*, 343 U. S. 932; order entered December 23, 1952, No. 9, Orig. (1952).

[48] *United States* v. *California*, 332 U. S. 19 (1947); *United States* v. *Louisiana*, 338 U. S. 806 (1949), 339 U. S. 699 (1949); *United States* v. *Texas*, 338 U. S. 806 (1949), 339 U. S. 707 (1949).

CONCLUSION

Accordingly, this Court is respectfully requested to grant the motion of the United States to intervene, permitting it to file its pleadings in intervention after the defendants named in Arizona's Bill of Complaint have filed their responsive pleadings.[49]

Respectfully submitted,

JAMES P. MCGRANERY,
Attorney General.

WALTER J. CUMMINGS, Jr.,
Solicitor General.

DECEMBER , 1952.

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[49] See Motion on Behalf of the United States of America for Leave to Intervene, p. 16, note 14.

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No. 14 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

MOTION ON BEHALF OF SIDNEY KARTUS, SUCCESSOR TO FRED T. COLTER, APPLICANT FOR AND ON BEHALF OF THE STATE OF ARIZONA AND WATER USERS UNDER GLEN-BRIDGE-VERDE-HIGHLINE PROJECTS, AND M. C. AUGUSTINE, IONE DOCKSTADER, JOHN R. WESTBERG, E. C. HILDEBRAND, R. H. JOHNSON, JOE L. HUERTA, HI-T RANCH CORPORATION, AND PERRY C. GREEN, MELVIN A. GREEN, HAROLD S. LAUER, JUDGE MANOR, I. F. NELSON, ADDIE V. BURTON, MARY E. SCHMID, AND E. V. McDANIEL, LANDHOLDERS UNDER SAID PROJECTS, FOR LEAVE TO FILE PETITION TO INTERVENE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 10 ORIGINAL

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

MOTION ON BEHALF OF SIDNEY KARTUS, SUCCESSOR TO FRED T. COLTER, APPLICANT FOR AND ON BEHALF OF THE STATE OF ARIZONA AND WATER USERS UNDER GLEN-BRIDGE-VERDE-HIGHLINE PROJECTS, AND M. C. AUGUSTINE, IONE DOCKSTADER, JOHN R. WESTBERG, E. C. HILDEBRAND, R. H. JOHNSON, JOE L. HUERTA, HI-T RANCH CORPORATION, AND PERRY C. GREEN, MELVIN A. GREEN, HAROLD S. LAUER, JUDGE MANOR, I. F. NELSON, ADDIE V. BURTON, MARY E. SCHMID, AND E. V. McDANIEL, LANDHOLDERS UNDER SAID PROJECTS, FOR LEAVE TO FILE PETITION TO INTERVENE.

SAMUEL LANGERMAN
Attorney for Petitioners

COMES NOW, SIDNEY KARTUS, successor to Fred T. Colter, Applicant for and on behalf of the State of Arizona and water users under the Glen-Bridge-Verde-Highline projects, and M. C. Augustine, Ione Dockstader, John R. Westberg, E. C. Hildebrand, R. H. Johnson, Joe L. Huerta, and Hi-T Ranch Corporation, and Perry C. Green, Melvin A. Green, Harold S. Lauer, Judge Manor, I. F. Nelson, Addie V. Burton, Mary E. Schmid, and E. V. McDaniel, landholders under said projects, and respectfully move this Court for leave to intervene in the above-entitled cause and for leave to file a petition for intervention for the following reasons:

I.

The State of Arizona, as complainant, has invoked the original jurisdiction of this Court pursuant to the provisions of Article III, Section 2, Clause 2, of the Constitution of the United States of America in regard to the rights and interests which it asserts in the Colorado River. On January 19, 1953, the Court granted Arizona's Motion for Leave to file Bill of Complaint and permitted the United States to file its petition for intervention in accordance with its motion requesting such permission.

II

In its Bill of Complaint, Arizona asks the Court to quiet its title to waters allegedly apportioned to Arizona by the Colorado River Compact signed at Santa Fe, New Mexico, on November 24, 1922, by representatives of the seven Colorado River states and the United States. The compact pro-

vided in Article I thereof, that "The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; . . .". Article IX thereof provided that "This compact shall become binding and obligatory when it shall have been approved by the legislatures of each of the signatory states and by the Congress of the United States. . . ". This compact was ratified by the State of Arizona through its legislature on February 24, 1944. [1]

III

Initiation of rights was begun for the Glen-Bridge-Verde-Highline Projects in 1916, and on September 20, 1923, and as amended thereafter, Fred T. Colter, then a State Senator of Arizona, on the authority of the then Governor of the State of Arizona, did file for and on behalf of the State of Arizona and water users under said Glen-Bridge-Verde-Highline Projects, applications for permits to appropriate the public waters of the State of Arizona and applications for permits to construct dams and reservoirs and to store for beneficial use all then unappropriated reservoir storage waters of the Colorado River, and did file therefor on Glen Canyon Storage, Diversion, and Power Dam, Bridge Canyon Storage, Diversion, and Power Dam, the Arizona Highline Canal, Marble Gorge, Storage, Power, and Diversion Dam, and alternate Verde Tunnel, as the principal sites and on some forty other sites, to irrigate 6,000,000 acres and develop 5,000,000 electrical horsepower,

1. Arizona Laws, 1944, First Special Session, pp. 12-13.

and for other beneficial uses of water in Arizona. These applications were filed under and by virtue of the statutes of Arizona.[2] Said applications thereafter were granted by the State Water Commissioner and the State Land Commissioner, the state officials designated by statute for such purpose.

IV

Petitioner, Sidney Kartus, is successor to Fred T. Colter as such applicant and filee.

V

From the time of initiation and filing of these applications and up to the present, they have been kept up with due and reasonable diligence in compliance with all laws relating to such matters. Eight volumes of records of such diligence are on file in the office of the State Land Commissioner of Arizona comprising some 8000 pages and hundreds of maps, charts, and exhibits. The various acts and events recorded in these eight volumes will be more fully itemized and set forth in the Petition for Intervention should the Court grant this motion.

VI

Petitioners M. C. Augustine, Ione Dockstader, John R. Westberg, E. C. Hildebrand, R. H. Johnson, Joe L. Huerta, and Hi-T Ranch Corporation, are the owners of lands presently being farmed, and Petitioners Perry C. Green, Melvin A. Green, Harold S. Lauer, Judge Manor, I. F. Nelson,

2. Section 5337 of the Revised Statutes of 1913, Civil Code; Section 3281 of the Revised Code of 1928; Section 75-102 of the Arizona Code of 1939.

Addie V. Burton, Mary E. Schmid, and E. V. McDaniel are the owners of land presently not being farmed, all of which lands are within the projects for which said applications or filings were made. They constitute members of two classes so numerous as to make it impracticable to name them all as petitioners, but said petitioners are fairly representative of the two classes. The matters to be determined in the above-entitled cause are of common, general, and great interest to the persons constituting such classes for which reason these petitioners respectfully file this petition for all such persons in like situation pursuant to Rule 23 of the Federal Rules of Civil Procedure.

VII

Petitioners M. C. Auustine, Ione Dockstader, John R. Westberg, E. C. Hildebrand, R. H. Johnson, Joe L. Huerta, and Hi-T Ranch Corporation, and other persons in the same class, are presently farming lands located in the central portion of the State of Arizona within the limits of said projects. In order to have a successful farm operation these petitioners and others of their class are required to irrigate the lands which they farm. These lands are located in an arid climate where precipitation is insufficient to satisfy the need for water for agricultural purposes. No substantial source of water except the Colorado River System is available to these petitioners to irrigate their lands. Presently they are using waters from the underground water supply tapped by wells or are using waters from the tributaries of the Colorado River System which are insufficient in amount to main-

tain their present farming. In recent years because the draft on the underground water is greatly in excess of the recharge, the well depths are increasing and the well discharges are decreasing. Because of such diminution of the underground water supply or insufficiency of such tributary water supply the farms of these petitioners and of others of their class, which are presently cultivated, will go out of cultivation unless additional water from the main stream of the Colorado River is obtained for these lands.

VIII

The water needed by petitioners M. C. Augustine, Ione Dockstader, John R. Westberg, E. C. Hildebrand, R. H. Johnson, Joe L. Huerta, and Hi-T Ranch Corporaton, and others in the same class to preserve their existing agriculture is not available to them or to the State of Arizona under the Colorado River Compact. This compact, even if interpreted by the Court in the manner requested by Arizona in its Bill of Complaint, does not provide for Arizona or for these petitioners or others in the same class any water to preserve their existing agriculture nor does Arizona's Bill of Complaint allege or seek to quiet title to the water heretofore appropriated for the lands of petitioners M. C. Augustine, Ione Dockstader, John R. Westberg, E. C. Hildebrand, R. H. Johnson, Joe L. Huerta, and Hi-T Ranch Corporation, and others of their class under and by virtue of the applications referred to hereinabove.

IX

Petitioners Perry C. Green, Melvin A. Green,

Harold S. Lauer, Judge Manor, I. F. Nelson, Addie V. Burton, Mary E. Schmid, and E. V. McDaniel, and others of the same class, are the owners of desert land within the projects mentioned hereinabove. These lands are exceedingly fertile and feasible of irrigation, and when irrigated will be exceedingly productive. Said lands can be reclaimed and put under irrigation under the projects filed upon and with the waters appropriated by the applicant, the said Fred T. Colter and his successor, the petitioner, Sidney Kartus, acting for and on behalf of said petitioners Perry C. Green, Melvin A. Green, Harold S. Lauer, Judge Manor, I. F. Nelson, Addie V. Burton, Mary E. Schmid, and E. V. McDaniel, and others of the same class. The Colorado River Compact, even if interpreted as requested by Arizona in its Bill of Complaint, does not provide for Arizona or for these petitioners or others in the same class any waters to reclaim their land nor does Arizona's Bill of Complaint allege or seek to quiet title to the waters heretofore appropriated for the lands of petitioners Perry C. Green, Melvin A. Green, Harold S. Lauer, Judge Manor, I. F. Nelson, Addie V. Burton, Mary E. Schmid, and E. V. McDaniel, and others of their class under said applications.

X

Arizona's Bill of Complaint pleads only such rights to Colorado River water, if any, which the State has under the Colorado River Compact. This compact purports to provide for an "equitable division and apportionment of the use of the

waters of the Colorado River System".[3] These petitioners earnestly submit that said compact is not equitable; that it does not equitably apportion the waters of the Colorado River; that it is therefore invalid; that it unlawfully, unconstitutionally, without compensation and without due process of law, attempted and is attempting to take away from these petitioners and others of their classes, the use of waters previously appropriated under said prior and superior applications by the said Fred T. Colter and his successor, the petitioner, Sidney Kartus, the use of which waters equitably belong to Arizona and to petitioners for whom they were and are appropriated under and by virtue of the laws of the State of Arizona. Said compact attempts to contravene and destroy said prior applications. The compact is inequitable for the following additional reasons:

1. It does not consider prior appropriations of the waters of the Colorado River System.

2. The proportion of each state which drains into the river was not considered in making the apportionment.

3. The compact failed to take into account other river waters available to the other basin states, while Arizona has no rivers except the Colorado River System.

4. It did not provide for the best development of the river from the standpoint of obtaining the

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3. Article I, Colorado River Compact.

maximum multi-purpose use and conservation of the waters, including the reflow.

5. It attempts to divide water in perpetuity.

6. It did not consider the fact that the best reclamation and power sites in the Colorado River System are located entirely in Arizona or on Arizona's borders.

7. It did not consider that the greatest amount of irrigible lands within the river basin are located within Arizona.

8. It permits unlimited exportation of Colorado River System waters outside of the river's basin, contrary to conservation principles, and to the detriment of prior appropriations and the established and potential economy of Arizona and the entire river basin.

9. It did not consider that the prior appropriations and projects under the Colter Filings do not interfere with the legitimate rights of other states with lands in the river basin.

XII

The claims of petitioners are inextricably interwoven with those being made by Arizona through its Attorney General and the Arizona Interstate Stream Commission in its Bill of Complaint. Said Bill of Complaint seeks to have the Court decree that the Colorado River Compact is a valid, equitable apportionment of the waters of the Colorado River System, and that Arizona and water users therein including petitioners are entitled to only

such waters from the Colorado River System as are apportioned to it by the Colorado River Compact as it may be interpreted by this Court. Thus, it seeks to destroy the greater claims of petitioners based on the prior appropriations hereinabove set forth, which prior appropriations are in accord with a proper equitable apportionment and maximum, beneficial, economical use of the waters of the Colorado River. Unless petitioners are permitted to intervene, the Court will not be fully informed, or informed at all, of their claims which are inextricably interwoven with and, as set forth above, seriously affected by the claims presently being made in Arizona's Bill of Complaint.

XII

Petitioners have no adequate remedy at law or otherwise to prevent this attempted destruction of these property rights, rights which in the arid west are of inestimable value. Petitioner, Sidney Kartus, requested the Attorney General of the State of Arizona and the counsel for the Interstate Stream Commission to set forth in Arizona's Bill of Complaint the said applications and claimed property rights of these petitioners so that these matters could be adjudicated by the Court. His requests have been denied and the Bill of Complaint in no way mentions or pleads the applications and claims of these petitioners.

XIII

Petitioners have taken and are taking steps to perfect the water rights hereinabove mentioned. Plans have been formulated and efforts have been

and are being made by petitioners for the formation of an irrigation and power district to proceed with necessary construction work. The total cost of such a project will be a minimum of several hundred million dollars. In order to facilitate the obtaining of financial assistance for this construction under terms and conditions which are feasible, it is necessary that title of petitioners to the water rights herein claimed be confirmed and quieted. This is possible only through a decree of the Court.

XIV

In addition to the reasons hereinabove set forth, petitioners respectfully submit that a final solution to the long-standing controversy relating to the division of the waters of the Colorado River requires all claims within each state to be set forth. Only such an adjudication could fully inform the parties and the United States Government, whose interests in this matter are set forth in its Motion for Leave to Intervene, of their respective rights in the Colorado River. A suit which omits the claims of persons or states whose claims are interwoven with those being litigated and which asks only for the interpretation of a compact, can have no finality. The controversy which has continued unabated over twenty years and which has already resulted in three previous attemps to obtain relief from this Court[4] can only be finally laid to rest if the Court permits and re-

4. Arizona vs. California, 283 U. S. 423 (1931); Arizona vs. California, 292 U. S. 341 (1934); Arizona vs. California, 298 U. S. 558 (1936).

quires all claims to the use of waters of the Colorado River System to be brought before it on the factual evidence thereof. Petitioners submit that it is of great general interest and concern whether the stability of water rights existing under State and Federal Constitutions may be destroyed at any time by an inequitable interstate compact, from which any state party to it is free to withdraw at will. Petitioners further submit that if the court interprets only the compact, complaining parties and the many thousands of persons in a like position would not be represented because of failure or refusal of state officials to plead their property rights.

WHEREFORE, petitioners respectfully pray this Court to permit them to file a Petition for Intervention in this case.

Samuel Langerman

SAMUEL LANGERMAN
Attorney for Petitioners

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 84 Original

STATE OF ARIZONA

Complainant

v

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

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COMPLAINANT'S OBJECTIONS TO MOTION ON BEHALF OF SIDNEY KARTUS ET AL. FOR LEAVE TO FILE PETITION TO INTERVENE

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IN THE

Supreme Court of the United States

October Term, 1952

No. 10 Original

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA

Defendants

COMPLAINANT'S OBJECTIONS TO MOTION ON BEHALF OF SIDNEY KARTUS, ET AL. FOR LEAVE TO FILE PETITION TO INTERVENE

The State of Arizona, appearing by its duly appointed attorneys, respectfully files herewith its objections to motion on behalf of Sidney Kartus, et al. for leave to file petition to intervene.

Issue I

The State of Arizona has a right to appear as *parens patriae* of its citizens regardless of the rights of individual and private appropriators or users of waters of interstate streams, inasmuch as a determination of the rights of the State of Arizona will necessarily determine petitioners' rights.

Issue II

The enactment of Section 75-2201 et seq, A.C.A. 1939, 1952 Cumulative Supplement, establishes the Arizona Interstate Stream Commission and empowers said Commission to prosecute and defend all rights, claims and privileges of the State respecting interstate streams and by virtue of said legislative enactment any other person or officer is prevented from instituting an action which relates to interstate streams.

Issue III

The Eleventh Amendment to the Constitution of the United States prevents petitioners from intervening.

ARGUMENT IN SUPPORT OF OBJECTIONS

Issue I

The petitioners should not be allowed to intervene in this action for the reason that any decree entered by the Court will operate as an adjudication of the petitioners' rights. All persons within the confines of a state are bound by an interstate compact which apportions water among the several states.

The outstanding case determined by the Supreme Court of the United States is *Hinderlider, State Engineer, et al. v. La Plata River & Cherry Creek Ditch Co.*, (1937) 304 U.S. 92. This was a case determined on an appeal from the Supreme Court of the State of Colorado. One of the points determined in that case was the effect of an interstate compact on an appropriator of water within the State of Colorado who had by decree of the Colorado Court been allocated a certain

amount of water from the La Plata River. The decree of the state court establishing the water right was entered in 1898 and a compact was signed between the States of Colorado and New Mexico with the permission of Congress in 1923. The Compact did not apportion sufficient water to the State of Colorado to take care of the 1898 Court decree. One of the contentions was that the State could not by compact interfere with the decree of the Colorado Court rendered in 1898. The Court held (Page 106) as follows:

"Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact. That the private rights of grantees of a State are determined by the adjustment by Compact of a disputed boundary was settled a century ago in *Poole v. Fleeger,* 11 Pet. 185, 209, where the Court said:

'It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union; unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress'."

In addition the Court cited *Garcia v. Lee*, 12 Pet. 511, 521; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Coffee v. Groover*, 123 U.S. 1, 29, 30, 31; *Virginia v. Tennessee*, 148 U.S. 503, 525; *Wyoming v. Colorado*, 286 U.S. 494, 508.

In the case of *Nebraska v. Wyoming*, (1935) 295 U.S. 40, Nebraska, by leave of Court, filed a bill of complaint against Wyoming seeking an equitable apportionment as between the two States of the waters of the North Platte River. The State of Wyoming presented a motion to dismiss, asserting that the Secretary of the Interior was an indispensable party. In disposing of the question the Court held:

> "* * * The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. *His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.* * * *"
> (emphasis supplied)

Subsequently the Platte Valley Public Power & Irrigation District filed a motion for leave to intervene which motion was denied by memorandum decision of this Court. 296 U.S. 548. Similarly this Court in *Texas v. New Mexico*, 304 U.S. 551 denied a motion for leave to file a brief amicus curiae.

The effect of a decree of the Supreme Court of the United States in a suit of original jurisdiction between States, as concerns private claimants of water rights within the respective states was determined in the case of *State of Wyoming v. State of Colorado* (1932) 286 U.S. 494. This was a suit brought by the State of Wyo-

ming against the State of Colorado to enforce a prior decree of the Supreme Court rendered in an earlier suit between the two States respecting their relative rights to divert and put to beneficial use the waters of the Laramie River, a stream rising in Colorado and flowing northward into Wyoming. The Court in this case used the following language:

> "* * * (3) But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between states, each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the Controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado'; and this court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators. 259 U.S. 468, 42 S. Ct. 552, 66 L. Ed. 999. Decisions in other cases also warrant the conclusion that the water claimants in Colorado, and those in Wyoming, were represented by their respective states and are bound by the decree.* * *"

In the present controversy, the State of Arizona will stand in judgment for the petitioners, for their rights can rise no higher than the rights of the State of Arizona and the effect of any judicial determination of this controversy between the two states will be binding upon petitioners as individual citizens. Citations of various Supreme Court cases which follow this principle are:

Missouri v. Illinois, 180 U.S. 208, 241;

Kansas v. Colorado, 185 U.S. 125, 142; Id., 206 U.S. 46, 49;

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237, 11 Ann. Cas. 488;

Hudson County Water Company v. McCarter, 209 U.S. 349, 355, 14 Ann. Cas. 560;

Pennsylvania v. West Virginia, 262 U.S. 533, 591, 595, 32 A. L. R. 300;

North Dakota v. Minnesota, 263 U.S. 365, 373;

Rhode Island v. Massachusetts, 12 Pet. 657, 748;

Florida v. Georgia, 17 *How.* 478, 494, 510, 522.

The right of a State, in its sovereign or quasi sovereign capacity to represent its citizens, has been ruled upon in many instances from early English law to the present date. One of the most concise statements of this rule is found in the case of *Commonwealth of Kentucky v. State of Indiana, et al* (1930) 281 U.S. 163, where the Commonwealth of Kentucky filed a bill of complaint against the State of Indiana, seeking to restrain the breach of a contract and for specific performance of said contract. In passing upon the right of the State to represent its citizens the Court held:

"* * * (2) *A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens.* The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters, and taxpayers, merely as such, of either state, without a showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the state itself. Otherwise, all the citizens of both states, as one citizen, voter, and taxpayer has as much right as another in this respect, would be entitled to be heard. * * *" (emphasis supplied)

In *State of Kansas v. Colorado*, (1902) 185 U.S. 125, at page 142, the Court, in speaking of its ruling in *State of Missouri v. Illinois*, (1900) 180 U.S. 208, said:

"As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriae,* trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution."

In *State of Wyoming v. Colorado,* (1922) 259 U.S. 419, it was contended, among other things, that actually the real parties in interest were the private appropriators of the water. As to that contention, the Court said, 259 U.S. at page 468:

"As respects Wyoming, the welfare, prosperity, and happiness of the people of the larger part of the Laramie Valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that state. Thus the interests of the state are indissolubly linked with the rights of the appropriators. To the extent of the appropriation and use of the water in Colorado a like situation exists there."

In *State of Kansas v. Colorado* (1907), 206 U.S. 46, at page 99, the Court said, in speaking of the status of Kansas in that suit:

"It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, *above a mere question of local private right and involves a matter of state interest, and must be con-*

sidered from that standpoint. State of Georgia v. Tennessee Copper Co., 206 U.S. 230, (11 Ann. Cas. 488)." (emphasis supplied)

See also:

State of Georgia v. Tennessee Copper Co., (1907), 206 U.S. 230-237, 11 Ann. Cas. 488;

People of State of New York v. New Jersey (1921) 256 U.S. 296-301;

State of New Jersey v. New York (1931), 283 U.S. 336, 342;

State of Wyoming v. Colorado (1936), 298 U.S. 573, 585;

State of Colorado v. Kansas (1934), 320 U.S. 383, 394.

The State, acting in its capacity as *parens patriae,* through the Arizona Interstate Stream Commission, adequately represents all claimants of water rights within the State, and none of such claimants should be made party to this action. Were the rule otherwise, it would leave the way open for hundreds, even thousands of other persons to intervene in the instant case seeking to have their various individual rights determined by the Supreme Court. This would create an intolerable situation and place so many litigants before the Court that substantial justice could not be accomplished.

Issue II

The State of Arizona must be represented by an agent or agency authorized to act and petitioners have nowhere shown that the Legislature has empowered them to act on behalf of the State. Inasmuch as the petitioners' rights are merged with those of the State of Arizona, their attempt to intervene actually places them in a position where they are asserting the rights of the State. This they may not do. The only properly authorized agency is the Arizona Interstate Stream Commission. In *People v. Navarre,* 22 Mich. 1 an action of debt had been commenced in the name of the

State without authority of the officer authorized by law to commence such action in the name of the State. In the course of the opinion it is said:

"But the plaintiff in error (the people) can only appear in this class of cases by some public officer designated by law. They cannot be placed in the attitude of litigants in the courts at the will and by action of private parties or attorneys. The State can only be recognized by the courts as a suitor in legal proceedings through the agents or representatives appointed by law to speak and act in its name in the matter in hand; and, unless in the given case the proper agent or representative is present, in legal contemplation the State is not present; and this presence of such agent or representative can be made known and attested only by the record. * * * While, therefore, the People are designated as plaintiffs in error in the papers before us, they are not present, indeed are not, according to legal apprehension, parties at all."

The legislative enactment by which this Commission is created is found in Section 75-2202, A.C.A. 1939, 1952 Cumulative Supplement, which provides as follows:

"75-2202. *Arizona interstate stream commission.*— The Arizona interstate stream commission is created as a body corporate, with the right to sue and be sued in its own capacity, and with all corporate rights and privileges of general bodies corporate except as otherwise provided by this act (SS 75-2201—75-2211). It shall have power, jurisdiction and authority to:

1. Prosecute and defend all rights, claims and privileges of the state respecting interstate streams. * * *"

The enactment of the above statute prevents any other person, including petitioners, from instituting or maintaining an action which relates to interstate streams. The general rule concerning the authority of

a certain officer or public body to institute or defend actions is set out in 59 C.J. 322, paragraph 480. This paragraph reads, in part, as follows:

> "Generally, therefore, any person expressly authorized by statute may institute, or defend, an action on the state's behalf; and when the legislature has authorized an action to be instituted or defended by a particular person or officer, the suit may not be instituted or defended, by another;"

It appears that the great weight of authority, if not the entire weight of authority, is in support of this general rule. In the case of *State v. Pure Oil Co.* (Okla. 1934) 37 P. 2d 608, a statutory enactment provided that "The Bank Commissioner shall have power and authority to institute and prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and such suits shall be brought in the name of the State of Oklahoma, on the relation of the Bank Commissioner." A question was raised as to whether the power thus conferred on the Bank Commissioner was exclusive. In passing upon the question the Court held:

> "It is the general rule of law that, when the legislative branch of the government has declared that certain classes of cases shall be prosecuted in the name of the state by designated persons or officers, such cases must be maintained by the person or officer designated and cannot be maintained by any other person or officer."

The Oklahoma Court in *Oklahoma Benefit Life Ass'n v. Bird* (Okla. 1943) 135 P. 2d 994, re-affirmed the general rule as applied to the power of the Insurance Commissioner to institute judicial proceedings. The Court used the following language:

> "And the general rule is that where the Legislature has declared that certain classes of cases shall be prosecuted in the name of the state by designated persons or officers, such cases cannot be maintained by any other person."

See also *Commonwealth v. Helm*, 163 Ky. 69, 173 S.W. 389.

The propriety of this rule is obvious. If it were otherwise, private citizens of the State could flood the courts with litigation on a certain problem, although the duty is lodged with regularly selected state officials or in officers or corporate bodies whose duties have been clearly defined by statute. As was stated in *State v. Pure Oil Co., supra,* "The necessity of orderly and harmonious government demands that the rule be observed."

Issue III

The Eleventh Amendment to the Constitution of the United States provides:

> "*(Suits against states — Restriction of judicial power.)*—The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The question as to whether or not a citizen of a State may sue one of the states of the Union has been determined in numerous cases. One of the leading cases in the field is *Monaco v. Mississippi* (1934) 292 U.S. 313. The Court in determining the effect of the Eleventh Amendment used the following language:

> "3. *To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar.* Superseding the decision in *Chisholm v. Georgia,* 2 Dall. 419, 1 L. ed. 440, supra, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. Re New York, supra (256 U.S. 497, 65 L. ed.

1060, 41 S. Ct. 588); *Missouri v. Fiske,* 290 U.S. 18, 25, 26, ante, 25, 54 S. Ct. 18." (emphasis supplied).

It is apparent from the Eleventh Amendment that its prohibitory effect extends to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State. The question presents itself as to whether or not an intervener in a case is in the position of one who commences or prosecutes a case. 30 C.J.S. 608, paragraph 163 states the general rule as to the effect of an intervention in the following language:

"An intervener by leave of court becomes a party for all purposes of the suit as though originally a party."

In support of the general rule, the District Court for the Southern District of New York, *In re Raabe, Glissman & Co.* (1947) 71 F. Supp. 678, states at page 680 as follows:

"(1, 2) Under Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *an intervenor in an action or proceeding is, for all intents and purposes, an original party.* * * *" (emphasis supplied)

See also *Commercial Electrical Supply Co. v. Curtis* (1923) 288 F. 657, where the Circuit Court of Appeals laid down the following rule at page 659:

"(1) It is the general rule that one who voluntarily intervenes in a suit in equity thereby becomes a party to the suit, is in the same situation, bound by the same orders and decrees, and subject to the same estoppels, as though he had been a party from the commencement thereof. *Frank v. Wedderin,* 68 Fed. 818, 822, 823, 16 C.C.A. 1; *Swift v. Black Panther Oil & Gas Co.* (8th C.C.A.) 244 Fed. 20, 28, 29, 156 C.C.A. 448; *Bowdoin College v. Merritt* (C.C.) 59 Fed. 6. 8; *Jack & Toner v. D. M. & Fort Dodge Ry. Co.,* 49 Iowa 627, 629; 2 Foster, Federal Practice, p. 1313, S. 259d. * * *"

The petitioners if allowed to intervene would become original parties in the instant case and *in effect, would be commencing or prosecuting a suit against California, which is prohibited by the Eleventh Amendment, supra.*

Should petitioners be allowed to intervene the State of Arizona would be suing to enforce individual rights of the petitioners and this, also, would be in violation of the Eleventh Amendment. Such circumstances should be distinguished from the right of a State to represent all of its citizens as *parens patriae.* This distinction has been brought out in the case of *State of North Dakota v. State of Minnesota* (1923) 263 U.S. 365. In that case North Dakota sought $5,000 for itself and $1,000,000 for its inhabitants, from the State of Minnesota. Recovery was held to be forbidden by the Eleventh Amendment inasmuch as the State was seeking relief for its individual inhabitants.

Conclusion

Whether to permit intervention in any case is a matter which lies within the sound discretion of the Court. As a general rule only those who have rights which are not being adequately protected in the proceedings are permitted to intervene.

Where a person is already represented in the proceedings the courts universally refuse intervention.

The State of Arizona acts as representative of all of its citizens in this litigation and its legislature has by proper statute created the Arizona Interstate Stream Commission and given to it the exclusive right to prosecute and defend all rights, claims and privileges of the State respecting interstate streams.

The granting of petitioner's motion would constitute a violation of the Eleventh Amendment to the Constitution of the United States. For the foregoing reasons the motion for leave to file a petition to intervene should be denied.

Respectfully submitted,

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OUTLINE OF ANSWER.

Page

First Affirmative Defense—The Defendants have the right to the beneficial consumptive use of 5,362,000 acre-feet per annum of water of the Colorado River System under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto 1

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Defendants.

ANSWER OF DEFENDANTS TO BILL OF COMPLAINT.

Defendants, by Their Duly Authorized Attorneys, Jointly Answer the Complaint Herein as Follows.

FIRST AFFIRMATIVE DEFENSE.

Defendants Have the Right to the Beneficial Consumptive Use of 5,362,000 Acre-feet per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto.

A. HISTORICAL AND GEOGRAPHICAL BACKGROUND.

1.
Introduction.

The defendants in this action are the State of California and public agencies of this State authorized by its laws to serve water to their inhabitants and lands. The rights which the State and these agencies defend are their rights to the beneficial consumptive use of waters of the Colorado River System for projects already constructed and now operating. These projects represent more than 75 years of continuous development, the oldest dating from 1877, the newest from 1923.

More than four million inhabitants of the State of California use, and are dependent in whole, or in substantial part, upon the waters of the Colorado River System. The area within the defendant agencies served by these waters exceeds two and one-half million acres. More than sixty California cities and other public entities are served with water from the Colorado River System. To provide this service, the defendants have constructed, or have obligated themselves to pay the cost of, works costing more than five hundred million dollars. Within the area served by these works the value of property now exceeds twelve billion dollars, and the gross value of the products of agriculture and industry in 1952 exceeded $3,500,000,000. The economy of Southern California is dependent upon the use of the waters here in controversy.

This controversy centers on the desire of Arizona to secure a right to the use of water for the Central Arizona Project, which has not been authorized by the Congress. She seeks to obtain water for that project by taking it from the existing and operating California projects.

Further details as to the proposed Arizona project appear in Paragraphs 65 and 66 of this Answer.

This First Affirmative Defense is concerned with the rights of the defendants under contracts into which they entered with the United States, more than twenty years ago, for the delivery to them of water under the Boulder Canyon Project Act. It outlines (A) the projects dependent upon the waters to be delivered under these contracts, (B) the provisions of the Colorado River Compact, (C) the provisions of the Boulder Canyon Project Act and (D) the provisions of the contracts themselves.

The Second Affirmative Defense alleges the facts which estop Arizona from questioning the validity of these contracts; the Third, the appropriative rights of the defendants; the Fourth, the indispensability of the United States as a party to this action. The Traverse to the Complaint follows these Affirmative Defenses.

2.

The California Projects.

The projects which carry the waters of the Colorado River System into Southern California are three in number. From north to south they are as follows: (See Plates 1 and 2 in the Appendix to this Answer.)

(a) The Colorado River Aqueduct, financed and constructed by defendant The Metropolitan Water District of Southern California, diverts from the main stream of the Colorado River above Parker Dam, 155 miles below Hoover Dam and 170 miles above the Mexican border. The main aqueduct transports water 242 miles westward and there connects with a system of about 300 miles of distribution aqueducts to serve the cities and other public bodies which are parts of the District. These

cities now number 48, including defendants City of Los Angeles and City of San Diego. They extend 150 miles along the coastal plain of Southern California and encompass a service area of over 1500 square miles. The total direct investment in the Colorado River Aqueduct System to date is over $244,000,000, and, when works now under construction are completed, will be in excess of $300,000,000. These sums are in addition to the Hoover Dam power obligations of this District and the City of Los Angeles. The District's minimum water requirements from the Colorado River are in the amount of 1,212,000 acre-feet per year, and this is the quantity provided for in its contracts with the United States. A full description of this project is contained in Exhibit A to this Answer and is incorporated herein by reference as though here fully stated. (See also Plates 6A and 6B.)

(b) Defendant Palo Verde Irrigation District diverts water from the Colorado River at a point 212 miles below Hoover Dam and 113 miles above the Mexican border. It contains within its boundaries approximately 120,500 acres, including the lands of the Palo Verde Valley, the oldest irrigated area in the Colorado River Basin. Its people have spent more than $20,000,000 to build the works that serve this area. A full description of this project is contained in Exhibit B to this Answer and is incorporated herein by reference as though here fully stated. (See also Plate 3.)

(c) The All-American Canal diverts at Imperial Diversion Dam, 303 miles below Hoover Dam and 22 miles above the Mexican border. It transports water into the Imperial Valley for defendant Imperial Irrigation District and into Coachella Valley for defendant Coachella Valley County Water District, delivering water enroute to the

Yuma Reclamation Project, of which 25,000 acres are in California and 50,000 acres are in Arizona. The total California investment in this project is over $60,000,000. A full description of the All-American Canal project is contained in Exhibit C to this Answer and is incorporated herein by reference as though here fully stated. (See also Plates 4 and 5.)

The minimum water requirements from the Colorado River System of the Palo Verde Irrigation District, Yuma Project in California, Imperial Irrigation District and Coachella Valley County Water District, are 4,150,000 acre-feet per year, which is the quantity provided for by their contracts with the United States, and is within the quantities of their appropriations made a half-century and more ago.

3.

Background of Colorado River Compact.

(a) Prior to 1920 appropriators in California, and to a limited extent in Arizona, had appropriated and put to use all of the natural flow of the main stream of the Colorado River which existed in the late summer irrigating season. Uses by junior appropriators in Arizona, Colorado, Utah, New Mexico and Wyoming were interfering with the uses under the senior appropriations in California and Arizona. Satisfaction of such junior appropriations was dependent upon the construction of storage works to salvage the flood waters then wasting to the Gulf of California during the spring months of the year. These spring flood waters were a menace to all of the lands along the lower river in Arizona and California. The menace was increasing because the deposition of silt by the river in its delta area was constantly raising the river bed, making the protection of the threat-

ened areas by means of levees steadily more difficult and precarious. The geographical situation required the critical levees to protect Imperial Valley to be built and maintained in Mexico, and the main canal serving the Imperial Valley at that time followed a contour which carried it through Mexican territory enroute. The construction of an All-American Canal was essential to the removal of international complications and problems, and was of concern to all the States in the Colorado River Basin and to the United States. Commencing in 1918, legislation was introduced in the successive Congresses to authorize the construction of such an All-American Canal. In the course of consideration of such legislation there became apparent the necessity for construction of storage works to control the floods, retain silt, and provide stored water for the expansion of junior appropriations. Such storage was desired by and was essential to all seven States of the Colorado River Basin. However, the States of the Upper Division (Colorado, Utah, New Mexico and Wyoming) were insistent that they be protected in some manner from the probability that after such storage was provided, appropriations in the Lower Basin would expand so rapidly as to appropriate all of the conserved waters and again forestall the possibility of long-range but slower expansion of uses in the Upper Basin.

(b) In 1921, the seven States of the Colorado River Basin enacted legislation authorizing negotiation of an inter-state compact for the division of the waters of the Colorado River System, and the Congress, by the Act of August 19, 1921 (42 Stat. 171), authorized the participation of a federal representative therein. The negotiations so authorized were undertaken and were carried on at various times from January 26 to November 24, 1922

when the Colorado River Compact, described in later paragraphs of this Answer, was signed.

4.

Comparison of Rights of California and Arizona at the Time of Signature of the Colorado River Compact.

(a) As of the date of signature of the Colorado River Compact, November 24, 1922, complete irrigation distribution systems were in operation and providing service to Palo Verde Irrigation District, Imperial Irrigation District, and the portion of the Yuma Project in California, for a total of approximately 610,000 acres, for which the demand on Colorado River water was not less than 4,500,000 acre-feet per annum. On a comparable basis such works had been completed and were in service along the Colorado River in Arizona for the Parker Project, Yuma Project, and other miscellaneous areas, for a total of 65,000 acres, for which the demand for water from the Colorado River was about 450,000 acre-feet per annum. In addition, works had been constructed in Arizona on the Gila River, a tributary of the Colorado River, requiring an additional 2,000,000 acre-feet per annum.

(b) As of the same date, there were vested appropriative rights, valid under the laws of California, to the beneficial consumptive use of not less than 6,000,000 acre-feet per annum of the waters of the Colorado River System, including those referred to in Paragraph (a) above. The appropriative rights claimed by Arizona were alleged by that State in *Arizona v. California,* 283 U. S. 423, to aggregate 3,900,000 acre-feet per annum, of which a quantity of approximately 3,000,000 acre-feet per annum was alleged to relate to the waters of the Gila River and its tributaries.

B. THE COLORADO RIVER COMPACT.

5.

Signature of Text of Compact.

On November 24, 1922, representatives of the States of Arizona, California, Nevada, Utah, Colorado, New Mexico, and Wyoming signed the text of a proposed compact (Appendix 1 to this Answer) to become effective upon ratification by their legislatures and consent of the Congress. This Compact became effective as the Six-State Colorado River Compact June 25, 1929, in the manner hereinafter described, Arizona having rejected and refused to ratify it. Wherever in this Answer the effect of the Six-State Colorado River Compact is pleaded, such effect is that which was reported by the negotiators in their published reports to their legislatures and to the Congress, and which appears in the legislative history of the Boulder Canyon Project Act which granted Congressional consent thereto in modified form.

6.

Text of Compact: Article I: Purposes.

Article I of said Compact states its major purposes to be for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. Article I further provides that to these ends the Colorado River Basin is divided into two Basins, and an apportionment of the

use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

7.

Article II: Definitions.

Article II(a) of said Compact defines the term, "Colorado River System," to mean that portion of the Colorado River and its tributaries within the United States of America. Defendants allege: said definition includes, as a necessary part of the Colorado River System, the Gila River and its tributaries. The Gila River rises in New Mexico and flows across Arizona to join the main stream of the Colorado River near Yuma, Arizona.

Article II(b) of said Compact defines the term "Colorado River Basin" to mean all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied. Defendants allege: as so defined, the Colorado River Basin includes all of the areas in the State of California served by the defendants.

Article II(c) of said Compact defines the term "States of the Upper Division" to mean the States of Colorado, New Mexico, Utah and Wyoming.

Article II(d) of said Compact defines the term "States of the Lower Division" to mean the States of Arizona, California and Nevada.

Article II(e) of said Compact defines the term "Lee Ferry" to mean a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

Article II(f) of said Compact defines the term "Upper Basin" to mean those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry. Defendants allege that the term "Upper Basin" as so defined is not identical with the term "States of the Upper Division" as defined in Article II(c), but includes a portion of Arizona, which is not a State of the Upper Division.

Article II(g) of said Compact defines the term "Lower Basin" to mean those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry. Defendants allege that as so defined, the Lower Basin includes all of the areas in the State of California served by the defendants, and all of the drainage area of the Gila River and its tributaries in Arizona. The term "Lower Basin" as so defined is not identical with the term "States of the Lower Division" as defined in Article II(d), but includes portions of Utah and New Mexico, which are not States of the Lower Division.

8.

Article III(a): Apportionments.

Article III(a) of said Compact apportions from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which it states "shall include all water necessary for the supply of any rights which may now exist." Defendants allege: the apportionment in perpetuity effected by Article III(a) of the Colorado River Compact is intended to and does reserve the use of the quantities therein stated from the operation of the laws of appropriation as between the Upper Basin and the Lower Basin. Said apportionment is from the waters of the entire Colorado River System, including the Gila River and its tributaries, and not merely from the virgin flow of the main stream.

The term "consumptive use" is not defined in said Compact, but is defined as "diversions less returns to the river" in Section 4(a) of the Boulder Canyon Project Act (Act of Dec. 21, 1928, 45 Stat. 1057), which statute granted the consent of the Congress to said Compact.

The foregoing definition of "consumptive use" was again employed in the Mexican Water Treaty signed February 3, 1944 (Treaty Series 994), as follows:

> Article I(d): "'To divert' means the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stock-raising or industrial purposes

whether this be done by means of dams across the channel, partition weirs, lateral intakes, pumps or any other methods."

Article I(h): "'Return flow' means that portion of diverted water that eventually finds its way back to the source from which it was diverted."

Article I(j): "'Consumptive use' means the use of water by evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream."

Such was the commonly accepted meaning of the term at the time of negotiation of the Compact and of the Congressional consent thereto, and was and is the meaning of said term as used throughout said Compact. Beneficial consumptive uses in California and in Arizona were and are intended and required by the Compact to be measured in the identical manner and at the places of use, wherever they occur, not in terms of "man-made depletion" of the flow of only the main stream at some lower point. No beneficial consumptive uses at places of use are excepted or exempt from said method of measurement, whether of natural flow or of water salvaged by storage or otherwise in any part of the Basin. The words "per annum" as used in said Compact mean "each year" and not an average of such uses over a period of years.

Uses of the waters of the Gila River and its tributaries under rights which existed as of June 25, 1929, are chargeable first against the apportionment made to the Lower Basin by Article III(a) of the Compact. Such uses in Arizona as of that date aggregated not less than 2,000,000 acre-feet per annum.

9.

Article III(b): Permission to the Lower Basin to Increase Its Uses.

Article III(b) of said Compact provides that, in addition to the apportionment made in Paragraph (a) of Article III, the Lower Basin is given the right to increase its beneficial consumptive use of the waters of the Colorado River System by one million acre-feet per annum. Defendants allege: the terms "beneficial consumptive use" and "per annum" as used in Article III(b) have the same meaning as in Article III(a). The first million acre-feet of beneficial consumptive uses above 7,500,000 acre-feet per annum, wherever such uses in the Lower Basin may occur, are encompassed by Article III(b), and said Article III(b) does not relate solely to waters found flowing in the Gila River or any other specific portion of the Lower Basin.

Said Compact contains no provision apportioning the use of water as between Arizona and California or among any States; imposes no restriction or limitation upon the amount which any State may use of the waters apportioned by Article III(a) to the Basin in which such use is made; and imposes no restriction or limitation upon Arizona, California, Nevada, Utah or New Mexico with respect to their respective participations in the increase of beneficial consumptive use permitted to the Lower Basin by Article III(b) of said Compact.

10.

Article III(c): Mexico.

Article III(c) of said Compact provides that if, as a matter of international comity, the United States of America shall recognize in the United Mexican States any right to the use of any waters of the Colorado

River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities "specified" in Paragraphs (a) and (b) of said Article III, and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in Paragraph (d), hereinafter referred to. Defendants allege: neither in said Article III(c) nor in any other provision of the Colorado River Compact is water or the use of water apportioned to the United Mexican States. The obligation assumed in Article III(c) by the States of Colorado, New Mexico, Utah and Wyoming, being the States of the Upper Division, to deliver water to supply one-half of the Mexican deficiency, does not include any obligation on the part of Arizona, with respect to that portion of her territory which is in the Upper Basin, to make such delivery. In the event that a deficiency must be borne by the Lower Basin under Article III(c), the Lower Basin is not required to diminish the uses apportioned to it by Article III(a) unless the additional uses permitted it by Article III(b) shall have been first yielded and shall have proved insufficient to meet the Lower Basin's share of the Treaty requirement.

On April 18, 1945, the Senate of the United States consented, with reservations, to a treaty (Treaty Series 994) with the United Mexican States, and the same was ratified, effective as of November 8, 1945. Defendants allege that the performance of said treaty as to the Colorado River System will require the guaranteed delivery, from any and all sources, of 1,500,000 acre-feet of water

per annum at the Mexican boundary, and that said sources are the entire Colorado River System, including the Gila River and its tributaries.

11.

Article III(d): Guarantee by States of the Upper Division.

Article III(d) of said Compact provides that the States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of said Compact. Defendants allege: the quantity of 75,000,000 acre-feet specified in Article III(d) bears no quantitative relationship to the beneficial consumptive use of 7,500,000 acre-feet per annum apportioned to either the Upper Basin or Lower Basin by Article III(a).

12.

Article III(e): Reasonable Use.

Article III(e) of said Compact provides that the States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

13.

Article III(f, g): Further Apportionment.

Article III(f) of said Compact provides that further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by Paragraphs III(a), (b), and (c) may be made in the manner provided in Paragraph (g) at any time after October 1, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in Paragraphs (a) and (b) of Article III.

Defendants allege: the provisions of Articles III(f) and III(g) are permissive and not mandatory, and no State has committed itself to enter into such a future compact.

The "further apportionment" referred to in Article III(f) relates only to an apportionment between Basins and then only on mutual consent of all States in both Basins.

Neither Article III(f) nor any other article of the Colorado River Compact prohibits or prevents the United States from presently contracting for the delivery from storage of, or the defendants herein from receiving, appropriating or using, waters surplus to those required to sustain the uses apportioned by Article III(a), nor does it postpone the enjoyment of the use thereof until another interstate compact is made, some time after October 1, 1963, if such a compact is ever made.

Article III(f) postpones the right of either Basin to demand the negotiation of such a compact until after (1) October 1, 1963, and (2) beneficial consumptive uses in the Upper Basin exceed 7,500,000 acre-feet per annum or such uses in the Lower Basin exceed 8,500,000 acre-feet per annum.

Article III(g) provides the mechanics for the calling of a conference and the formulation of a compact for a further apportionment as referred to in Article III(f), subject to legislative ratification thereof by the signatory States and consent by the Congress.

14.

Article VII: Indian Tribes.

Article VII provides that nothing in the Colorado River Compact shall be construed as affecting the obligations of the United States of America to Indian tribes. Defendants allege: all beneficial consumptive uses of water by Indian

tribes pursuant to obligations of the United States to such tribes are chargeable to the beneficial consumptive uses available under the Compact to the Basin, and to the State, in which such uses are situate.

15.

Article VIII: Present Perfected Rights.

Article VIII of said Compact provides that "present perfected rights" to the beneficial use of waters of the Colorado River System are unimpaired by this Compact. Said Article VIII provides further that whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to, and be satisfied from, water that may be stored not in conflict with Article III. Said Article VIII further provides that all other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

Defendants allege: "Unimpaired" as used in this Article means unimpaired as to both the quantity and the quality of the waters to which said perfected rights relate. The Compact does not define the term "present perfected rights." The rights existing in the defendants on and prior to June 25, 1929, are alleged in Paragraph 28 of this Answer.

16.

Article XI: Ratification.

Article XI of the Compact provides that said Compact shall be binding and obligatory when it shall have been

approved by the Legislatures of each of the signatory States and by the Congress of the United States.

17.

Ratification of Seven-state Compact by Six States: 1923.

During the year 1923, the Legislatures of California, Colorado, Nevada, New Mexico, Utah and Wyoming ratified the proposed Colorado River Compact. The Legislature of Arizona rejected it, after first adopting in one house or the other reservations or amendments which, among others, would have provided "That the Gila River System, including the waters of said Gila River and streams tributary thereto, be not included, considered or involved in any way with the so-called Colorado River Compact."

18.

Rejection by Arizona: 1925.

In 1925 the Governor of Arizona formally announced that Arizona elected to rely on the law of appropriation as between States as announced by this Court in *Wyoming v. Colorado,* 259 U. S. 419 (1922), and that Arizona did reject the proposed Colorado River Compact.

19.

Ratification of Six-state Compact: 1925-1929.

Between 1925 and 1929, the Legislatures of California, Colorado, Nevada, New Mexico, Utah and Wyoming enacted legislation reciprocally waiving the provisions of Article XI of the proposed Colorado River Compact (which article made the Compact effective when approved by the Legislatures of seven states), and enacting that said Compact should become effective when six states should have ratified it and the Congress should have given its consent.

C. THE BOULDER CANYON PROJECT ACT AND THE STATUTORY COMPACT BETWEEN THE UNITED STATES AND CALIFORNIA.

20.
Consideration of the Boulder Canyon Project by the Congress.

From April 25, 1922, to December 21, 1928, the Congress gave consideration in hearings and debates to four measures, popularly referred to as the Swing-Johnson bills, for the purpose of ratifying the Colorado River Compact, authorizing the construction of a storage dam on the Colorado River at or near Boulder Canyon, and authorizing the construction of an All-American Canal from the Colorado River to the Imperial and Coachella Valleys.

In the course of these hearings and debates the projects of the defendants as now constructed, and the water requirements of these projects, were thoroughly examined and made known to the Congress, and to all of the States of the Colorado River Basin, and said legislation in its successive stages was formed and adapted to make possible the construction of said projects, to assure them an adequate water supply, and to require said defendants to undertake the repayment of the cost of Hoover Dam and the All-American Canal to that end.

Among the successive steps of legislative consideration a bill was favorably reported by committees in the 70th Congress, passed the House, but was prevented from coming to a vote in the Senate by filibusters of the Arizona Senators in February, 1927, and May, 1928.

Thereupon the Congress enacted the Act of May 28, 1928 (45 Stat. 1011), authorizing the President to ap-

point a Board of Engineers to review the economic and engineering features of the proposed Boulder Canyon Project. The Board, known as the "Sibert Board," reviewed the proposed Boulder Canyon Project, including water requirements of the defendants and of other areas to be served by the said project, and rendered its report, favorable to the project, on December 3, 1928 (H. Doc. 446, 70th Congress, 2d Session; reprinted in H. Doc. 717, 80th Congress, p. A187).

Thereafter the Congress proceeded to the consideration and final passage of the fourth Swing-Johnson bill, which became the Boulder Canyon Project Act (Act of December 21, 1928, 45 Stat. 1057). The full text of this statute appears as Appendix 2 to this Answer. Wherever in this Answer the effect of that Act is pleaded, the construction relied upon is the construction of the Act supported by the legislative history thereof.

21.

Alternative Consent to Seven-state or Six-state Compact by Congress.

The Boulder Canyon Project Act enacted, among other things, the consent of Congress to the proposed Compact signed at Santa Fe, New Mexico, November 24, 1922, either as a seven-state compact, or, in the alternative, as a six-state compact, conditioned, in the latter event only, upon the enactment by California of a statute in specified terms; and said Act delegated to the President the power to proclaim at the expiration of six months the effectuation and existence of either the seven-state compact or the

alternative six-state compact, but not both. The language of the statute in this respect reads:

> Sec. 4(a). Par. 1: "This Act shall not take effect * * * unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than

one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

Sec. 13(a). "The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, * * * is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided."

Defendants allege: The term "excess or surplus waters unapportioned by said compact," as so used in said Act, includes the increase of use of 1,000,000 acre-feet per annum permitted to the Lower Basin by Article III(b) of the Colorado River Compact.

22.

Authorization of a Tri-state Agreement.

Section 4(a), Paragraph 2, of the Boulder Canyon Project Act also authorized, but did not require as a condition precedent or otherwise, an agreement among Arizona, Nevada and California, pertaining to the use by said States of water apportioned to the Lower Basin by Article III(a) of the Colorado River Compact and water not apportioned by Article III(a) of said Compact, subject, however, by the terms of Section 8(b) of said Act, to the requirement of further consent of Congress at least

if such Agreement should be made after January 1, 1929. Section 8(b) of the Project Act further provided that any Agreement among Arizona, California, or Nevada to which Congress should give its consent after January 1, 1929, should be subject to all contracts made by the Secretary of the Interior under Section 5 of said Act. The Secretary has made such contracts with the defendants, as stated in this First Affirmative Defense.

Paragraph 2 of Section 4(a) contained no reference to the increase of use of 1,000,000 acre-feet per annum specifically permitted to the Lower Basin by Article III(b) of the Colorado River Compact. Rather, in like manner as in Paragraph 1 of said Section 4(a), the proposed Tri-State Agreement suggested an allocation to Arizona of one-half of any excess or surplus waters unapportioned by Article III(a) of the Colorado River Compact, said excess including water referred to in Article III(b) of said Compact as well as other surplus.

The Tri-State Agreement proposed by the second paragraph of Section 4(a) of the Project Act makes no provision for uses by Utah and New Mexico, States which are in part within the Lower Basin.

It has not been ratified by any State.

23.

Legislation by California as to Compact.

The Legislature of California thereafter ratified the proposed Colorado River Compact in the alternative as a seven-state compact or as a six-state compact, whichever the President should proclaim at the end of six months from December 21, 1928. (Calif. Stats. 1929, Ch. 1, p. 1; Stats. 1929, Ch. 15, p. 37; see Stats. 1929, Ch. 16, p. 38, *infra.*)

24.

Enactment by California of Limitation Act.

California, in response to the first paragraph of Section 4(a) of the Boulder Canyon Project Act, on March 4, 1929, enacted the following statute (Stats. 1929, Ch. 16, p. 38; hereinafter referred to as the California Limitation Act, Appendix 3 to this Answer) to become effective only upon the ratification of the Colorado River Compact by six States, and its non-ratification by the seventh State (Arizona) within six months from December 21, 1928, and proclamation of the latter event by the President:

> "An act to limit the use by California of the waters of the Colorado river in compliance with the act of Congress known as the 'Boulder Canyon Project Act,' approved December 21, 1928, in the event the Colorado River compact is not approved by all of the states signatory thereto.
>
> "The people of the State of California do enact as follows:
>
> "Section 1. In the event the Colorado river compact signed at Santa Fe, New Mexico, November 24, 1922, * * * is not approved within six months from the date of the passage of that certain act of the Congress of the United States known as the 'Boulder Canyon Project Act,' approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado river compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the

provisions of the first paragraph of article eleven of said compact which makes the same binding and obligatory when approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of such six states approval and the President by public proclamation shall have so declared, as provided by the said 'Boulder Canyon Project Act,' the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming as an express covenant and in consideration of the passage of the said 'Boulder Canyon Project Act' that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said 'Boulder Canyon Project Act,' and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

"Sec. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4(a) of the said 'Boulder Canyon Project Act' and this act shall be so construed."

25.

Proclamation of Six-state Compact by President.

On June 25, 1929 the President of the United States proclaimed that (a) seven States had not ratified the Colorado River Compact within six months from the date of the approval of the Boulder Canyon Project Act, but that (b) six states (including California) had ratified said compact and consented to waive the provisions of Article XI thereof requiring seven-state approval, as prescribed in Section 13(a) of the Boulder Canyon Project Act; (c) that California had met the requirements set out in the first paragraph of Section 4(a) of the Boulder Canyon Project Act necessary to render said act effective on six-state approval of said compact, and (d) all prescribed conditions having been fulfilled, the Boulder Canyon Project Act was effective June 25, 1929. (Appendix 4 to this Answer, 46 Stat. 3000.)

26.

Legislation by Arizona as to Compact.

On February 24, 1944, the Legislature of Arizona enacted a statute entitled "An Act ratifying the Colorado River Compact; and declaring an emergency," (Sess. L. Ariz. 144, pp. 427-428.) The effect of said statute is referred to in Paragraph 59 of the Traverse in this Answer.

27.

Statutory Compact.

(a) The Boulder Canyon Project Act offered to California, and California by its Limitation Act accepted, a Statutory Compact between the United States and Cali-

fornia, on the basis of the interpretations of the Colorado River Compact, the Boulder Canyon Project Act, and the proposed Statutory Compact appearing in the legislative history of the Boulder Canyon Project Act; and said Statutory Compact is now in existence, subject to the terms of the six-state Colorado River Compact.

(b) Arizona has acquiesced in and does by the present action acquiesce in the existence of said Statutory Compact.

(c) Said Statutory Compact authorizes the United States to contract to deliver, and to presently deliver, water from storage to users in California up to the full quantities stated in said Statutory Compact.

(d) Said quantities comprise the aggregate annual beneficial consumptive use of not to exceed:

(1) Four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, plus

(2) One-half of all excess or surplus waters not apportioned by Article III(a) of the Colorado River Compact, including in said excess or surplus the waters referred to in Article III(b) of said Compact.

(e) The waters so delivered by the United States are for permanent service and available, among other purposes, for the supply of any rights which existed in California as of June 25, 1929.

(f) Said Statutory Compact does not provide for the reduction of said quantities in consequence of reservoir,

evaporation or other losses occurring prior to delivery of said waters at the points of diversion in California.

(g) Said Statutory Compact authorizes California and users therein to presently contract with the United States for the delivery to such users of water stored by the United States, and to receive, appropriate and presently use the same.

(h) Neither the Colorado River Compact nor said Statutory Compact withdraws said excess or surplus waters from present appropriation or use in California, nor prohibits nor prevents the United States from lawfully contracting to deliver, and presently delivering, such excess or surplus waters for present use in California and for permanent service.

(i) California was induced to enact the Limitation Act and thereby accept the offer of a Statutory Compact made by the United States in the Boulder Canyon Project Act by the representation of the United States, known to Arizona, that the said offer and proposed compact had the meaning and intent above alleged.

(j) California has fully performed all obligations of said Statutory Compact on its part to be performed to date, and is entitled to the performance of said Statutory Compact by the United States.

28.

Rights of California as of June 25, 1929.

(a) As of June 25, 1929, the effective date of the Colorado River Compact, the Boulder Canyon Project Act, and the Statutory Compact, projects had been constructed and were in operation in California requiring the bene-

ficial consumptive use of more than 4,950,000 acre-feet per annum of the waters of the Colorado River System. Rights to the use of that quantity were part of then vested appropriative rights of the defendants valid under the laws of California, to the beneficial consumptive use of a quantity greatly in excess of 5,362,000 acre-feet per annum of waters of the Colorado River System.

(b) In addition to the projects of the defendants in this action, there are large areas in California readily susceptible of irrigation from the Colorado River System by means of feasible projects for which valid appropriations had been made under the laws of California long prior to the enactment of the Boulder Canyon Project Act. In consequence, however, of the limitation imposed upon California's uses by the said Statutory Compact, California's valid appropriations, which aggregated in excess of eight million acre-feet per annum as of June 25, 1929, were restricted by the formula stated in said Statutory Compact to a basis adequate only to supply the amounts required by the Palo Verde Project, the Colorado River Aqueduct, and the All-American Canal as constructed. The minimum amounts required by these projects for beneficial consumptive use aggregate 5,362,000 acre-feet per annum.

(c) As of June 25, 1929, the comparable statistics relative to Arizona did not differ materially from those alleged in Paragraph 4 of this Answer with reference to the date November 24, 1922.

D. DEFENDANTS' WATER CONTRACTS WITH THE SECRETARY OF THE INTERIOR EXECUTED PURSUANT TO THE AUTHORITY OF THE BOULDER CANYON PROJECT ACT AND THE STATUTORY COMPACT.

29.

The Boulder Canyon Project Act: Authorization for Construction and Repayment Contracts: Sections 1 and 4(b).

Section 1 of the Boulder Canyon Project Act (Act of December 21, 1928; 45 Stat. 1057; Appendix 2 to this Answer) authorized the construction of Hoover Dam and the All-American Canal.

Section 4(b), Paragraph 2, of said Act established the following conditions precedent to the construction of the All-American Canal:

> "Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law."

To comply with the foregoing conditions, the defendants Imperial Irrigation District, and later Coachella Valley County Water District and City of San Diego, entered into contracts with the United States, described in

subsequent paragraphs of the First and Second Affirmative Defenses for the repayment of the cost of the Imperial Dam and All-American Canal.

30.

Section 5: Authorization for Water Delivery Contracts.

Section 5, Paragraph 1, of said Act authorized the Secretary of the Interior to contract for the storage and delivery of water, and for the disposition of electric energy, in the following terms:

> "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon. for irrigation and domestic uses, and generation of electrical energy * * * upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Contracts under the said Act for delivery of water from storage were entered into between the United States and each of the defendants (except the City of Los Angeles and County of San Diego), as set forth in subsequent paragraphs of this First Affirmative Defense.

31.

Section 6: Utilization of the Hoover Dam Reservoir.

Section 6, Paragraph 1, governing the use of Hoover Dam and reservoir, provided in part as follows:

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power * * *"

32.

Seven-party Agreement.

On August 18, 1931, pursuant to request of the Secretary of the Interior, representatives of the defendants, other than the State of California, signed an agreement (referred to as the "Seven-Party Agreement," Appendix 10 to this Answer) fixing the relative priorities of the defendants in water available to California under the Colorado River Compact and the Statutory Compact, which they thereafter ratified (H. Doc. 717, 80th Cong., p. A479), and which the Division of Water Resources of the State of California approved and recommended to the Secretary of the Interior as a uniform schedule of priorities to be included in all contracts for the storage and delivery of water of the Colorado River System into which said Secretary might enter with users in California.

33.

General Regulations.

On September 28, 1931, the Secretary of the Interior promulgated amended general regulations (H. Doc. 717, 80th Cong., p. A487), incorporating in Article 6 thereof

the aforesaid schedule of priorities. The said regulations are now in full force and effect with respect to the delivery of water from storage for use in California. Their full text appears as Appendix 8 to this Answer, and the effect of the schedule of priorities therein contained is tabulated below:

Priority No.	Agency and description	Annual quantity in acre-feet (beneficial consumptive use)
1	Palo Verde Irrigation District—104,500 acres in and adjoining existing district	
2	Yuma project (California division)—not exceeding 25,000 acres	
3	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal (b) Palo Verde Irrigation District—16,000 acres of adjoining mesa	3,850,000
4	Metropolitan Water District and/or City of Los Angeles	550,000
5	(a) Metropolitan Water District and/or City of Los Angeles (b) City and/or County of San Diego	550,000 112,000
6	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal (b) Palo Verde Irrigation District—16,000 acres of adjoining mesa	300,000
		5,362,000
7	Agricultural use in the Colorado River Basin in California, as designated on Map 23000, U. S. Bureau of Reclamation.	All remaining water available for use in California

34.

Contracts for Delivery of Water to the Defendants.

Pursuant to the aforesaid statutory authority and in accordance with the aforesaid regulations, the United States has entered into contracts severally with the defendants, Metropolitan Water District of Southern California, City of San Diego, Palo Verde Irrigation District, Imperial Irrigation District and Coachella Valley County Water District, for the delivery to them at stated points of diversion of water from storage for beneficial consumptive use in California, in the quantities and in accordance with the priorities stated in said regulations, subject to the availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act. Said contracts are for permanent and continuous service. The full text of each of said contracts appears as an Appendix to this Answer, and is incorporated herein by reference as though here fully stated. Each of said defendants has performed and is performing all obligations of all of its contracts with the United States to be performed by said defendant to date, and is entitled to performance of said contracts by the United States.

The said contracts, together with contracts related thereto, are identified below by reference to dates, parties, subject matter and the numbers they bear in the Appendix to this Answer:

DATE	PARTIES	SUBJECT MATTER	APPENDIX NO.
	Palo Verde Project Contract		
February 7, 1933	United States and Palo Verde Irrigation District	Water Delivery Contract	No. 11
	All-American Canal Contracts		
October 23, 1918	United States and Imperial Irrigation District	Laguna Dam Repayment Contract	No. 12
December 1, 1932	United States and Imperial Irrigation District	All-American Canal Water Delivery and Repayment Contract	No. 13
February 14, 1934	Imperial Irrigation District and Coachella Valley County Water District	Agreement of Compromise	No. 14
October 2, 1934	United States and City of San Diego	San Diego Participation in the All-American Canal	No. 15
October 15, 1934	United States and Coachella Valley County Water District	All-American Canal Water Delivery and Repayment Contract	No. 16
December 22, 1947	United States and Coachella Valley County Water District	Coachella Valley Distribution System Construction Contract	No. 17
March 4, 1952	United States and Imperial Irrigation District	All-American Canal Operation and Maintenance Contract	No. 18

DATE	PARTIES	SUBJECT MATTER	APPENDIX NO.
	Colorado River Aqueduct Contracts		
April 24, 1930	United States and Metropolitan Water District of Southern California	Water Delivery Contract	No. 19
April 26, 1930	United States and Metropolitan Water District of Southern California	Contract for Power to Pump Water	No. 20
September 28, 1931	United States and Metropolitan Water District of Southern California	Amended Water Delivery Contract	No. 21
February 10, 1933	United States and Metropolitan Water District of Southern California	Parker Dam Co-Operative Contract	No. 22
February 15, 1933	United States and City of San Diego	Water Delivery Contract	No. 23
October 4, 1946	United States, Metropolitan Water District of Southern California, and San Diego City and County	Merger of San Diego Water Delivery Contract	No. 24
October 17, 1945	United States and City of San Diego	Repayment Contract for San Diego Aqueduct	No. 25
March 14, 1947	City of San Diego and Metropolitan Water District of Southern California	Assignment	No. 26
April 1, 1952	United States and San Diego County Water Authority	Repayment Contract, Second Barrel, San Diego Aqueduct	No. 27

35.

Rights of Palo Verde Irrigation District, Imperial Irrigation District, and Coachella Valley County Water District to Delivery of Water by the United States.

Defendants, Palo Verde Irrigation District, Imperial Irrigation District, and Coachella Valley County Water District are entitled, by virtue of their aforesaid contracts with the United States, to the delivery from storage of so much water as may be necessary to enable them and the lands within the Yuma Project in California to make aggregate annual beneficial consumptive use (diversions less returns to the river) in California of not less than 4,150,000 acre-feet per annum, subject to the availability thereof under the Colorado River Compact and the Boulder Canyon Project Act, with relative priorities as stated in Article 6 of said regulations dated September 28, 1931 (Appendix 8 to this Answer), being the aggregate of priorities 1, 2, 3 and 6 therein stated; and further subject, as between Imperial Irrigation District and Coachella Valley County Water District, to the "Agreement of Compromise" between them dated February 14, 1934, appearing as Appendix 14 to this Answer.

36.

Right of Metropolitan Water District to Delivery of Water by the United States.

The Metropolitan Water District of Southern California is entitled, by virtue of its aforesaid contracts with the United States, and of assignment to said District of rights of the City of San Diego theretofore held under contract between said City and the United States, to the delivery from storage of so much water as may be necessary to enable said District to make aggregate annual beneficial consumptive use (diversions less returns to the river) in

California of 1,212,000 acre-feet per annum, subject to the availability thereof under the Colorado River Compact and the Boulder Canyon Project Act, with relative priorities as stated in Article 6 of said regulations dated September 28, 1931 (Appendix 8 to this Answer), being the aggregate of priorities 4 and 5 therein stated.

37.

Seniority of California Contracts.

The said contracts between the United States and each of the defendants vests in said defendants, respectively, a right in accordance with the terms of said contracts to the delivery from storage of water of the Colorado River System for beneficial consumptive use in the respective quantities hereinabove alleged. Said contract rights, severally and collectively, are senior in time and right to any and all rights which may exist by virtue of contracts between the United States and any other parties for the delivery of water from Hoover Dam storage to, or for use in, Arizona, with the partial exception of contracts, if any, made with the Yuma Project in Arizona relating to such rights as that project may have owned prior to the construction of Hoover Dam. The aggregate of the quantities of water which the United States has agreed in said contracts, subject to availability under the Colorado River Compact and the Boulder Canyon Project Act, to deliver to the defendants from storage is the quantity required to enable them to make aggregate annual beneficial consumptive use (diversions less returns to the river) in California of 5,362,000 acre-feet. There are so available for delivery from storage by the United States, and for receipt and beneficial consumptive use by the defendants, quantities of water in excess of that amount.

SECOND AFFIRMATIVE DEFENSE.

Arizona Is Estopped and Precluded From Asserting the Interpretations of the Colorado River Compact, the Statutory Compact, and the Defendants' Contracts Alleged in the Bill of Complaint.

38.

All of the allegations of the First Affirmative Defense heretofore stated are referred to and made a part hereof as though fully set out.

39.

Ratification by California of the Statutory Compact in Reliance Upon Its Contemporaneous Interpretation.

(a) California ratified the Colorado River Compact as a Six-state Compact and entered into the Statutory Compact with the United States, in reliance upon the interpretations and contemporaneous construction of the Colorado River Compact appearing in the published reports of the negotiators thereof to their Legislatures, and in the legislative history of the Boulder Canyon Project Act, which Act evidenced the offer to California of said Statutory Compact and the consent of Congress to said Six-state Colorado River Compact, conditioned upon the acceptance by California of both. Said interpretations and contemporaneous construction of the Colorado River Compact and the Statutory Compact were those stated in paragraphs 6 to 16, inclusive, and 27 of the First Affirmative Defense of this Answer.

(b) California entered into the Statutory Compact by enacting the Limitation Act to comply with the stated condition for the effectuation of a Six-state Compact only because of Arizona's rejection of the Colorado River Compact as a seven-state Compact and her refusal to ratify the

same within the six-month period specified in Section 4(a) of the Boulder Canyon Project Act, and not as an inducement to Arizona to ratify said Compact. If Arizona had so ratified within said six-month period, the California Limitation Act by its terms would not have taken effect.

(c) By acceptance of the Statutory Compact with the United States heretofore alleged, California sustained serious and substantial detriment, (i) in the limitation of her beneficial consumptive uses to an aggregate amount which is less than that to which her valid appropriations entitled her and less than the quantity which she was otherwise entitled to use under the Colorado River Compact, and (ii) in the classification of such uses under the Colorado River Compact.

(d) The interpretations of the Colorado River Compact and Boulder Canyon Project Act asserted by Arizona in the present action are in contravention of each of the interpretations of said documents above alleged, in reliance upon which California entered into said Statutory Compact.

40.

Litigation.

(a) On October 13, 1930, Arizona instituted an action in this Court (*Arizona v. California, et al.*, 283 U. S. 423 (1931)), to enjoin the construction of the Hoover Dam and All-American Canal, to declare the Boulder Canyon Project Act unconstitutional, and to invalidate the Colorado River Compact. In that action Arizona by its pleadings and briefs represented to this Court that the Colorado River Compact and the Statutory Compact bore

interpretations generally consistent with those stated in the First Affirmative Defense of this Answer, and alleged that Arizona had refused to ratify the Colorado River Compact for the reason that the Compact did have that meaning. Said representations are reprinted in Appendix 28 to this Answer. The representations of Arizona to the Court in that case are inconsistent with the interpretations now alleged by Arizona in the Bill of Complaint in the present cause.

(b) On February 14, 1934, Arizona moved for leave to file in this Court a bill to perpetuate the testimony of the negotiators of the Colorado River Compact. (*Arizona v. California, et al.*, 292 U. S. 341 (1934).) This Court denied the motion for leave to file; the Opinion rejected Arizona's claim that the Colorado River Compact "means that the waters apportioned by Article III(b) of said Compact are for the sole and exclusive use and benefit of the State of Arizona."

(c) In October, 1935, Arizona filed in this Court a motion for leave to file a Bill of Complaint against the States parties to the Six-state Colorado River Compact praying an equitable apportionment, which motion was denied. (*Arizona v. California*, 298 U. S. 558 (1936).)

(d) In not one of the three cases above referred to did Arizona challenge the validity under the Boulder Canyon Project Act, the Colorado River Compact, or the Statutory Compact, of the water delivery contracts entered into between the Secretary of the Interior and the defendants, nor the right of the United States to presently and permanently deliver, and the defendants to presently and permanently use, one-half of the excess or surplus waters unapportioned by said Compact.

41.

Legislative and Administrative Construction of Statutory Compact.

(a) The capacities of the Colorado River Aqueduct and All-American Canal were fully known to the executive departments of the United States and to the Congress and were approved by them, and were fully known to Arizona, and said works were constructed to said capacities, before the interpretations now asserted by Arizona were disclosed. Thus:

(i) The first water delivery contract of The Metropolitan Water District of Southern California with the United States, dated April 24, 1930 (Appendix 19 to this Answer), was accompanied by one between the same parties dated April 26, 1930 (Appendix 20 to this Answer), which obligated that District for 36% of the firm energy to be produced by Hoover Dam for 50 years, to be paid for whether used or not, but to be used solely for pumping the said water into and in the Colorado River Aqueduct in accordance with said water delivery contract. This obligation amounted to a minimum of $75,000,000. Both contracts by their terms were contingent upon the making of necessary appropriations by the Congress for the construction of Hoover Dam, and the power contract by its terms was not to take effect until the first such appropriation was made. Both contracts were reported by the Secretary of the Interior to the Congress in support of the first appropriation for construction of Hoover Dam, were fully considered by the Congress, and the first appro-

priation was made in the Act of July 3, 1930, 46 Stat. 860, Ch. 846, with the knowledge and approval of Congress of the administrative construction of the Colorado River Compact and the Boulder Canyon Project Act evidenced by the execution of said contracts. Arizona opposed said legislation but did not therein disclose the present contentions of that State.

(ii) In the Act of June 18, 1932, 40 Stat. 324, the Congress granted a right-of-way to the Colorado River Aqueduct across lands of the United States, this being required because the capacity of the aqueduct was in excess of that contemplated by then existing general right-of-way legislation.

(iii) By the Act of August 30, 1935, 49 Stat. 1039, the Congress authorized the Parker Dam Project and ratified all contracts and agreements which had been executed in connection therewith. Such contracts and agreements included, (1) the contract between the United States and the defendant The Metropolitan Water District of Southern California for the financing and construction of Parker Dam as a diversion dam for the Colorado River Aqueduct (Appendix 22), (2) the Water Delivery Contract amended as of September 28, 1931 (Appendix 21), and (3) the Power Contract (Appendix p. 20).

(iv) The capacity of the All-American Canal was not only known to the Congress but was calculated, designed and built by the United States to carry the full quantities of water which it had agreed to deliver to Imperial Irri-

gation District, Coachella Valley County Water District, lands of the Yuma Project in California, and City of San Diego, as heretofore alleged. Such capacity, and the progress of construction, were reported to the Congress during the consideration of more than twenty appropriation Acts between the years 1934 and 1952, and money was appropriated by the Congress in knowledge and approval thereof.

(b) The interpretations of the Colorado River Compact, the Statutory Compact, and the contracts of the defendants with the United States, now asserted by Arizona are in contravention of the interpretations of said documents known to and relied upon by both the Congress and defendants in the enactment of the foregoing legislation and the construction of works thereunder.

42.

Arizona Is Estopped to Assert Her Present Interpretations of the Colorado River Compact, Statutory Compact, and Contracts Executed Pursuant Thereto.

(a) Arizona did not officially assert any other or different interpretations of the Colorado River Compact or the Boulder Canyon Project Act than those alleged in the three actions in this Court above cited, until 1944.

(b) During the period between 1929 and February 24, 1944, in reliance upon the interstate contractual and compact relationship which resulted from Arizona's rejection of the Colorado River Compact, as described in the First Affirmative Defense, and in reliance upon the interpreta-

tions advanced by Arizona as reasons for rejecting ratification of the said Compact, the defendants herein underwrote the cost of Hoover Dam and the All-American Canal, constructed the Colorado River Aqueduct, and proceeded with the costly works and entered into the contracts and financial obligations elsewhere in this Answer described, and have developed an economy dependent thereon and have irrevocably changed, to defendants' detriment, their respective positions. Arizona is now estopped to assert interpretations of the Colorado River Compact and the Statutory Compact inconsistent with and more favorable to Arizona and detrimental to defendants than were her earlier representations and interpretations as herein alleged, and upon which the defendants herein, and Congress and the executive officers of the United States, relied in enacting legislation and entering into contracts, constructing projects and incurring obligations as herein alleged.

(c) If Arizona now claims that said Statutory Compact confers rights upon her, then said State is obligated to accept and is estopped to deny the interpretations of said Compact placed upon it by the United States and California, the parties thereto, as such interpretations are evidenced by its legislative history and by the legislative and administrative construction thereof as pleaded in this Answer.

THIRD AFFIRMATIVE DEFENSE.

Defendants Have Appropriative Rights to the Beneficial Consumptive Use of Not Less Than 5,362,000 Acre-feet of Colorado River System Water per Annum, Senior to the Claims Made by Arizona in the Bill of Complaint.

43.

All of the allegations of the First and Second Affirmative Defenses heretofore stated are referred to and made a part of this Third Affirmative Defense as though fully here set out.

44.

Appropriations of California's Agricultural Areas.

(a) Defendant Palo Verde Irrigation District includes within its boundaries approximately 120,500 acres. Appropriations under the laws of California were duly and regularly made July 17, 1877, and amended and supplemented on subsequent dates, for the use of 3800 cubic feet per second of the waters of the Colorado River System for the irrigation of all of said area and domestic and other purposes therein by the predecessors in interest of said District. Said appropriations have been duly conveyed to said District and are now owned by it. Water was first diverted from the Colorado River System and used within said area under said appropriations in the year 1877 and has been continuously so used since that date. Defendant District, its predecessors and the property owners within said District have constructed works to divert and use said waters, and said works are now in operation. Said District, its predecessors and property owners have at all times exercised due diligence to put to beneficial use the full quantity of water so appropriated.

(b) The Yuma Reclamation Project, lying principally in the State of Arizona, includes within its boundaries approximately 25,000 acres in California. Said 25,000 acres is comprised in part of lands in Indian reservations created by the Act of March 3, 1865 (13 Stat. 559), and diversion of water for all of said 25,000 acres was authorized by the Act of April 21, 1904 (33 Stat. 189). Appropriations under the laws of California were duly and regularly made July 8, 1905, for the use of waters of the Colorado River System for the irrigation of all of said area, and domestic and other purposes within said area, as well as in Arizona, by the Secretary of the Interior. Water was first diverted from the Colorado River System and used within said area in California under said appropriations in the year 1910 and has been continuously so used since that date. The Secretary of the Interior and the owners of said lands in California have at all times exercised due diligence, and are now exercising due diligence, to put to beneficial use the full quantity of water so appropriated for use in California.

(c) Defendant Imperial Irrigation District presently includes within its boundaries approximately 900,000 acres and is committed to include 90,000 acres in addition. Appropriations under the laws of California were duly and regularly made in 1893, amended and supplemented on subsequent dates, for the use of 10,000 cubic feet per second of the waters of the Colorado River System for irrigation of all of said areas and other areas and domestic and other purposes therein by the predecessors in interest of said District. Said appropriations were duly conveyed to said District and are now owned by it. Water was first diverted from the Colorado River System and used within said areas under said ap-

propriations in the year 1901 and has been continuously so used since that date. Defendant District, its predecessors and the property owners within said District have constructed works to divert and use said waters for said purposes and said works are now in operation. Said District, its predecessors and property owners have at all times exercised due diligence, and are now exercising due diligence, to put to beneficial use the full quantity of water so appropriated.

(d) Defendant Coachella Valley County Water District includes within its boundaries 278,000 acres. Appropriations under the laws of California were duly and regularly made in the year 1893, and amended and supplemented on subsequent dates, for the use of waters of the Colorado River System for irrigation of all of said area and domestic and other purposes therein by the predecessors in interest of said District. Water was first diverted from the Colorado River System and used within said area under said appropriations in the year 1948 and has been continuously so used since that date. Defendant District, its predecessors and the property owners within said District have constructed works to divert and use said waters, and said works are now in operation. Said District, its predecessors and property owners have at all times exercised due diligence, and are now exercising due diligence, to put to beneficial use the full quantity of water so appropriated.

(e) Under the laws of California the defendants Palo Verde Irrigation District, Imperial Irrigation District,

Coachella Valley County Water District, and the defendant State of California as *parens patriae* for the lands within the Yuma Project in California, were, prior to June 25, 1929, entitled to make beneficial consumptive use (diversions less returns to the river) in California of an aggregate quantity of water greatly in excess of 4,150,000 acre-feet per annum, and since that date, have been, and now are, entitled to make such use of an aggregate quantity of water of not less than 4,150,000 acre-feet per annum, all of which is reasonably required for the service of their inhabitants and lands. The relative priorities of defendants are controlled by an agreement among them dated August 18, 1931 (Appendix 10 to this Answer), supplemented as to defendants Imperial Irrigation District and Coachella Valley County Water District by an Agreement of Compromise dated February 14, 1934 (Appendix 14 to this Answer).

45.

Appropriations of The Metropolitan Water District of Southern California, City of Los Angeles, and City of San Diego.

(a) Defendant City of Los Angeles is one of the cities the corporate area of which is included within The Metropolitan Water District of Southern California. Appropriations under the laws of California were duly and regularly made June 28, 1924, and amended and supplemented on subsequent dates, for the use of 1500 cubic feet per second of waters of the Colorado River System for municipal and other purposes within said area by said City.

Construction of works for such purpose had commenced in 1923. In 1928, to facilitate the service of said waters to areas on the coastal plain of Southern California, the City joined with other public agencies in the organization of The Metropolitan Water District of Southern California.

(b) Defendant City of San Diego is one of the cities, the corporate area of which is included within The Metropolitan Water District of Southern California. A portion of the defendant County of San Diego is also within said District. Appropriations under the laws of California were duly made April 15, 1926 by The City of San Diego, and amended and supplemented on subsequent dates, for the use of 155 cubic feet per second of the waters of the Colorado River System for municipal and other purposes within the defendants, the City of San Diego and the County of San Diego. On June 9, 1944, to facilitate the service of said waters within said City and said County, said City joined with other public agencies within said County in the organization of the San Diego County Water Authority, and on December 17, 1946, the area within said Authority was annexed to and became a part of The Metropolitan Water District of Southern California. On October 4, 1946, by agreement among said City, County, Authority and District, the rights of said City, County and Authority, including those hereinabove described, were transferred to and merged with those of The Metropolitan Water District of Southern California. (Appendix 24 to this Answer.)

(c) Defendant The Metropolitan Water District of Southern California includes within its boundaries the corporate areas of 48 cities, districts, and other entities on the coastal plain of Southern California. Appropriations under the laws of California were duly and regularly made as aforesaid on June 28, 1924, and April 15, 1926, for the use of waters of the Colorado River System for municipal and other purposes by the cities of Los Angeles and San Diego and are now administered by The Metropolitan Water District of Southern California. After its incorporation, and for the purpose of consolidating and taking in its own name, filings theretofore made by the City of Los Angeles, the defendant Metropolitan Water District in 1929 and 1930 filed applications for the appropriation of waters of the Colorado River System, which applications have been amended from time to time and were and are filings upon and appropriations inclusive of the water of the Colorado River designated in said notices of appropriation theretofore filed by the defendant City of Los Angeles. Water was first diverted from the Colorado River System and used within said area in 1941 under said appropriations and has been continuously so used since that date.

(d) Defendants, Metropolitan Water District of Southern California, City of Los Angeles, and City of San Diego have constructed works to divert and use said waters, and said works are now in operation. Said defendants have at all times exercised due diligence, and are now exercising due diligence, to put to beneficial use

the full quantity of water so appropriated. Under the laws of California, the said defendants were on June 25, 1929, and now are, entitled under said appropriations to divert and to make beneficial consumptive use (diversions less returns to the river) in California of not less than 1,212,000 acre-feet per annum of the waters of the Colorado River System, all of which is reasonably required for the service of the inhabitants and lands within said District.

46.

Total Appropriations of Defendants.

Prior to June 25, 1929, the defendants herein and other appropriators in California were vested with valid appropriative rights entitling said defendants to the beneficial consumptive use (diversions less returns to the river) in California, of an aggregate quantity of water greatly in excess of 5,362,000 acre-feet per annum; and since that date defendants have been, and now are, vested with valid appropriative rights entitling said defendants to such use of an aggregate quantity of water not less than 5,362,000 acre-feet per annum. Said rights were on said date, and are, within, protected by, and capable of being satisfied from the uses provided for California by the Statutory Compact between California and the United States described in the First Affirmative Defense of this Answer.

All of said quantity can be put to beneficial consumptive use by means of works heretofore constructed and now

substantially complete and in operation, and is reasonably required by the defendants for the service of their inhabitants and lands.

47.

California's Appropriations Are Senior to Arizona's

(a) All of the appropriations of each of the defendants above alleged are senior in time and right to all appropriations made for the use of waters of the Colorado River System in Arizona, with the partial exception of (1) certain beneficial consumptive uses, the quantities being unknown to the defendants, of the Yuma Project in Arizona, the Colorado River Indian Reservation, and small miscellaneous uses from the main stream and tributaries other than the Gila River, and (2) beneficial consumptive uses of approximately 2,000,000 acre-feet per annum of the waters of the Gila River and its tributaries.

(b) The only appropriation or appropriations made for the use of water from the Colorado River System for the Central Arizona Project referred to in the complaint herein were initiated in the year 1951, and are junior in time and right to all the rights of defendants as hereinbefore alleged.

(c) The claims to the use of water asserted by Arizona in its bill of complaint would require the further curtailment of said senior appropriations in California for the benefit of said junior appropriations in Arizona, for projects in the inceptive and formative stage and lacking economic feasibility.

FOURTH AFFIRMATIVE DEFENSE.

The United States Is an Indispensable Party.

48.

All of the allegations of the three preceding Affirmative Defenses heretofore stated are referred to and made a part of this Fourth Affirmative Defense as though fully here set out.

49.

The United States of America is an indispensable party to this action, and the United States of America is not sued herein and has not given its final consent to be sued.

50.

On December 31, 1952, the United States of America moved this Court for leave to intervene in the above entitled cause and for leave to file a petition for intervention, and on January 19, 1953, this Court granted said motion. Upon the filing by the United States of America of the Petition for Intervention, and upon the United States of America becoming finally committed to be bound by any decree or judgment rendered by this Court in the above entitled cause, defendants herein will withdraw this Fourth Affirmative Defense.

TRAVERSE.

Come now the defendants and admit, deny and allege:

51.

(a) Answering Paragraph IV(a) and (b) of said Complaint, admit that the mileages therein stated are approximately correct.

(b) Answering Paragraph IV(c) of said Complaint, admit that the mileages therein stated are approximately correct, and deny all the other allegations of said paragraph.

52.

Answering Paragraph V of the said Bill of Complaint, deny the allegations of said paragraph, except as such allegations conform to the facts set out in Paragraphs 3, 5, and 17-27 inclusive of the First Affirmative Defense and Paragraph 59 of this Traverse.

53.

Answering Paragraph VII of said Complaint, deny that any apportionment of the beneficial consumptive use of water is made by any other part of Article III of the Colorado River Compact than Paragraph (a) of said Article III. Deny that the pertinent provisions of said Article III of the Compact are correctly set out in said Paragraph VII and allege that they are correctly set out in Appendix 1 to this Answer.

54.

Answering Paragraph VIII of said Complaint, deny the allegations of said paragraph, except as such allega-

tions conform to the facts set out in the First and Second Affirmative Defenses and Paragraph 59 of the Traverse of this Answer.

55.

Answering Paragraph IX(c) of said Complaint, deny the allegations of said paragraph and allege that the provisions of Section 13(a) of the Boulder Canyon Project Act are correctly set out in Appendix 2 to this Answer.

56.

(a) Answering Paragraph X(a) of said Complaint, allege that the only conditions precedent established by Section 4(a) of the Project Act were established by the first paragraph of said Section 4(a).

(b) Answering Paragraph X(b) of said Complaint, allege that the proclamation referred to is set out in Appendix 4 to this Answer.

57.

(a) Answering Paragraph XI(a) of said Complaint, deny the allegations of said paragraph, except as such allegations conform to the facts set out in the First Affirmative Defense of this Answer.

(b) Answering Paragraph XI(b) of said Complaint, admit the execution and existence of the Seven-Party Priority Agreement therein referred to, but deny that the purpose thereof was solely to determine the quantities of Colorado River water which the contracting defendants were entitled to receive and allege that the purpose of said Seven-Party agreement was to determine the relative priorities of said defendants in the beneficial consumptive use of water available for use in California, under the Colorado River Compact and the Statutory Compact be-

tween the United States and California. Deny all other allegations of said Paragraph XI(b).

(c) Answering Paragraph XI(c) of said Complaint, allege that the quotation therein made is partial, allege that the effect of the contracts therein referred to can be determined only by consideration of the complete texts thereof, respectively, and allege that said complete texts are annexed to this Answer as Appendixes, suitably identified.

(d) Answering the allegations of Paragraph XI(d) of said Complaint, deny the allegations of said paragraph, except that defendants admit that, by the terms of the Statutory Compact evidenced by the Boulder Canyon Project Act and the California Limitation Act, the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of said Boulder Canyon Project Act and all water necessary for the supply of any rights which existed as of June 25, 1929, shall not exceed 4,400,000 acre-feet of the waters apportioned to the Lower Basin by Paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by Article III(a) of said Compact, such uses always to be subject to the terms of said Compact, and allege that defendants lawfully own the right to use said quantities on said terms.

Allege that the quantities of excess or surplus water unapportioned by Article III(a) of the Colorado River Compact are such that the portion thereof which is now available and which will continue to be available to California under said Statutory Compact for beneficial con-

sumptive use in California is not less than one million acre-feet per annum.

58.

(a) Answering Paragraph XII(a) of said Bill of Complaint, deny the allegations of said paragraph, except as such allegations conform to the facts set out in the First Affirmative Defense of this Answer and Exhibits A and C hereto. Allege that construction of Hoover Dam commenced September 17, 1930, that said Dam commenced the storage of water February 1, 1935, that said Dam commenced power operation June 1, 1937, and that the maximum storage capacity of the reservoir (Lake Mead) created thereby is approximately 30,000,000 acre-feet. Allege that construction of Parker Dam was authorized on August 30, 1935, by the Rivers and Harbors Act of 1935 (49 Stat. 1039; Appendix 5 to this Answer). Allege that Davis Dam was constructed to perform functions under the Mexican Water Treaty and for other purposes.

(b) Answering Paragraph XII(b) of said Complaint, admit that the facilities therein referred to were constructed for one or more of the purposes therein stated in connection with waters of the Colorado River System, but not solely the main stream of the Colorado River, and allege that said facilities are governed by, and must be maintained, operated and administered in conformity with, the Boulder Canyon Project Adjustment Act (Act of July 19, 1940, 54 Stat. 774), the Mexican Water Treaty signed February 3, 1944 (Treaty Series 994), with 11 reservations thereto appended by the Senate of the United States and protocol dated November 14, 1944, the Reclamation Law and other laws, as well as in conformity with

the laws mentioned in said Paragraph XII(b) of the Bill of Complaint.

(c) Answering Paragraph XII(c) of said Complaint, deny, except as herein expressly admitted or alleged, all the allegations of said paragraph. Allege that, through the operation of the facilities mentioned in said Paragraph XII(c) and other facilities, California and its water users may make aggregate annual beneficial consumptive use (diversions less returns to the river) of water of and from the Colorado River System in the amount of four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin States by Paragraph "a" of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by Article III(a) of said Compact, and have a right to do so, and such right is not in contravention of the Colorado River Compact or the Statutory Compact between the United States and California, and allege that the quantity of such excess or surplus waters is such that the portion thereof available for present and continuing beneficial consumptive use in California is in excess of one million acre-feet per annum. Allege that the designed capacity of said facilities was intended to be and will (taking into consideration the seasonal fluctuations of demand for beneficial consumptive use of water in California and usual and proper operating practices), make possible the aggregate annual beneficial consumptive use of Colorado River System water in California in the quantity of approximately 5,362,000 acre-feet. Allege that such claim is rightful and that California and its water users are lawfully entitled to, and own the right to, use said quantity of said water annually on the terms stated in said Statutory Compact.

(a) Answering Paragraphs XIII(a) and (b) of said Bill of Complaint, defendants deny each and every allegation thereof except as said allegations are herein specifically admitted or alleged.

(b) Defendants admit that on the 24th day of February, 1944, the Legislature of the State of Arizona adopted an act entitled, "An Act ratifying the Colorado River Compact; and declaring an emergency," Sess. L. Ariz., page 427.

(c) The interpretations, intent, meaning and effect of the said Colorado River Compact and the Statutory Compact set out in the First Affirmative Defense, and relied on by California, are based on the text of said documents, the legislative history thereof and the contemporaneous and administrative interpretations thereof. Such interpretations were in large part identical with the interpretations presented to this Court by Arizona in the case of *Arizona v. California,* 283 U. S. 423 (1931), and are the interpretations upon the basis of which Arizona rejected the Colorado River Compact and sought to have that Compact and the Boulder Canyon Project Act declared invalid and void. Such interpretations were well known to Arizona long prior to, and in, February of 1944. Any ratification of the Colorado River Compact by Arizona in 1944 necessarily constituted an acceptance of such interpretations.

(d) The Statutory Compact became operative solely by reason of Arizona's failure to approve and ratify the Seven-State Compact within the six months' period set out in Paragraph 1 of Section 4(a) of the Boulder Canyon Project Act. Arizona, in this action, seeks to establish alleged rights dependent upon that State's participation

as a party to the Colorado River Compact as a Seven-State Compact, and also seeks to establish alleged rights as a third party beneficiary of the said Statutory Compact. Arizona has not herein, or otherwise, offered to do equity and to waive any rights as such third party beneficiary, or by such waiver, or otherwise, to place California in the same position in its relation to Arizona as that which California would have occupied with respect to contractual or other rights to the use of waters of the Colorado River System, had the Legislature of the State of Arizona approved and ratified the proposed Colorado River Compact as a Seven-State Compact prior to June 25, 1929. Arizona cannot, as of February 24, 1944, and thereafter, be permitted to assert, to her advantage, and to California's detriment, rights allegedly derived from, and dependent upon, both the Colorado River Compact and the Statutory Compact.

(e) Defendants admit that on the 24th day of February, 1944, the Legislature of the State of Arizona adopted an act entitled "An Act ratifying the contract between the United States and the State of Arizona for storage and delivery of water from Lake Mead, and declaring an emergency," Sess. L. Ariz. 1944, page 419, and allege that said statute contained the following provisions, among others:

> Article 7 "(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boul-

der Canyon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies."

"Article 10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III(a) of the Colorado River Compact; (3) what part, if any, is within Article III(b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III(a) of the Colorado River Compact between the Upper Basin and the Lower Basin."

"Article 18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract."

60.

Answering Paragraph XIV of said Complaint, deny, except as herein expressly admitted or alleged, all the allegations of said Paragraph XIV. Allege that by contract made March 30, 1942, the United States agreed to deliver to Nevada from storage in Lake Mead "so much water

as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year" and that Nevada agreed to pay charges therefor. Allege that by contract made January 3, 1944, the United States and Nevada agreed to amend said contract of March 30, 1942, to provide that

> "Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River System, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year * * *."

Allege that Nevada has contended that it has not by any official or binding act limited its claims of right to use of waters of the Colorado River System to said quantity of 300,000 acre-feet per annum or any other specific quantity, and allege that legislation is now pending in the Congress to authorize construction of projects in Nevada requiring the aggregate annual beneficial consumptive use of quantities of water in excess of said amount.

61.

Answering Paragraph XV of said Complaint, deny, except as herein expressly admitted or alleged, all the allegations of said Paragraph XV. Admit that portions of New Mexico and Utah are located within the Lower Basin of the Colorado River System, as defined by Article

II(g) of the Colorado River Compact. Admit that in Article 7(g) of its alleged contract with the United States of February 9, 1944, "Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights." Allege that such "equitable shares" have not been defined nor determined. Defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer and, placing their denial upon that ground, deny that Arizona expects to negotiate with New Mexico and Utah, or New Mexico or Utah, a compact, or compacts, which will define the respective rights, or any rights, of those States, or either of them, to participate as Lower Basin States, or otherwise, in the use of Colorado River water, or Colorado River System water, apportioned now or hereafter to the Lower Basin. Allege that neither New Mexico nor Utah has, by any official or binding act indicated that it intends to, or will, negotiate any compact with Arizona in the premises. Allege that New Mexico and Utah contend that they have not, by any official or binding act, limited their respective claims to the use of waters of the Colorado River System available for use in the Lower Basin. Allege that there are present, or potential, controversies between Arizona on the one hand and New Mexico and Utah on the other, as to whether any portions (and if so, what portions), of the present or future rights of use of New Mexico and Utah relate to the waters, the right of use of which is apportioned to the Lower Basin by Article III(a) of the Compact, or relate to the waters of which the Lower Basin is entitled to increase its use under Article III(b)

of the Compact, or relate to some other category of waters.

62.

Answering Paragraph XVI of said Complaint, deny all the allegations of said paragraph except as hereinafter expressly admitted or alleged. Allege that the treaty between the United States and the United Mexican States, signed February 3, 1944, and proclaimed effective as of November 8, 1945 (Treaty Series 994), allotted to Mexico a guaranteed annual quantity of 1,500,000 acre-feet of water, from any and all sources, and any other quantities arriving at the Mexican points of diversion. Said Treaty also provides that in any year in which there exists a surplus of waters of the Colorado River System in excess of the amount necessary to supply users in the United States and the guaranteed quantity of Mexico, the United States will deliver additional waters of the Colorado River System to provide a total quantity not to exceed 1,700,000 acre-feet a year. Allege that said guaranteed quantity of 1,500,000 acre-feet may be reduced in the event of extraordinary drought or serious accident to the irrigation system in the United States, in the same proportion as consumptive uses in the United States are reduced. Allege that the terms "any and all sources" as so used in said treaty means the entire Colorado River System as defined in Article II of the Colorado River Compact, including the Gila River and its tributaries. Allege that by the terms of Article III(c) of the Compact any right of Mexico to the use of any waters of the Colorado River System:

> "shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if

such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)."

63.

Answering Paragraphs XVII(a) and XVII(b) of said Complaint, deny, except as herein expressly admitted or alleged, all of the allegations of said paragraphs. Allege that there is available to Arizona, Nevada, Utah and New Mexico in the aggregate the beneficial consumptive use of 3,100,000 acre-feet per annum of the waters of the Colorado River System, including the Gila River and its tributaries, apportioned by Article III(a) of the Colorado River Compact, plus one-half of the excess or surplus waters unapportioned by Article III(a) of the Compact, including in such excess or surplus waters unapportioned by Article III(a) of said Compact the increase of use permitted to the Lower Basin by Article III(b) of the Compact, said aggregate being subject to an undetermined deduction on account of reservoir and other losses, and such deductions as may be required in consequence of the Mexican Water Treaty. Allege that the share thereof to which Arizona may be entitled, and to which each of the other said States may be entitled, of the uses to which the four said States are entitled in the aggregate, has not been determined in any manner. Admit that Arizona is not presently beneficially consumptively using 3,800,000 acre-feet of water per annum. Allege that there have been or are now being constructed in Arizona projects which, when fully operating, will require the beneficial con-

sumptive use (diversions less returns to the river) of waters of the Colorado River System in the approximate amount of 3,200,000 acre-feet per annum, of which not less than 2,000,000 acre-feet per annum is so used from the waters of the Gila River and its tributaries, and of which the remainder will be so used by the Yuma Project, Parker Valley Indian lands, lands in Mohave Valley, and by the Gila Project and other projects from the main stream of the Colorado River and by other projects from the waters of the Little Colorado River and other tributaries. The aforesaid quantities are exclusive of the quantities proposed by Arizona to be used from the main stream of the Colorado River upon the Central Arizona Project.

64.

Answering Paragraph XVIII of said Complaint, allege that defendants have not sufficient information or belief to enable them to answer the last sentence of said Paragraph XVIII, and, placing their denial on that ground, deny the allegation that there is no controversy which relates to the use of waters of the Colorado River System by Indians or Indian tribes which involves the complainant. Allege that under Article 7(a), 7(b), 7(d), 7(j) and 7(l) of the alleged contract between the United States and Arizona of February 9, 1944, all beneficial consumptive uses in Arizona of Colorado River System water, whether by Indians or others, are chargeable to Arizona.

65.

Answering Paragraph XIX of the Complaint, deny, except as herein expressly admitted or alleged, all of the allegations of said paragraph. Admit that Arizona is, in a large part, an arid state, and that irrigation is essential

to its successful agriculture, that water is needed for domestic, municipal and industrial purposes and that precipitation is insufficient to satisfy the need for water unless conserved and stored, and allege that the same facts are true of the Lower Basin generally and of the areas served by the defendants in particular. Admit that there are in Arizona in excess of 725,000 acres of land presently irrigated by the use of surface and underground water. Admit that Arizona has no substantial source of water except the Colorado River System and certain large underground water basins which in part feed, or are fed by, waters of the Colorado River System. Allege that the beneficial consumptive use of such water, to the extent that it is derived from the waters of the Colorado River System, is chargeable to Arizona. Allege that, since 1944, Arizona has permitted and encouraged the expansion of the irrigated area in that State by several hundred thousand acres through the leasing and sale of state-owned land and otherwise, in knowledge of the inadequacy of the surface and underground water supply to support such irrigation on a sustained basis, and has not enacted suitable or any effective legislation for the control of the overdraft and depletion of the underground water supply, or to protect the underground water supply of existing projects from drainage by new projects. If, as alleged in the Bill of Complaint, the underground supply in Arizona is grievously depleted, that situation is due to the failure of Arizona to regulate the reckless and speculative expansion of acreage, waste of water and overdraft of ground water basins in that area, and not to any act of the defendants. Allege that the water supply presently available to the Central Arizona area is ample to sustain a population and industrial production more

than twice as large as now exists, and that the reduction, if any, in value of agricultural production which may result from inability to import water from the main stream Colorado River to that area will be minor in extent and will have no appreciable effect on the economy of the State. Allege that the Secretary of the Interior in his reports, referred to in the Bill of Complaint, on the Central Arizona Project, has stated that in terms of gross crop value the average annual loss in Central Arizona without the Project would be only $5,300,000, which is approximately 1% of the construction cost allocated to irrigation.

66.

(a) Answering Paragraph XX of said Complaint, deny, except as herein expressly admitted or alleged, all the allegations of said Paragraph XX. Admit that at the request of Arizona the United States Bureau of Reclamation has investigated a project to bring water to Central Arizona from the main stream of the Colorado River. Admit that such project is known as the Central Arizona Project, and allege that it includes many features other than those required to bring water from the main stream of the Colorado River to Central Arizona. Deny that plans for such project are substantially as set out in House Document 136, 81st Congress, and allege that physical and engineering features, financial plans and cost of the project have been materially altered from time to time since the preparation of said report. Admit that during the 79th and succeeding Congresses Arizona has endeavored to obtain Congressional authorization for the construction of one or another kind of Central Arizona Project by the Bureau of Reclamation. Admit and allege that defendants have vigorously resisted such legislation

upon the grounds hereinafter stated. Admit that bills to authorize one or another kind of Central Arizona Project were passed by the United States Senate in the 81st and 82nd Congresses but failed of passage in the House of Representatives. Admit that on April 18, 1951, the House of Representatives Committee on Interior and Insular Affairs adopted a resolution that consideration of the bills relating to the Central Arizona Project

> "be postponed until such time as use of the water in the lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the lower Colorado River Basin."

Allege that on October 10, 1951, the same committee adopted a resolution

> "To defer action on S.75 (a bill to authorize construction of the Central Arizona Project) until February 1, 1952, or some time thereafter, to give the proponents an opportunity to have decided the justiciable issue before the Courts, or draft new legislation that will create a justiciable issue without authorizing a project of undetermined feasibility."

(b) Allege that such Congressional action has been due, among other things, to the following facts:

(1) Arizona has not shown that there is any water of the Colorado River System lawfully available for permanent beneficial consumptive use in Arizona in addition to the quantities of such water now used by, or committed to the use of, projects now constructed or under construction in Arizona.

(2) Such waters as were available for use in Arizona have been rendered unavailable for use by the proposed

Central Arizona Project by acts of the State of Arizona and in consequence of causes beyond the control of California and these defendants, and specifically because:

(i) In 1948, Arizona, with knowledge of the present controversy over the waters of the Colorado River System, elected to dedicate the beneficial consumptive use of 600,000 acre-feet of water per annum to the development of raw desert land on the Gila Project on the main stream of the Colorado River, and has done so, in preference to preserving the right to such waters for the Central Arizona Project.

(ii) Until the eve of this action, Arizona had made no appropriations under her own laws for the Central Arizona Project, and had permitted other projects in that State to acquire priorities superior to the priorities of that project.

(3) The Central Arizona Project, as shown by the official reports thereon by the Department of the Interior, is infeasible and uneconomic in the following, among other respects:

(i) The Project described in said H. Doc. 136, 81st Congress would lift irrigation water more than 985 feet and transport it more than 325 miles to grow grains, cotton, alfalfa and other field crops. Essentially, the plan proposed is to deprive the Salt River Project of approximately one-half of the supply which said project normally receives from the reservoirs it has constructed on the Salt River, transport to the Gila Valley the waters so taken from the Salt River Project, and replace such waters with waters from the main stream of the Colorado River, plus some waters for other areas. In the course of this substitution only about one-half of the water diverted

from the main stream would be delivered to the land, the remainder disappearing in transit.

(ii) The capital cost of the Project is not less than $800,000,000, and said official reports of the Department of the Interior concede that no part of this sum could or would be repaid by the irrigation water users.

(iii) The Central Arizona Project would require a capital investment of approximately $2,000 per acre to irrigate lands which would have an average value of $300 per acre when given a full supply of water.

(iv) The Project's annual irrigation operating costs alone would exceed the entire payment capacity of the irrigators, making it necessary to sustain the irrigation features by means of subsidies equal to the entire capital cost thereof, plus all of the interest on the capital costs, plus part of the costs of operation and maintenance thereof. The maximum portion of the construction cost which the latest of said reports claims that the irrigators can repay, in any circumstances, above the cost of operation maintenance and replacements, is less than ten cents per acre per year.

(v) Bridge Canyon Dam, as proposed by this Project, would have a reservoir capacity so small that it would be filled with silt in less than thirty years, unless an additional and much larger reservoir were built upsteam at an estimated cost of not less than $350,000,000. No provision is made in the Central Arizona Project for the construction or payment of the cost of said upstream reservoir, and such cost is in addition to the cost of $800,000,000 heretofore alleged.

(vi) Bridge Canyon Dam would neither conserve nor make available any water for the Central Arizona Pro-

ject, but is arbitrarily included therein so that the power revenues therefrom, including therein the amounts collected from the power users as interest on the capital invested by the Federal Government, may be diverted from servicing the federal debt occasioned by construction of that dam, and used to subsidize the Project's irrigation aqueduct and distribution system.

(vii) The Project would consume one billion five hundred million kilowatt hours per annum—one-third of the power output of the proposed Bridge Canyon power plant —for uneconomic purposes.

(viii) All of the Project's gross revenues from all sources, including power, would be less than the simple interest on the total investment.

(ix) The burden upon the federal taxpayers occasioned by the necessity to pay the interest upon the increase in the national debt occasioned by the Project (for the payment of which the Project would supply no revenues), would, according to official reports to the Congress by the Secretary of the Interior supplementing H. Doc. 136, 81st Cong., referred to in the Bill of Complaint, exceed two billion dollars during the first seventy-five years alone, at the end of which time no part of the Project investment would have been repaid; and this burden would continue to increase indefinitely thereafter.

(c) Allege that the report of the Department of the Interior on the Central Arizona Project (H. Doc. 136, 81st Congress) was conditioned upon the enactment by Arizona of suitable legislation to control the expansion of new acreages and the overdraft on the underground water supply. No such legislation has been enacted, and the irrrigated acreage in Arizona has expanded more than

250,000 acres since the date of said report. Said expansion exceeds the area which the Bill of Complaint alleges in Paragraph XIX thereof will go out of cultivation if additional water is not supplied.

(d) Allege that the said report of the Department of the Interior was further conditioned upon the organization of a district or other entity embracing the service area of the proposed Project with powers of taxation, to contract with the United States for the repayment of the Government's investment allocated to irrigation. No such district has been organized.

(e) Allege that the Project violates the standards of feasibility established by the Congress, its authorization would require the reversal of the policies of nearly fifty years of federal legislation, and there is no assurance that necessary legislation to authorize said Project will ever be enacted.

(f) Allege that Arizona cannot, in equity, demand the curtailment or abandonment of projects now existing and operating in California in order to reserve water for an uneconomic and infeasible Central Arizona Project. The detriment to California and the United States thereby to be occasioned would far exceed the benefits claimed for the Central Arizona Project. No net benefit would result from the application of water to the Central Arizona Project at the sacrifice of projects already constructed in California.

67.

(a) Answering Paragraph XXI(a) of said Bill of Complaint, deny that Arizona is entitled to the amount of water of the Colorado River System claimed by her, and allege that she and the States of Nevada, Utah, and New

Mexico are entitled in the aggregate to not more than the quantities of said water as alleged in Paragraph 63 of this Traverse. Allege that defendants are without information or belief to enable them to answer the other allegations of said Paragraph XXI(a) of said Bill of Complaint, and placing their denial on that ground, deny all other allegations of said Paragraph XXI(a).

(b) Answering Paragraphs XXI(b) and (c) of said Bill of Complaint, allege that defendants are without information or belief sufficient to enable them to answer, and, placing their denial on that ground, deny all the allegations of said paragraphs.

(c) Answering Paragraph XXI(d) of said Bill of Complaint, deny that the claims of defendants to waters of the Colorado River System are improper or wrongful and allege that said claims of defendants are proper and valid as more particularly alleged in the Affirmative Defenses in this Answer. Allege that defendants are without information or belief to enable them to answer the other allegations of said Paragraph XXI(d), and, placing their denial on that ground, deny all other allegations of said Paragraph XXI(d).

(d) Answering Paragraphs XXI(e) and (f) of said Bill of Complaint, allege that defendants are without information or belief sufficient to enable them to answer, and, placing their denial on that ground, deny all the allegations of said paragraphs.

68.

Answering Paragraph XXII of the said Bill of Complaint, admit that controversies exist between the plaintiff and the defendants as to the interpretation, construction, and application of the Colorado River Compact, the Boul-

der Canyon Project Act and the California Limitation Act, but deny that the subject of such controversies is fully or accurately set out in the said Paragraph XXII, and allege that there are additional subjects of controversy disclosed by Affirmative Defenses and denials contained in this Answer. Deny the accuracy or validity of the alleged solutions to the controversies suggested by Arizona in said Paragraph XXII, and deny that Arizona's position is sustained by this Court's decision in *Arizona v. California,* 292 U. S. 341, or in any other decision.

69.

Answering Paragraph XXIII of said Bill of Complaint, admit that there are claims asserted by the defendants in addition to the controversial subjects partially stated in Paragraph XXII of the Bill of Complaint, which adversely affect the alleged right of the State of Arizona to the beneficial consumptive use of 3,800,000 acre-feet of water from the Colorado River System, allege that such claims are stated in the Affirmative Defenses and denials contained in this Answer, and deny all other allegations of the said Paragraph XXIII.

70.

Answering Paragraph XXIV of said Complaint, deny all the allegations of said Paragraph XXIV except as expressly herein admitted or alleged. Admit and allege that under the authority of the Colorado River Compact, Boulder Canyon Project Act, California Limitation Act, Boulder Canyon Project Adjustment Act (54 Stat. 774) as amended, the Reclamation Law, the Mexican Water Treaty and other laws, Hoover, Davis, Parker, Headgate Rock, Palo Verde, Imperial and Laguna Dams have been constructed in the main stream of the Colorado River,

the Metropolitan (Colorado River) Aqueduct and All-American Canal have been constructed in California, and the Yuma Project in Arizona has been built and the Colorado River Indian Reservation irrigation project and Gila reclamation project in Arizona are under construction and are in partial operation. Allege that complainant and defendants have used and benefited from such facilities and that none of such facilities would have been constructed had it not been for one or more of said laws. Allege that Arizona and its water and power users are now estopped and forever precluded, as stated in the Second Affirmative Defense, from denying the validity and integrity of the Colorado River Compact, Boulder Canyon Project Act, California Limitation Act, and other laws in this paragraph mentioned, their effect as alleged in this Answer, and rights of defendants pursuant thereto. Admit and allege the validity and integrity of said laws in accordance with the true intent and meaning thereof at the time when they were respectively adopted or promulgated, as stated in the Affirmative Defenses of this Answer.

71.

Answering the allegations of Paragraph XXV of the said Bill of Complaint, deny all the allegations thereof.

72.

Answering Paragraph XXVI of said Complaint, deny, except as herein expressly admitted or alleged, all the allegations of said paragraph. Admit that facilities now constructed and in use to divert water from the Colorado River System for use in California, if said facilities were operated to their maximum capacity every day in the year, would have capacity to take annual quantities exceeding 5,362,000 acre-feet of water, but allege that such capacities

are designed for peak deliveries to accommodate seasonal variations in demand for water, and except as such capacities provide a maximum rate of diversion, they are not directly related to actual beneficial consumptive use of water in the State of California, and that the designed capacity of said works, taking such factors into account, is based on the beneficial consumptive use of approximately 5,362,000 acre-feet per annum. Admit and allege that during the years 1946 to 1952, inclusive, defendants, through the use of such facilities, diverted water from the Colorado River System in the following quantities:

DIVERSIONS.

1946—3,381,000 acre-feet
1947—3,392,000 acre-feet
1948—3,714,000 acre-feet
1949—3,944,000 acre-feet
1950—4,312,000 acre-feet
1951—4,540,000 acre-feet
1952—4,588,000 acre-feet

Allege that each of the above stated quantities is materially greater than the beneficial consumptive uses of such water in California, in that they represent diversions, without regard to returns to the river. Admit and allege that defendants and each of them have intended for many years, and do now intend, to make beneficial consumptive use (diversions less returns to the river) in California of quantities of Colorado River System water in excess of an aggregate annual consumptive use of 4,400,000 acre-feet, to-wit, 4,400,000 acre-feet per annum plus one-half of the excess or surplus waters unapportioned by Article III(a) of the Colorado River Compact (including in such excess or surplus the waters referred to in Article III(b) of said Compact), plus any additional quantities which may from

time to time be available for use in California under said Compact, the Boulder Canyon Project Act, California Limitation Act, Mexican Water Treaty and other laws above mentioned, by reason of non-use by others; and allege that defendants have the right to make use of such water. Admit that defendants will in the future continue to increase their diversions and beneficial consumptive use of Colorado River System water, within the limits above stated.

73.

Answering Paragraph XXVII of the said Bill of Complaint, admit that the controversy between the parties hereto is a controversy of serious magnitude, but deny each and every other allegation of the said paragraph.

74.

Answering Paragraph XXVIII of said Bill of Complaint, admit the allegations of said paragraph, and allege that the States of California and Nevada through their Senators and Representatives, in the 79th, 80th, 81st and 82nd Congresses, have presented and urged the adoption by said Congresses of resolutions consenting that the United States be made a party to an action or actions in this Court for determination of the controversies existing among the Lower Basin States as to their respective rights to the use of Colorado River System water. Allege further that Arizona has opposed the adoption of any and all such resolutions.

75.

Answering Paragraph XXIX of said Bill of Complaint, admit the allegations of said paragraph and allege that Arizona is not entitled to any remedy against these defendants.

PRAYER.

WHEREFORE, defendants pray

1. That complainant be ordered by the Court to reply to the affirmative matter stated in this Answer.

2. That the Court decree that complainant take nothing by its Complaint, and that defendants recover their costs and disbursements herein expended.

3. That the Court grant to the defendants such other and further relief as to the Court may seem meet and proper.

Respectfully submitted,

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EXHIBIT "A."

Facts Relative to the Colorado River Aqueduct.

The Colorado River Aqueduct, financed and constructed by defendant The Metropolitan Water District of Southern California, diverts from the main stream of the Colorado River above Parker Dam, 155 miles below Hoover Dam and 170 miles above the Mexican border. The aqueduct transports water 242 miles westward and there connects with a system of 215 miles of distribution aqueducts which serves the cities and other public bodies which are members of the District. These now number 48, including defendants City of Los Angeles and City of San Diego, extending 150 miles along the coastal plain of Southern California and encompassing a service area of over 1,570 square miles.

In 1923 the City of Los Angeles surveyed routes and began the design for such an aqueduct, and in 1924 appropriated water therefor under the laws of California. In 1926 the City of San Diego made appropriations for the same purpose and commenced the design of works.

The District was organized in 1928, under the authority of the Metropolitan Water District Act (Chap. 429 Cal. Stat, 1927, p. 694). It now has a population of over four million people and an assessed valuation exceeding five billion dollars.

As of June 25, 1929 (the effective date of the Colorado River Compact and the Boulder Canyon Project Act), the City of Los Angeles had expended about $3,000,000 in the design and preliminary construction expense of the Colorado River Aqueduct. Such preliminary work was later taken over and paid for by the defendant District.

The major works of the aqueduct, large-scale construction of which began in 1932 and was completed in 1941, have a capacity of 1,800 cubic feet per second for a diversion of 1,212,000 acre-feet per year. Water is lifted by five pumping plants 1,617 feet net.

In 1931 the District joined with the other defendant agencies in an agreement establishing their respective priorities in the use of Colorado River water available to California, thereby accepting a low priority which it would not have accepted under the construction of the Colorado River Compact and the California Limitation Act now urged by Arizona. On September 28, 1931, the District entered into a contract (amending an earlier contract of April 24, 1930) with the United States (Appendix 21), providing for delivery, from storage at Hoover Dam, of water with the priority and in the quantity set out in that Priority Agreement. As a part of the same transaction, and for the purpose of pumping water into and in its aqueduct, as well as assuring to the United States revenues to repay the cost of the Hoover Dam and Power Plant, the District also entered into a fifty-year contract to take (and to pay for whether taken or not) about one-third of the firm electrical energy output of the project. (Appendix 20.) This obligation amounts to about $75,000.000.

Parker Dam was built at the expense of this District by the United States under a contract dated February 10, 1933, ratified by the Act of August 30, 1935, 49 Stat. 1039. (Appendices 5, 22.) This dam provides a point of diversion for the quantity of water agreed by the United States to be delivered to the District from storage at Hoover Dam, under the Water Delivery Contract referred to above.

The water delivery contract, electrical energy contract, and contract for the construction of Parker Dam, all were parts of an integrated plan for the delivery, diversion and pumping of water of the Colorado River for consumptive use on the coastal plain of Southern California, with the priority, and in the quantity, set out in the Priority Agreement.

A qualified fee in the public lands traversed by the aqueduct was granted to the District by the Act of June 18, 1932, 40 Stat. 324.

The District has sold interest-bearing bonds and expended in excess of $200,000,000 in the construction of the Colorado River Aqueduct, the distribution system and Parker Dam, and is now expending $60,000,000 more for the construction of additional works.

Service of water through the Colorado River Aqueduct commenced in June, 1941, and has continued since that date.

The aqueduct system is designed to meet the needs of the expanding population and industry of the coastal plain of Southern California for the foreseeable future. Prudent practice in the planning and construction of large municipal water supply systems in areas with a history of rapid growth of population and industry requires that the capacity of such works, and the firm water supply, be sufficient to care for the needs of the population projected so as to avoid disastrous water shortages.

The San Diego branch of the Colorado River Aqueduct, extending from a point on the main aqueduct for a distance of approximately 71 miles to the south, was constructed by the Bureau of Reclamation for the Navy Department under an executive order, ratified by the Act

of April 15, 1948, 62 Stat. 171, to meet a shortage of water in a critical defense area. The San Diego County Water Authority, of which the City of San Diego is part, is obligated by contract to repay to the United States the cost of this branch aqueduct, $15,000,000.

A second "barrel" to the San Diego Aqueduct was authorized by the Act of October 11, 1951, 65 Stat. 404, and is now under construction. The San Diego County Water Authority also is obligated to repay to the United States the true cost of this second barrel, an additional $18,000,000 with interest. The aggregate capacity of the two San Diego barrels is approximately 200 cubic feet per second.

The total investment in the Colorado River Aqueduct System, its San Diego extension, and distribution works, to date, is over $244,000,000; and when works now under construction are completed, this investment will be in excess of $300,000,000. The ultimate investment, to which the community is committed, will be considerably greater.

The area served by the Colorado River Aqueduct is notably rich in agriculture and petroleum products and has sustained a phenomenal industrial growth. Many important military installations and defense industries are located within said service area.

The climate of Southern California is extremely arid. Local water supply is limited and variable and the area is dependent upon a supplemental supply from the Colorado River Aqueduct.

Maps showing the boundaries of the District are included in the Appendix hereto as Plates 6A and 6B.

EXHIBIT "B."

Facts Relating to Palo Verde Irrigation District.

The defendant Palo Verde Irrigation District contains within its boundaries approximately 120,500 acres, including 16,000 acres of the irrigable lands on the Lower Palo Verde Mesa. The Palo Verde Valley proper is located on the west bank of the Colorado River, about 35 miles along the river and about 6 miles wide. The "Lower Mesa," containing approximately 34,000 acres, adjoins the Valley on the west.

In point of settlement Palo Verde Valley is one of the oldest irrigated areas in the Colorado River Basin. About 1856, Thomas H. Blythe located in the Valley on lands riparian to the Colorado River. These lands, later known as the "Blythe Rancho" were not acquired by Blythe, however, until the middle 70's when 36,000 acres were deeded to him by the State of California as swamp and overflow land. The westerly portion of the Valley and the Mesa area were then government land.

While diversions for irrigation were made by Blythe, appropriations under the laws of the State of California were not made until July 17, 1877, when two filings were posted and recorded by Thomas H. Blythe for 190,000 miner's inches or 3800 cubic feet per second of the waters of the Colorado River for "agricultural, mining, manufacturing, domestic and commercial purposes" to supply water to the entire Palo Verde Valley area and the Palo Verde Lower Mesa. In 1877 Blythe constructed diversion works (an intake structure of 800 cubic feet per second capacity) for the irrigation of the Valley. This was an open gravity-fed canal, protected by a natural rock point which projected into the river in the northeasterly portion

of the Valley. The natural slope of the terrain through the Valley being from the north to the south and westerly from the river, the water thus diverted flowed by gravity to any portion of the Valley area to be irrigated.

Additional notices of appropriation were posted and recorded by Blythe and his associates as follows:

December 15, 1878, O. P. Calloway and T. H. Blythe for 95,000 miner's inches, and for the overflow waters of Olive Slough;

February 15, 1883, Thomas H. Blythe, 100,000 miner's inches;

April 2, 1904, A. A. Moore, Jr., and Mrs. Florence Blythe Moore, 300,000 miner's inches.

All of these appropriations were supplemental to and not in conflict with the prior notices of appropriation of 1877.

On November 15, 1905, the Blythe Estate sold and transferred title to the Blythe Rancho and its water rights and system to A. L. Hobson, W. A. Hobson and Frank Murphy. Immediately thereafter, the Hobsons and Murphy organized the Palo Verde Land and Water Company, a California corporation, for the purpose of acquiring the property and water rights of the Blythe Rancho. The Palo Verde Land and Water Company proceeded to initiate an over-all irrigation plan and design. This consisted of an arterial canal system leading from the Blythe intake, hereinabove described, and extending by main canal southwesterly and southerly through the Valley area. The main canals were so designed that the entire Valley area could be irrigated by the construction of laterals. Under this over-all plan, the intake structure was enlarged to a capacity in excess of 1500 cubic feet per second. This

was a reinforced concrete intake structure. The canal system then in existence was enlarged and extended. The intake and upper portion of the main canal was designed and constructed of sufficient size and capacity to divert water to a point where it could be and would be, under said over-all plan, transported to the Lower Mesa area by the construction of a pumping plant and additional main canals in that area.

In the year 1908, the Land and Water Company caused to be organized the Palo Verde Mutual Water Company and by deed dated July 28, 1908, conveyed to the Mutual Water Company the irrigation system, water rights, rights-of-way, and all other lands and properties owned by said Land and Water Company. The Mutual Water Company immediately took over the irrigation system and rebuilt the intake structure and enlarged the entire canal system. All of this construction work was undertaken pursuant to the over-all plan and design theretofore adopted. Although the Mutual Water Company had acquired all of the water rights under the prior notices of water appropriations posted and recorded by Blythe and associates, as hereinabove described, the Company on September 14, 1908, through C. W. Petit, caused to be posted and recorded a notice of appropriation for the Mutual Water Company claiming 200,000 miner's inches of water of the Colorado River "for the purposes of irrigating Ranch lands, for domestic and stock uses, and for power for operating machinery and for generating electric energy and for other useful and beneficial purposes." The area claimed in the appropriation is the same as that set forth under the Blythe filings. Again on August 5, 1911, an additional notice of appropriation was posted and recorded by C. J. Berg for the Mutual Water Company of

a claim for 200,000 miner's inches of water of the Colorado River "for the purpose of irrigating ranch lands, for domestic and stock uses, and for other useful and beneficial purposes." These appropriations made on behalf of the Mutual Water Company were thereafter assigned to the company and are supplemental to and not in conflict with the prior appropriations which had been transferred to the Mutual Water Company by its predecessors in interest.

During 1910, after the construction by the federal government of Laguna Dam for the Yuma Project in Arizona, it was discovered that the bed of the river had been raised and that levees would have to be constructed, heightened and strengthened to protect the irrigated area from flood waters. In 1914, the Palo Verde Joint Levee District was formed for the purpose of protecting the Valley area from flood waters and to control the river. More than 35 miles of levee works were constructed by this District during its existence and until its functions were transferred to defendant Palo Verde Irrigation District, as hereinafter set forth.

The said rising bed of the river subsequent to 1910, in addition to necessitating the levee work, also caused a corresponding rise in the water table of the Valley area and a serious drainage problem had developed. To meet this situation, the Palo Verde Drainage District was formed in 1922, and during the time of its existence and until its functions were transferred to Palo Verde Irrigation District, the said Drainage District had constructed approximately 72 miles of drains and spillways to expedite the return flow of the water to the river and to lower the underground water table.

In 1917 the 1908 intake structure was widened to a capacity in excess of 2100 cubic feet per second. This

intake structure was thereafter known as the "Blythe Intake."

About the year 1921 the management of the Levee District and the Drainage District was practically identical. In order to consolidate the functions of the Mutual Water Company, the Levee District and the Drainage District under one management and to continue the development of one comprehensive plan for the entire Palo Verde Valley and Mesa areas, the Palo Verde Irrigation District, defendant herein, was organized under a special act of the California Legislature (Chap. 452, Calif. Stats. 1923). The District thereafter succeeded to all of the properties and water rights of its said predecessors in interest.

As of June 25, 1929, the defendant Palo Verde Irrigation District, its predecessors in interest, and property owners within its boundaries had constructed the above described Blythe Intake, 440 miles of main canals and laterals, more than 72 miles of drains and spillways, and more than 35 miles of protective levee works. The diversion and irrigation works have at all times been in continuous operation.

As hereinabove set forth in the First Affirmative Defense of this Answer, Palo Verde Irrigation District entered into a contract with the Secretary of the Interior on February 7, 1933, for the delivery of water to the District under the aforesaid appropriation in a total quantity in accordance with the amounts and priorities set forth in the Seven-Party Priority Agreement hereinabove described in said First Affirmative Defense, said water to be delivered to the District and measured at the point of diversion known as the "Blythe Intake."

On April 21, 1938, defendant District filed Application No. 9280 with the State of California, Department of Public Works, Division of Water Resources, to appropriate waters of the Colorado River at the point of diversion, said Blythe Intake, for use on the lands in the District and between the District and the Colorado River, a gross area of 104,500 acres and 16,000 acres in the Lower Palo Verde Mesa. Said application provided that it was filed to supplement the existing rights and without waiving any of the existing rights or claims to such rights under the appropriations filed from July 17, 1877 to August 5, 1911. Pursuant to said application, Permit No. 7652 was issued by the State of California for a maximum rate of diversion not exceeding 2100 cubic feet per second, and an average rate of diversion not exceeding 1500 cubic feet per second.

In 1944 and 1945, in consequence of the retrogression or scouring of the river bed following the construction of Hoover Dam, a rock-filled diversion weir was constructed at the expense of the United States. Since this weir was located upstream from the former Blythe Intake, the District was compelled to construct a new reinforced concrete intake structure, which is of a capacity in excess of 2100 cubic feet per second. This intake structure is the one now in use by this District.

At the present time the Palo Verde Valley proper has a population of approximately 11,000 people. The 1952 farm income from field crops, truck crops and livestock was in excess of $20,500,000. The Palo Verde Irrigation District has no other source of water supply except from said Colorado River through said intake, canals and works hereinabove described. The diversion works and distribution system and protective works of the District at the

present time consist of the intake structure hereinabove described, more than 450 miles of main and lateral canals extending throughout the entire Valley area, and more than 106 miles of drains and spillways. There are presently more than 85,000 acres, gross, of land in cultivation in the Valley proper and approximately 2000 acres on the "Lower Mesa."

During the time that the foregoing diversion and distribution system had been constructed, the property owners within the District have expended considerable sums in the clearing and leveling of lands in order to put the aforesaid appropriative waters to beneficial use. From 1877 to date, the defendant Palo Verde Irrigation District, its predecessors in interest and property owners, have expended in said construction of said intake, canals, laterals, drains, spillways, levees and land leveling, in excess of $20,000,000.

During all of said time from 1877 to date, said defendant Palo Verde Irrigation District and its predecessors in interest have had a definite plan and project for the utilization of the full amount of said appropriated water and have at all times exercised the utmost of due diligence in the construction of said works and the improvement of said lands. Said plan for the project is now substantially completed. The full quantity of water under the appropriations made by its predecessors in interest was and is necessary and essential for beneficial consumptive use within said District, and said use is within the said appropriations, all of which appropriative and other rights and properties of its predecessors, as hereinabove set forth, are now owned by Palo Verde Irrigation District, and said rights relate back to 1877.

EXHIBIT "C."

Facts Relative to the All-American Canal Project.

The All-American Canal diverts at Imperial Diversion Dam, 303 miles below Hoover Dam and 22 miles above the Mexican border. It transports water into the Imperial Valley for the Imperial Irrigation District and into Coachella Valley for the Coachella Valley County Water District, delivering water enroute to the Yuma Reclamation Project, of which 25,000 acres are in California and 50,000 acres are in Arizona.

An area of about 1,550,000 acres in the Imperial Valley and its northwestern extension, Coachella Valley, lies below the elevation of the Colorado River at the International boundary line. Over 1,000,000 acres of this area lie below sea level. The bringing of water from the Colorado River to irrigate these lands was first proposed in the 1850's, and the approval of such a project was given by an act passed by the California Legislature in 1859. The area is climatically of high temperatures and is one of the most arid in the United States, with practically no rainfall. These conditions, combined with a fertile soil and a year-round growing season, result in a high per-acre requirement for water.

Development of Imperial Valley commenced with surveys and plans made in 1893 to divert water from the Colorado River at a point which was later the site of Laguna Dam. It followed in general the present route of the All-American Canal.

A less expensive route was used in 1901 for the construction of a canal (Alamo Canal) which diverted in California a short distance above the Mexican boundary, traversed Mexican territory for some 60 miles and then

re-entered the United States, utilizing for much of the distance an old overflow channel of the Colorado River. This canal and its extensions totaling 130 miles continued in service until 1942. Although the route was thus changed from that originally surveyed, the area to be developed remained the same, viz., the area in Imperial Valley to be ultimately served by Imperial Irrigation District through the All-American Canal.

Formal appropriations of water under the laws of California for irrigation and power development, each of which was in the amount of 10,000 cubic feet per second of the flow of the Colorado River, were made by the predecessors of Imperial Irrigation District in the period 1893-1899 and succeeding years. The area described in these appropriations is that now to be served by means of the All-American Canal.

Irrigation commenced in Imperial Valley in June, 1901, and has been maintained continuously since that date. The original wooden headgate was replaced in 1906 by a permanent headgate, Hanlon Heading, with a capacity of 10,000 cubic feet per second.

In 1905, river floods broke into the Alamo Canal in Mexico and the entire flow of the Colorado River for a period of approximately two years ran from Lower California into Imperial Valley, threatening the whole valley with destruction, inundating a substantial part of the reclaimed lands, filling the lowest portion of Salton Sink, and creating what is now known as the Salton Sea. The break was not successfully repaired until 1907.

The defendant Imperial Irrigation District, organized in 1911, succeeded in 1916 to all of the water rights and other property above mentioned. By 1922 approximately

540,000 acres of the land now within this District had received water service from the Colorado River.

Interference by junior divertors in the Upper Basin with senior appropriators in California, the need for storage and flood control, the desirability of removing the District's water supply from the jurisdiction of Mexico, the necessity of eliminating existing diversion difficulties, and the insistence by the United States on a diversion works at or near Laguna Dam, all manifested the need for an All-American Canal.

Accordingly, in 1918 this District entered into a contract with the Secretary of the Interior providing for surveys and plans for an All-American Canal to Imperial Valley, to divert at the then completed Laguna Dam, as proposed by the 1893 plans and surveys. The Secretary appointed a Board of Engineers which made a favorable report July 22, 1919. The plans and route proposed were substantially the same as those of the present All-American Canal to Imperial Valley.

On October 23, 1918, the District acquired by contract with the United States the right to utilize Laguna Dam as a diversion dam, and agreed to construct an All-American Canal from that point into Imperial Valley. For the right to use the Laguna Dam, this District agreed to pay, and has paid the United States—including a small proportion later paid by Coachella Valley County Water District and San Diego—the sum of $1,600,000.

In 1919 and 1920 the Congress held hearings on legislation authorizing the construction of the All-American Canal. At these hearings interests in other states, with water rights junior to those of Imperial Irrigation District, protested the construction of the canal, which would

expedite development of Imperial Valley, unless storage on the Colorado River was provided to protect the junior appropriators, since the normal flow of the river had already been appropriated and in some years fully utilized. Storage was also urgently needed for flood control to relieve the increasing cost of protecting the whole lower river area by levees in Arizona, California and Mexico. As a result, the Congress enacted the "Kincaid Act" (Act of May 18, 1920, 41 Stat. 600), providing for an investigation by the Secretary of the Interior, and the Secretary transmitted a report, "Problems of Imperial Valley and Vicinity" to the Congress in February, 1922 (Sen. Doc. 142, 67th Cong., 2d Sess.). This report recommended that the United States construct a high storage dam, at or near Boulder Canyon on the lower Colorado River, and an All-American Canal from Laguna Dam to the Imperial Valley.

This report was the genesis of the Boulder Canyon Project and was utilized in the negotiation of the Colorado River Compact.

In 1922 Congress began consideration of the first of the Swing-Johnson bills to carry out the recommendations of that report. Similar bills were considered by Congress in succeeding years, culminating in the Boulder Canyon Project Act of 1928.

The Upper States of the Colorado River Basin, Colorado, New Mexico, Utah and Wyoming, had objected that if such storage works were built, the additional rights which would be acquired through priority of appropriation by water users in the lower States would preclude the future expansion of uses by projects in the Upper Basin. The Upper States insisted that the rights for such future

development be protected before the project was authorized; and out of this demand came the Colorado River Compact.

As of June 25, 1929, the effective date of the Compact and Act, diversion works and a main canal had been constructed with a capacity adequate for the irrigation of 1,000,000 acres of lands in Imperial Valley, and over 600,000 acres were receiving water service from the Colorado River System.

On December 1, 1932, Imperial Irrigation District and the United States entered into a contract, under provisions of the Boulder Canyon Project Act, for the construction by the Bureau of Reclamation of the All-American Canal including a new diversion dam, Imperial Dam, located a few miles upstream from Laguna Dam, and repayment of the cost thereof to the United States; and for delivery of water to the District at Imperial Dam in accordance with its appropriative rights.

As provided in the Boulder Canyon Project Act, the All-American Canal contract between Imperial Irrigation District and the United States granted to Imperial Irrigation District the right to utilize the power possibilities upon that canal, including power possibilities at Pilot Knob. This contract requires the net proceeds from power development to be paid by Imperial Irrigation District to the United States to be applied upon the cost of the All-American Canal Project. The contract also provides that Imperial Irrigation District include within its boundaries certain designated lands on the Mesa areas of Imperial Valley so that Government and private lands there located would be served by the canal as contemplated by the District's appropriative rights. The inclusion of

said land is also intended to give Imperial Irrigation District an increased acreage base to bear the cost of said All-American Canal Project and other obligations in connection with the general reclamation of these areas. Imperial Irrigation District has developed the power possibilities on the All-American Canal Project. This District is the sole supplier of electrical energy throughout the Imperial Irrigation District and Coachella Valley County Water District and additional areas in Imperial and Riverside Counties, California.

Defendants City of San Diego and Coachella Valley County Water District (organized in 1918) entered into contracts in 1933 and 1934, respectively, with the United States for capacity in, and repayment based on capacities, of a proportionate part of the cost of the canal and dam.

Construction of the All-American Canal commenced August 8, 1934, and water was first delivered therefrom to defendant Imperial Irrigation District, May 23, 1940. All of the District's water supply has been received through the All-American Canal since February 14, 1942.

Water was first delivered through the All-American Canal to Coachella Valley County Water District in 1948. San Diego has never received service therefrom, but receives its water through the Colorado River Aqueduct.

The headworks of the All-American Canal at Imperial Dam have a capacity of 15,155 cubic feet per second. This initial capacity is maintained for 15 miles southward to "Syphon Drop," where 2000 cubic feet per second, carried for the Yuma Reclamation Project in Arizona (and 25,000 acres of the Yuma Project in California) is delivered to the Yuma Project, and to the Syphon Drop power plant, which is owned by the United States.

The All-American Canal maintains a capacity of 13,155 cubic feet per second for the next 7 miles, to Pilot Knob Check about one mile above the Mexican boundary. At this point, 3000 cubic feet per second and other canal capacity, when available, may be utilized for hydro power development at the Pilot Knob power plant, authorized by the Boulder Canyon Project Act to be constructed by the defendant Imperial Irrigation District, and such water will be discharged back into the Colorado River. Water passed through the Pilot Knob power plant or Pilot Knob Wasteway will go into the custody and control of the United States section of the International Boundary and Water Commission for disposal under the Mexican Water Treaty (Treaty Series 994).

The All-American Canal turns west below Pilot Knob Check to Imperial Valley, with a capacity of 10,155 cubic feet per second. Of this, 8500 is for defendant Imperial Irrigation District and 1500 for defendant Coachella Valley County Water District. The remainder, 155 cubic feet per second, is capacity reserved for and at the expense of defendant City of San Diego.

The cost of the All-American Canal, including Imperial Dam, for which the defendants Imperial Irrigation District and Coachella Valley County Water District are obligated to the United States, under repayment contracts referred to in the First Affirmative Defense, is $38,500,000. This is borne by them, in general, in proportion to the capacities of the sections of the works serving them. In addition, the defendant Coachella Valley County Water District is obligated to the United States in the additional amount of not to exceed $13,500,000, the cost of its distribution and other works. San Diego's share of the cost is about $500,000.

The gross area to be served by Imperial Irrigation District under the All-American Canal is approximately 1,000,000 acres, of which 900,000 acres are now within the boundaries of said District. The area within Coachella Valley County Water District is approximately 278,000 acres, of which an area of 135,000 acres is within the service area of the All-American Canal.

The total investment of Imperial Irrigation District, and its municipalities, in works dependent upon the waters of the Colorado River System (including that District's obligations with respect to the All-American Canal) is not less than $62,000,000. These works include more than 1800 miles of main canals and laterals, nearly 1400 miles of drainage canals in Imperial Valley, some 130 miles of main canals, and 75 miles of river protective levees.

The irrigation, domestic and industrial water requirements of all the lands in Imperial Irrigation District, together with the municipal and industrial water requirements of some eleven cities and towns within that District, and the requirements of extensive military and defense bases, depend entirely upon the waters of the Colorado River System. There is no appreciable local rainfall, no usable underground water supply, and no other source of water available. The value of the agricultural production of the lands within Imperial Irrigation District amounted to $133,000,000 for the year 1952, and the very existence of the people, as well as the entire economy of the area within this District, is wholly dependent upon the wa-

ter supply from the Colorado River System through the All-American Canal.

The investment of Coachella Valley County Water District, its predecessors and landowners in all these works is not less than $33,000,000. The value of the agricultural production of Coachella Valley County Water District in 1952 was about $28,000,000, and its economy is dependent in substantial part upon the waters of the Colorado River System received through this canal.

The entire plan for the reclamation of all lands to be included within the Coachella Valley County Water District were well known to the Congress and to all of the interested States and Agencies in the Colorado River Basin long prior to 1929. The development, progressively as above outlined, in the reclamation of said area and the building of said dam, canal and works to the above indicated capacity, has been effected to the end of completing the project as originally planned; and the amount of water to which Imperial Irrigation District and Coachella Valley County Water District are entitled under their appropriations and contracts with the United States, as elsewhere herein recited, is the minimum amount required for the maintenance of said projects and the economy within said areas.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. ~~[redacted]~~ Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, and COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

APPENDIXES TO THE ANSWER.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPENDIX NO. 1

THE COLORADO RIVER COMPACT

(Text)

November 24, 1922

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact under the Act of Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, Page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel	for the State of Arizona
W. F. McClure	for the State of California
Delph E. Carpenter	for the State of Colorado
J. G. Scrugham	for the State of Nevada
Stephen B. Davis, Jr.	for the State of New Mexico
R. E. Caldwell	for the State of Utah
Frank C. Emerson	for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the

protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II

As used in this compact:—

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin,

and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggrgate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River

System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, con-

sumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL
(Signed) W. F. MCCLURE
(Signed) DELPH E. CARPENTER
(Signed) J. G. SCRUGHAM
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL
(Signed) FRANK C. EMERSON

APPROVED:
(Signed) HERBERT HOOVER.

APPENDIX NO. 2

THE BOULDER CANYON PROJECT ACT

Act of December 21, 1928

45 Stat. 1057

CHAP. 42. An Act To provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures

to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

Sec. 2. (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of

the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is author-

ized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

Sec. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

Sec. 4 (a). This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree

irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty

or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect

the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4.

Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be

determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydorelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share

of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Sec. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provision of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of

repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

Sec. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privi-

lege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

Sec. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, ~~canals,~~ and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees

and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

Sec. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute

revenue from said project and be covered into the fund herein provided for: *Provided,* That all persons who have served in the United States Army, Navy, or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, Act of December 5, 1924 (Forty-third Statutes at Large, page 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this Act: *Provided further,* That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

Sec. 10. That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

Sec. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

Sec. 12. "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Con-

gress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

Sec. 13. (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

Sec. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern

the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Sec. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

Sec. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

Sec. 17. Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

Sec. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

Sec. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

Sec. 20. Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

Sec. 21. That the short title of this Act shall be "Boulder Canyon Project Act."

Approved, December 21, 1928.

APPENDIX NO. 3

THE CALIFORNIA LIMITATION ACT

Chap. 16, Calif. Stats. 1929, p. 38

CHAP. 16. An act to limit the use by California of the waters of the Colorado river in compliance with the act of congress known as the "Boulder canyon project act," approved December 21, 1928, in the event the Colorado river compact is not approved by all of the states signatory thereto.

[Approved by the Governor March 4, 1929. In effect August 14, 1929.]

The people of the State of California do enact as follows:

Section 1. In the event the Colorado river compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain act entitled "An act to ratify and approve the Colorado river compact, signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice, be given by the governor of such ratifications and approval," approved January 10, 1929, (statutes 1929, chapter 1) is not approved within six months from the date of the passage of that certain act of the congress of the United States known as the "Boulder canyon project act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado river compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the provisions of the first paragraph of

article eleven of said compact which makes the same binding and obligatory when approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of such six states approval and the President by public proclamation shall have so declared, as provided by the said "Boulder canyon project act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming as an express covenant and in consideration of the passage of the said "Boulder canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said "Boulder canyon project act," and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

Sec. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water specified in subdivision 2 of section 4 (*a*) of the said "Boulder canyon project act" and this act shall be so construed.

APPENDIX NO. 4

THE PRESIDENTIAL PROCLAMATION OF JUNE 25, 1929

Act of June 25, 1929
46 Stat. 3000

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
PUBLIC PROCLAMATION

Pursuant to the provisions of Section 4(a) of the Boulder Canyon Project Act approved December 21, 1928 (45 Stat. 1057), it is hereby declared by Public Proclamation:

(a) That the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming have not ratified the Colorado River Compact mentioned in Section 13(a) of said act of December 21, 1928, within six months from the date of the passage and approval of said act.

(b) That the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming have ratified said compact and have consented to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and that each of the States last named has approved said compact without condition, except that of six-State approval as prescribed in Section 13(a) of said act of December 21, 1928.

(c) That the State of California has in all things met the requirements set out in the first paragraph of Section 4(a) of said act of December 21, 1928, necessary to render said act effective on six-State approval of said compact.

(d) All prescribed conditions having been fulfilled, the said Boulder Canyon Project Act approved December 21, 1928, is hereby declared to be effective this date.

In testimony whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this 25" day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-nine, and of the Independence of the United States of America, the One Hundred and Fifty-third.

[Seal]

HERBERT HOOVER

By the President:

HENRY L. STIMSON

Secretary of State.

APPENDIX NO. 5

CONGRESSIONAL AUTHORIZATION OF THE PARKER DAM DIVERSION STRUCTURE AND RATIFICATION OF RELATED CONTRACTS

Act of August 30, 1935
49 Stat. 1028

CHAP. 831. An Act Authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

[Pertinent Section Only, p. 1039]

Sec. 2. That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as "Parker Dam" on the Colorado River and "Grand Coulee Dam" on the Columbia River, are hereby authorized and adopted, and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate, and maintain dams, structures, canals, and incidental works necessary to such projects, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified. The construction by the Secretary of the Interior of a dam in and across the Colorado River at or near Head Gate Rock, Arizona, and struc-

tures, canals, and incidental works necessary in connection therewith is hereby authorized, and none of the waters, conserved, used, or appropriated under the works hereby authorized shall be charged against the waters allocated to the upper basin by the Colorado River compact, nor shall any priority be established against such upper basin by reason of such conservation, use, or appropriation; nor shall said dam, structures, canals, and works, or any of them, be used as the basis of making any such charge, or establishing any such priority or right, and all contracts between the United States and the users of said water from or by means of said instrumentalities shall provide against the making of any such charge or claim or the establishment of any priority right or claim to any part or share of the water of the Colorado River allocated to the Upper Basin by the Colorado River compact, and all use of said instrumentalities shall be in compliance with the conditions and provisions of said Colorado River compact and the Boulder Canyon Project Act.

APPENDIX NO. 6

CONGRESSIONAL RATIFICATION OF SAN DIEGO AQUEDUCT DIVERSION

Act of April 15, 1948
62 Stat. 171

CHAP. 186. An Act relating to the construction and disposition of the San Jacinto-San Vicente aqueduct.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby (1) ratifies the action taken by various departments and agencies in the executive branch of the Government in planning for and proceeding with the construction of an aqueduct running from a connection with the Colorado River aqueduct of the Metropolitan Water District of Southern California near the west portal of San Jacinto tunnel in Riverside County, California, to San Vicente Reservoir in San Diego County, California; (2) authorizes the completion of such aqueduct in accordance with existing Government plans for the completion thereof; and (3) ratifies the action of the Navy Department in disposing of the aqueduct to the city of San Diego, California, pursuant to contract NOy-13300 which provides, among other things, for the leasing of such aqueduct to such city.

Approved April 15, 1948.

APPENDIX NO. 7

CONGRESSIONAL AUTHORIZATION OF SECOND "BARREL" FOR SAN DIEGO

Act of October 11, 1951
65 Stat. 404

CHAP. 494. An Act To authorize the Secretary of the Navy to enlarge existing water-supply facilities for the San Diego, California, area in order to insure the existence of an adequate water supply for naval installations and defense production plants in such area.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of section 3 of this Act, the Secretary of the Navy, under the direction of the Secretary of Defense, is authorized and directed to provide for—

(1) such enlargement of the existing aqueduct extending from the west end of the San Jacinto tunnel of the Metropolitan Water District of Southern California to the San Vicente Reservoir in San Diego County, California, as may be necessary to increase the rated capacity of such existing aqueduct from eighty-five cubic feet per second to not less than one hundred and sixty-five cubic feet per second, or

(2) the construction of a new aqueduct paralleling such existing aqueduct and having a rated capacity of not less than eighty cubic feet per second.

Sec. 2. The use of all water diverted through said works from the Colorado River shall be subject to and controlled by the Colorado River Compact, the Boulder

Canyon Project Act, the California Self-Limitation Statute and the Mexican Water Treaty and shall be included within and shall in no way increase the total quantity of water to the use of which the State of California is entitled and limited by said compact, statutes, and treaty.

Sec. 3. No construction shall be undertaken under the authority of section 1 of this Act and no funds shall be expended for the preparation of plans or specifications for any such construction unless and until the Secretary of the Navy has entered into a contract with the San Diego County Water Authority amending the contract (NOy-13300) of October 17, 1945 (providing for the completion of such existing aqueduct), to provide—

(1) for the computation of the true cost of the work performed under the authority of section 1 of this Act in the same manner as provided for determining true cost in such contract of October 17, 1945;

(2) for the repayment of the true cost of the work performed under the authority of section 1 of this Act, together with interest on such amount computed at the rate certified by the Secretary of the Treasury to be the average rate paid by United States on its long-term loans, within a period of forty years after the completion and delivery to the San Diego County Water Authority of possession of the works constructed under the authority of this Act: *Provided,* That repayment shall be made in annual installments of not less than one-fortieth of the true cost due when computed as herein prescribed plus annually accrued interest;

(3) that the use of all water diverted through said works from the Colorado River shall be subject to and controlled by the Colorado River Compact, the Boulder Canyon Project Act, the California Self-Limitation Statute and the Mexican Water Treaty and shall be included within and shall in no way increase the total quantity of water to the use of which the State of California is entitled and limited by the said compact, treaty, and statutes;

(4) for the conveyance by the United States to the San Diego County Water Authority of title to the works constructed (including all rights-of-way and other interests in land used in connection with such works) under such contract of October 17, 1945, together with the works constructed under the authority of section 1 of this Act, upon repayment of the true cost of such works, including interest, computed as hereinabove set forth; and

(5) that after the effective date of this contract the member agencies of the San Diego County Water Authority, their successors or assigns as the distributors of the water, shall furnish to the Government on a preferential basis and at a rate no higher than that charged other users of comparable quanities of water, a quantity of water sufficient to meet the requirements of Government activities located and to be located in the area served by such agencies.

Sec. 4. For the purpose of enabling him to carry out the provisions of the first section of this Act, the Secretary of the Navy is authorized to acquire lands and rights

pertaining thereto, or other interests therein, including the temporary use thereof, by donation, purchase, exchange of Government-owned lands, or otherwise.

Sec. 5. The United States and the San Diego County Water Authority and their respective permittees, licensees, and contractees and all users and appropriators of water of the Colorado River diverted or delivered through the existing aqueduct and the enlargement or addition thereto shall observe and be subject to the Colorado River Compact, the Boulder Canyon Project Act, the California Self-Limitation Statute and the Mexican Water Treaty in the diversion, delivery, and use of water of the Colorado River, anything in this Act to the contrary notwithstanding, and such condition and covenant shall attach as a matter of law whether or not set out or referred to in the instrument evidencing such permit, license, or contract and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming and the users of water therein or thereunder by way of suit, defense, or otherwise in any litigation respecting the waters of the Colorado River.

Sec. 6. The Secretary of the Navy is authorized to provide for the construction of the whole or any part of the work authorized by the first section of this Act (1) by contract, (2) by the use of facilities and personnel of the Navy Department, or (3) by the use of the facilities and personnel of any other department or agency of the United States with which an agreement may be entered

into to perform or to have performed the whole or any part of such work.

Sec. 7. The appropriation of such sums as may be necessary to carry out the provisions of this Act is hereby authorized.

Sec. 8. This Act and all works constructed hereunder shall be subject to and controlled by the Colorado River Compact dated November 24, 1922, and proclaimed effective by the President June 25, 1929; the Boulder Canyon Project Act approved December 21, 1928; the California Limitation Act approved by the Governor of California March 4, 1929; and no right or claim of right to the use of the waters of the Colorado River shall be aided or prejudiced hereby.

Approved October 11, 1951.

APPENDIX NO. 8
GENERAL REGULATIONS, SEPTEMBER 28, 1931

United States Department of the Interior,
Office of the Secretary,
Washington, September 28, 1931.

General Regulations

Contracts for the Storage of Water in Boulder Canyon Reservoir, Boulder Canyon Project, and the Delivery Thereof

1. No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All contracts for delivery of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act.

2. The right is reserved to amend or extend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

3. Storage water in Boulder Canyon Reservoir will be delivered upon such terms and conditions as the Secretary may fix from time to time by regulations and contracts thereunder. Water so contracted for may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

4. Contracts respecting water for irrigation and domestic uses shall be for permanent service, and shall conform to Paragraph a of Section 4 of the Boulder Canyon Project Act.

5. No charge shall be made for water or for the use, storage or delivery of water for irrigation or for water for potable purposes in the Imperial and Coachella Valleys. Charges otherwise shall be fixed by regulation from time to time. Where water is permitted by the Secretary to be taken from the Colorado River from the reservoir above the Hoover Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make a higher charge for water taken above the dam, than if delivery is made below the dam.

6. Subject to the provisions of Article 7 of these regulations, deliveries of water to users in California shall be in accordance with the following recommendation of the State Division of Water Resources:

"The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

"Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

"Sec. 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

"Sec. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"Sec. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

"Sec. 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"Sec. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for

use exclusively on 16,000 acres in that area known as the Lower Palo Verde Mesa, adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"Sec. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

"Sec. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

"Sec. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in

Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

"Sec. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusions of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

"Sec. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

"Sec. 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties."

7. The Secretary reserves the right to contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; *Provided,* that priorites numbered fourth and fifth in said recommendation shall not thereby be disturbed.

(Signed) RAY LYMAN WILBUR,
Secretary of the Interior.

September 28, 1931.

APPENDIX NO. 9

GENERAL REGULATIONS, APRIL 23, 1930.

The Secretary of the Interior,
Washington, April 23, 1930.

General Regulations

Contracts for the Storage of Water in Boulder Canyon Reservoir, Boulder Canyon Project, and the Delivery Thereof

Storage water in Boulder Canyon Reservoir will be sold upon such terms and conditions as the Secretary may fix from time to time. Water so sold may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

Contracts respecting water for domestic uses shall be for permanent service, and shall conform to Paragraph a of Section 4 of the Boulder Canyon Project Act. No charge shall be made for water or for the use, storage or delivery of water for irrigation or for water for potable purposes in the Imperial or Coachella Valleys.

Where water is taken from the Colorado River above the Boulder Canyon Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make a higher charge for water taken above the dam, than if delivery is made below the dam.

No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All purchases of water shall be subject to all

the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act.

The right is reserved to amend or extend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

RAY LYMAN WILBUR,
Secretary of the Interior.

APPENDIX NO. 10

THE SEVEN PARTY PRIORITY WATER AGREEMENT

Aug. 18, 1931

AGREEMENT REQUESTING THE DIVISION OF WATER RESOURCES OF THE STATE OF CALIFORNIA TO APPORTION CALIFORNIA'S SHARE OF THE WATERS OF THE COLORADO RIVER AMONG THE VARIOUS APPLICANTS AND WATER USERS THEREFROM IN THE STATE, CONSENTING TO SUCH APPORTIONMENTS, AND REQUESTING SIMILAR APPORTIONMENTS BY THE SECRETARY OF THE INTERIOR OF THE UNITED STATES.

This Agreement, made the 18th day of August, 1931, by and between Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego;

Witnesseth:

Whereas the Secretary of the Interior did, on November 5, 1930, request of the Division of Water Resources of California a recommendation of the proper apportionments of the water of and from the Colorado River to which California may be entitled under the provisions of the Colorado River Compact, the Boulder Canyon Project Act and other applicable legislation and regulations, to the end that the same could be carried into each and all of the contracts between the United States and applicants for water contracts in California as a uniform clause; and

Whereas the parties hereto have fully considered their respective rights and requirements in cooperation with the

other water users and applicants and the Division of Water Resources aforesaid;

Now, Therefore, the parties hereto do expressly agree to the apportionments and priorities of water of and from the Colorado River for use in California as hereinafter fully set out and respectfully request the Division of Water Resources to, in all respects, recognize said apportionments and priorities in all matters relating to State authority and to recommend the provisions of Article I hereof to the Secretary of the Interior of the United States for insertion in any and all contracts for water made by him pursuant to the terms of the Boulder Canyon Project Act, and agree that in every water contract which any party may hereafter enter into with the United States, provisions in accordance with Article I shall be included therein if agreeable to the United States.

ARTICLE I.

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

Section 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land

located in said project in California, such waters as may be required by said lands.

Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

Section 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

Section 5. A fifth priority, (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Section 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the

right to make similar arrangements with users in other states without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other states without distinction in priority, and to deterimne the correlative relations between the said City and/or said County and such users resulting therefrom.

Section 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

ARTICLE II.

That each and every party hereto who has heretofore filed an application or applications for a permit or permits to appropriate water from the Colorado River requests the Division of Water Resources to amend such application or applications as far as possible to bring it or them into conformity with the provisions of this agreement; and each and every party hereto who has heretofore filed a protest or protests against any such application or applications of other parties hereto does hereby request withdrawal of such protest or protests against such application or applications when so amended.

ARTICLE III.

That each and all of the parties to this agreement respectfully request that the contract for delivery of water between The United States of America and The Metropolitan Water District of Southern California under date of April 24, 1930 be amended in conformity with Article I hereof.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers thereunto duly authorized, the day and year first above written. Executed in seven originals.

Recommended for execution.

PALO VERDE IRRIGATION DISTRICT
By ED. J. WILLIAMS,
ARVIN B. SHAW, JR.

IMPERIAL IRRIGATION DISTRICT
By CHAS. L. CHILDERS,
M. J. DOWD.

COACHELLA VALLEY COUNTY WATER DISTRICT
By THOS. C. YAGER,
ROBBINS RUSSEL.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
By W. B. MATTHEWS,
C. C. ELDER.

CITY OF LOS ANGELES
By W. W. HURLBUT,
C. A. DAVIS.

CITY OF SAN DIEGO
By C. L. BYERS,
H. N. SAVAGE.

COUNTY OF SAN DIEGO
By H. N. SAVAGE,
C. L. BYERS.

APPENDIX NO. 11

PALO VERDE WATER DELIVERY CONTRACT WITH THE UNITED STATES

February 7, 1933

Approved as to form:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
BOULDER CANYON PROJECT

United States and Palo Verde Irrigation District
Contract for Delivery of Water

(1) **This Contract,** made this 7th day of February nineteen hundred thirty-three, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between **The United States of America,** hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and **Palo Verde Irrigation District,** an irrigation district created, organized and existing under and by virtue of an act of the Legislature of the State of California approved June 21, 1923 (Chapter 452, Statutes of California, 1923), as amended, known as and designated "Palo Verde Irrigation District Act," with its principal office at Blythe, Riverside County, California, hereinafter referred to as the District;

Witnesseth:

Explanatory Recitals

(2) **Whereas,** for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and

(3) **Whereas,** after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

(4) **Whereas,** the District is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir, and it is to the mutual interest of the parties hereto that such contract be executed and the rights of the District in and to waters of the river be hereby defined.

(5) **Now, Therefore,** in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Delivery of Water by the United States

(6) The United States shall, from storage available in the Boulder Canyon Reservoir, deliver to the District each year at a point in the Colorado River immediately

above the District's point of diversion known as Blythe Intake, (or as relocated within two miles of the present intake) so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows: (Subject to availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

Section 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irri-

gation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

Section 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

Section 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adja-

cent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Section 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason or reducing diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the

exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

Section 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of

water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation. The District reserves the right to establish, at any time, by judicial determination, its rights to divert and/or use water from the Colorado River. In the event the above stated recommendation as to the District is superseded by an agreement between all the above allottees or by a final judicial determination, the parties hereto reserve the right to further contract in accordance with such agreement or such judicial determination; *Provided,* that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the areas for which the District is allotted water as described in the above stated recommendation. This contract is for permanent water service but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used; First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by said Colorado River Compact in the construction, management and operation of Hoover Dam, and other works and the storage, diversion, delivery and use of water for the generation of power,

irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements or installation of equipment and/or machinery at Hoover Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract neither prejudices nor admits any claim of the District on account of alleged changes in elevation of the river bed howsoever caused, or the effect of such alleged changes on the District's diversion of water delivered hereunder. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River.

Receipt of Water by District

(7) The District shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated, and shall at its own expense convey such water to its distribution system, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

Measurement of Water

(8) The water to be delivered hereunder shall be measured at Blythe Intake by such measuring and controlling

devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed and maintained by and at the expense of the District, but they shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

Record of Water Diverted

(9) The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

No Charge for Delivery of Water

(10) The District shall not be required to pay to the United States any tolls, rates or charges of any kind for or on account of the storage or delivery of water hereunder.

Inspection by the United States

(11) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

Disputes or Disagreements

(12) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Rules and Regulations

(13) There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of its diversion works at Blythe Intake, all such rules and regulations will be fully adhered to.

Agreement Subject to Colorado River Compact

(14) This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved by the Boulder Canyon Project Act.

Priority of Claims of the United States

(15) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Contingent Upon Appropriations

(16) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work contemplated hereby, and to there being sufficient moneys available in the Colorado River Dam fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam fund to permit of said allotments. This agreement is also subject to the condition that if for any reason construction of Hoover Dam is not prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon

one (1) year's written notice to the other party hereto.

Rights Reserved Under Section 3737 Revised Statutes

(17) All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies Under Contract Not Exclusive

(18) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

Interest in Contract not Transferable

(19) No interest in this agreement is transferable, and no sublease shall be made, by the District without the written consent of the Secretary, and any such attempted transfer or sub-lease shall cause this contract to become subject to annulment, at the option of the United States.

Member of Congress Clause

(20) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR
Secretary of the Interior.

Attest:

NORTHCUTT ELY
RICHARD J. COFFEY
(Seal)

PALO VERDE IRRIGATION DISTRICT,
By L. A. HAUSER
President.

Attest:

O. W. MALMGREN
Assistant Secretary.

Approved as to form: Feb 7 - 1933
RAY LYMAN WILBUR
Ray Lyman Wilbur,
Secretary of the Interior.

State of California, County of Riverside—ss.

I, L. S. Shipley, Secretary of Palo Verde Irrigation District do hereby certify the attached is a true copy of a Contract for Delivery of Water between the United States Department of the Interior, Bureau of Reclamation and Palo Verde Irrigation District dated February 7, 1933 as filed in Minute Book 6 of Palo Verde Irrigation District records, pages 71 to 82 inclusive.

Dated: This 14th day of April, 1953.

[District Seal]

L. S. SHIPLEY,
L. S. Shipley,
Secretary

APPENDIX NO. 12

LAGUNA DAM DIVERSION CONTRACT for IMPERIAL IRRIGATION DISTRICT

Oct. 23, 1918

This Agreement, Made the 23rd day of October, A. D., 1918, by and between the **United States of America** acting in this behalf by Franklin K. Lane, Secretary of the Interior, hereinafter styled the United States, party of the first part, and the **Imperial Irrigation District,** a corporation duly organized and existing under and by virtue of the laws of the State of California, hereinafter styled the District, party of the second part,

Witnesseth:

2. **Whereas,** in connection with the Yuma project, Arizona-California, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, and particularly Section 25 of the Act of April 21, 1904 (33 Stat., 224), the United States Reclamation Service has constructed on the Colorado River a dam known as the Laguna Dam and certain auxiliary works, situate about ten miles northeast of Yuma, Arizona, together with a main supply canal extending from said dam southwesterly to a point known as Siphon Drop, situate in Section 10, Township 16 South, Range 22 East, S. B. M.; and

3. **Whereas,** under the aforesaid act of Congress, the United States contemplates the reclamation of 120,000 acres of irrigable land, more or less, under the Yuma project with water from Colorado River diverted at Laguna Dam, and the District desires to change its point

of diversion and secure the right to divert water at said dam for the irrigation of all irrigable land within the boundaries of the District; and

4. **Whereas,** the District is authorized under Chapter 160 of the Statutes of California, 1917, page 243, to contract with the United States for a supply of water for irrigation:

5. **Now, Therefore,** in consideration of the mutual covenants and agreements to be kept and performed and considerations to be paid, as hereinafter provided, it is hereby agreed as follows, to wit:

6. That immediately on the execution of this contract, the District shall proceed with diligence to secure data, which, together with other available data and data to be gathered under the existing cooperative contract dated February 16, 1918, will constitute a complete detailed survey with specifications and estimates of cost for the following:

(a) All necessary works and structures for the diversions of water from the Colorado River at Laguna Dam, thence through said existing main canal of the Yuma project, and sufficient enlargement and modification, including such works or devices as the Secretary of the Interior may require for the purpose of maintaining as near as may be the efficiency of the desilting and sluicing works at Laguna Dam, as such efficiency would be, were the Yuma project fully developed, to divert and carry all water needed by the District for the irrigation of its lands above referred to, without impairing the utilization of said Laguna Dam, main canal, and auxiliary works to the full extent necessary to irrigate the Yuma project when fully developed.

(b) A main canal entirely within the United States, with all necessary appurtenant structures for the practical operation thereof, of sufficient capacity and proper construction to irrigate all lands in Imperial County, State of California, susceptible of economic irrigation from said canal. Such canal to connect with said main canal of the United States at a point described as Siphon Drop, and thence to connect with the canal system of said District in the United States upon the line located and approved as provided by the terms of the cooperative contract of February 16, 1918, above referred to.

7. Upon the approval by the Secretary of the Interior of the said survey, specifications, and estimates, District will provide for beginning and carrying to completion with due diligence, at the cost of the District, the work of construction and installation at the Laguna Dam and on the main canal, described in and contemplated by this agreement, and the District shall provide proper pecuniary support for the same in advance, in a manner satisfactory to the Secretary of the Interior. All such work shall be carried on in such manner as not to interfere with the proper operation of the Yuma project by the United States, and the District will promptly carry out any measures required by the United States or its authorized agents to avoid or relieve any interference with the delivery of water to the Yuma project during and due to such construction, and will save the United States harmless as to any claims for damages that may be presented by reason thereof.

8. All work of construction and installation, and the materials used therein, shall at all times be subject to the approval of the Secretary of the Interior, and be under the supervision and inspection of his authorized agents and

engineers, to the end that the works shall conform strictly with said surveys and specifications, and such modification thereof as the Secretary of the Interior may approve in writing. In case any of said works are constructed under contract made by the District and are not in accordance with said surveys and specifications, the Secretary may, at his option, replace such unsatisfactory construction work at the expense of the District, or stop said work of construction or cancel this contract, or resort to any other lawful remedy, and the decision of the Secretary of the Interior whether said surveys and specifications or modifications thereof have been complied with shall be final and conclusive. The District shall make complete detailed progress reports of the said construction work upon demand of the Secretary of the Interior. The cost of the inspection on the part of the United States provided by this section shall be paid by the District to the United States upon demand.

9. For the right to use the Laguna Dam, the main canal, and appurtenant structures, and divert water, as herein provided, the District agrees to pay to the United States the sum of $1,600,000 in twenty instalments, the first of which shall become due and payable December 31, 1919, and subsequent instalments annually thereafter. The first four instalments shall each be two per centum, the next two installments each four per centum, and the next fourteen each six per centum of the total amount. Upon failure of the District to make any such payment at the time and in the amount specified, then all rights under this contract shall be at an end, and all payments theretofore made shall become forfeited to the United States as liquidated damages; and as a further consideration for entering into this contract on the part of the

United States, the District hereby releases and relinquishes any and all claims whatsoever for said moneys or any portion thereof so forfeited and paid as liquidated damages; provided, that the Secretary of the Interior may in his discretion extend the time for any such payment upon the payment of seven per cent interest in advance.

10. Subject to the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, the United States shall have and retain perpetually the title to and the complete control, operation, and management of said Laguna Dam, auxiliary works, and enlarged main canal from the dam to and including the Siphon Drop with appurtenant structures as enlarged, including the diversion works at Siphon Drop for the diversion and delivery of water to the Yuma project and the District. The District shall pay to the United States, quarterly, on demand, April 1, July 1, October 1, and December 31, its proportionate share of the cost of operation and maintenance of said dam, auxiliary works, and enlarged main canal for the preceding quarter, such payment by the District to bear the same ratio to the total cost of such operation and maintenance as the amount of water received by the District at the point of delivery to the District's canal at Siphon Drop bears to the total amount of water carried in said main canal at that point plus the amount of water diverted from the canal above the Siphon Drop for use on the Yuma project lands; provided, that such extraordinary expense as may be caused by the operation of such desilting works as may be necessary to as nearly as may be maintained the efficiency of the desilting works at Laguna Dam, as such efficiency would be were the Yuma project fully developed, shall be borne by Imperial Irriga-

tion District. Such extraordinary expense, if any, shall be determined by the Secretary of the Interior. If the District fails to pay to the United States within thirty (30) days after rendition of bill, all operation and maintenance charges as determined by the Secretary of the Interior as they became due, the Secretary of the Interior, in addition to any other remedy which may be available to him for recovery of such charges, is authorized to shut off water from the intake of the District until such time as all sums due have been paid, with interest thereon at the rate of seven per cent per annum, from rendition of bill.

11. The United States reserves the right to arrange for the connection with and use of Laguna Dam on such terms as the Secretary of the Interior may deem expedient, by any other irrigation enterprise, district, corporation, or individual; also of the headworks and main canal and other governmentally constructed works and works constructed jointly by these parties, after proper enlargement and modification, on terms herein stipulated, without, however, impairing the utilization of said dam, canal, and other works to the extent necessary to irrigate the lands within the boundaries of Imperial Irrigation District.

12. The United States reserves the right to develop power with the water in the enlarged main canal down to and including Siphon Drop. All other power possibilities in the main canal down to and including some convenient power site near Pilot Knob shall be developed by the United States to the extent deemed expedient by the Secretary of the Interior, at the joint expense and for the joint benefit of the Yuma project and the Imperial Irrigation District as herein provided. The apportion-

ment of the cost of canal and headworks alterations and enlargement, and of canal extension from the Laguna Dam to the site selected for power development near Pilot Knob, shall be made to the United States (for the Yuma project) and to the Imperial Irrigation District, in the proportion that 2,000 second-feet bears to the total canal enlargement less 2,000 second-feet. The cost of constructing power plants, transmission lines and other power plant accessories shall be also apportioned to Yuma project and the District, respectively, in the ratio that 8500 water horse power bears to the aggregate water horse power capacity of the plant installed.

The operation and maintenance of any such power plant or plants constructed for joint benefit and the sales of power therefrom shall be under the control of the Secretary of the Interior, and charges for commercial power shall be upon rules adopted by the Secretary of the Interior applying equally to both valleys. Such power as in the judgment of the Secretary of the Interior is necessary for pumping and other operation and maintenance purposes shall be delivered to the Yuma project and to the Imperial Irrigation District at the cost of development thereof, plus 10 per cent, said cost to include interest at 5 per cent per annum on the capital invested in power plants, transmission lines, and power plant accessories, and also a proportional part of the headworks and canal enlargement from Laguna Dam to Pilot Knob, determined by the relation 2,000 second-feet bears to the total enlarged canal capacity and reasonable depreciation as may be determined by the Secretary of the Interior. The preference right to purchase power developed at the price herein specified shall be given over other uses of power, to the requirements of the Yuma

project (limited to an area not exceeding 120,000 acres) for power to be used in pumping irrigation water. The profits from power sales or power leases shall be divided between the Yuma project and the Imperial Irrigation District in the proportion of their respective investments in power plants, transmission lines, and power plant accessories, and in the canal and headworks alterations, canal enlargement, and canal extension from the Laguna Dam to and including the power house site near Pilot Knob, to be determined by the Secretary. In case capacity be also provided by enlargement for the irrigation of lands in the United States outside of the Imperial Irrigation District, then the cost of enlargement computed as above as chargeable to the Imperial Irrigation District shall be borne by such District and such other lands in the ratio of their respective irrigable acreages. The cost of any works used jointly by several irrigation enterprises below the point near Pilot Knob where power is developed shall be apportioned equitably by the Secretary of the Interior. No water shall be diverted for power purposes from such main canal below Siphon Drop at any time when such water shall be required for irrigation of lands being irrigated therefrom in Imperial County.

13. It is understood and agreed that the connection with Laguna Dam herein provided for is to be constructed as a part of an all-American canal, which the District hereby agrees to build at as early a date as possible and within reasonable time; and when the District shall have completed said all-American canal, it shall have the right to drop water at some other point than the vicinity of Pilot Knob for power development, and in this event agrees to place at the disposal of the United States at Pilot Knob, or some other point to be agreed upon, such

power in addition to that generated at Pilot Knob as in the judgment of the Secretary of the Interior is necessary for pumping and other irrigation operation and maintenance purposes of the Yuma project or any auxiliary thereof, not in excess of 8500 water horse power in the aggregate, at the cost of development thereof at the power house, plus 10 per cent, said cost to include interest at 5 per cent and reasonable depreciation as determined by the Secretary of the Interior. All power development, operation and maintenance of power plants on the all-American canal, and sales of power, shall be under the control of the Secretary of the Interior, and charges for commercial power shall be upon rules adopted by the Secretary of the Interior, applying equally to both Imperial and Yuma Valleys. The profits from commercial power shall be divided between the Imperial Irrigation District and the Yuma project in ratio of their respective investments in power, including the enlargements, alterations, and extensions of the headworks and main canal down to and including the power house site near Pilot Knob, plus investments in the power plants, power house, transmission lines, and other accessories. In dividing profits, the District shall be credited with the net revenue from the amount of power by which the total power output is increased by the all-American canal west of Pilot Knob, which shall be determined by the Secretary of the Interior. Power delivered to Imperial Irrigation District for pumping and other irrigation operation and maintenance purposes shall be delivered on the same terms as power delivered to the Yuma project for said purposes.

14. It is understood and agreed that the Secretary of the Interior shall control the division of water and shall divert for use of the Yuma project or any auxiliary

thereof as heretofore or hereafter undertaken by the United States within the present boundaries of the United States and not exceeding 120,000 acres, sufficient water to secure the permanent and economical reclamation thereof, not exceeding, however, one-quarter of the water in the river above Laguna Dam. The foregoing applies only to the natural flow of the Colorado River, and not to storage water, which shall be delivered to the party entitled thereto.

The United States makes no guaranty or representation as to the quantity of water that may be available without storage for delivery to the District under this contract, and shall not be responsible for failure to deliver water under this contract caused by insufficient supply of water in the Colorado River, hostile diversion or drought, interruption made necessary by repairs, nor on account of any valid order or decree of a competent court; nor for any damages by floods, acts of hostility, or unavoidable circumstances, nor for loss of crops or other damage caused by non-delivery of water.

15. It is understood and agreed that the District shall have the right at any time to extend its boundaries within the United States and water additional lands upon payment of same amount per acre as irrigable lands in present Imperial Irrigation District are to pay under terms of this contract. This right to be also available on same conditions to Yuma project, additional to one hundred twenty thousand acres herein mentioned. All proceeds from payments on account of initial connection charges

assessed to and collected from such new lands shall be used under the direction of the Secretary of the Interior for the construction of storage works for the benefit of the lands contributing.

16. This contract shall not become effective until the same shall have been duly ratified and confirmed in accordance with law, by a vote of the people of the Imperial Irrigation District, and unless it shall be so ratified within six months from the date of execution hereof by the Secretary of the Interior, it shall become void and of no further effect.

17. In case of failure on the part of the District to provide for beginning the work of enlargement of the Yuma main canal within two years from the date hereof, the Secretary of the Interior shall have the right to abrogate this contract.

18. No Member of, or Delegate to Congress, or Resident Commissioner after his election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909 (35 Stat., L. 1109).

In Witness Whereof, the parties hereto have caused the execution of these presents as of the day and year first above written.

THE UNITED STATES OF AMERICA
By FRANKLIN K. LANE
Secretary of the Interior.

IMPERIAL IRRIGATION DISTRICT
By LEROY HOLT
President.

[Seal]
Attest
J. H. M. IVER
Secretary.

APPENDIX NO. 13

WATER DELIVERY AND REPAYMENT CONTRACT UNITED STATES & IMPERIAL IRRIGATION DISTRICT

Dec. 1, 1932

Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water

Article 1. **This Contract,** made this 1st day of Dec. nineteen hundred thirty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat., 1057), designated the **Boulder Canyon Project Act,** between **The United States of America,** hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and **Imperial Irrigation District,** an irrigation district created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at El Centro, Imperial County, California, hereinafter referred to as the District;

Witnesseth:

Explanatory Recitals

Article 2. **Whereas,** for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the

Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty-million acre-feet of water, and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary is also authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable as provided in the reclamation law; and

Article 3. **Whereas,** after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

Article 4. **Whereas,** there are included within the boundaries of the District areas of private and public lands, and additional private and public lands will by appropriate proceedings be included within the District, and the District is desirous of entering into a contract for the construction of a suitable diversion dam and main canal and appurtenant structures, hereinafter respectively styled Imperial Dam and All-American Canal, located entirely within the United States connecting with the Imperial and Coachella Valleys, and for the delivery to the District of stored water from Boulder Canyon Reservoir; and

Article 5. **Whereas,** the Secretary has determined, upon engineering and economic considerations, that it is advisable to provide for the construction of such diversion dam and main canal and appurtenant structures, and has determined that the revenues provided for by this contract are adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of the said diversion dam, main canal and appurtenant structures in the manner provided in the reclamation law;

Article 6. **Now, Therefore,** in consideration of the mutual convenants herein contained, the parties hereto agree as follows, to wit:

Construction by United States

Article 7. The United States will construct the Imperial Dam in the main stream of the Colorado River at the approximate location indicated on the map marked Exhibit "A" attached hereto and by this reference made a part hereof, and will also construct the All-American Canal and appurtenant structures to the Imperial and Coachella Valleys, the approximate location of said canal to be as shown on the aforesaid Exhibit "A". Said canal shall be constructed to a designed capacity of fifteen thousand (15,000) cubic feet of water per second from and including the diversion and desilting works at said dam to Syphon Drop; thirteen thousand (13,000) cubic feet of water per second from Syphon Drop to Pilot Knob, and ten thousand (10,000) cubic feet of water per second westerly from Pilot Knob to Engineer Station nineteen hundred and seven as said Engineer Station is indicated on said Exhibit "A". Other portions of said canal shall be constructed with such capacities as the Secretary may conclusively determine to be necessary or

advisable upon engineering or economic considerations to accomplish the ends contemplated by this contract; provided, however, that changes in capacities, locations, lengths and alignments, may be made during the progress of the work as may, in the opinion of the Secretary, whose opinion shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable, except the capacities above indicated from and including the diversion and desilting works at Imperial Dam to Engineer Station nineteen hundred and seven as hereinabove in this article referred to, which capacities may be changed only by mutual agreement between the Secretary and the District. The ultimate cost to the District of the aforesaid works shall in no event exceed the aggregate sum of thirty-eight million, five hundred thousand dollars ($38,500,000). Such cost shall include all expenses of whatsoever kind heretofore or hereafter incurred by the United States from the Reclamation Fund or the Colorado River Dam Fund in connection with, growing out of, or resulting from the consruction of said diversion dam, main canal and appurtenant structures, including but not limited to the cost of labor, materials, equipment, engineering, legal work, superintendence, administration, overhead, any and all costs arising from operation and maintenance of said dam, main canal and appurtenant structures prior to the time that said costs are assumed by the District, damage of all kinds and character and rights-of-way as hereinafter provided. The District hereby agrees to repay to the United States expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the diversion dam and main canal, the incurrence of which increases expenditures by the United States beyond said sum of $38,500,000. The United States will invoke all legal

and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it, without cost to the District, except that the United States reserves the right where rights-of-way are thus acquired to reimburse the owners of such lands for the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursements in the cost of the work to be performed hereunder. If rights-of-way are required over an existing project of the Bureau of Reclamation, such sum or sums as may be necessary to reimburse the United States on account of the construction charges allocated to irrigable areas absorbed in such rights-of-way shall also be considered as a part of and be included with other costs of the work to be performed hereunder. The District agrees to convey to the United States without cost, unencumbered fee simple title to any and all lands now owned by it, which, in the opinion of the Secretary may be required for right-of-way purposes for the aforesaid diversion dam, main canal and appurtenant structures. Where rights-of-way within the State of California are required for the construction of works herein provided for, and such rights-of-way are not reserved to the United States under acts of Congress, or otherwise, or the lands over which such rights-of-way are required are not then owned by the District, the District agrees that it will, upon request of the Secretary, acquire title to such lands, and in turn convey unencumbered fee simple title thereto to the United States at the actual cost thereof to the District, subject to the approval of such cost by the Secretary.

Assumption of Operation and Maintenance by District

Article 8. Upon sixty (60) days written notice from the Secretary of the completion of construction of the

aforesaid diversion dam, main canal and appurtenant structures, or of any major unit thereof, useful to the District, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto, the District shall assume the care, operation and maintenance of said diversion dam, main canal and appurtenant structures or major units thereof, including Laguna Dam, and thereafter the District shall at its own cost and without expense to the United States care for, operate and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the diversion, transportation and distribution of water as when received from the United States, reasonable wear and damage by the elements excepted. Operation and maintenance of Imperial Dam by the District is a part of the obligation undertaken under this contract by the District for the transportation and delivery of water to public and Indian lands of the United States, and shall not interfere with the control of such dam by the United States. The United States may, from time to time, in the discretion of the Secretary, resume operation and maintenance of said dam upon not less than 60-days' written notice and require reassumption thereof by the District on like notice. During such times, after completion, as the dam is operated and maintained by the United States, the District shall on March 1 of each year advance to the United States the estimated cost of operation and maintenance for the following twelve months, upon estimates furnished therefor on or before September 1st next preceding. After the care, operation and maintenance of the aforesaid works have been assumed by the District, the District shall save the United States, its officers, agents and employees harmless as to any and all injury and damage to persons and property which may

arise out of the care, operation and maintenance thereof. In the event the United States fails to complete the works herein contemplated and the District fails to elect to make use of the works theretofore partially or wholly constructed, the District shall be fully relieved of any and all responsibility for any further operation and maintenance of the works theretofore taken over by the District for that purpose and thereupon the District shall no longer be responsible for said maintenance or operation or damage to person or property which may arise therefrom.

Keeping Diversion Dam, Main Canal and Appurtenant Structures in Repair

Article 9. Except in case of emergency no substantial change in any of the works to be constructed by the United States and transferred to the District under the provisions hereof shall be made by the District without first having had and obtained the written consent of the Secretary and the Secretary's opinion as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to and replacements of all works constructed hereunder or transferred to it under the terms and conditions hereof, which, in the opinion of the Secretary, are deemed necessary for the proper operation and maintenance of such works. In case of neglect or failure of the District to make such repairs, the United States may, at its option, after reasonable notice to the District, cause such repairs to be made and charge the actual cost thereof, plus fifteen per centum (15%) to cover overhead and general expense, to the District. On or before September first of each calendar year the United States shall give written

notice to the District of the amount expended by the United States for repairs under this article during the twelve-month period immediately preceding. Such cost, plus overhead and general expense as stated above, shall be repaid by the District on March first immediately succeeding.

Agreement by District to Pay for Works Constructed by the United States

Article 10. (a) The District agrees to pay the United States the actual cost, not exceeding thirty-eight million five hundred thousand dollars ($38,500,000), incurred by the United States on account of the aforesaid works, subject, however, to the provisions of Article seven (7) hereof; provided, that should Congress fail to make necessary appropriations to complete the work herein provided for, then the Secretary may, at such reasonable time as he may consider advisable, after Congress shall have failed for five consecutive years to make the necessary appropriations which shall have been annually requested by the Secretary, give the District notice of the termination of work by the United States and furnish a statement of the amount actually expended by the United States thereon. Upon the receipt of such notice by the District the District shall be given two years from and after such receipt of notice to elect whether it will utilize said works theretofore constructed, or some particular part thereof. Such election on the part of the District shall be expressed by resolution of the Board of Directors submitted to the electorate of the District for approval or rejection in the manner provided by law for submission of contracts with the United States. If the District elects not to utilize, or fails within said two-year period to elect to utilize said works or some portion thereof, then the District shall

have no further rights therein and no obligations therefor. If the District elects to utilize said works or a portion thereof, then the reasonable value to the District of the works so utilized not exceeding the actual cost thereof to the United States shall be paid by the District under the terms of this contract; the first payment to be due and payable on the first day of March following the first day of September next succeeding the final determination of the reasonable value to the District of such works, in case no further work is done by the District. Should the District elect to complete the work contemplated by this contract, or some portion thereof, the first payment shall be due and payable on the first day of March following the first day of September next succeeding the date of final completion of the work by the District as determined by the Secretary. In determining the value of such works to the District there shall be taken into account, among other things, the method of financing required and cost of money, so that in no event shall all of the works contemplated by this contract cost the District more than they would have cost the District had they all been constructed by the United States under the terms of this contract. In the event of failure of the parties to agree as to the reasonable value to the District of the works which the District elects to use, the same shall be determined as provided in Article twenty-seven (27) hereof.

(b) The District as a whole is obligated to pay to the United States the full amount herein agreed upon regardless of the default or failure of any tract in the District, or of any landowner in the District, in the payment of the assessments levied by the District against such tract or landowner, and the District shall, when necessary, levy

and collect appropriate assessments to make up for the default or delinquency of any tract of land or of any landowner in the payment of assessments, so that in any event, and regardless of any defaults or delinquencies in the payment of any assessment or assessments, the amounts due or to become due the United States shall be paid to the United States by the District when due.

(c) The District shall be divided into units by the Board of Directors of the District. Said units shall be named, commencing with Imperial Unit, which unit shall comprise the lands of the District as of July 1, 1931. Each of the other units shall be as determined by the Board of Directors of the District and shall be described by legal description of the lands embraced therein or by designation of exterior boundaries or otherwise suitable for identification. Additional lands may be added to any unit herein or hereafter designated.

(d) The lands within each unit as hereinabove provided for will be benefited by the works to be constructed under this contract in the proportion that the area within such unit bears to the total area of the District and the costs of the said works, construction and otherwise, shall be apportioned to and paid by the lands within each unit in that proportion. In levying assessments or other charges to meet the cost of the said works, the Board of Directors of the District shall take into consideration payments to be made under this contract, with proper allowance for existing and anticipated delinquencies and redemptions, in order to provide sufficient funds to meet such payments as same become due and said board shall also take into account all sums expended or to be expended under the contract of October 23, 1918, for the right to connect with the Laguna Dam, the cost of all sur-

veys and investigations and other expenditures properly chargeable as a part of the cost of the said works but which are not included as a part of the construction cost thereof reimbursable to the United States under this contract. While the cost of the said works and other expenditures above mentioned shall be apportioned to the various units according to their respective areas, it is understood that the assessments or other charges to be imposed upon the lands within each respective unit shall be on an ad valorem or other basis as now or may hereafter be provided by law for assessment or imposition of other charges upon lands within irrigation districts. Rates of assessment or schedule in the various units from year to year or from time to time may be different or unequal as between the various units. If the amount collected from the lands in any unit in any year shall be less than the amount apportioned to such unit for that year for such purpose, the deficit shall nevertheless be charged to that unit and any fund or funds of the District from which money may be taken to make up such deficit in order to provide for the payment in full of the obligations of the District, shall be entitled to reimbursement for such money from subsequent collections of unpaid assessments or charges in said unit or from the amounts received for the redemption of lands sold for delinquent assessments or charges or from subsequent or additional levies made on the lands within that unit to provide for such reimbursement.

(e) In the event lands now or hereafter within Coachella Valley County Water District, a county water district organized and existing under the laws of the State of California, are included within Imperial Irrigation District, the said Coachella Valley County Water

District shall have the privilege, at its option, if, as and when authorized to do so by law, to pay to Imperial Irrigation District the total amount of any annual and/or special assessments levied by the last named District upon said lands or any installment of such assessments or any of the several individual assessments or installments thereof, in any case as the same become due and payable. The regular and lawful proceedings, rights and remedies of the last named District shall be in no manner impaired or affected by the provisions of this subarticle. The agreement in this subarticle contained is made expressly for the benefit of said Coachella Valley County Water District.

(f) If for any reason only a part of the works herein contemplated is constructed either by the United States or by the District, then the Board of Directors of the District shall, after public hearing, determine whether or not all of the lands in the District are benefited by the works constructed. If the Board shall find and declare that any certain lands within the District are not benefited by such construction, then no assessments shall thereafter be levied upon such lands for the purpose of meeting the obligations under this contract; and, for the purpose of this subarticle, no land shall be regarded as benefited by the construction of such works until the works contemplated by this contract as indicated on said Exhibit "A" from which water would reasonably be obtained for such lands shall have been constructed.

(g) The District shall have the right to refuse water service to any lands within the District which may at any time be delinquent in the payment of any assessment levied for the purpose of carrying out the provisions of this contract.

Changes in District Boundaries

Article 11. After the date of this contract no change shall be made in the boundaries of the District and the Board of Directors shall make no order changing the boundaries of the District, unless and until the Secretary shall assent to such change in writing, and such assent shall have been filed with the Board of Directors of the District; provided, however, that such assent is hereby given for the inclusion of all of the lands indicated on Exhibit "A" referred to in Article 34 hereof.

Terms of Payment

Article 12. The amount herein agreed to be paid to the United States shall be due and payable in not more than forty (40) annual installments commencing with the calendar year next succeeding the year when notice of completion of all work provided for herein is given to the District or under the provisions of Article 10 (a) hereof upon termination of work through failure of Congress to make necessary appropriations therefor. The first five of such annual installments shall each be one per centum (1%) of the amount herein agreed to be paid to the United States; the next ten of such installments shall each be two per centum (2%) of the amount herein agreed to be paid to the United States, and the remainder of such annual installments shall each be three per centum (3%) of the amount herein agreed to be paid to the United States. The sums payable annually as set forth above shall be divided into two equal semi-annual payments, payable on March first and September first of each year; provided, however, that if notice of the completion of work is given to the District subsequent to September first of any year the first semi-annual installment of charges hereunder shall be due and payable on March first of the second succeeding year.

Operation and Maintenance Costs

Article 13. Each agency other than the District for which capacity is provided in the works to be constructed hereunder shall bear such proportionate part of the cost of operation and maintenance (including repairs and replacements) of the component parts thereof and of the Laguna Dam as may be determined by the Secretary to be equitable and just, but not less than an amount in proportion to the total amount as are the relative capacities provided in each component part for such agency and for all other agencies, including the District. Each agency shall advance to the District, on or before January first of each year, its proportionate share of the estimated cost for that year of operation and maintenance in accordance with a notice to be issued by the District, provided that payment shall in no event be due until thirty days after receipt of notice. Prior to March 1st of each year the District shall provide each agency with a statement showing in detail the costs for the previous year for operation and maintenance of the works on account of which such agency has made advances. Differences between actual costs and estimated costs shall be adjusted in next succeeding notices. Upon request of any agency both the advance notice of estimated costs and the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided, and the cost of such review shall be borne equally by the requesting agency and the District. The District may, at its option, withhold the delivery of water from any agency until its proportionate share of the costs of operation and maintenance have been advanced or paid, as in this article provided.

Power Possibilities

Article 14. As one of the considerations for the partial termination of the contract of October 23, 1918, as provided for in Article sixteen (16) hereof, the power possibilities on the All-American Canal down to and including Syphon Drop with water carried for the benefit of the Yuma Project as provided for in Article fifteen (15) hereof, are hereby reserved to the United States. Subject to the foregoing provisions of this Article and the participation by other agencies as provided for in Article twenty-one (21) hereof, the District shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal. The net proceeds as hereinafter defined in Article thirty-two (32) hereof and as determined by the Secretary for each calendar year from any such power development shall be paid into the Colorado River Dam Fund on March first of the next succeeding calendar year and be credited to the District on this contract until the District shall have paid thereby and/or otherwise an amount of money equivalent to that herein agreed to be paid to the United States. Thereafter such net power proceeds shall belong to the District. It is agreed that in the event the net power proceeds in any calendar year, creditable to the District, shall exceed the annual installment of charges payable under this contract during the then current calendar year, the excess of such net power proceeds shall be credited on the next succeeding unpaid installment to become due from the District under this contract.

Diversion and Delivery of Water for Yuma Project

Article 15. As a further consideration for the partial termination of the contract of October 23, 1918, as pro-

vided in Article sixteen (16) hereof, the District hereby agrees to divert at the Imperial Dam, and to transport and deliver at Syphon Drop and/or such intermediate points as may be designated by the Secretary, the available water to which the Yuma Project (situated entirely within the United States and not exceeding in area 120,000 acres plus lands lying between the project levees and the Colorado River as such levees are located in 1931) is entitled, not exceeding two thousand (2,000) second-feet of water in the aggregate, or such part thereof as the Secretary may direct, for the use and benefit of said project, including the development of power at Syphon Drop, such water to be diverted, transported and delivered continuously in so far as reasonable diligence will permit provided, however, that water shall not be diverted, transported or delivered for the Yuma Project when the Secretary notifies the District that said project for any reason may not be entitled thereto; provided, further, that the District shall divert, transport and deliver such water in excess of requirements for irrigation or potable purposes, as determined by the Secretary, on the Yuma Project as so limited, only when such water is not required by the District for irrigation or potable purposes. The diversion, transportation and delivery of water for the Yuma Project as aforesaid shall be without expense to the United States or its successors in control of said project, as to capital investment required to provide facilities for such diversion and transportation of water, except such checks, turnouts and other structures required for delivery from said canal.

Contract of October 23, 1918

Article 16. That certain contract between the United States of America and the District, bearing date of

October 23, 1918, providing for a connection with Laguna Dam, is hereby terminated, except as to the provisions of Article nine (9) thereof, and as one of the considerations for the partial termination of said contract by the United States, the District hereby promises and agrees to make full payment to the United States of all unpaid installments of charges as provided in Article nine (9) of said agreement, anything in said contract to the contrary notwithstanding. As an additional consideration for the partial termination of said contract of October 23, 1918, the District hereby promises and agrees to furnish to the United States or its successors in interest in the control, operation and maintenance of the Yuma Project, from any power development on the All-American Canal at or near Pilot Knob, up to but not to exceed four thousand horsepower of electrical energy for use by the agency in charge of project operations for irrigation and drainage pumping purposes and necessary incidental use on said Yuma Project, such power to be furnished at cost (including overhead and general expense) plus ten per cent; provided, however, that the District shall not be required to furnish such power at or near Pilot Knob except at such times as all power feasible of development at Syphon Drop or developed elsewhere within a radius of 40 miles from the city of Yuma for the benefit of the Yuma Project is being used for project operations as in this article specified.

Delivery of Water by United States

Article 17. The United States shall, from storage available in the reservoir created by Hoover Dam, deliver to the District each year at a point in the Colorado River immediately above Imperial Dam, so much water as may be necessary to supply the District a total quantity, in-

cluding all other waters diverted for use within the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows: (Subject to availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

Section 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial

consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

Section 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

Section 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per

annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Section 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accu-

mulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

Section 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement of determination; *Provided,* that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the boundaries of the District in the Imperial and Coachella Valleys in California. This contract is for permanent water services but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used; First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by said Colorado River Compact in the construction, management and operation of Hoover Dam, Imperial Dam, All-American Canal and other works and the storage, diversion, delivery and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, iinspection, maintenance, repairs, replacements or installation of equipment and/or machinery at Hoover

Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River. Nothing in this contract shall be construed to prevent the District from diverting water to the full capacity of the All-American Canal if and when water over and above the quantity apportioned to it hereunder is available, and no power development at Imperial and/or Laguna Dam shall be permitted to interfere with such diversion by the District, but, except as provided in Article twenty-one (21), water shall not be diverted, transported or carried by or through the works to be constructed hereunder for any agency other than the District, except by written consent of the Secretary.

Measurement of Water

Article 18. The water which the District receives under the apportionment as provided in Article seventeen (17) hereof shall be measured at such point or points on the canal as may be designated by the Secretary. Measuring and controlling devices shall be furnished and installed by the United States as a part of the work provided for herein, but shall be operated and maintained by and at the expense of the District. They shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

Record of Water Diverted

Article 19. The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

Refusal of Water in Case of Default

Article 20. The United States reserves the right to refuse to deliver water to the District in the event of default for a period of more than twelve (12) months in any payment due the United States under this contract, or, in the discretion of the Secretary to reduce deliveries in such proportion as the amount in default by the District bears to the total amount due. It is understood, however, that the provisions of this article shall not relieve the District of its obligation to divert, transport and deliver water for the use and benefit of the Yuma Project as herein elsewhere provided, nor shall it relieve the District of its obligation hereunder to divert, transport and deliver water for the use and benefit of other agencies with whom the United States may contract for the diversion, transportation and delivery of water through or by the works to be constructed under the terms hereof. The United States further reserves the right to forthwith assume control of all or any part of the works to be constructed hereunder and to care for, operate and maintain the same, so long as the Secretary deems necessary or advisable, if, in his opinion, which shall be final and binding upon the parties hereto, the District does not carry out the terms and conditions of this contract to their full

extent and meaning. In such event, the District's pro rata share of the actual cost of such care, operation and maintenance by the United States shall be repaid to the United States, plus fifteen per centum (15%) to cover overhead and general expense, on March first of each year immediately succeeding the calendar year during which the works to be constructed hereunder are operated and maintained by the United States. Nothing herein contained shall relieve the District of the obligation to pay in any event all installments and penalties provided in this contract.

Use of Works by the United States and Others

Article 21. The United States also reserves the right to, and the District agrees that it may, at any time prior to the transfer of constructed works to the District for operation and maintenance, increase the capacity of the said works and contract for such increased capacity with other agencies for the delivery of water for use in the United States; provided, however, that such other agencies shall not thereby be entitled to participate in power development on said All-American Canal, except at points where and to the extent that the water diverted and/or carried for them contributes to the development of power. In the event other agencies thus contract with the United States, each of such agencies shall assume such proportion of the total cost of said works to be used jointly by such agency and the District, including Laguna Dam, as the Secretary may determine to be equitable and just but not less than the proportion that the capacity provided for such agency in such works bears to the total capacity thereof (except in that part thereof above Syphon Drop including Laguna Dam, in which part the proportion which such other agency shall assume shall be not less than the

proportion that the capacity provided for such agency therein bears to the total capacity thereof less the capacity to be provided hereunder without cost to and for the Yuma Project) and the District's financial obligations under this contract shall be adjusted accordingly. In no event shall construction costs chargeable to the District be increased by reason of additional capacity being provided for any such agency or agencies or contract or contracts having been made with same. Any such agency thus contracting shall also be required to reimburse the District in such amounts and at such times as the Secretary may determine to be equitable and just for payments theretofore made by the District for the right to use Laguna Dam.

Title to Remain in the United States

Article 22. Title to the aforesaid Imperial Dam and All-American Canal to be constructed by the United States under the terms and conditions hereof, shall be and remain in the United States notwithstanding transfer of the care, operation and maintenance thereof to the District; provided, however, that the Secretary may, in his discretion, when repayments to the United States of all moneys advanced shall have been made, transfer the title to said main canal and appurtenant structures, except the diversion dam and the main canal and appurtenant structures down to and including Syphon Drop, to the District or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form or organization as may be acceptable to him.

Assessment of Public Land

Article 23. The following lands are hereby designated as subject to the provisions of the act of August 11, 1916

(39 Stat., 506), and the act of May 15, 1922 (42 Stat., 541):

(a) All unentered public lands and entered lands for which no final certificate has been issued, situate within the District at the date hereof; and when included within the District, unentered public lands and entered lands for which no final certificate has been issued, hereafter to be included within the District pursuant to this contract, all described in a statement marked Exhibit "B" attached hereto and by reference thereto made a part hereof; and

(b) unentered public lands and entered lands for which no final certificate has been issued not so described but hereafter annexed to the District, upon the Secretary's consenting, in the case of such lands hereafter annexed to the District, to assessment hereunder of such added lands, which consent will be requested by resolution of the Board of Directors of the District and will be manifested by letter filed with the District, a copy of such letter to be filed also with the General Land Office, and a copy with the proper local Land Office.

Within a reasonable time, to be determined by the Secretary, from the date water is available for and can be delivered to any public lands within the boundaries of the District, such lands shall be opened to entry.

Rules and Regulations

Article 24. There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after

notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of the Imperial Dam and All-American Canal, all such rules and regulations will be fully adhered to.

Inspection by the United States

Article 25. The Secretary may cause to be made from time to time a reasonable inspection of the works constructed by the United States under the terms hereof to the end that he may ascertain whether the terms of this contract are being satisfactorily executed by the District. The actual expense of such inspection in any calendar year, as found by the Secretary, shall be paid by the District to the United States on March first of each year immediately following the year in which such inspection is made, and upon statement to be furnished by the Secretary. The Secretary or his representative shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other purposes.

Access to Books and Records

Article 26. The officials or designated representatives of the District shall have full and free access to the books and records of the United States, so far as they relate to the matters covered by this contract, with the right at any time during office hours to make copies of and from the same; and the Secretary shall have the same right in respect of the books and records of the District.

Disputes or Disagreements

Article 27. Disputes or disagreements as to the interpretation or performance of the provisions of this contract, except as otherwise provided herein, shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Interest and Penalties

Article 28. No interest shall be charged on any installments of charges due from the District hereunder except that on all such installments or any part thereof, which may remain unpaid by the District to the United States after the same become due, there shall be added to the amount unpaid a penalty of one-half of one per centum (½%) and a like penalty of one-half of one per centum (½%) of the amount unpaid shall be added on the first day of each month thereafter so long as such default shall continue.

Agreement Subject to Colorado River Compact

Article 29. This contract is made upon the express condition and with the express understanding that all

rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved by the Boulder Canyon Project Act.

Application of Reclamation Law

Article 30. Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation and maintenance of the works to be constructed hereunder.

Contract to Be Authorized by Election and Confirmed by Court

Article 31. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. The District shall without delay and at its own cost and expense furnish the United States for its files, copies of all proceedings relating to the election upon this contract and the confirmation

proceedings in connection therewith, which said copies shall be properly certified by the Clerk of the Court in which confirmatory judgment is obtained.

Method of Determining Net Power Proceeds

Article 32. In determining the net proceeds for each calendar year from any power development on the All-American Canal, to be paid into the Colorado River Dam Fund as provided in Article fourteen (14) hereof, there shall be taken into consideration all items of cost of production of power, including but not necessarily limited to amortization of and interest on capital investment in power development, replacements, improvements, and operation and maintenance, if any. Any other proper factor of cost not here expressly enumerated may be taken into account in determining the net proceeds.

Contingent Upon Appropriations

Article 33. This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. If more than three years elapse after this contract becomes effective and before appropriations are available to permit the United States to make expenditures hereunder, the District may, at its option, upon giving sixty (60) days written notice to the Secretary, cancel this contract. Such

option shall be expressed by vote of the electors of the District with the same formalities as required for the authorization of contracts with the United States.

Inclusion of Lands

Article 34. (a) In this article where the words "area to be included" are used such words shall be understood to mean those certain areas shown on Exhibit "A" and bounded by the lines indicated thereon as "Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District."

(b) The District agrees to change its boundaries within a reasonable time after the execution of this contract, in the manner provided by law, so as to include within the District the public lands of the United States in Imperial County lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included.

(c) The District further agrees to change its boundaries, if lawful petition or petitions therefor be presented to its Board of Directors prior to the first day of January, 1940, so as to include within the District any privately owned and/or entered lands for which final certificate has not been issued, in Imperal County, lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included.

(d) The District further agrees to change its boundaries, in the manner provided by law, so as to include within

the District the lands lying north of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included, if lawful petition or petitions sufficient in all respects for such inclusion be presented to its Board of Directors at any time prior to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final; provided, however, that the District shall not change its boundaries so as to include any of said lands lying north of the northerly boundary line of said Township eleven (11) South, unless the said petition or petitions so filed shall be sufficient to lawfully include in the aggregate not less than ninety (90%) per centum (the areas to be approved by the Secretary) of the said lands, exclusive of the Dos Palmas area and exclusive of Indian lands and public lands of the United States. Within a reasonable time after the inclusion of such lands pursuant to said petition or petitions the District further agrees to change its boundaries, in the manner provided by law, so as to also include within the District the public lands of the United States within the area to be included and lying north of the northerly boundary line of said Township eleven (11) South.

(e) Whenever any of the lands within the area to be included are included within the District the inclusion thereof shall be made upon conditions substantially as hereinafter contained (filling blank spaces with appro-

priate unit names as may be required and other proper designations), and the Secretary, on behalf of the United States, hereby consents to such inclusion and conditions, which conditions are as follows:

CONDITION No. 1

Definitions

In the following conditions, the word "District" shall mean Imperial Irrigation District; the word "Board" shall mean the Board of Directors of Imperial Irrigation District; the words "All-American Canal Contract" shall mean that certain contract between the United States of America by Ray Lyman Wilbur, Secretary of the Interior, and Imperial Irrigation District, dated....., and
(date of this contract)
entitled "Contract for construction of diversion dam, main canal and appurtenant structures and for Delivery of Water," authorized by the electors of Imperial Irrigation District at an election held.....
.....; and the words "distribu-
(date of this contract authorized)
tion system" shall mean the secondary main canal and lateral system or systems, including all canals, pipe lines, structures, pumping plants, machinery and incidental works necessary or convenient under the rules and regulations of Imperial Irrigation District for delivery of water for irrigation and domestic purposes from the All-American Canal, as the same is shown on Exhibit "A" attached to and made a part of said All-American Canal Contract, to lands in .....Unit as such unit is
(name)
hereinafter defined.

Condition No. 2

Division Into Units

For the purposes of these conditions and in compliance with the terms of the All-American Canal Contract, the District shall be divided into units, commencing with Imperial Unit, which unit shall comprise the lands within the District as of July 1, 1931, and such other lands as may at any time or from time to time be added thereto in the discretion of the Board..... Unit shall
(name)
comprise .....
.....
.....
(here shall follow description or other designation of the unit involved as provided by Article 10 (c) of the All-American Canal Contract).

Condition No. 3

All-American Canal Contract

The lands within.....
(name)
Unit shall be, in all respects, bound by all of the terms and conditions of the All-American Canal Contract and particularly by Article 10 thereof, and shall pay, as a unit obligation, the several amounts and in the manner and at the times provided for in said contract, as the Board my determine; provided, that said lands in .....
(name)
.....Unit shall pay to the District, as a unit obligation, that porportion of the total sum paid by the District to the United States under that certain contract of October 23, 1918, between

the United States and the District for the right to connect with Laguna Dam, prior to the payment of the first installment on said contract of October 23, 1918, for which said land shall be assessed, that the total area of.....Unit
(name)
bears to the total area of the District at the date notice of completion of all work provided for in the All-American Canal Contract shall be given, pursuant to Article 12 thereof, to the District. Said sum shall be divided into ten annual installments, as nearly equal as may be practicable, and paid, commencing with the calendar year next succeeding the calendar year when such notice of completion shall be so given.

CONDITION No. 4

Distribution System

The lands within.....Unit
(name)
shall pay, as a unit obligation, the total capital cost of any distribution system which may be constructed by or under authority of the District, to serve the lands within said.....Unit or any
(name)
part thereof. When said distribution system, or any part thereof, is constructed, or an obligation therefor is incurred, said lands shall pay annually, such sum or sums as may be necessary to meet the then current obligation therefor, whether for principal or interest or both, or otherwise. Said distribution system shall at all times be and remain the exclusive property of the District unless the District shall provide otherwise, in the discretion of the Board. When funds for the construction of said distribution system

are made available, the District shall construct or authorize the same to be constructed, as the Board may determine.

Condition No. 5

Pumping Costs

The Board shall provide by rule for the payment by the lands served of the cost of power required to pump water to or for the use of such lands.

Condition No. 6

Charges to be Part of Assessment

Any and all charges against or upon the lands within.....Unit provided
(name)
for by the foregoing conditions unless otherwise collected from the lands within.....
(name)
Unit shall be a part of, but in addition to, the annual assessment upon the said lands for other District purposes and payable in installments accordingly, and shall constitute an additional annual charge upon the land, and the Board shall levy such assessment upon the said lands upon an ad valorem or other basis as now or hereafter provided by law, in an amount or in amounts sufficient to raise the several sums provided for from the said lands within .....Unit; provided, that
(name)
for the protection of the interests and security of the United States, pending completion of construction of the All-American Canal to such extent that water is available in said canal for use in.....

.....Unit, the annual assessment
(name)
upon the lands within said unit for District purposes shall be limited to raise only the just proportion chargeable to said unit for expenditures connected with or applying to the All-American Canal and/or arising from expenditures made in or on behalf of said unit.

(f) In the event petition or petitions for inclusion, pursuant to this article, of any privately-owned lands or entered lands for which no final certificate has at the time been issued, lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included, be presented subsequent to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final, then the District may in the discretion of the Board of Directors require as a condition precedent to the granting of said petition or petitions and in addition to the other conditions above named, that the petitioners shall pay to the District such respective sums as nearly as the same can be estimated (the amounts to be determined by the Board) as the holders of title or evidence of title to the several parcels of land involved in said petition or petitions and their grantors would have been required to pay to the District as assessments had such lands been included within the District at the expiration of said 30-day period, or such portion of said sum as the Board of Directors may at the time determine. The provisions of this sub-article shall also apply to all lands lying north of the northerly boundary line of said Town-

ship eleven (11) South, and within the area to be included, provided the ninety per centum (90%) petition required by sub-article (d) of this article is filed prior to the expiration of said 30-day period.

(g) In the event the petition or petitions for inclusion of the said lands lying north of the northerly boundary line of said Township eleven (11) South of the San Bernardino Base Line, as in sub-article (d) above provided are not made and filed with the Board of Directors of the District prior to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final, as hereinabove provided, then said lands shall not thereafter be included within the District under the provisions of this contract and the works referred to in this contract north of the northerly boundary line of said Township eleven (11) South of the San Bernardino Base Line shall not be constructed under this contract and the District shall be relieved from all responsibility therefor, anything in this contract to the contrary notwithstanding, and the capacities in the works to be constructed under this contract, shall be reduced accordingly.

(h) Nothing contained in this contract shall impair any right or remedy of any person entitled to object or protest against the inclusion within the District of any particular tract or tracts of land, or the conditions imposed by the Board of Directors of the District on the inclusion of any particular tract or tracts, nor impair the power of the Board to hear and determine any such objections or protests, but if in the opinion of the Secretary such determination by the Board substantially impairs the interests of, or security otherwise available to,

the United States, under this contract, then and in such event the United States shall be under no obligation to proceed further under this contract. In the event any petition or petitions be filed for the inclusion within the District of any lands within the area to be included and, after the conditions set out in sub-article (e) of this article, or conditions less burdensome, are imposed thereon, a sufficient majority statement or statements in writing be filed objecting to the inclusion of such lands with the conditions imposed thereon, so that the Board of Directors is required to dismiss such petition or petitions, then it shall be regarded as if such petition or petitions had not been filed.

Priority of Claims of the United States

Article 35. Claims of the United States arising out of this contract shall have priority over all others, secured and unsecured.

Rights Reserved under Section 3737 Revised Statutes

Article 36. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies under Contract not Exclusive

Article 37. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a

waiver of any other provision hereof or of a subsequent breach of such provision.

Interest in Contract not Transferable

Article 38. No interest in this contract is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

Member of Congress Clause

Article 39. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

Attest:

NORTHCUTT ELY
ELWOOD MEAD

Attest:

F. D. MCIVER
Secretary.

THE UNITED STATES OF AMERICA
By ROY LYMAN WILBUR
Secretary of the Interior.

IMPERIAL IRRIGATION DISTRICT
By JOHN L. DUBOIS
President.

[Seal]

NOTE

Attached to original as Exhibit "B" is a 15 page detailed description by reference to U. S. Government surveys of unentered public lands and entered public lands for which no final certificate had been issue, all referred to as lands to be included, as set forth in Article 34 and elsewhere of the foregoing contract. (Omitted due to lack of space.)

SALTON SEA

COACHELLA VALLEY

SANTA ROSA MOUNTAINS

SAN JACINTO MOUNTAINS

SUPERSTITION MOUNTAIN

FISH CREEK MOUNTAIN

R.6E. R.7E. R.8E. R.9E. R.10E. R.11E. R.12E. R.13E. R.14E. R.15E.

T.4S. T.5S. T.6S. T.7S. T.8S. T.9S. T.10S. T.11S. T.12S.

Mecca Thermal Oasis Valerie Dos Palmas Salt Bed Dos Palmas Area Durmid Bertram Pope Frink Wrisley Murdo Niland Point Sinai Salton Sea Beach Salton City Desert Beach Westmorland Calipatria Brawley Holtville Imperial Valley Farms Imperial Irrigation District Coachella Valley Stream Southern Pacific Railroad Main Canal Lateral Highway U.S. 99 Imperial County San Diego County Riverside County Chocolate Mountains Gypsum Mine Borrego Valley

N.

EXPLANATION

- Boundary of Present Imperial Irrigation District
- Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District
- Proposed Main (All American) Canal
- Proposed Laterals
- Main Highways
- Dirt Roads
- Transmission Lines

Exhibit "A"

CALIFORNIA

ARIZONA

SONORA

SAND HILLS

EAST MESA

IMPERIAL IRRIGATION DISTRICT

YUMA PROJECT

MAIN CANAL

ALL AMERICAN CANAL

CANAL TO COACHELLA VALLEY

BOUNDARY LINE

INTERNATIONAL

IMPERIAL CANAL

COLORADO RIVER

IMPERIAL DAM (PROPOSED)

LAGUNA DAM

PILOT KNOB MESA

CARGO MUCHACHO MTS.

YUMA

Mesquite

Gianis

Ruffner

Dolyn

Ogilby

Algodones

Andrade

Calexico

Holtville

El Centro

Imperial

Brawley

Heber

Niland

Westmorland

Calipatria

Mullyon

Sandia

Curlew

Gadsden

Pilot Knob

Picacho

Fortuna Wash

Gila Gravity Main Canal

Yuma Valley Main Canal

Yuma Mesa Canal

Colorado River Indian Reservation

Unnamed Wash

Picacho Wash

Gila Gravity Main Canal

Yuma Auxiliary Canal

Yuma Valley Main Canal

Colorado River Indian Reservation

Gila Gravity Main Canal

Yuma Auxiliary Canal

Yuma Valley Main Canal

Yuma Mesa

SALTON SEA

COACHELLA VALLEY

SANTA ROSA MOUNTAINS

SUPERSTITION MOUNTAIN

FISH CREEK MOUNTAIN

COYOTE MOUNTAIN

MESA

MAIN

EXPLANATION

- Boundary of Present Imperial Irrigation District
- Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District
- Proposed Main (All American) Canal
- Proposed Laterals
- Main Highways
- Dirt Roads
- Transmission Lines

C.S. GOSDORN.

DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ALL AMERICAN CANAL SYSTEM

IMPERIAL IRRIGATION DISTRICT

CALIFORNIA

JUNE 1931

SCALE OF MILES

DENVER, COLORADO JUNE 23, 1931 212-D-112

APPENDIX NO. 14

AGREEMENT OF COMPROMISE: IMPERIAL IRRIGATION DISTRICT AND COACHELLA VALLEY WATER DISTRICT

February 14, 1934

Sec. 1. This Agreement, Made the 14th day of February, 1934, by and between Imperial Irrigation District, an irrigation district organized and existing under and by virtue of the California Irrigation District Act of the State of California and acts amendatory thereof or supplementary thereto, with its principal office at El Centro, Imperial County, California, said District being hereinafter sometimes styled "Imperial District," and Coachella Valley County Water District, a County Water District organized and existing under and by virtue of the County Water District Act of the State of California and acts amendatory thereof or supplementary thereto, and having its office at Coachella, Riverside County, California, said District being hereinafter sometimes styled "Coachella District,"

Witnesseth:

RECITALS.

Sec. 2. That, Whereas, Pursuant to the terms of the Boulder Canyon Project Act, approved December 21, 1928 (45 Stat. 1057), the Secretary of the Interior is authorized to construct a main canal and appurtenant structures located entirely within the United States, connecting Laguna Dam or other suitable diversion dam, which said Secretary is authorized to contruct, with Imperial and Coachella Valleys in California; and

Sec. 3. Whereas, The Secretary of the Interior has determined upon engineering and economic considerations

to construct a new diversion dam on the Colorado River approximately four and one-half miles above Laguna Dam, which new diversion dam has heretofore been and is designated Imperial Dam; and

Sec. 4. Whereas, Pursuant to the Boulder Canyon Project Act, a contract, dated December 1, 1932, hereinafter styled "Imperial Contract," has heretofore been executed between the United States and Imperial District for the construction of said Imperial Dam, main canal and appurtenant structures, which said main canal and appurtenant structures are hereinafter styled "All-American Canal," and for the re-payment of the cost thereof as provided by law; and

Sec. 5. Whereas, By said Imperial Contract, certain lands in Coachella Valley, and within Coachella District and lands adjacent to said District may, by petition, be included within the boundaries of Imperial District, and if said lands are not so included, then the works and capacity to serve said lands shall not be constructed under said contract; and

Sec. 6. Whereas, Said Coachella District through its Board of Directors has determined that said lands will not become a part of Imperial District pursuant to said contract, and that Coachella District desires to obtain a contract, hereinafter styled "Coachella Contract," with the United States, separately from Imperial District, for capacity in said Imperial Dam and All-American Canal to be provided for the benefit of said Coachella District, in addition to the capacity therein provided for Imperial District, and to pay the proper cost of such capacity; and

Sec. 7. Whereas, Under date of August 18, 1931, an agreement was made between certain interested agencies

in California, including the parties to this agreement, for the apportionment of the Colorado River water available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act, a portion of which agreement is set out in Article 17 of said Imperial Contract as being a recommendation of the Chief of the Division of Water Resources of the State of California; and

Sec. 8. Whereas, Water for irrigation and domestic uses in the areas to be served under or from the All-American Canal in Imperial and Coachella Valleys will be supplied pursuant to the third and sixth priorities of said recommendation of the Chief of the Division of Water Resources of the State of California; and

Sec. 9. Whereas, Imperial District has certain prior rights to the use of the waters of the Colorado River, and the extent of said rights is in dispute as between the parties hereto, and each of said parties makes certain claims as to the use of said waters; and

Sec. 10. Whereas, The parties hereto, upon their respective contracts with the United States becoming effective and said All-American Canal being constructed, will respectively have certain power possibilities on the All-American Canal, which it is desired to have developed, operated and controlled as a unified project; and

Sec. 11. Whereas, Controversy has arisen and now exists between the parties hereto as to the extent and relation of their respective present and future rights to water and power on and from said All-American Canal, which controversy it is desired to have compromised and settled by this agreement;

Now, Therefore, In consideration of the premises and the mutual obligations and covenants of the parties hereto and as a compromise and settlement of their said respective rights, privileges and claims respecting the matters herein contained, it is agreed:

COACHELLA CONTRACT.

Sec. 12. Coachella District will forthwith apply to the proper governmental authorities for a contract between itself and the United States for the construction by the United States of the portion of the Imperial Dam and All-American Canal which will serve said District, and for the payment of its proper proportion of construction and other costs and for delivery of water; said contract to be in harmony with the provisions of the Imperial Contract and this agreement. The draft of said proposed Coachella Contract attached hereto and marked "Annex A" has been examined by Imperial District and the substance of said draft is approved by the parties hereto. Imperial District agrees that said draft, or such other draft as may be acceptable to the United States and in harmony with the provisions of the Imperial Contract and of this agreement, may be executed between the Coachella District and the United States. Imperial District will actively assist Coachella District in obtaining execution of such contract by the United States.

VALIDATION ACTION.

Sec. 13. That forthwith upon the execution of this agreement Coachella District will cause to be dismissed on behalf of itself and A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, with the stipulation that remittitur issue forthwith and that each

party pay his or its own costs, their appeal now pending in the Supreme Court of California, in that certain action entitled: "In the Matter of the Validation of a Contract Dated Dec. 1, 1932, Entitled 'Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures, and for Delivery of Water,' between the United States of America and Imperial Irrigation District. John L. Dubois, et al., Plaintiffs and Respondents, vs. All Persons, Defendants; Coachella Valley County Water District et al., Defendants and Appellants," being L. A. No. 14487, and this agreement shall not become effective for any purpose unless and until said appeal is so dismissed on behalf of all of said parties within ten (10) days from the execution hereof. Coachella District will actively assist in bringing said action to an early and final conclusion to the end that the present judgment be sustained.

GENERAL PROVISIONS.

Sec. 14. The provisions of this agreement hereinafter set forth shall be effective and binding upon the parties hereto only in the event that the Coachella Contract above mentioned is executed by and between the United States and said Coachella District prior to the transfer of constructed works to Imperial District for operation and maintenance, as provided by said Imperial Contract, and such Coachella Contract prior to such transfer or thereafter become binding upon the parties thereto, pursuant to law. After this agreement becomes effective, it together with the lease herein provided for, shall terminate in the event Coachella District shall be relieved of all obligations under the Coachella Contract, by reason of failure of the United States to complete the works to be constructed thereunder.

WATER.

Sec. 15. As a full and complete compromise and settlement of the controversy existing between the parties hereto as to the extent and priority of their respective rights and claims to the use of the waters of the Colorado River, it is agreed, as between said parties, that:

Imperial Irrigation District shall have the prior right for irrigation and potable purposes only, and exclusively for use in the Imperial Service Area, as hereinafter defined, or hereunder modified, to all waters apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys as provided in the third and sixth priorities set out in the recommendation of the Chief of the Division of Water Resources of the State of California, as contained in Article 17 of the Imperial Contract. Subject to said prior right of Imperial Irrigation District, Coachella Valley County Water District shall have the next right, for irrigation and potable purposes only and exclusively for use in the Coachella Service Area, as hereinafter defined, or hereunder modified, to all waters so apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in the Imperial and Coachella Valleys, as provided in said third and sixth priorities. The use of water for generation of electric energy shall be, in all respects, secondary and subservient to all requirements of said two districts for irrigation and potable purposes as above limited.

As hereinabove used, the term "Imperial Service Area" shall comprise all lands within the boundaries of Imperial

Irrigation District as said District was constituted on June 23, 1931 and all lands in Imperial and San Diego Counties, California, shown on map marked Exhibit "A", attached to said Imperial contract, and included within hatched border lines indicated on said map by legend as "Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District," other than (a) such of said lands as are labeled "Dos Palmas Area" and (b) such of said lands as lie West of Salton Sea and North of the Northerly boundary line of Township 11, South of the San Bernardino Base Line. The term "Coachella Service Area" shall comprise all lands described on statements hereto attached and marked "Exhibits" "B," "C," "D" and "E," respectively, being approximately, but not exactly, the lands within said hatched border lines shown on said Exhibit "A," other than those included in said Imperial Service Area. Upon application of either district and with the written consent of the Secretary of the Interior, the boundaries of the service area which such district is entitled hereunder to serve may at any time or from time to time be changed, but may not be so changed as, in the aggregate, to add more than 5000 acres to, nor to subtract more than 5000 acres from such service area, as herein defined, without the written consent of the district entitled hereunder to serve the other service area. Coachella District shall not participate in any revenues received by Imperial District for diverting, carrying and delivering at or near Pilot Knob, water for irrigation or domestic use for any person or agency other than the parties hereto, and Coachella District shall perform no such service at or near Pilot Knob.

APPLICATIONS TO APPROPRIATE WATER.

Sec. 16. The parties hereto agree that their respective applications to appropriate water from the Colorado River for irrigation and domestic purposes heretofore filed with the Division of Water Resources of the State of California be deemed amended to conform with the foregoing provisions of this agreement and stipulate that permits be issued to them, respectively, in accordance herewith and agree to file with said Division all necessary papers and stipulations to that end. Except as between the parties hereto the provisions of this agreement shall not affect nor impair any rights of either party to the waters of the Colorado River.

LEASE OF POWER RIGHTS.

Sec. 17. As a compromise and settlement of the controversy existing between the parties hereto as to all power possibilities, power rights, power resources and power privileges upon the whole of said All-American Canal in both Imperial and Riverside Counties, now or hereafter held, owned, or possessed by said parties, or either of them, including all those at or near Pilot Knob, which said power possibilities, power rights, power resources and power privileges are hereinafter styled "power rights," and to combine and co-ordinate all of said power rights as a unified project so as to produce the maximum benefits to the parties hereto and to the United States, it is agreed that the parties hereto will, within a reasonable time after the execution of said Coachella Contract, execute a good and sufficient lease agreement, wherein Coachella District shall demise to Imperial District all of said power rights which the Coachella District may now

have or hereafter obtain. Said lease, among other reasonable provisions, shall provide:

(a) That the term of said lease shall commence with the date thereof and terminate on January 1, 2033; provided, that should the term herein or in said lease fixed exceed that permitted by law at the date of said lease, then said term shall be deemed reduced to the longest period permitted by law;

(b) That said lease shall vest in Imperial District the entire and exclusive operation, management, development and control of all said power rights and the use, sale and control of power produced therefrom;

(c) That subject to the conditions hereinafter contained, Imperial District shall pay, on March first of each year, as rental for said demised power rights, eight per cent of the net proceeds, as defined in sub-section (f) hereof, received by Imperial District during the preceding calendar year from all said power rights held, owned or possessed by both parties hereto and from all power works and power facilities by or in connection with which Imperial District utilizes said power rights;

(d) That said rentals shall be paid by Imperial District to the United States and credited on the Coachella Contract until Coachella District's obligations to the United States under said contract are fully paid, and thereafter Imperial District shall pay said rentals to Coachella District;

(e) That no rentals shall be due or payable unless and until capacity in the All-American Canal shall have been provided for Coachella District down to Pilot Knob;

(f) That in determining said net proceeds, as between the parties hereto, there shall be taken into consideration

all items of cost of production and disposal of power, including, but not necessarily limited to amortization of and interest on capital investment for power purposes, improvements, operation and maintenance, and depreciation, and any other proper factor of cost not herein expressly enumerated;

(g) That the determination of said net proceeds for the purpose of ascertaining rentals payable under said lease shall be made without reference to the fact that as to Imperial District said rentals will constitute a part of the cost of doing business;

(h) That on March first of each year Imperial District shall furnish to Coachella District a statement of account showing the computation of said rental;

(i) That Coachella District shall not be required to contribute in any manner to the cost of construction, operation or maintenance of any power works or facilities on or in connection with the All-American Canal, except indirectly, as said items may be taken into consideration in determining rentals to be paid under said lease;

(j) That said lease shall terminate upon Coachella District being relieved of obligations as provided in Section 14 hereof and/or at the option of Coachella District, in the event of default in any payment of rentals by Imperial District for a period of two years;

(k) That any overdue rental shall bear interest at the rate of one-half of one per cent per month until paid;

(l) That when Imperial District is ready to undertake construction of facilities to serve electrical energy (herein designated "power") in Coachella Valley, Coa-

chella District shall obtain for Imperial District signed contracts or applications for power as provided in Section 18 hereof, and be otherwise subject to the provisions of said Section 18;

(m) That when Imperial District is ready to serve power from the All-American Canal in Coachella Valley, then, if and while said lease is in effect, Imperial District will furnish such power in Coachella District at the rates and upon the conditions provided in Section 19 hereof;

(n) That Coachella District shall, by its officials or designated representatives, have the right of ingress to and egress from all power works and facilities of Imperial District for the purpose of inspection thereof, and full and free access to and the right during office hours to inspect and copy all books and records of Imperial District relating to its power operations;

(o) That the interest of Imperial District under said lease shall not, nor shall any part thereof nor interest therein, be assigned, nor shall Imperial District sublet any part of nor interest in said demised power rights without the written consent of Coachella District;

(p) That at the termination of said lease the rights and privileges of the parties thereto shall be segregated and/or adjusted as may be equitable and just, having in view the business, interests and investments of the parties and their respective legal and equitable rights in said power rights, works and facilities on or in connection with the All-American Canal;

(q) That in the event the parties cannot agree upon such segregation or adjustment, then the same shall be made by a board of arbitration, consisting of five persons, one to be selected by Imperial District, one by Coachella

District, and three by the Secretary of the Interior and the decision of said board of arbitration shall be final and binding upon the parties to said lease;

(r) That nothing contained in said lease shall be construed as in any manner abridging, limiting, or depriving either of the parties thereto of any means of enforcing any remedy, either at law or in equity, for the breach of any of the provisions of said lease which it would otherwise have;

(s) That the waiver of a breach of any of the provisions of said lease shall not be deemed to be a waiver of any other provision thereof or of a subsequent breach of such provision.

POWER CONTRACTS.

Sec. 18. When the lease provided for in Section 17 hereof has been executed and Imperial District is ready to undertake construction of facilities to serve electrical energy, (herein styled "power") in Coachella Valley it shall notify Coachella District of said fact in writing and it shall thereupon be the duty of Coachella District to obtain for Imperial District, within six months after service of such notice, contracts or applications for power signed by consumers using at the time of service of such notice not less than eighty per cent of the power load then being consumed in the Coachella Service Area. Such contracts or applications shall be in such form and substance as reasonably required by Imperial District and shall among other things bind the consumer to take from Imperial District all power that he may require in Coachella District for a period of three years. In the event of disagreement between the parties as to whether or not Coachella District has complied with the foregoing

provisions of this section on its part to be complied with, then the Secretary of the Interior may, at the written request of either party, determine said fact and notify the parties hereto of such determination in writing, and such determination shall be final and binding upon the parties hereto. Notwithstanding anything herein or in said lease contained, there shall be no obligation on the part of the Imperial District for rentals under said lease during the time, if any, after said six months period that said signed contracts or applications for said eighty per cent of power load have not been so delivered.

POWER RATES.

Sec. 19. When the lease provided for in Section 17 hereof has been executed and Imperial District is ready to serve power from the All-American Canal in Coachella Valley then, and while said lease remains in effect, Imperial District will furnish such power in Coachella District upon the following terms:

A. To Coachella District, for use by itself for project purposes within said Coachella Service Area as such project purposes are hereinafter defined, at rates in no case exceeding the cost of power delivered in Coachella Valley, plus fifteen per cent, and in no event at rates higher than are charged by Imperial District to itself for like uses with such additional charges as may be necessary to offset difference in costs of transmitting power as between Imperial and Coachella Valleys. Subject to the foregoing provisions, Coachella District agrees that, for a period of five years from and after the service of the notice provided for in Section 18 hereof said Coachella District will purchase from Imperial District and pay for all power Coachella District may require for project pur-

poses within the Coachella Service Area, and for which Imperial District has sufficient facilities and is prepared to serve. Imperial District shall not be required to furnish power to Coachella District for project purposes at points where Imperial District does not then have sufficient facilities for such power service.

"Project Purposes" as used in this section shall be understood to mean construction, operation and maintenance of Coachella District's irrigation and drainage system within the Coachella Service Area, where such construction, operation, or maintenance is of a general public nature and not individual or private in character.

B. To all consumers within Coachella District, other than to Coachella District for project purposes, at no higher rates than those charged, and under the same conditions and regulations as those prescribed, by Imperial District for like service to consumers within Imperial District with such additional charges as may be necessary to offset difference in costs of transmitting power as between Imperial and Coachella Valleys. In no event shall such rates to such consumers exceed seventy-five per cent of the rates paid for like service by individual consumers in Coachella District on January 1, 1934, based upon the purchasing power of the dollar on said date. Imperial District shall make such further reduction in rates to such consumers as may be necessary to meet competitive rates for like service of any public utility, at the time authorized by the Railroad Commission of the State of California, or other authority succeeding to its functions, and able to serve such consumers, but in no event shall Imperial District be required to charge rates that will return less than the cost of service.

POWER PERMITS.

Sec. 20. The parties hereto agree to cooperate to the end that all necessary and proper permits and licenses to appropriate water for power purposes and construct power facilities may be obtained from the Division of Water Resources of the State of California and/or Federal Power Commission as may be authorized by law and hereby stipulate that such permits and licenses issue to the parties hereto, as follows, to-wit:

1. To Imperial District, as to all such permits and licenses on the portion of the All-American Canal shown on said Exhibit "A" and marked "Main (All American) Canal to Imperial Valley" lying west of the southerly end of the "Main (All American) Canal to Coachella Valley" as same is shown on said Exhibit "A";

2. To Coachella District, as to all such permits and licenses on the portion of the All-American Canal shown on said Exhibit "A" and marked "Main (All American) Canal to Coachella Valley" lying North of the Northerly boundary line of Township 11, South of the San Bernardino Base Line;

3. To Imperial District and Coachella District, as their respective privileges to utilize power possibilities may appear from their said contracts with the United States, as to all such privileges on all portions of the Imperial Dam and All-American Canal, including Pilot Knob, not herein above specified.

AGREEMENT VOID IF CERTAIN LANDS INCLUDED IN IMPERIAL DISTRICT.

Sec. 21. In the event lawful petition or petitions sufficient in all respects for inclusion within Imperial District of ninety per cent (90%) of the lands shown on said Exhibit "A" lying north of the northerly boundary line of Township Eleven (11), South of the San Bernardino Base Line and bounded by the lines indicated on said Exhibit "A" as "Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District", exclusive of the Dos Palmas Area and exclusive of Indian lands and public lands of the United States, shall be filed pursuant to and within the time limited by said Imperial Contract, and said lands shall be thereafter included within said Imperial District pursuant to such petition or petitions, then, as of the date of such inclusion, this agreement shall terminate and be at an end.

REMEDIES UNDER AGREEMENT NOT EXCLUSIVE.

Sec. 22. Nothing contained in this agreement shall be construed as in any manner abridging, limiting, or depriving either of the parties hereto of any means of enforcing any remedy, either at law or in equity, for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this agreement shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

Sec. 23. This agreement shall not be interpreted nor construed so as to amend, modify or change said Imperial Contract in any particular, and no provision hereof in conflict with said Imperial Contract shall be of any force or effect. As to any provisions hereof in which the United

States is interested this Agreement shall be deemed to be made expressly for the benefit of the United States, as well as of the parties hereto.

Sec. 24. This agreement shall inure to and be binding upon the parties hereto, their and each of their respective successors and assigns.

In Witness Whereof, Said parties have executed this agreement in triplicate original by their respective officers, thereunto duly authorized by resolutions of their respective Boards of Directors, the day and year first above written.

IMPERIAL IRRIGATION DISTRICT
By EVAN T. HEWES
Its President

ATTEST:
W. W. GOODSON
Its Secretary
(Seal)

COACHELLA VALLEY COUNTY WATER DISTRICT
By HARRY W. FORBES
Its President

ATTEST:
HELEN F. RUNYEN
Its Secretary
(Seal)

Note:

Attached to the original of the foregoing Agreement of Compromise dated February 14, 1934, between Imperial Irrigation District and Coachella Valley County Water District are the following as exhibits.

EXHIBIT "A"

A map bearing symbol number 212-0-112 designated "Boulder Canyon Project All American Canal System."

CALIFORNIA 1931

This map is identical with the map attached to the Contract of December 1, 1932, between United States of America and Imperial Irrigation District found in Appendix 13 to the Answer except that in the place of the words "Imperial Irrigation District" in said Appendix 13 the words "Coachella Valley County Water District" are used in the description designation on said map Exhibit A.

EXHIBIT "B"

A description by reference to U. S. Government survey of the lands within Coachella Valley County Water District and its Improvement District No. 1 and within the Coachella Service Area as referred to in the aforesaid contract.

EXHIBIT "C"

A description by U. S. Government Survey of Lands outside Coachella Valley County Water District and within the Coachella Service Area designated the Salton Area as referred to in the aforesaid contract.

ANNEX "A"

The form and language of a proposed contract to be made between United States of America and Coachella Valley County Water District, with Exhibits "A", "B", and "C" above referred to, duplicated and attached thereto—all referred to in the aforesaid compromise agreement.

(The above items are omitted to save space.)

APPENDIX NO. 15

REPAYMENT CONTRACT: UNITED STATES AND CITY OF SAN DIEGO

October 2, 1934

[Symbol I1r-1151]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
BOULDER CANYON PROJECT
ALL-AMERICAN CANAL
THE CITY OF SAN DIEGO, CALIFORNIA

Contract for Construction of Capacity in Diversion Dam, Main Canal and Appurtenant Structures.

Article 1. **This Contract,** made this 2d day of October, nineteen hundred thirty-four, pursuant to the Act of Congress approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat., 1057), designated the Boulder Canyon Project Act, and the Act of Congress approved June 16, 1933 (48 Stat., 195), designated the National Industrial Recovery Act, between **The United States of America,** hereinafter referred to as the United States, acting for this purpose by Harold L. Ickes, ~~Federal Emergency Administrator of Public Works and~~ Secretary of the Interior, hereinafter styled the Secretary, and **The City of San Diego,** a municipal corporation of the State of California, organized under a freeholders' charter, hereinafter referred to as the City;

Witnesseth:

Explanatory Recitals

Article 2. **Whereas,** for the puspose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water, and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary is also authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable as provided in the reclamation law; and

Article 3. **Whereas,** after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Boulder Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

Article 4. **Whereas,** (a) there has been executed under date of December 1, 1932, a contract, herein styled Imperial Contract, between the United States and Imperial Irrigation District, an irrigation district created, or-

ganized and existing under and by virtue of the laws of the State of California, hereinafter referred to as the District, which contract provides for the construction of a suitable diversion dam and main canal and appurtenant structures, therein and hereinafter respectively styled "Imperial Dam" and "All-American Canal", located entirely within the United States, connecting with the Imperial and Coachella Valleys, and for the delivery to the District of stored water from Boulder Canyon Reservoir; and

(b) There has been executed under date of February 15, 1933, a contract between the United States and the City whereby the City was accorded certain storage rights under the conditions therein stated in said Boulder Canyon Reservoir, and the right under the conditions therein stated to have the United States deliver to the City at a point in the Colorado River immediately above Imperial Dam, the water to which the City may be entitled, (estimated in said contract to be 155 cubic feet per second), in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, set out in said contract; and

(c) The City is now desirous of entering into this contract for the construction of capacity for it in said Imperial Dam and All-American Canal for said 155 cubic feet of water per second, so that the City may transport through said canal for the benefit of the inhabitants of the City, and those of other cities and communities in San Diego County who may hereafter become entitled, with the consent of the Secretary, to use part of said stored water from Boulder Canyon Reservoir, under said contract of February 15, 1933, this contract to be in harmony with the provisions of said Imperial Contract; and

Article 5. **Whereas,** The Secretary has determined, upon engineering and economic considerations, that it is advisable to provide for the construction of said Imperial Dam and All-American Canal, and has determined that the revenues provided for by this contract are adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of the capacity in said Imperial Dam and All-American Canal to be constructed hereunder, in the manner provided in the reclamation law;

Article 6. **Now, Therefore,** in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Construction by United States

Article 7. The United States will construct the Imperial Dam in the main stream of the Colorado River at the approximate location indicated on the map marked Exhibit "A" attached hereto and by this reference made a part hereof, and will also construct the Main (All American) Canal and Main (All American) Canal to Imperial Valley, the approximate location of said Canal to be as shown on the aforesaid Exhibit "A". Said Canal shall be so constructed as to provide a designed capacity of one hundred fifty-five (155) cubic feet of water per second, to be used by the City for the benefit of the inhabitants of said city and those of other cities and communities in San Diego County who may hereafter become entitled to use the same with the consent of the City and the Secretary, from and includng the diversion and desilting works at said dam to the westerly end of that portion of the All-American Canal designated on said Exhibit "A" as "Main (All American) Canal" and "Main (All

American) Canal to Imperial Valley". The ultimate cost to the City and the District of the Imperial Dam and All-American Canal shall in no event exceed the aggregate sum of thirty-million dollars ($30,000,000.00). Such cost shall include all expenses of whatsoever kind heretofore or hereafter incurred by the United States from the Reclamation Fund or the Colorado River Dam fund in connection with, growing out of, or resulting from the construction of said Imperial Dam and All-American Canal, including but not limited to the cost of labor, materials, equipment, engineering, legal work, superintendence, administration, overhead, any and all costs arising from operation and maintenance of said Imperial Dam and All-American Canal prior to the time that said costs are assumed respectively by the City and the District, damage of all kinds and character and rights of way as hereinafter provided. The City hereby agrees to repay to the United States its share of all expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the Imperial Dam and All-American Canal, the incurrence of which increases expenditures by the United States beyond the said sum of thirty million dollars ($30,000,000.00). The City shall repay the same share of said expenditures as the share to be paid by the City under Article 10 (b) hereof of the capital cost of the particular part of said works causing such damage. The United States will invoke all legal and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it, without cost to the City, except that the United States reserves the right where rights-of-way are thus acquired to reimburse the owners of such lands for the value of improvements which may be destroyed, and the City agrees

that the United States may include such disbursements in the cost of the Imperial Dam and All-American Canal. If rights-of-way are required over an existing project of the Bureau of Reclamation, such sum or sums as may be necessary to reimburse the United States on account of the construction charges allocated to irrigable areas absorbed in such rights-of-way shall also be considered as a part of and be included with other costs of the Imperial Dam and All-American Canal. The City agrees that the District may convey to the United States, unencumbered fee simple title to any and all lands now owned by it which, in the opinion of the Secretary, may be required for right-of-way purposes for those portions of the Imperial Dam and All-American Canal to be used in common by the City and the District, at the fair market value thereof, to be determined by the Secretary, such value to be considered (as to the City) as a part of and included with other costs of the Imperial Dam and All-American Canal. Where rights-of-way within the State of California are required for the construction of Imperial Dam and All-American Canal, and such rights-of-way are not reserved to the United States under acts of Congress, or otherwise, or the lands over which such rights-of-way are required are not then owned by the District, the City agrees that the District, upon request of the Secretary, may acquire title to any such lands required for such purposes, and convey unencumbered fee simple title thereto to the United States at the actual cost thereof to the District, subject to the approval of such cost by the Secretary.

Operation and Maintenance of Common Works

Article 8. (a) Imperial Dam and All-American Canal designated on said Exhibit "A" as "Imperial Dam", "Main

(All American) Canal" and "Main (All American) Canal to Imperial" and Laguna Dam are herein styled "common works". Upon sixty (60) days' written notice from the Secretary of the completion of construction of the Imperial Dam and All-American Canal, or of any major unit thereof useful to the District and the City or either of them, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto, the District may assume the care, operation and maintenance of said common works, or major units thereof, and thereafter the District may care for, operate and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the diversion, transportation and distribution of water as when received from the United States, reasonable wear and damage by the elements excepted. The United States may, from time to time, in the discretion of the Secretary, resume operation and maintenance of said Imperial Dam upon not less than sixty (60) days' written notice and require reassumption thereof by the District on like notice. During such times, after completion, as Imperial Dam is operated and maintained by the United States, the City shall on March first of each year advance to the United States its share of the estimated cost of operation and maintenance for the following twelve months, upon estimates furnished therefor on or before September first next preceding. Such share to be advanced by the City shall be in the proportion that the capacity provided for the City in common works above Syphon Drop bears to the total capacity thereof.

(b) From and after the assumption by the District of operation and maintenance of said common works, or any major unit thereof of benefits to the City, the City

shall bear such proportion of the cost of operation and maintenance (including repairs and replacements and any charges made by the United States under Article Nine (9) hereof) of each component part of said common works, as the capacity provided for the City in such component part bears to the total capacity thereof. The City agrees, expressly for the benefit of the District, to advance to the District on or before January first of each year its said proportionate share of the estimated cost for that year of such operation and maintenance in accordance with a written notice to be issued to it by the District, provided that payment shall in no event be due until thirty (30) days after receipt of such notice. Prior to March first of each year the District shall provide the City with a written statement showing in detail the cost for the previous year for operation and maintenance of the works on account of which the City has made advances. Differences between actual costs and estimated costs shall be adjusted in the next succeeding notices. Upon request of the City, both the advance notice of estimated costs and the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided and the cost of such review shall be borne equally by the District and the City. The District may at its option withhold delivery of water from the City until its proportionate share of the cost of operation and maintenance has been advanced or paid as in this article provided and until all sums due the District under Article 10 (c) hereof have been paid.

In the event the United States fails to complete the works herein contemplated and the City fails to elect to

make use of works theretofore partially or wholly constructed, the City shall be fully relieved of any and all responsibility for maintenance or operation or damage to person or property which may arise therefrom.

Keeping Diversion Dam, Main Canal and Appurtenant Structures in Repair

Article 9. Except in case of emergency, no substantial change in any of the works to be constructed by the United States and transferred to the District under the provisions hereof or under said Imperial Contract shall be made by the District, without first having had and obtained the written consent of the Secretary and the Secretary's opinion as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to and replacements of all said works transferred to it under the terms and conditions hereof or under said Imperial Contract which, in the opinion of the Secretary, are deemed necessary for the proper operation and maintenance of such works. In case of neglect or failure of the District to make such repairs, the United States may, at its option, after reasonable notice to the District, cause such repairs to be made and charge the actual cost thereof, plus fifteen per centum (15%) to cover overhead and general expense, to the District. On or before September first of each calendar year the United States shall give written notice to the District of the amount expended by the United States for repairs under this article during the twelve-month period immediately preceding. Such cost, plus overhead and general expense as stated above, shall be repaid by the District on March first immediately succeeding.

Agreement by City to Pay for Capacity Constructed for It by the United States

Article 10. (a) The total estimated cost of the Imperial Dam and All-American Canal as stated in Article 10 of the said Imperial Contract, is thirty-eight million, five hundred thousand dollars ($38,500,000.00), of which not to exceed thirty million dollars ($30,000,000.00) represents the total estimated cost of Imperial Dam, the Main (All American) Canal, and the Main (All American) Canal to Imperial Valley. The City agrees to pay the United States its share, as defined in sub-article (b) of this Article, of the actual total cost not exceeding thirty million dollars ($30,000,000.00), incurred by the United States on account of such works, subject, however, to the provisions of Article seven (7) hereof; provided, that should Congress and other Governmental financing authorities fail to make necessary appropriations or allocations of money to complete the work herein provided for, then the Secretary may, at such reasonable time as he may consider advisable, after Congress and such other Governmental authorities shall have failed for five (5) consecutive years to make the necessary appropriations or allocations which shall have been annually requested by the Secretary, give the City notice of the termination of work by the United States and furnish a statement of the amount actually expended by the United States thereon. Upon the receipt of such notice by the City, the City shall be given two (2) years from and after such receipt of notice to elect whether it will utilize said works theretofore constructed hereunder, or some particular part thereof. Such election on the part of the City shall be expressed by resolution of the City Council submitted to

the electorate of the City for approval or rejection in the manner provided by law. If the City elects not to utilize, or fails within said two-year period to elect to utilize said works constructed hereunder, or some portion thereof, then the City shall have no further rights therein and no obligations therefor. If the City elects to utilize said works or a portion thereof, then the reasonable value to the City of the works so utilized, not exceeding the actual cost thereof to the United States, shall be paid by the City under the terms of this contract; the first payment to be due and payable on the first day of March following the first day of August next succeeding the final determination of the reasonable value to the City of such works, in case no further work is done by the City. Should the City elect to complete the work contemplated by this contract, or some portion thereof, the first payment shall be due and payable on the first day of March following the first day of August next succeeding the date of final completion of the work by the City as determined by the Secretary. In determining the value of such works to the City there shall be taken into account, among other things, the method of financing required and cost of money, so that in no event shall all of the works contemplated by this contract cost the City more than they would have cost the City had they all been constructed by the United States under the terms of this contract. In the event of failure of the parties to agree as to the reasonable value to the City of the works which the City elects to use, the same shall be determined as provided in Article twenty-two (22) hereof.

(b) The amounts herein agreed to be paid by the City to the United States shall be in accordance with the fol-

lowing proportions, which proportions the Secretary hereby determines to be equitable and just, to wit:

(i) That proportion of the total cost of that part of said common works above Syphon Drop, excepting Laguna Dam, that the capacity provided for the City therein bears to the total capacity thereof less the capacity to be provided without cost to and for the Yuma Project.

(ii) That proportion of the total cost of each component part of all said common works, other than the part above Syphon Drop, that the capacity provided for the City in such part of said works bears to the total capacity thereof.

(c) The City agrees to pay to the United States on the 31st day of December of each year commencing December 31, 1935, a portion (computed in the same manner as its share of costs of common works above Syphon Drop as agreed in Article 10 (b) (i) hereof) of each of the annual payments (together with interest required thereon), then or thereafter required to be made to the United States for a connection with Laguna Dam, under said contract dated October 23, 1918, and under Article sixteen (16) of said Imperial Contract.

The Secretary hereby determines that it is equitable and just that the City pay, and the City agrees, expressly for the benefit of the District, to pay the District the same proportion of the aggregate sum which shall have been paid by the District to the United States prior to December 31, 1935, for a connection with Laguna Dam, as aforesaid, as the proportion herein agreed to be paid by the City to the United States of payments hereafter to be

made for said connection with Laguna Dam. The aggregate sum to be paid by the City to the District shall be divided into ten (10) equal instalments, payable annually on March first of each year, commencing on or before the year 1939, with interest from date hereof on unpaid balance at the rate of six per centum (6%) per annum, payable March 1st, 1936, and annually thereafter. At its option, the City may at any time pay any amount on principal of said aggregate sum in advance of the due date and interest on the amount so paid shall thereupon cease.

Terms of Payment

Article 11. The amount herein agreed to be paid to the United States shall be due and payable in not more than thirty-eight (38) annual instalments commencing with the calendar year next succeeding the year when notice of completion of all work provided for herein is given to the City or under the provisions of Article 10 (a) hereof upon termination of work through failure of Congress or other Governmental authorities to make necessary appropriations or allocations therefor. The first five (5) of such annual instalments shall each be one percentum (1%) of the amount herein agreed to be paid to the United States; the next ten (10) of such instalments shall each be two percentum (2%) of the amount herein agreed to be paid to the United States, the next twenty-one (21) of such instalments shall each be three percentum (3%) of the amount herein agreed to be paid to the United States, and the remainder of such annual instalments shall each be six percentum (6%) of the amount herein agreed to be paid to the United States. The sums payable annually as set forth above shall be divided into two (2) equal semi-annual payments, payable on March first and September first of

each year; provided, however, that if notice of the completion of work is given to the City subsequent to August first of any year the first semi-annual instalment of charges hereunder shall be due and payable on March first of the second succeeding year.

Operation and Maintenance Costs

Article 12. Each agency which hereafter contracts for capacity to be provided for it in Imperial Dam and All-American Canal and for which agency capacity is so provided shall bear such proportionate part of the cost of operation and maintenance (including repairs and replacements) of the component parts of Imperial Dam and All-American Canal and of the Laguna Dam as may be determined by the Secretary to be equitable and just, but not less than an amount in proportion to the total amount as are the relative capacities provided in each component part for such agency and for all other agencies, including the City. Each such agency shall advance to the District operating the works provided to be used in common by the District and the City and such agency on or before January first of each year, its proportionate share of the estimated cost for that year of operation and maintenance in accordance with a notice to be issued by the District, provided that payment shall in no event be due until thirty (30) days after receipt of notice. Prior to March 1st of each year the District shall provide each agency with a statement showing in detail the costs for the previous year for operation and maintenance of the works on account of which such agency has made advances. Differences between actual costs and estimated costs shall be adjusted in next succeeding notices. Upon request of any agency, both the advance notice of estimated costs and

the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided, and the cost of such review shall be borne equally by the requesting agency and the District. The District may, at its option, withhold the delivery of water from any agency until its proportionate share of the costs of operation and maintenance has been advanced or paid, as in this Article provided.

Power Possibilities

Article 13. The power possibilities on the All-American Canal down to and including Syphon Drop with water carried for the benefit of the Yuma Project as provided for in Article fourteen (14) hereof, are hereby reserved to the United States. Subject to this reservation and the participation by other agencies as provided for in Article seventeen (17) hereof, the City shall have the privilege of utilizing by contract or otherwise, by means of the capacity to be provided for the City hereunder, such power possibilities, including those at or near Pilot Knob, as may exist upon said canal in proportion to its relative contribution or obligation toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located; provided, that such privilege shall not interfere with the utilizing by the District of such power possibilities at or near Pilot Knob, by means of the capacity to be provided for the District in the All-American Canal from Syphon Drop to Pilot Knob, in excess of eight thousand five hundred (8,500) cubic feet of water per second. The net proceeds as hereinafter defined in Article twenty-seven

(27) hereof, and as determined by the Secretary for each calendar year, from any power development which the City is hereunder authorized to make, shall be paid into the Colorado River Dam fund on March first of the next succeeding calendar year and be credited to the City on this contract until the City shall have paid thereby and/or otherwise an amount of money equivalent to that herein agreed to be paid to the United States. Thereafter such net power proceeds shall belong to the City. It is agreed that in the event the net power proceeds in any calendar year, creditable to the City, shall exceed the annual instalment of charges payable under this contract during the then current calendar year, the excess of such net power proceeds shall be credited on the next succeeding unpaid instalment to become due from the City under this contract.

Diversion and Delivery of Water for Yuma Project

Article 14. The City hereby consents that there be diverted at the Imperial Dam, and transported and delivered at Syphon Drop and/or such intermediate points as may be designated by the Secretary, the available water to which the Yuma Project (situated entirely within the United States and not exceeding in area 120,000 acres plus lands lying between the project levees and the Colorado River as such levees were located in 1931) is entitled, not exceeding two thousand (2,000) second-feet of water in the aggregate, or such part thereof as the Secretary may direct, for the use and benefit of said project, including the development of power at Syphon Drop, such water to be diverted, transported and delivered continuously in so far as reasonable diligence will permit; provided, however, that water shall not be diverted, transported, or delivered

for the Yuma Project when the Secretary notifies the District that said project for any reason may not be entitled thereto; provided, further that there may be diverted, transported and delivered such water in excess of requirements for irrigation or potable purposes, as determined by the Secretary, on the Yuma Project as so limited, only when such water is not required by the City under the provisions of its said contract of February 15, 1933. The diversion, transportation and delivery of water for the Yuma Project as aforesaid shall be without expense to the United States or its successors in control of said project, as to capital investment required to provide facilities for such diversion and transportation of water except such checks, turnouts and other structures required for delivery from said canal.

Contract of October 23, 1918

Article 15. That certain contract between The United States of America and the District, bearing date of October 23, 1918, providing for a connection with Laguna Dam, having been terminated, except as to the provisions of Article nine (9) thereof, by said Imperial Contract, the City hereby consents to such partial termination of said first mentioned contract. The City hereby consents that there be furnished to the United States or its successors in interest in the control, operation and maintenance of the Yuma Project, from any power development on the All-American Canal at or near Pilot Knob, up to but not to exceed four thousand horsepower of electrical energy for use by the agency in charge of project operations for irrigation and drainage pumping purposes and necessary incidental use on said Yuma Project, such power to be fur-

nished at cost (including overhead and general expense) plus ten per cent; provided, however, that such power at or near Pilot Knob shall not be required to be furnished except at such times as all power feasible of development at Syphan Drop or developed elsewhere within a radius of forty (40) miles from the City of Yuma for the benefit of the Yuma Project is being used for project operations as in this article specified.

Refusal of Water in Case of Default

Article 16. The United States reserves the right to refuse to deliver water to the City in the event of default for a period of more than twelve (12) months in any payment due the United States under this contract, or in the discretion of the Secretary to reduce deliveries in such proportion as the amount in default by the City bears to the total amount due. The United States further reserves the right to forthwith assume control of all or any part of the works to be constructed hereunder and to care for, operate and maintain the same, so long as the Secretary deems necessary or advisable, if, in his opinion, which shall be final and binding upon the parties hereto, the City does not carry out the terms and conditions of this contract to their full extent and meaning. In such event, the City's pro rata share of the actual cost of such care, operation and maintenance by the United States shall be repaid to the United States, plus fifteen per centum (15%) to cover overhead and general expense, on March first of each year immediately succeeding the calendar year during which said works are operated and maintained by the United States. Nothing herein contained shall relieve the City of the obligation to pay in any event all instalments and penalties provided in this contract.

Use of Works by the United States and Others

Article 17. The United States also reserves the right to, and the City agrees that it may, at any time prior to the transfer of constructed works to the District for operation and maintenance, increase the capacity of such works and contract for such increased capacity with other agencies for the delivery of water for use in the United States. Such other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. In the event other agencies thus contract with the United States, each of such agencies shall assume such proportion of the total cost of said works to be used jointly by such agency and the City, including Laguna Dam, as the Secretary may determine to be equitable and just, but not less than the proportion that the capacity provided for such agency in such works bears to the total capacity thereof (except in that part thereof above Syphon Drop including Laguna Dam, in which part the proportion which such other agency shall assume shall be not less than the proportion that the capacity provided for such agency therein bears to the total capacity thereof less the capacity to be provided without cost to and for the Yuma Project) and the City's financial obligations under this Contract shall be adjusted accordingly. In no event shall construction costs chargeable to the City be increased by reason of additional capacity being provided for any such agency or agencies or contract or contracts having been made with same. Any such agency thus contracting

shall also be required to reimburse the City in such amounts and at such times as the Secretary may determine to be equitable and just for payments theretofore made by the City for the right to use Laguna Dam.

Title to Remain in the United States

Article 18. Title to the aforesaid Imperial Dam and All-American Canal shall be and remain in the United States notwithstanding transfer of the care, operation and maintenance thereof to said District or other agency; provided, however, that the Secretary may, in his discretion, when repayment to the United States of all moneys advanced shall have been made, transfer the title to said main canal and appurtenant structures, except the diversion dam and the main canal and appurtenant structures down to and including Syphon Drop, to the District, the City or other agencies in the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him.

Rules and Regulations

Article 19. There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract governing the diversion and delivery of water hereunder to or for the City and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the City and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The City

hereby agrees that in the operation and maintenance of the Imperial Dam and All-American Canal, all such rules and regulations will be fully adhered to by it.

Inspection by the United States

Article 20. The Secretary may cause to be made from time to time a reasonable inspection of the works constructed by the United States to the end that he may ascertain whether the terms of this and other contracts are being satisfactorily executed by the City and/or other agencies. Such proportion of the actual expense of such inspection in any calendar year, as shall be found by the Secretary to be equitable and just, shall be paid by the City to the United States on March first of each year immediately following the year in which such inspection is made, and upon statement to be furnished by the Secretary. The Secretary or his representative shall at all times have the right of ingress to and egress from all works of the City for the purpose of inspection, repairs and maintenance of works of the United States, and for all other purposes.

Access to Books and Records

Article 21. The officials or designated representatives of the City shall have full and free access to the books and records of the United States, so far as they relate to the matters covered by this contract, with the right at any time during office hours to make copies of and from the same; and the Secretary shall have the same right in respect of the books and records of the City.

Disputes or Disagreements

Article 22. Disputes or disagreements as to the interpretation or performance of the provisions of this con-

tract, except as otherwise provided herein, shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the City shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Interest and Penalties

Article 23. No interest shall be charged on any instalments of charges due from the City hereunder except that on all such instalments or any part thereof, which may remain unpaid by the City to the United States after the same become due, there shall be added to the amount unpaid a penalty of one-half of one per centum (½%) and a like penalty of one-half of one per centum (½%) of the amount unpaid shall be added on the first day of each month thereafter so long as such default shall continue.

Agreement Subject to Colorado River Compact

Article 24. This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, No-

vember 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which compact was approved by the Boulder Canyon Project Act.

Application of Reclamation Law

Article 25. Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation and maintenance of the works to be constructed hereunder.

Contracts to Be Authorized by Election of Electors of City

Article 26. The execution of this contract by the City shall be authorized by the vote of two-thirds of the qualified electors of the City voting at an election to be held for that purpose, assenting that the City incur the indebtedness and liability of this contract, and authorizing and directing the City Council to levy annually a tax sufficient to provide for the payment to the United States each year when due each and every of the annual obligations of the City under this contract, or any portion thereof not paid from revenues derived from other sources. The City shall without delay and at its own cost and expense furnish the United States for its files, copies of all proceedings relating to the election upon this contract, which said copies shall be properly certified by the City Clerk of The City of San Diego.

Method of Determining Net Power Proceeds

Article 27. In determining the net proceeds for each calendar year from any power development which the City is hereunder authorized to make, on the All-American Canal, to be paid into the Colorado River Dam fund as provided in Article thirteen (13) hereof, there shall be taken into consideration all items of cost of production of power, including but not necessarily limited to amortization of and interest on capital investment in power development, replacements, improvements, and operation and maintenance, if any. Any other proper factor of cost not here expressly enumerated may be taken into account in determining the net proceeds.

Contingent Upon Appropriations

Article 28. This contract is subject to appropriations or allocations being made by Congress or other Governmental financing authority from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam fund to permit of said allotments. If more than three years elapse after this contract becomes effective and before appropriations or allocations are available to permit the United States to make expenditures hereunder, the City may, at its option, upon giving sixty (60) days' written notice to the Secretary, cancel this contract. Such option shall be expressed by vote of the electors of the City with the same formalities as required for the authorization of this contract.

Rights Reserved Under Section 3737 Revised Statutes

Article 29. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies Under Contract Not Exclusive

Article 30. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States, the City, or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

Interest in Contract Not Transferable

Article 31. No interest in this contract is transferable by the City to any other party, without the consent of the United States, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

Member of Congress Clause

Article 32. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By HAROLD L. ICKES
~~Federal Emergency Administration of Public Works and~~
[COG JLK MW]
Secretary of the Interior.

[Seal]

THE CITY OF SAN DIEGO,
~~By~~ RUTHERFORD B. IRONES
Mayor.

[Seal]

Approved as to form and legality:
D. L. AULT
City Attorney.

Attest:
ALLEN H. WRIGHT
City Clerk

(Seal)

State of California, County of San Diego—ss.

On this 30th day of October, 1939, before me, Fred W. Sick, a Notary Public in and for the said County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared Rutherford B. Irones personally known to me to be the person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of San Diego, the day and year in this certificate first above written.

FRED W. SICK
Notary Public in and for the County of San Diego,
State of California

[Seal]

My Commission expires May 22, 1943.

APPENDIX NO. 16

WATER DELIVERY AND REPAYMENT CONTRACT:

UNITED STATES AND COACHELLA VALLEY COUNTY WATER DISTRICT

October 15, 1934

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
BOULDER CANYON PROJECT
ALL-AMERICAN CANAL
COACHELLA VALLEY COUNTY WATER DISTRICT

Contract for Construction of Capacity in Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water.

Article 1. This Contract, made this 15 day of October, nineteen hundred thirty-four, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat., 1057), designated the Boulder Canyon Project Act, and the Act of Congress approved June 16, 1933 (48 Stat., 195), designated the National Industrial Recovery Act, between The United States of America, hereinafter referred to as the United States, acting for this purpose by Harold L. Ickes, Federal Emergency Administrator of Public Works and Secretary of the Interior, hereinafter styled the Secretary, and Coachella Valley County Water District, a County Water District created, organized and existing under and by virtue of the County Water District

Act of the State of California, and acts amendatory thereof or supplementary thereto, with its principal place of business at Coachella, Riverside County, California, hereinafter referred to as the District;

Witnesseth:

Explanatory Recitals

Article 2. Whereas, for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty-million acre-feet of water, and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary is also authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable as provided in the reclamation law; and

Article 3. Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Boulder Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

Article 4. Whereas, (a) there are included within the boundaries of the District areas of private and public lands and additional private and public lands will, by appropriate proceedings, be added to the District and to the Coachella Service Area, defined in Article 17 hereof; and

(b) There has been executed under date of December 1, 1932, a contract, herein styled Imperial Contract, between the United States and Imperial Irrigation District, an irrigation district created, organized and existing under and by virtue of the laws of the State of California, which contract provides for the construction of a suitable diversion dam and main canal and appurtenant structures, therein and hereinafter respectively styled "Imperial Dam" and "All-American Canal", located entirely within the United States, connecting with the Imperial and Coachella Valleys, and for the delivery to said Imperial Irrigation District of stored water from Boulder Canyon Reservoir; and

(c) Certain controversies between said two districts relating to their respective interests in water and power on said All-American Canal have been settled and compromised by an agreement executed between said two districts, dated February 14th, 1934, a triplicate original of which said agreement was on July 3, 1934, filed with the Secretary; and

(d) The District is desirous of entering into a contract for the construction of certain capacity for it in said Imperial Dam and All-American Canal and for the delivery to the District, for the benefit of the lands under or that will be served from the All-American Canal in Coachella Valley, now or hereafter within the District and lying within said Coachella Service Area, of stored water

from Boulder Canyon Reservoir, such contract to be in harmony with the provisions of said Imperial Contract and those of said agreement dated February 14th, 1934; and

Article 5. Whereas, The Secretary has determined, upon engineering and economic considerations, that it is advisable to provide for the construction of such Imperial Dam and All-American Canal, and has determined that the revenues provided for by this contract are adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of the capacity in said Imperial Dam and All-American Canal to be constructed hereunder, in the manner provided in the reclamation law;

Article 6. Now, Therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to-wit:

Construction by United States

Article 7. The United States will construct the Imperial Dam in the main stream of the Colorado River at the approximate location indicated on the map marked Exhibit "A" attached hereto and by this reference made a part hereof, and will also construct the All-American Canal to the Imperial and Coachella Valleys, the approximate location of said canal to be as shown on the aforesaid Exhibit "A". Said canal shall be so constructed as to provide a designed capacity of one thousand five hundred (1500) cubic feet of water per second, to be used by the District for the benefit of the lands now or hereafter within the District and lying within said Coachella Service Area, from and including the diversion and desilting works at said dam to the southerly end of that portion

of the All-American Canal designated on said Exhibit "A" as "Main (All American) Canal to Coachella Valley" (hereinafter styled "Coachella Main Canal"). Said Coachella Main Canal shall be constructed with such capacities as the Secretary may conclusively determine to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by this contract; provided, however, that changes in capacities, locations, lengths and alignments, may be made during the progress of the work as may, in the opinion of the Secretary, whose opinion shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable, except the capacity above indicated from and including the diversion and desilting works at Imperial Dam to the Southerly end of said Coachella Main Canal, which capacity may be changed only by mutual agreement between the Secretary and the District. The ultimate cost to said two districts of the Imperial Dam and All-American Canal shall in no event exceed the aggregate sum of thirty-eight million, five hundred thousand dollars ($38,500,000.00). Such cost shall include all expenses of whatsoever kind heretofore or hereafter incurred by the United States from the Reclamation Fund or the Colorado River Dam fund in connection with, growing out of, or resulting from the construction of said Imperial Dam and All-American Canal, including but not limited to the cost of labor, materials, equipment, engineering, legal work, superintendence, administration, overhead, any and all costs arising from operation and maintenance of said Imperial Dam and All-American Canal prior to the time that said costs are assumed respectively by the said two districts, damage of all kinds and character and rights-of-way as hereinafter provided.

The District hereby agrees to re-pay to the United States its share of all expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the diversion dam and main canal, the incurrence of which increases expenditures by the United States beyond said sum of $38,500,000.00. The District shall re-pay the same share of said expenditures as the share to be paid by the District under Article 10 (b) hereof of the capital cost of the particular part of said works causing such damage. The United States will invoke all legal and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it, without cost to the District, except that the United States reserves the right where rights-of-way are thus acquired to reimburse the owners of such lands for the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursements in the cost of the Imperial Dam and All-American Canal. If rights-of-way are required over an existing project of the Bureau of Reclamation, such sum or sums as may be necessary to reimburse the United States on account of the construction charges allocated to irrigable areas absorbed in such rights-of-way shall also be considered as a part of and be included with other costs of the Imperial Dam and All-American Canal. The District agrees to convey to the United States without cost, unencumbered fee simple title to any and all lands now owned by it which, in the opinion of the Secretary, may be required for right-of-way purposes for the Imperial Dam and All-American Canal; and the District agrees that Imperial Irrigation District may convey to the United States, unencumbered fee simple title to any and all lands now owned by it which, in the opinion of

the Secretary, may be required for right-of-way purposes for those portions of the Imperial Dam and All-American Canal to be used in common by said two districts, at the fair market value thereof, to be determined by the Secretary, such value to be considered (as to the District) as a part of and included with other costs of the Imperial Dam and All-American Canal. Where rights-of-way within the State of California are required for the construction of Imperial Dam and All-American Canal, and such rights of way are not reserved to the United States under Acts of Congress, or otherwise, or the lands over which such rights of way are required are not then owned by either of said two districts, then the District agrees, (a) that it will, upon request of the Secretary, acquire title to such lands required for such purposes as lie north of the lowest turnout for East Mesa on said Coachella Main Canal, and in turn convey unencumbered fee simple title thereto to the United States at the actual cost thereof to the District, subject to the approval of such cost by the Secretary; and (b) agrees that Imperial Irrigation District, upon request of the Secretary, may acquire title to any such lands required for such purposes as lie south of the Northerly boundary line of Township Eleven (11), South of the San Bernardino Base Line, and likewise convey unencumbered fee simple title thereto to the United States at the actual cost thereof to the Imperial Irrigation District, subject to the approval of such cost by the Secretary.

Assumption of Operation and Maintenance of Common and Separate Works

Article 8(a). Imperial Dam and All-American Canal and Laguna Dam except (i) that portion of said Coachella Main Canal lying North of the lowest turnout for East

Mesa and (ii) that portion of the All-American Canal lying West of the Southerly end of said Coachella Main Canal and designated on said Exhibit "A" as "Main (All American) Canal to Imperial Valley" are herein styled "common works". Upon sixty (60) days written notice from the Secretary of the completion of construction of the Imperial Dam and All-American Canal, or of any major unit thereof useful to said two districts or either of them, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto, said Imperial Irrigation District may assume the care, operation and maintenance of said common works, or major units thereof, and thereafter said Imperial Irrigation District may care for, operate and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the diversion, transportation and distribution of water as when received from the United States, reasonable wear and damage by the elements excepted. The United States may, from time to time, in the discretion of the Secretary, resume operation and maintenance of said Imperial Dam upon not less than sixty (60) days written notice and require reassumption thereof by said Imperial Irrigation District on like notice. During such times, after completion, as the Imperial Dam is operated and maintained by the United States, the District shall on March first of each year advance to the United States its share of the estimated cost of operation and maintenance for the following twelve months, upon estimates furnished therefor on or before September first next preceding. Such share to be advanced by the District shall be in the proportion that the capacity provided for the District in common works above Syphon Drop bears to the total capacity thereof.

(b) From and after the assumption of operation and maintenance of said common works or any major unit thereof, by Imperial Irrigation District, the District shall bear such proportion of the cost of operation and maintenance (including repairs and replacements and any charges made by the United States under Article Nine (9) hereof) of each component part of said common works, as the capacity provided for the District in such component part bears to the total capacity thereof. The District agrees, expressly for the benefit of Imperial Irrigation District, to advance to Imperial Irrigation District on or before January first of each year its said proportionate share of the estimated cost for that year of such operation and maintenance in accordance with a written notice to be issued to it by Imperial Irrigation District, provided that payment shall in no event be due until thirty (30) days after receipt of such notice. Prior to March first of each year Imperial Irrigation District shall provide the District with a written statement showing in detail the cost for the previous year for operation and maintenance of the works on account of which the District has made advances. Differences between actual costs and estimated costs shall be adjusted in next succeeding notices. Upon request of the District, both the advance notice of estimated costs and the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided and the cost of such review shall be borne equally by said two districts. The Imperial Irrigation District may at its option withhold delivery of water from the District until its proportionate share of the costs of operation and maintenance

has been advanced or paid, as in this article provided and until all sums due Imperial Irrigation District under Article 10 (c) hereof have been paid.

(c) Upon sixty (60) days written notice from the Secretary of the completion of construction of the Coachella Main Canal and appurtenant structures or of any major unit thereof useful to the District, as determined by the Secretary, whose determination thereof shall be final and binding on the parties hereto, the District shall assume the care, operation and maintenance of all such works north of the lowest turnout for East Mesa on said Coachella Main Canal, and thereafter the District shall, at its own cost and without expense to the United States, care for, operate and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the transportation and distribution of water as when received from the United States, reasonable wear and damage by the elements excepted.

Upon like notice Imperial Irrigation District may assume the care, operation and maintenance, at its own cost, of all works designated on said Exhibit "A" as "Main (All American) Canal to Imperial Valley", lying west of the southerly end of the Coachella Main Canal.

(d) After the care, operation and maintenance of any of the aforesaid works have been assumed by the District, the District shall save the United States, its officers, agents and employees harmless as to any and all injury and damage to persons and property which may arise out of the care, operation and maintenance thereof. In the event the United States fails to complete the works herein contemplated and the District fails to elect to make use of works theretofore partially or wholly constructed, the

District shall be fully relieved of any and all responsibility for any further operation and maintenance of any works theretofore taken over by the District for that purpose and thereupon the District shall no longer be responsible for said maintenance or operation or damage to person or property which may arise therefrom.

Keeping Diversion Dam, Main Canal and Appurtenant Structures in Repair

Article 9. Except in case of emergency no substantial change in any of the works to be constructed by the United States and transferred to either of said two districts under the provisions hereof or under said Imperial Contract shall be made by such district, without first having had and obtained the written consent of the Secretary and the Secretary's opinion as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. Such district shall promptly make any and all repairs to and replacements of all said works transferred to it under the terms and conditions hereof or under said Imperial Contract which, in the opinion of the Secretary, are deemed necessary for the proper operation and maintenance of such works. In case of neglect or failure of such district to make such repairs, the United States may, at its option, after reasonable notice to such district, cause such repairs to be made and charge the actual cost thereof, plus fifteen per centum (15%) to cover overhead and general expense to such district operating the works so repaired. On or before September first of each calendar year the United States shall give written notice to such district operating such works of the amount expended by the United States for repairs under this

article during the twelve-month period immediately preceding. Such cost, plus overhead and general expense as stated above, shall be repaid by such district operating such works on March first immediately succeeding.

Agreement by District to pay for Works Constructed by the United States

Article 10. (a) The District agrees to pay the United States its share, as defined in sub-article (b) of this Article, of the actual cost, not exceeding thirty-eight million five hundred thousand dollars ($38,500,000.00), incurred by the United States on account of the Imperial Dam and All-American Canal, subject, however, to the provisions of Article seven (7) hereof; provided, that should Congress and other Governmental financing authorities fail to make necessary appropriations or allocations of money to complete the work herein provided for, then the Secretary may, at such reasonable time as he may consider advisable, after Congress and such other Governmental authorities shall have failed for five (5) consecutive years to make the necessary appropriations or allocations which shall have been annually requested by the Secretary, give the District notice of the termination of work by the United States and furnish a statement of the amount actually expended by the United States thereon. Upon the receipt of such notice by the District, the District shall be given two (2) years from and after such receipt of notice to elect whether it will utilize said works theretofore constructed hereunder, or some particular part thereof. Such election on the part of the District shall be expressed by resolution of the Board of Directors submitted to the

electorate of the District for approval or rejection in the manner provided by law for submission of contracts with the United States. If the District elects not to utilize, or fails within said two-year period to elect to utilize said works constructed hereunder, or some portion thereof, then the District shall have no further rights therein and no obligations therefor. If the District elects to utilize said works or a portion thereof, then the reasonable value to the District of the works so utilized, not exceeding the actual cost thereof to the United States, shall be paid by the District under the terms of this contract; the first payment to be due and payable on the first day of March following the first day of August next succeeding the final determination of the reasonable value to the District of such works, in case no further work is done by the District. Should the District elect to complete the work contemplated by this contract, or some portion thereof, the first payment shall be due and payable on the first day of March following the first day of August next suuceeding the date of final completion of the work by the District as determined by the Secretary. In determining the value of such works to the District there shall be taken into account, among other things, the method of financing required and cost of money, so that in no event shall all of the works contemplated by this contract cost the District more than they would have cost the District had they all been constructed by the United States under the terms of this contract. In the event of failure of the parties to agree as to the reasonable value to the District of the works which the District elects to use, the same shall be determined as provided in Article twenty-six (26) hereof.

(b) The amounts herein agreed to be paid by the District to the United States shall be in accordance with the following proportions, which proportions the Secretary hereby determines to be equitable and just, to-wit:

i. That proportion of the total cost of that part of said common works above Syphon Drop, excepting Laguna Dam, that the capacity provided for the District therein bears to the total capacity thereof less the capacity to be provided without cost to and for the Yuma project.

ii. That proportion of the total cost of each component part of all said common works, other than the part above Syphon Drop, that the capacity provided for the District in such part of said works bears to the total capacity thereof.

iii. The entire cost of all works North of the lowest turnout for East Mesa on the Coachella Main Canal.

(c) The District agrees to pay to the United States on the 31st day of December of each year commencing December 31, 1935, a portion (computed in the same manner as its share of costs of common works above Syphon Drop as agreed in Article 10 (b) i hereof) of each of the annual payments (together with interest required thereon,) then or thereafter required to be made by Imperial Irrigation District to the United States for a connection with Laguna Dam, under its contract dated October 23, 1918, and under Article sixteen (16) of said Imperial Contract, or otherwise.

The Secretary hereby determines that it is equitable and just that the District pay, and the District agrees, expressly for the benefit of Imperial Irrigation District,

to pay Imperial Irrigation District the same proportion of the aggregate sum which shall have been paid by Imperial Irrigation District to the United States prior to December 31, 1935, for a connection with Laguna Dam, as aforesaid, as the proportion herein agreed to be paid by the District to the United States of payments hereafter to be made for said connection with Laguna Dam. The aggregate sum to be paid by the District to Imperial Irrigation District shall be divided into ten equal installments, payable annually on March first of each year, commencing on or before the year 1939, with interest from date hereof on unpaid balances at the rate of six per centum (6%) per annum, payable March 1st, 1936, and annually thereafter. At its option, the District may at any time pay any amount on principal of said aggregate sum in advance of the due date and interest on the amount so paid shall thereupon cease.

(d) The lands now in the District, which are also situate in the Coachella Service Area, as defined in Article seventeen (17) hereof, are designated and described in statement hereto attached, marked Exhibit "B" and by this reference made a part hereof. The Board of Directors of the District does hereby declare, determine and find, and has by the ordinance by which it authorized the execution of this contract, declared, determined and found that only that portion of the District within said area described in said Exhibit "B" is susceptible of service with water from the waterworks contemplated under this contract and that said area shall be and constitute Improvement District No. 1 of the District. Said Board of Directors does further declare, determine and find and has, by said ordinance, declared, determined and found that that portion of said Coachella Service Area not

now in the District, of which description is hereto attached, marked Exhibit "C" and by this reference made a part hereof, (hereinafter styled "Salton Area"), is also susceptible of service from said waterworks, and that if and when said area described in Exhibit "C" is added to the District, said area shall also be added to, and entitled to the same benefits and subject to the same obligations as the lands in said Improvement District No. 1. Said Board of Directors does further declare, determine and find and has, by said ordinance, declared, determined and found, that those certain lands in said Coachella Service Area and not now in the District, (i) shown on said Exhibit "A" as enclosed within a hatched border line and marked "Dos Palmas Area", of which description is hereto attached, marked Exhibit "D" and by this reference made a part hereof, and (ii) shown on said Exhibit "A" as bounded on the East, South and West by a like hatched border line and on the North by the North boundary line of Imperial County and lying West of Salton Sea, (herein styled "Fish Springs Area") of which description is hereto attached, marked Exhibit "E" and by this reference made a part hereof, are also susceptible of service from said waterworks and that if and when said Dos Palmas Area, or any part thereof, is added to the District, it shall be and constitute Improvement District No. 2 of the District, and that if and when said Fish Springs Area, or any part thereof, is added to the District, it shall be and constitute Improvement District No. 3 of the District.

All lands now or hereafter situate both in said Coachella Service Area and in the District are, as a whole, obligated to pay to the United States the full amount herein agreed upon, regardless of the default or failure of any tract,

or of any landowner, in the payment of the taxes levied by the District against such tract or landowner, and the District shall, when necessary, levy and collect appropriate taxes to make up for the default or delinquency of any such tract of land or of any such landowner in the payment of taxes, so that in any event, and regardless of any defaults or delinquencies in the payment of any tax or taxes, the amounts due or to become due the United States shall be paid to the United States by the District when due. No lands in the District shall be charged with any taxes or assessments under this contract except those situate within said Coachella Service Area, as defined in Article seventeen (17) hereof, or as thereunder modified.

The Improvement District above mentioned are hereby required to be constituted and created as nearly as may be, in the Manner prescribed in said County Water District Act for creation of Improvement Districts in County Water Districts in case of ordinary issuance of bonds.

Changes in Boundaries of Coachella Service Area

Article 11. After the date of this contract no change shall be made in the boundaries of the Coachella Service Area as defined in Article seventeen (17) hereof and the Board of Directors shall make no order changing the boundaries of said Coachella Service Area except as provided in said Article seventeen (17); provided, however, that the Secretary hereby consents to the inclusion in said Coachella Service Area of all of the lands described on Exhibits "B", "C", "D" and "E" hereto attached.

Terms of Payment

Article 12. The amount herein agreed to be paid to the United States shall be due and payable in not more

than forty (40) annual installments commencing with the calendar year next succeeding the year when notice of completion of all work provided for herein is given to the District or under the provisions of Article 10 (a) hereof upon termination of work through failure of Congress and other Governmental authorities to make necessary appropriations or allocations therefor. The first five (5) of such annual installments shall each be one per centum (1%) of the amount herein agreed to be paid to the United States; the next ten (10) of such installments shall each be two per centum (2%) of the amount herein agreed to be paid to the United States, and the remainder of such annual installments shall each be three per centum (3%) of the amount herein agreed to be paid to the United States. The sums payable annually as set forth above shall be divided into two (2) equal semi-annual payments, payable on March first and September first of each year; provided, however, that if notice of the completion of work is given to the District subsequent to August first of any year the first semi-annual installment of charges hereunder shall be due and payable on March first of the second succeeding year.

Operation and Maintenance Costs

Article 13. Each agency which hereafter contracts for capacity to be provided for it in Imperial Dam and All-American Canal and for which agency capacity is so provided shall bear such proportionate part of the cost of operation and maintenance (including repairs and replacements) of the component parts of Imperial Dam and All-American Canal and of the Laguna Dam as may be determined by the Secretary to be equitable and just, but not less than an amount in proportion to the total amount as are the relative capacities provided in each component

part for such agency and for all other agencies, including the District. Each such agency shall advance to each district operating any works provided to be used in common by such district and such agency on or before January first of each year, its proportionate share of the estimated cost for that year of operation and maintenance in accordance with a notice to be issued by such district, provided that payment shall in no event be due until thirty (30) days after receipt of notice. Prior to March 1st of each year each such district shall provide each agency with a statement showing in detail the costs for the previous year for operation and maintenance of the works on account of which such agency has made advances. Differences between actual costs and estimated costs shall be adjusted in next succeeding notices. Upon request of any agency, both the advance notice of estimated costs and the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided, and the cost of such review shall be borne equally by the requesting agency and such district. Such district may, at its option, withhold the delivery of water from any agency until its proportionate share of the costs of operation and maintenance have been advanced or paid, as in this article provided.

Power Possibilities

Article 14. The power possibilities on the All-American Canal down to and including Syphon Drop with water carried for the benefit of the Yuma Project as provided for in Article fifteen (15) hereof, are hereby reserved to the United States. Subject to this reservation

and the participation by other agencies as provided for in Article twenty-one (21) hereof, the District shall have the privilege of utilizing by contract or otherwise, by means of the capacity to be provided for the District hereunder, such power possibilities, including those at or near Pilot Knob, as may exist upon said canal in proportion to its relative contribution or obligation toward the capital cost of said canal and appurtenent structures from and including the diversion works to the point where each respective power plant may be located; provided, that such privilege shall not interfere with the utilizing by Imperial Irrigation District of such power possibilities at or near Pilot Knob, by means of the capacity to be provided for Imperial Irrigation District in the All-American Canal from Syphon Drop to Pilot Knob, in excess of 8,500 cubic feet of water per second. The net proceeds as hereinafter defined in Article thirty-one (31) hereof, and as determined by the Secretary for each calendar year, from any power development which the District is hereunder authorized to make, shall be paid into the Colorado River Dam fund on March first of the next succeeding calendar year and be credited to the District on this contract until the District shall have paid thereby and/or otherwise an amount of money equivalent to that herein agreed to be paid to the United States. Thereafter such net power proceeds shall belong to the District. It is agreed that in the event the net power proceeds in any calendar year, creditable to the District, shall exceed the annual installment of charges payable under this contract during the then current calendar year, the excess of such net power proceeds shall be credited on the next succeeding unpaid installment to become due from the District under this contract.

Diversion and Delivery of Water for Yuma Project

Article 15. The District hereby consents that there be diverted at the Imperial Dam, and transported and delivered at Syphon Drop and/or such intermediate points as may be designated by the Secretary, the available water to which the Yuma Project (situated entirely within the United States and not exceeding in area 120,000 acres plus lands lying between the project levees and the Colorado River as such levees were located in 1931) is entitled, not exceeding two thousand (2,000) second-feet of water in the aggregate, or such part thereof as the Secretary may direct, for the use and benefit of said project, including the development of power at Syphon Drop, such water to be diverted, transported and delivered continuously in so far as reasonable diligence will permit; provided, however, that water shall not be diverted, transported or delivered for the Yuma Project when the Secretary notifies Imperial Irrigation District that said project for any reason may not be entitled thereto; provided, further, that there may be diverted, transported and delivered such water in excess of requirements for irrigation or potable purposes, as determined by the Secretary, on the Yuma Project as so limited, only when such water is not required by the District for irrigation or potable purposes. The diversion, transportation and delivery of water for the Yuma Project as aforesaid shall be without expense to the United States or its successors in control of said project, as to capital investment required to provide facilities for such diversion and transportation of water except such checks, turnouts and other structures required for delivery from said canal.

Contract of October 23, 1918

Article 16. That certain contract between the United States of America and Imperial Irrigation District, bearing date of October 23, 1918, providing for a connection with Laguna Dam, having been terminated, except as to the provisions of Article nine (9) thereof, by said Imperial Contract, the District hereby consents to such partial termination of said first mentioned contract. The District hereby consents that there be furnished to the United States or its successors in interest in the control, operation and maintenance of the Yuma Project, from any power development on the All-American Canal at or near Pilot Knob, up to but not to exceed four thousand horsepower of electrical energy for use by the agency in charge of project operations for irrigation and drainage pumping purposes and necessary incidental use on said Yuma Project, such power to be furnished at cost (including overhead and general expense) plus ten per cent; provided, however, that such power at or near Pilot Knob shall not be required to be furnished except at such times as all power feasible of development at Syphon Drop or developed elsewhere within a radius of 40 miles from the City of Yuma for the benefit of the Yuma Project is being used for project operations as in this article specified.

Delivery of Water by United States

Article 17. The United States shall, from storage available in the reservoir created by Boulder Dam, deliver to or for the District, for the benefit of the lands under or that will be served from the All-American Canal in Coachella Valley, now or hereafter within the District and lying within the Coachella Service Area, hereinafter defined, each year, at a point in the Colorado River im-

mediately above Imperial Dam, so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use within the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows: (Subject to availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

> The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:
>
> Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.
>
> Section 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.
>
> Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adja-

cent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

Section 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

Section 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water

per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Section 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir ac-

cumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

Section 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; Provided, that priorities numbered fourth and fifth shall not thereby be disturbed.

The use of water by the District shall be in conformity to the following provisions of that certain agreement executed between the District and Imperial Irrigation District dated February 14th, 1934, hereinabove in Article 4 (c) referred to, to-wit:

> "Imperial Irrigation District shall have the prior right for irrigation and potable purposes only, and exclusively for use in the Imperial Service Area, as hereinafter defined or hereunder modified, to all waters apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys as provided in the third and sixth priorities set out in the recommendation of the Chief of the Division of Water Resources of the State of California, as contained in Article 17 of the Imperial Contract. Subject to said prior right of Imperial Irrigation District, Coachella Valley County Water District shall have the next right, for irrigation and potable purposes only and exclusively for use in the Coachella Service Area, as hereinafter defined or hereunder modified, to all waters so apportioned to said Imperial Irrigation District and other lands under or that will

be served from the All-American Canal in the Imperial and Coachella Valleys, as provided in said third and sixth priorities. The use of water for generation of electric energy shall be, in all respects, secondary and subservient to all requirements of said two districts for irrigation and potable purposes as above limited.

As hereinabove used, the term 'Imperial Service Area' shall comprise all lands within the boundaries of Imperial Irrigation District as said District was constituted on June 23, 1931, and all lands in Imperial and San Diego Counties, California, shown on Map marked Exhibit 'A', attached to said Imperial Contract, and included within hatched border lines indicated on said map by legend as 'Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District', other than (a) such of said lands as are labeled 'Dos Palmas Area' and (b) such of said lands as lie West of Salton Sea and North of the Northerly boundary line of Township 11, South of the San Bernardino Base Line. The term 'Coachella Service Area' shall comprise all lands described on statements hereto attached and marked Exhibits 'B', 'C', 'D' and 'E', respectively,"

(Said Exhibits "B", "C", "D" and "E" being identical with Exhibits "B", "C", "D" and "E" attached to this contract between the District and the United States),

"being approximately, but not exactly, the lands within said hatched border lines shown on said Exhibit 'A', other than those included in said Imperial Service Area. Upon application of either District and with the written consent of the Secretary of the Interior, the boundaries of the service area which

such district is entitled hereunder to serve may at any time or from time to time be changed, but may not be so changed as, in the aggregate, to add more than 5000 acres to, nor to subtract more than 5000 acres from such service area, as herein defined, without the written consent of the district entitled hereunder to serve the other service area."

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within said Coachella Service Area. This contract is for permanent water service but is subject to the condition that Boulder Dam and Boulder Canyon Reservoir shall be used; First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by said Colorado River Compact, in the construction, management and operation of Boulder Dam, Imperial Dam, All-American Canal, and other works and the storage, diversion, delivery and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements or installation of equipment and/or machinery at Boulder Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and

employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River. Subject to the provisions of Article fourteen (14) hereof, nothing in this contract shall be construed to prevent the diversion by or for the District of water to the full capacity herein provided for it in the All-American Canal if and when water over and above the quantity apportioned to it hereunder is available, and no power development at Imperial and/or Laguna Dam shall be permitted to interfere with such diversion by or for said District, but, except as provided in Article Twenty-one (21) hereof, water shall not be diverted, transported nor carried by or through Imperial Dam or All-American Canal for any agency other than the District or Imperial Irrigation District, except by written consent of the Secretary.

Measurement of Water

Article 18. The water which the District receives under the apportionment as provided in Article seventeen (17) hereof shall be measured at such point or points on the canal as may be designated by the Secretary. Measuring and controlling devices shall be furnished and installed by the United States as a part of the work provided for herein, but shall be operated and maintained by and at the expense of the district, or districts, operating the works. They shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

Record of Water Diverted

Article 19. The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and delivered to the District, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

Refusal of Water in Case of Default

Article 20. The United States reserves the right to refuse to deliver water to the District in the event of default for a period of more than twelve (12) months in any payment due the United States under this contract, or in the discretion of the Secretary to reduce deliveries in such proportion as the amount in default by the District bears to the total amount due. It is understood, however, that the provisions of this article shall not relieve the District of its obligation hereunder to divert, transport and deliver water for the use and benefit of other agencies with whom the United States may contract for the diversion, transportation and delivery of water through or by the works to be constructed under the terms hereof. The United States further reserves the right to forthwith assume control of all or any part of the works to be constructed hereunder and to care for, operate and maintain the same, so long as the Secretary deems necessary or advisable, if, in his opinion, which shall be final and binding upon the parties hereto, the District does not carry out the terms and conditions of this contract to their full extent and meaning. In such event, the District's pro rata share of the actual cost of such care, operation and maintenance by the United

States shall be repaid to the United States, plus fifteen per centum (15%) to cover overhead and general expense, on March first of each year immediately succeeding the calendar year during which said works are operated and maintained by the United States. Nothing herein contained shall relieve the District of the obligation to pay in any event all installments and penalties provided in this contract.

Use of Works by the United States and Others

Article 21. The United States also reserves the right to, and the District agrees that it may, at any time prior to the transfer of constructed works to the District or Imperial Irrigation District for operation and maintenance, increase the capacity of such works and contract for such increased capacity with other agencies for the delivery of water for use in the United States. Such other agencies shall have the privilege at any time of utilizing by contract or otherwise, such power possibilities as may exist upon said canal in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. In the event other agencies thus contract with the United States, each of such agencies shall assume such proportion of the total cost of said works to be used jointly by such agency and the District, including Laguna Dam, as the Secretary may determine to be equitable and just but not less than the proportion that the capacity provided for such agency in such works bears to the total capacity thereof (except in that part thereof above Syphon Drop including Laguna Dam, in which part the proportion which such other agency shall assume shall be not less than the proportion

that the capacity provided for such agency therein bears to the total capacity thereof less the capacity to be provided without cost to and for the Yuma Project) and the District's financial obligations under this contract shall be adjusted accordingly. In no event shall construction costs chargeable to the District be increased by reason of additional capacity being provided for any such agency or agencies or contract or contracts having been made with same. Any such agency thus contracting shall also be required to reimburse the District in such amounts and at such times as the Secretary may determine to be equitable and just for payments theretofore made by the District for the right to use Laguna Dam.

Title to Remain in the United States

Article 22. Title to the aforesaid Imperial Dam and All-American Canal shall be and remain in the United States notwithstanding transfer of the care, operation and maintenance thereof to said two districts, or either of them; provided, however, that the Secretary may, in his discretion, when repayment to the United States of all moneys advanced shall have been made, transfer the title to said main canal and appurtenant structures except the diversion dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him.

Rules and Regulations

Article 23. There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract governing the diversion and

delivery of water hereunder to or for the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of the Imperial Dam and All-American Canal, all such rules and regulations will be fully adhered to by it.

Inspection by the United States

Article 24. The Secretary may cause to be made from time to time a reasonable inspection of the works constructed by the United States to the end that he may ascertain whether the terms of this contract are being satisfactorily executed by the District. Such proportion of the actual expense of such inspection in any calendar year, as shall be found by the Secretary to be equitable and just, shall be paid by the District to the United States on March first of each year immediately following the year in which such inspection is made, and upon statement to be furnished by the Secretary. The Secretary or his representative shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other purposes.

Access to Books and Records

Article 25. The officials or designated representatives of the District shall have full and free access to the books and records of the United States, so far as they relate to the matters covered by this contract, with the right

at any time during office hours to make copies of and from the same; and the Secretary shall have the same right in respect of the books and records of the District.

Disputes or Disagreements

Article 26. Disputes or disagreements as to the interpretation or performance of the provisions of this contract, except as otherwise provided herein, shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Interest and Penalties

Article 27. No interest shall be charged on any installments of charges due from the District hereunder except that on all such installments or any part thereof, which may remain unpaid by the District to the United States after the same become due, there shall be added to the amount unpaid a penalty of one-half of one per centum (½%) and a like penalty of one-half of one per centum (½%) of the amount unpaid shall be added on the first day of each month thereafter so long as such default shall continue.

Agreement Subject to Colorado River Compact

Article 28. This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved by the Boulder Canyon Project Act.

Application of Reclamation Law

Article 29. Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation and maintenance of the works to be constructed hereunder.

Contract to be Authorized by Election and Confirmed by Court

Article 30. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending

appellate action if ground for appeal be laid. The District shall without delay and at its own cost and expense furnish the United States for its files, copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith, which said copies shall be properly certified by the Clerk of the Court in which confirmatory judgment is obtained.

Method of Determining Net Power Proceeds

Article 31. In determining the net proceeds for each calendar year from any power development which the district is hereunder authorized to make, on the All-American Canal, to be paid into the Colorado River Dam fund as provided in Article fourteen (14) hereof, there shall be taken into consideration all items of cost of production of power, including but not necessarily limited to amortization of and interest on capital investment in power development, replacements, improvements, and operation and maintenance, if any. Any other proper factor of cost not here expressly enumerated may be taken into account in determining the net proceeds.

Contingent upon Appropriations

Article 32. This contract is subject to appropriations or allocations being made by Congress or other Governmental financing authority from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient

moneys in the Colorado River Dam fund to permit of said allotments. If more than three years elapse after this contract becomes effective and before appropriations or allocations are available to permit the United States to make expenditures hereunder, the District may, at its option, upon giving sixty (60) days written notice to the Secretary, cancel this contract. Such option shall be expressed by vote of the electors of the District with the same formalities as required for the authorization of contracts with the United States.

Addition of Lands to District

Article 33. (a) The District agrees to change its boundaries, subject to presentation to its Board of Directors before January 1, 1940, of lawful and sufficient petition or petitions therefor and the approval of the electors, so as to add to the District and to its Improvement District No. 1 all lands lying within the Salton Area, referred to in Article 10 (d) hereof.

(b) Whenever any of said lands within the Coachella Service Area are added to the District, the Secretary, on behalf of the United States, hereby consents to such addition. Nothing contained in this contract shall impair any right or remedy of any person entitled to object or protest against the addition to the District of any particular tract or tracts of land, nor impair the power of the Board to hear and determine any such objections or protests.

(c) Nothwithstanding anything herein contained, the District may, at its option, change its boundaries so as to add to the District all or any part of the Dos Palmas Area, and/or of the Fish Springs Area, referred to in Article 10 (d) hereof. In the event any lands within

said Dos Palmas Area or Fish Springs Area shall be added to the District such addition shall be made upon conditions substantially as hereinafter contained and as and when authorized by law, and the Secretary on behalf of the United States hereby requires and consents to such conditions, to-wit:

CONDITION No. 1

Contribution to Capital Costs

The lands within each Improvement District shall collectively bear that proportion of all costs of the Imperial Dam, and All-American Canal, including Laguna Dam, herein agreed to be borne by the District, which the area within such Improvement District bears to the total area of the Coachella Service Area from time to time within the District.

CONDITION No. 2

Contribution to Costs Paid by District

Each Improvement District, other than Improvement District No. 1 shall bear, in the proportion set out in Condition No. 1, its share of all capital costs of the Imperial Dam and All-American Canal, including Laguna Dam, paid by the District prior to the first District tax collection from the lands within such Improvement District and shall pay such share to the District in such installments and at such times as shall be determined by resolution of the Board of Directors of the District to be just and equitable. Upon collection of said sums by the District, the portions of the Coachella Service Area by which said sums were originally paid shall thereupon be entitled to reimbursement or credit in such manner as may be determined by said Board.

CONDITION NO. 3

Distribution System

Each Improvement District shall bear the entire capital cost of any distribution system which may be constructed by or under the authority of the District to serve the lands within such Improvement District but shall not be required to bear any part of the capital cost of any distribution system to serve the lands within any other Improvement District.

CONDITION NO. 4

Taxation

All charges hereunder to be borne by each Improvement District unless otherwise collected from the lands therein, shall be a part of but in addition to the annual taxes upon said lands for other District purposes and shall constitute an additional annual charge upon said lands, to be levied upon an ad valorem or other basis as now or hereafter provided by law.

Rights Reserved Under Section 3737 Revised Statutes

Article 34. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies Under Contract not Exclusive

Article 35. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States, the District or Imperial Irrigation District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The

waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

Interest in Contract Not Transferable

Article 36. No interest in this contract is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

Member of Congress Clause

Article 37. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

Contract Void If Certain Lands Included in Imperial Irrigation District

Article 38. In the event lawful petition or petitions sufficient in all respects for inclusion within Imperial Irrigation District of ninety per centum (90%) of the lands shown on said Exhibit "A" lying North of the Northerly boundary line of Township Eleven (11), South of the San Bernardino Base Line and bounded by the lines indicated on said Exhibit "A" as "Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District", exclusive of the Dos Palmas area and exclusive of Indian lands and public lands of the United States shall be filed pursuant to and within the time limited by said Imperial Contract, and said lands shall be thereafter included within said Imperial Irrigation

District pursuant to such petition or petitions, then, as of the date of such inclusion, this contract shall terminate and be at an end.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA
By HAROLD L. ICKES
Federal Emergency Administrator of Public Works and Secretary of the Interior.

COACHELLA VALLEY COUNTY WATER DISTRICT
By HARRY W. FOSTER
President.

Attest:

THELMA SCHISLER
Secretary.

(The following exhibits, annexed to the foregoing contract, are omitted here because of limitations of space:

Exhibit A: "Bureau of Reclamation map No. 212-D-112, dated at Denver, Colorado, June 23, 1931, and entitled 'Boulder Canyon Project—All-American Canal System'."

Exhibit B: "Description of lands within Coachella Valley County Water District and its improvement district No. 1 and within the Coachella service area."

Exhibit C: "Description of lands outside Coachella Valley County Water District and within the Coachella service area, designated the Salton Area."

Exhibit D: "Description of lands outside Coachella Valley County Water District and within the Coachella service area, designated the Dos Palmas area."

Exhibit E: "Description of lands outside Coachella Valley County Water District and within the Coachella service area, designated the Fish Springs area.")

APPENDIX NO. 17

WATER DISTRIBUTION CONTRACT: UNITED STATES AND COACHELLA VALLEY COUNTY WATER DISTRICT

December 22, 1947

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
BOULDER CANYON PROJECT
ALL-AMERICAN CANAL
COACHELLA VALLEY COUNTY WATER DISTRICT

Contract for Construction of Distribution System, Protective Works, and Drainage Works

1. **This Contract,** made this 22nd day of December, 1947, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, the Act of Congress approved May 10, 1939 (53 Stat. 635, 718), designated the Interior Department Appropriation Act, 1940, the Act of Congress approved August 4, 1939 (53 Stat. 1187), designated the Reclamation Project Act of 1939, and the Act of Congress approved June 26, 1947 (Public Law 121, 80th Cong., 1st Session), between **The United States of America,** hereinafter referred to as the "United States", acting for this purpose by ~~J. A. Krug,~~ William E. Warne, Assistant Secretary of the Interior, hereinafter referred to as the "Secretary", and **Coachella Valley County Water District,** a County Water District

created, organized and existing under and by virtue of the County Water District Act of the State of California, and acts amendatory thereof or supplementary thereto, with its principal place of business at Coachella, Riverside County, California, hereinafter referred to as the "District".

Witnesseth That:

Explanatory Recitals

2. **Whereas,** pursuant to the provisions of the Reclamation Law and particularly pursuant to the provisions of the Boulder Canyon Project Act, the United States and the District have heretofore entered into a contract of date October 15, 1934 (Symbol and No. I1r-781), entitled "Contract for Construction of Capacity in Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water"; and

3. **Whereas,** in addition to the works which the United States agreed to construct for the use and benefit of the District, as provided by the aforesaid contract of October 15, 1934, which said works, or portions thereof, are now completed or in course of construction, the District has requested that the United States also construct for use in connection therewith and in addition thereto (a) a distribution system for the benefit of the District and those lands that will be served with water from the All-American Canal in Coachella Valley, now or hereafter within the District and lying within the Coachella Service Area defined in Article 17 of said contract of October 15, 1934; (b) an appurtenant system of protective works for the protection of said distribution system, the Main (All-American) Canal to Coachella Valley, and lands and other properties below the Canal from overflow or other damage by storm

waters or surface waters from above the Canal; and (c) has also requested the United States to participate in the conduct of field investigations and analyses of data incidental to the preparation by the District of designs for the construction by the District of such drainage works as may hereafter be required for lands now or hereafter within the District and the Coachella Service Area; and

4. **Whereas,** the United States is willing to undertake the construction of the aforementioned distribution system and the appurtenant system of protective works and is willing to participate in investigations and studies preliminary to the construction by the District of said drainage works, all under the conditions hereinafter set forth; and

5. **Whereas,** the estimated total cost of said distribution system, appurtenant system of protective works and drainage investigations and studies is Eighteen Million Dollars ($18,000,000), of which cost the Secretary has heretofore allocated to the purpose of flood control the sum of Four Million Five Hundred Thousand Dollars ($4,500,000), said last mentioned sum to be non-repayable and non-returnable to the United States; and

6. **Whereas,** the Secretary has determined, and does hereby determine, that the revenues provided for by this contract are adequate in his judgment to insure payment of all repayable and returnable expenses of construction, operation and maintenance of the works to be constructed by the United States under the terms hereof, as well as other work to be performed by the United States hereunder, in the manner provided in the Reclamation Law; and

7. **Whereas,** the District will, at its own expense, construct such drainage works as may hereafter be required

for the lands now or hereafter within the District and lying within the said Coachella Service Area;

Now, Therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Modification of Contract Dated October 15, 1934

8. (a) As one of the considerations for the execution of this contract by the United States it is agreed that the Main (All-American) Canal to Coachella Valley (hereinafter styled "Coachella Main Canal"), shall terminate at Engineer Station 6517, a point near 57th Ave., as shown on Exhibit "A" attached hereto and by this reference made a part hereof, instead of at the boundary line common to Riverside and Imperial Counties, as shown on Exhibit "A" attached to the aforesaid contract dated October 15, 1934. As so shortened, said Coachella Main Canal shall be constructed in the approximate location shown on Exhibit "A", hereto attached, with such capacities as the Secretary may conclusively determine to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by the aforesaid contract of October 15, 1934, as amended by this contract; provided, however, that such changes in capacities, locations, lengths and alignments may be made during the progress of the work as may, in the opinion of the Secretary, whose opinion shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable.

(b) Notwithstanding any of the terms or provisions of the aforesaid contract dated October 15, 1934, all work agreed to be performed by the United States thereunder shall be deemed to be completed upon whichever of the following described dates shall first occur:

(1) The date of expiration of five years from and after the date of acceptance by the United States of the work called for by its contract with Otto B. Ashbach and Sons, dated January 10, 1947 (Symbol and Number I2r-17147), for construction of earthwork, concrete canal lining and structures between Engineer Stations 6106+06 and 6517+00 on the Coachella Main Canal, or

(2) The date of completion of the distribution system hereinafter described in Article 9(a)(i) of this contract, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto.

(c) Following receipt by the District of notice of completion of all work provided for by the aforesaid contract dated October 15, 1934, as determined under the provisions of this contract, payment for such work shall be due and payable from the District to the United States in accordance with the terms of said contract dated October 15, 1934.

Construction by the United States and the District

9. (a) In addition to the construction of the works agreed to be constructed by the United States for the use and benefit of the District under the provisions of the aforesaid contract of date October 15, 1934, as amended by Article 8 of this contract, the United States will also, subject to the provisions of Articles 12 and 32 hereof, construct for use in connection therewith:

(i) A distribution system at the approximate locations indicated on the map marked Exhibit "A", attached hereto and by this reference made a part hereof. Said distribution system shall consist generally

of open, concrete-lined or asphaltic-lined canals and concrete pipe laid underground, with capacities as indicated in said Exhibit "A", pumping plants as indicated in said Exhibit and such other appurtenant and auxiliary structures as the Secretary may conclusively determine to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by such distribution system; provided, however, that changes in capacities, locations, lengths and alignments of said distribution system works may be made during the progress of the work and after consultation with the District, as may in the opinion of the Secretary, whose opinion thereof shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable; and

(ii) A system of protective works designed to protect the Coachella Main Canal, the distribution system herein provided for and lands and other properties below the Canal from overflow or other damage by storm waters or surface waters. Said protective works shall consist of, but need not be limited to, such dams, dikes, levees, embankments, catchment basins, bridges, causeways, roads, culverts, flumes, syphons, waterways, evacuation and dispersion channels, and other works, as indicated in said Exhibit "A", as the Secretary may conclusively determine to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by such system of protective works; provided, that changes in capacities, locations, lengths and alignments of said protective works or structures may be made during the progress of the work and after consultation with the District, as may in the opinion of

the Secretary, whose opinion thereof shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable.

(b) The District hereby agrees to construct such drainage works as may be necessary for the drainage of lands now or hereafter within the District and the Coachella Service Area. To the extent that the Secretary may conclusively determine to be necessary or advisable, the United States shall participate in the conduct of field investigations and analyses of data incidental to the preparation, by the District, of designs for the construction by the District of such drainage works. Construction plans and specifications prepared by the District for the construction from time to time of units of said drainage works shall be subject to the concurrence of the United States; provided, however, that the cost to the District of such participation by the United States shall in no event exceed the sum of One Hundred Fifty Thousand Dollars ($150,000).

(c) The ultimate cost to the District of the work herein agreed to be performed by the United States shall in no event exceed the aggregate sum of Thirteen Million Five Hundred Thousand Dollars ($13,500,000). Such cost shall include all expenses of whatsoever kind or nature heretofore or hereafter incurred by the United States from the Reclamation Fund, the Colorado River Dam Fund, or otherwise, in connection with, growing out of or resulting from the work herein agreed to be performed by the United States, including, but not limited to, the cost of labor, materials, equipment, engineering, legal work, superintendence, administration, overhead, any and all costs arising from operation and maintenance of works to be constructed by the United States under the terms hereof prior to the time said operation and maintenance costs are assumed

by the District, damage of all kinds and character, and the costs of rights-of-way and destroyed improvements, as hereinafter provided.

(d) The United States will invoke all legal and valid reservations of rights-of-way under Acts of Congress, or otherwise reserved or held by it, without cost to the District, except that the United States reserves the right, where rights-of-way are thus acquired, to reimburse the owners of the servient lands for the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursements in the cost of work performed by the United States hereunder, as provided in subdivision (c) of this Article.

(e) The District shall convey to the United States, without cost, unencumbered fee simple title to any and all lands owned by it which, in the opinion of the Secretary, may be required for right-of-way purposes for the works constructed by the United States hereunder.

(f) Where rights-of-way are required for those works described in subdivision (a) (i) of this Article, and such rights-of-way are not reserved to the United States under Acts of Congress or otherwise, or the lands over which such rights-of-way are required are not then owned by the District, the District shall, upon request of the Secretary, acquire title to such lands or perpetual easements therein, required for such purpose, and in turn convey unencumbered fee simple title thereto or perpetual easements therein to the United States, at the actual cost thereof to the District, including the actual cost of legal and title expenses incurred by the District, subject to the approval of such costs by the Secretary. In case of neglect or failure of the District, upon request of the Secretary, so to acquire and convey any lands or perpetual easements de-

termined by him to be necessary for the construction of such works, the United States may acquire the same and charge the actual cost thereof, including the actual cost of legal and title expenses incurred by the United States, to the District. All sums reimbursed to the District by the United States under the provisions of this subdivision of this Article shall be included in the cost of work performed by the United States hereunder, as provided in subdivision (c) of this Article.

(g) Where rights-of-way are required for those works described in subdivision (a) (ii) of this Article, and the lands over which such rights-of-way are required are not then owned by the United States or by the District, the District shall, upon request of the Secretary, acquire title to such lands or perpetual easements therein, required for such purpose, and in turn convey unencumbered fee simple title thereto or perpetual easements therein, without cost, to the United States. In case of neglect or failure of the District, upon request of the Secretary, so to require and convey any lands or perpetual easements determined by him to be necessary for the construction of those works described in subdivision (a) (ii) of this Article, the United States may acquire the same and charge the actual cost thereof, including the actual cost of legal and title expenses incurred by the United States, to the District. On or before October 1 of each calendar year, the United States will give written notice to the District of the amount expended by the United States under the provisions of this subdivision of this Article during the twelve-month period ending on September 1 next preceding, and such amount shall be repaid to the United States by the District on March 1 next following.

Operation and Maintenance of Constructed Works

10. (a) The District shall assume the care, operation and maintenance of the works herein agreed to be constructed by the United States, or any major part thereof completed and ready for use, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto, upon sixty (60) days' written request therefor made by the Secretary at any time subsequent to the completion of construction of said works or any such major part thereof. Thereafter, except as herein otherwise provided, the District shall, at its own cost and without expense to the United States, care for and operate and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the diversion, transportation and distribution of water, and for the protection of the Coachella Main Canal, the distribution system herein provided for and lands and other properties below the main canal from overflow or other damage by storm waters, or surface waters, as when received from the United States, reasonable wear and damage by the elements excepted, and shall use all practicable methods to insure the economical and beneficial use of water. After the care, operation and maintenance of any such works shall have been assumed by the District, the District shall save the United States, its officers, agents, attorneys and employees, harmless as to any and all injury and damage to persons and property which may arise out of the care, operation and maintenance thereof.

(b) During the repayment period of this contract, if, in the opinion of the Secretary, whose opinion shall be final and binding upon the parties hereto, the District, at any time, shall have failed to perform substantially

any provision of this contract, the United States may, on sixty (60) days' written notice to the District, resume the control of any such works and thereafter care for, operate and maintain the same. In such event the District shall advance to the United States within fifteen (15) days after written demand by the Secretary, the estimated cost of such care, operation and maintenance by the United States, plus fifteen per centum (15%) to cover overhead and general expense, during the period commencing with the date that the care, operation and maintenance of such works is assumed by the United States and terminating on the first day of March next succeeding. During such time thereafter as the United States shall retain the operation and maintenance of such works, the District shall advance to the United States on March first of each year, upon estimates therefor to be furnished by the United States on or before September first next preceding, the estimated cost of operation and maintenance, plus fifteen per centum (15%) to cover overhead and general expense, for the following twelve (12) months. If the amount advanced by the District for any period shall prove to be insufficient to pay the cost of operation and maintenance by the United States during such period, the amount of such deficiency shall be paid forthwith by the District to the United States upon notice thereof and demand therefor by the Secretary. The surplus of any amount so advanced by the District for operation and maintenance by the United States during any period shall be credited on the estimated cost of operation and maintenance by the United States during the succeeding period. Any surplus of any advances made by the District for operation and maintenance which shall remain unexpended and un-

obligated for such purpose by the United States at such time as the care, operation and maintenance of the works are returned to the District shall be refunded to the District. Nothing herein contained shall relieve the District of the obligation to pay, in any event, all installments and interest provided in this contract.

(c) Whenever the United States shall have resumed the care, operation and maintenance of any such works pursuant to the provisions of subdivision (b) of this Article, the Secretary, upon written request by the District accompanied by assurances satisfactory to him, may, upon sixty (60) days' written notice to the District, return the care, operation and maintenance of any such works to the District.

(d) The right of the United States to control the care, operation and maintenance of any such works, pursuant to the provisions of this Article, shall continue during the repayment period of this contract.

Keeping Works and Appurtenant Structures in Repair

11. During the repayment period of this contract, except in case of emergency, no substantial change in any of the works to be constructed by the United States and transferred to the District under the provisions hereof shall be made by the District without first having had and obtained the written consent of the Secretary, and the Secretary's opinion as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to, and replacements of, all works transferred to it under the terms and conditions hereof which, in the opinion of the Secretary, are deemed necessary for the proper operation and mainte-

nance of such works. In case of neglect or failure of the District to make such repairs, the United States may, at the option of the Secretary, after reasonable notice to the District, cause such repairs to be made and charge the actual cost thereof, plus fifteen per centum (15%) to cover overhead and general expense, to the District. On or before October 1 of each calendar year the United States shall give written notice to the District of the amount expended by the United States for repairs under this Article during the twelve-month period ending on September 1 immediately preceding. Such cost, plus overhead and general expense as stated above, shall be repaid by the District on March 1 immediately succeeding.

Agreement by District to Pay for Work Performed by the United States

12. (a) The District agrees to pay to the United States the actual cost, not exceeding Thirteen Million Five Hundred Thousand Dollars ($13,500,000), incurred by the United States on account of work herein agreed to be performed by the United States. In addition, the District hereby agrees to repay to the United States all expenditures incurred on account of any and all damages due to the existence, operation and maintenance of the works herein agreed to be constructed by the United States, the incurrence of which increases expenditures by the United States beyond the sum of Thirteen Million Five Hundred Thousand Dollars ($13,500,000). The total of all such costs and expenditures described in Article 9 and in this subdivision 12 (a) shall constitute, is hereby designated and is hereinafter referred to as "the general repayment obligation of the District".

(b) Should Congress or other Governmental financing authorities fail to make necessary appropriations or allocations of money to complete the work herein provided for, then the Secretary may, at such reasonable time as he may consider advisable after Congress and such other Governmental financing authorities shall have failed for two (2) consecutive years to make the necessary appropriations or allocations which shall have been annually requested by the Secretary, give the District notice of the termination of work by the United States, and furnish the District with a statement of the amount actually expended by the United States thereon, exclusive of the amounts theretofore covered by notices given under Article 15 of this contract, and the amount set out in such statement shall be paid by the District in the manner set out in Article 15 of this contract.

Establishment of Irrigation Blocks; Allocation of Construction Costs Obligations Thereto

13. (a) The Secretary shall, from time to time, during the construction of works hereunder, designate the areas of land within the District to which irrigation water will be available through the works described in Article 9 (a) (i) hereof at substantially the same time. Each such area shall be known as an irrigation block. No irrigation block so designated shall include land in more than one improvement district of the District. The designation of each irrigation block shall be made before water becomes available therefor through the works described in Article 9 (a) (i) hereof.

(b) The Secretary shall make an allocation of the District's general repayment obligation to the lands in the respective irrigation blocks. The obligation of each

irrigation block shall be that amount which bears the same ratio to the general repayment obligation of the District that the irrigable acreage in such irrigation block bears to the total irrigable acreage of the District, all as determined by the Secretary, whose determination thereof shall be conclusive and binding upon the parties hereto. If necessary, the obligation as to each block may be determined originally on the basis of estimates as to (i) the net irrigable acreage in the District as a whole, (ii) the net irrigable acreage in each block and (iii) the ultimate amount of the general repayment obligation of the District, and the obligation so determined shall be controlling until the obligation is finally determined on the basis of the actual net irrigable acreage in the District as a whole, the actual net irrigable acreage in each block and the actual amount of the general repayment obligation of the District. If the total obligation for any block, as finally determined, is different from the original allocation therefor, the remaining unaccrued balance of the original obligation shall be adjusted by the amount of the difference. The Secretary promptly shall notify the District in writing of the amounts when originally and when finally determined as the obligation as to each irrigation block.

(c) The general repayment obligation of the District as determined pursuant to Articles 9 and 12 (a) hereof shall remain a general obligation of the District as a whole notwithstanding the allocation thereof among two or more irrigation blocks in the District, and default of the lands in any block as to the obligation allocated to that block shall not relieve the District as a whole of liability as to that portion of its general repayment obligation. All lands now or hereafter in the District are, as a whole,

obligated to pay to the United States the full amounts herein agreed upon, regardless of the default or failure of any tract or of any landowner in the payment of the taxes levied by the District against such tract or landowner, and the District shall, when necessary, levy and collect appropriate taxes to make up for the default or delinquency of any such tract of land or of any such landowner in the payment of taxes, so that in any event and regardless of any defaults or delinquencies in the payment of any tax or taxes, the amounts becoming due the United States hereunder shall be paid to the United States by the District when due. Nothing in this subdivision of this Article, however, shall be construed as in any manner altering the time or rate of payment of the obligation allocated to each irrigation block.

Development Periods and Furnishing of Water During Such Periods

14. For each irrigation block which shall be designated as provided in Article 13 hereof there is hereby fixed a development period of eight (8) years from and including the date on which water from the works described in Article 9 (a) (i) hereof is available for all irrigable lands in the block, as determined by the Secretary. During the development period for each irrigation block the District shall deliver water to the lands within such block on a water rental or toll-charge basis. The charge shall be on the basis of an amount per acre foot of water per annum. The charges for each irrigation block shall be fixed by the District with the object of collecting throughout the development period amounts at least sufficient (i) to defray the annual costs of operation and maintenance chargeable to that block, and (ii) to provide for repairs

to and depreciation of works constructed by the United States and operated by the District hereunder, in accordance with the provisions of Article 10. The amount of the charge and the terms and conditions with respect to it for each year during the development period shall be determined and announced by the District on or before January 1 of each year. The District shall collect the necessary tolls and charges from the water users within each irrigation block during a development period in advance of the delivery of water.

Terms of Payment

15. The amount herein agreed to be paid to the United States on account of each irrigation block shall be due and payable by the District in not more than forty (40) annual instalments commencing with the calendar year, next succeeding the year of termination of the development period for such irrigation block. The first five (5) of such annual instalments shall each be one per centum (1%) of the cost allocated to each irrigation block, all as conclusively determined by the Secretary; the next ten (10) of such instalments shall each be two per centum (2%) of said cost, and the remainder of such annual instalments shall each be three per centum (3%) of said cost. The sums payable annually as set forth above shall be divided into two (2) equal semiannual instalments payable on March 1st and September 1st of each year; provided, however, that if the development period with respect to any irrigation block shall terminate subsequent to August 1st of any year, the first semiannual instalment of charges hereunder shall be due and payable on March 1st of the second succeeding year following termination of the development period for such irrigation block.

Accumulation and Use of Reserve Fund

16. (a) Beginning in the calendar year in which the first instalment of the general repayment obligation of the District shall have become due and payable under the provisions of Article 15 hereof and continuing thereafter until such time as all sums of money becoming due hereunder shall have been paid to the United States, the District shall accumulate and maintain, in the manner hereinafter provided, a reserve fund which shall be available for the purposes and in the circumstances hereinafter mentioned.

(b) Said reserve fund shall be accumulated by the District in yearly increments of Twenty Thousand Dollars ($20,000) until the reserve fund thus accumulated shall total One Hundred Thousand Dollars ($100,000), which total sum shall be maintained at all times, provided, however, that the District shall not be required to add to said reserve fund an amount in excess of Twenty Thousand Dollars ($20,000) in any one year.

(c) Except in case of emergency expenditures shall be made from said reserve fund only with the advance approval of the Secretary and only for the purposes of meeting major, unforeseen costs of operation and maintenance, repair, betterment and replacement of works constructed hereunder by the United States or the District.

(d) Said reserve fund shall be deposited and maintained, apart from other District funds, in a depository meeting the requirements of the laws of California and upon conditions concerning its withdrawal which are satisfactory to the Secretary.

(e) During such time or times as the operation and maintenance of works constructed hereunder shall have

been resumed by the United States in accordance with the provisions of Article 10 (b) hereof, said reserve fund shall be available for use by the United States for the same purposes as said reserve fund was theretofore available for use by the District.

Refusal of Water in Case of Default

17. The United States reserves the right to refuse to deliver water to the District under the provisions of the aforesaid contract of October 15, 1934, in the event of default for a period of more than twelve (12) months in any payment due the United States under this contract, or, in the discretion of the Secretary, to reduce deliveries in such proportion as the amount in default by the District bears to the total amount due. No water shall be delivered to or for any tract of land in the District during any time that the owners or holders thereof are delinquent in the payment of any taxes heretofore or hereafter levied by the District or any toll or other charges which the District may be authorized to make. It is understood, however, that the provisions of this Article shall not relieve the District of its obligation under the aforesaid contract of October 15, 1934, to divert, transport and deliver water for the use and benefit of other agencies with which the United States may contract for the diversion, transportation and delivery of water through or by the works constructed or to be constructed under the terms of the said contract of October 15, 1934.

Title to Remain in the United States.

18. Title to the works to be constructed by the United States under the terms hereof shall be and remain in the United States, notwithstanding transfer of the care, op-

eration and maintenance thereof to the District; provided, however, that the Secretary may, in his discretion, when repayment to the United States of all moneys advanced shall have been made, transfer the title to said works to the District.

Rules and Regulations

19. There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract governing the care, operation and maintenance of the works to be constructed hereunder. Such rules and regulations may be modified, revised and/or extended from time to time, after notice to the District and opportunity for it to present its views, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof. The District hereby agrees that in the care, operation and maintenance of the works to be constructed hereunder, all such rules and regulations will be fully adhered to.

Inspection by the United States

20. The Secretary may cause to be made from time to time a reasonable inspection of the works constructed by the United States to the end that he may ascertain whether the terms of this contract are being satisfactorily executed by the District. The actual expense of such inspection in any calendar year shall be paid by the District to the United States on March 1st of each year immediately following the year in which such inspection is made, and upon statement to be furnished by the Secretary. The Secretary or his representative shall at all times have the right of ingress to and egress from all works of the

District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other purposes, within the terms of this contract.

Access to Books and Records

21. The officials or designated representatives of the District shall have full and free access to the books and records of the United States, as far as they relate to the matters covered by this contract, with the right at any time during office hours to make copies of or from the same; and the Secretary shall have the same right in respect of the books and records of the District.

Development and Compilation of Data and Keeping of Books, Records and Reports

22. (a) The District shall with reasonable accuracy maintain a modern set of books of account, in form acceptable to the Secretary, showing all the financial transactions of the District. On or before the first day of February of each year the District shall make full and complete written reports to the United States, on forms to be approved and furnished by the Secretary, covering all water delivered to the lands of the District through the works to be constructed hereunder, the disposition of such water, and the nature, extent and total estimated value of each kind of crop produced on the total acreage of the District during the twelve-month period ending December 31 next preceding. The District shall furnish such financial reports and statements of its operations and condition as may be required from time to time by the Secretary. The records and data from which any reports or statements are made shall be accessible to the United States on demand by the Secretary and the District

shall cooperate to the fullest extent in facilitating any investigation by the United States of the facts shown in such records or data.

(b) The District hereby declares its intention to cooperate with the United States in the development, preparation and compilation of such data, reports and statements as in the judgment of the Secretary are necessary or desirable, which operations may, at the request of the District, be performed by the United States at the expense of the District. The aggregate cost to the District during any calendar year of operations under this subdivision shall not exceed the sum of Fifteen Thousand Dollars ($15,000), unless a greater sum is authorized by the District. The actual cost to the United States of such operations in any calendar year shall be paid by the District to the United States on March 1st of each year immediately following the year in which such operations are conducted, and upon statement to be furnished by the Secretary.

Disputes or Disagreements

23. Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such arbitration proceedings. Whenever a controversy arises out of this contract and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators

not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of a majority, with all five (5) arbitrators participating, shall be a valid and binding award of the arbitrators.

Interest on Charges Due from District

24. No interest shall be charged on any charges due from the District hereunder, except that on all such charges or any part thereof, which remain unpaid by the District to the United States after the same become due, an interest charge of one-half of one percentum (½%) of the amount unpaid shall be added thereto, and thereafter an additional interest charge of one-half of one percentum (½%) of the principal sum unpaid shall be added on the first day of each succeeding calendar month until the amount due, including such interest, is paid in full.

Contract Subject to Colorado River Compact

25. This contract is made upon the express condition and with the express covenant that all rights hereunder shall be subject to and controlled by the Colorado River Compact, approved by Section 13 (a) of the Boulder Canyon Project Act, and the parties hereto shall observe and be subject to and controlled by said Colorado River Compact in the construction, management and operation of all works provided for herein. It is understood and agreed by the parties hereto that this contract does not deal with the subject of availability of water.

Application of Reclamation Law

26. Except as provided in the Boulder Canyon Project Act, the Reclamation Law shall govern the construction,

operation and maintenance of the works to be constructed hereunder.

Lands Not to Receive Water Until Owners Thereof Execute Certain Contracts

27. No water shall be delivered to any excess lands, as defined in Article 29 hereof, unless the owners thereof shall have executed valid recordable contracts in form satisfactory to the Secretary, agreeing to the provisions of this contract between the United States and the District; agreeing to the appraisal provided for in Article 28 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Coachella Main Canal or the distribution system and system of protective works herein agreed to be constructed, all as hereinafter provided; and agreeing to the sale of such lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed by the Secretary as hereinafter provided. No sale of any such lands shall carry the right to receive water delivered under said contract of October 15, 1934, unless and until the purchase price involved in such sale is approved by the Secretary and upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary may instruct the District by written notice to refuse to deliver any water to the land involved in such fraudulent sales and the District thereafter shall not deliver said water to such lands.

Valuation and Sale of Excess Lands

28. (a) The value of the irrigable lands within the District as defined in Article 29, held in private ownership of large landowners as defined in said Article, for the

purposes of this contract, shall be determined, subject to the approval thereof by the Secretary, by three appraisers. One of said appraisers shall be designated by the Secretary and one shall be designated by the District and the two appraisers so appointed shall name the third. If the appraisers so designated by the Secretary and the District are unable to agree upon the appointment of the third, they shall so advise the Secretary and the District and the designation of the third appraiser shall then be made by the Secretary.

(b) The following principles shall govern the appraisal:

(i) No value shall be given such lands on account of the existing or prospective possibility of securing water from the Coachella Main Canal or the distribution system and system of protective works herein agreed to be constructed.

(ii) The value of improvements on the land at the time of said appraisal shall be included therein, but shall also be set forth separately in such appraisal.

(c) The cost of the appraisal shall be paid by the United States.

(d) Any improvements made or placed on the appraised land after the appraisal hereinabove provided for prior to sale of the land by a large landowner may be appraised in like manner, and the same shall be subject to approval by the Secretary or his authorized representative.

(e) Future sales of such irrigable lands of large landowners shall not carry the right to receive water delivered under said contract of October 15, 1934, for such

land and the District agrees to refuse to deliver water to land so sold until, in addition to compliance with the other provisions hereof:

(i) A verified statement showing the sale price upon any such sale shall have been filed with the District; and

(ii) There shall have been complied with by the landowner such reasonable rules and regulations as may now or hereafter be promulgated by the Secretary for the better administration and enforcement of the Reclamation Law and of the provisions hereof, which may include, among others, the requirement that prior to delivery of water to any District lands acquired from a large landowner, the owner thereof shall furnish the District with an affidavit describing in detail the affiant's purchase of such lands made prior thereto.

(f) The District agrees, by all reasonable means, including the quarterly examination of county records or procurement of necessary title abstract service and otherwise, to ascertain the occurrence and conditions of all sales of such irrigable lands of large landowners and to inform the United States concerning the same.

(g) A true copy of this contract and of each appraisal made pursuant thereto shall be maintained on file in the office of the District and like copies in the office of the Regional Director, United States Bureau of Reclamation, Boulder City, Nevada, and shall be made available for examination during the usual office hours by all persons who may be interested therein.

Excess Lands

29. (a) As used herein the terms "excess land" means that part of the irrigable land within the District in excess of 160 acres held in the beneficial ownership of any single person; or in excess of 320 acres held in the beneficial ownership of husband and wife jointly, as tenants in common or by the entirety, or as community property; the term "large landowner" means an owner of excess lands; the term "nonexcess land" means all irrigable land within the District which is not excess land as defined herein; and the term "irrigable lands within the District" means those lands now or hereafter within the District and lying within the Coachella Service Area, which, in the conclusive determination of the Secretary, are irrigable and susceptible of service from the distribution system herein agreed to be constructed.

(b) Each large landowner as a further condition precedent to the right to receive water delivered under said contract of October 15, 1934, for any of his excess lands shall:

(i) Before the initial delivery date or before the expiration of six months from the announcement thereof, whichever occurs first, execute a valid recordable contract in form satisfactory to the Secretary, agreeing to the provisions herein contained and agreeing to dispose of his excess lands in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved, appraised value of such excess land and within a period of ten years after the date of the execution of said recordable contract and agreeing further that if said land is not so disposed

of within said period of ten years the Secretary shall have the power to dispose of said land subject to the same conditions on behalf of such large landowner subject to conditions all as herein provided; and the District agrees that it will refuse to deliver water to any large landowner other than for his nonexcess lands until such owner meets the conditions precedent herein stated.

(ii) Within thirty days after the date of notice from the United States requesting such large landowner to designate his irrigable lands within the District which he desires to designate as nonexcess lands, file in the office of the District, in duplicate, one copy thereof to be furnished by the District to the United States, his written designation and description of lands so selected to be nonexcess lands and upon failure to do so the District shall make such designation and mail a notice thereof to such large landowner, and in the event the District fails to act within such period of time as the Secretary considers reasonable, such designation will be made by the Secretary who will mail a notice thereof to the District and the large landowner. The large landowner shall become bound by any such action on the part of the District or the Secretary and the District will deliver water only to the land so designated to be nonexcess land.

Public Lands Subject to the Act of August 11, 1916, as Amended

30. Those public lands of the United States and entered lands for which no final certificates have been issued, located within the District, and described on the

list which is hereto attached, marked Exhibit "B", and by this reference made a part hereof, are hereby designated as subject to all the provisions of the act entitled "An Act to promote the reclamation of arid lands", approved August 11, 1916 (39 Stat. 506), as amended by the Act of May 15, 1922 (42 Stat. 541); provided, that unentered public lands, while in that status, shall not be assessed by the District for any purpose.

Contract to Be Authorized by Election and Confirmed by Court

31. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. The District shall, without delay and at its own cost and expense, furnish the United States for its files copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith, which said copies shall be properly certified by the clerk of the court in which confirmatory judgment is obtained.

Contract Contingent Upon Appropriations

32. This contract is subject to appropriations or allocations being made by Congress or other Governmental financing authorities from year to year of moneys suf-

ficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, attorneys, or employees, by reason of sufficient moneys not being so appropriated or on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments.

Notices

33. (a) Any notice, demand or request required or authorized by this contract to be given or made to or upon the United States shall be delivered, or mailed postage prepaid, to the Regional Director, United States Bureau of Reclamation, Boulder City, Nevada, except where, by the terms hereof, the same is to be given or made to or upon the Secretary, in which event it shall be delivered, or mailed postage prepaid, to the Secretary of the Interior, at Washington, D. C.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the District shall be delivered, or mailed postage prepaid, to the Chief Engineer and General Manager of the Coachella Valley County Water District, Coachella, Riverside County, California.

(c) The designation of any person specified in this Article, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this Article for other notices.

Rights Reserved Under Section 3737, Revised Statutes

34. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies Under Contract Not Exclusive

35. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any provision hereof, or of any other or subsequent breach of any provision hereof.

Interest in Contract Not Transferable

36. No interest in this contract is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

Contract of October 15, 1934, to Remain in Full Force and Effect, Except as Herein Modified

37. Except as modified by the provisions hereof, the aforesaid contract between the United States and the District of date October 15, 1934 (11r-781), shall be and remain in full force and effect.

Priority of Claims of the United States

38. Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Officials Not to Benefit

39. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

Discrimination Against Employees or Applicants for Employment Prohibited

40. The District shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all subcontracts; Provided, however, That this clause does not refer to, extend to or cover the business or activities of the District which are not related to or involved in the performance of this contract.

Representative of Secretary

41. Where this contract provides for action by the Secretary, such action may be taken, subject to review by the Secretary, for and on behalf of the Secretary by his representative duly authorized by him.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By WILLIAM E. WARNE,
Assistant Secretary of the Interior.

COACHELLA VALLEY COUNTY WATER DISTRICT,

By E. KEITH FARRAR
President.

Attest:

BARBARA K. SCHMIDT
Secretary.

(The following exhibits, annexed to the foregoing contract, are omitted here because of the limitations of space:

Exhixit A: "Bureau of Reclamation map entitled Boulder Canyon Project All-American Canal System-California, Coachella Valley County Water District Distribution System and Protective Works."

Exhibit B: "Unentered Public Lands and Entered Lands for which no final certificates have been issued.")

APPENDIX NO. 18

OPERATION CONTRACT: UNITED STATES and IMPERIAL IRRIGATION DISTRICT

March 4, 1952

Contract Amendatory of and Supplemental to All-American Canal Contract Dated December 1, 1932

1. **This Amendatory and Supplemental Contract,** made this 4th day of March, 1952, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and Acts amendatory thereof and supplementary thereto, all of which Acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and the Treaty between the United States of America and the United Mexican States signed at Washington, February 3, 1944, the Protocol thereto signed at Washington November 14, 1944, and the reservations included in the consent to ratification by the Senate of the United States, April 18, 1945, providing for the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico all as duly ratified and proclaimed (59 Stat. 1219), hereinafter called the "Mexican Water Treaty," between **The United States of America,** hereinafter referred to as the "United States," acting for this purpose by Oscar L. Chapman, Secretary of the Interior, hereinafter styled the "Secretary," and **Imperial Irrigation District,** an irrigation district created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at El

Centro, Imperial County, California, hereinafter referred to as the "District,"

Witnesseth:

Explanatory Recitals

2. **Whereas,** the United States and the District have heretofore entered into a contract dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water," hereinafter called "Contract of December 1, 1932," providing, among other things, for the construction of Imperial Dam and the All-American Canal, for the operation and maintenance thereof, for repayment of the cost thereof by the District, for the utilization of power possibilities upon said Canal and for the delivery of water by the United States; and

3. **Whereas,** among other works, Imperial Dam and that Section of the All-American Canal from Imperial Dam to and including Pilot Knob Check and Wasteway have been constructed by the United States; and

4. **Whereas,** the Mexican Water Treaty makes provision for a portion of the waters allocated to Mexico under said Treaty to be diverted at Imperial Dam and delivered to Mexico by means of the All-American Canal and the Pilot Knob Wasteway; and

5. **Whereas,** under the provisions of the Mexican Water Treaty, direct ownership, control and jurisdiction over Imperial Dam and that portion of the All-American Canal from Imperial Dam to and including Pilot Knob Check and Wasteway is required to be retained in the United States within the limits and to the extent necessary to effectuate the provisions of the said Treaty, and

such requirement of the said Treaty will be satisfied if the care, operation and maintenance by the District of the works specified in subsection (b) of Article 10 hereof are under the supervision and control of the Secretary to insure that all diversions are made in accord with Master Schedules and fulfillment at all times of all necessary coordinated actions affecting all diversions; and

6. **Whereas,** the Mexican Water Treaty provides that Mexico shall pay to the United States a proportion of the costs actually incurred in the construction of Imperial Dam and of the All-American Canal from Imperial Dam to and including Pilot Knob Check and Wasteway, as determined by the two Governments, and annually, a part of the total costs of maintenance and operation of such facilities in proportion to the amount of water delivered annually through such facilities for use in each of the two countries; and

7. **Whereas,** under the said Treaty it is provided that in the event that revenues from the sale of hydroelectric power which may be generated at Pilot Knob become available for the amortization of part or all of the costs of Imperial Dam and the Imperial Dam-Pilot Knob Section of the All-American Canal, Mexico's part of the cost of said facilities is to be reduced or repaid in the same proportion as the balance of the total costs is reduced or repaid; and

8. **Whereas,** the United States and the District desire to amend and supplement their contract of December 1, 1932, so as to make said contract conform with the obligations of the United States under the Mexican Water Treaty, and to preserve to the United States and to the District the benefits of said contract to the maxi-

mum extent compatible with the provisions of said Treaty;

9. **Now, Therefore,** in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Operation and Maintenance of Certain Works by United States and by District

10. (a) The Secretary, in accordance with the contract of December 1, 1932, has determined and does hereby determine and notify the District, and the District agrees, that construction of all works provided for therein has been completed in accordance with the said contract of December 1, 1932. The Secretary hereby grants to the District permission to install, at its own cost and expense, such structures in the common section of the Main All-American Canal to Coachella Valley at such times, at such points and with such capacities as the District may determine; provided, however, that such permission shall not be construed as modifying the position either of the District or the Secretary with regard to the opening to entry of public lands on the Imperial East Mesa.

(b) At the expiration of sixty (60) days from and after the date of this contract, or at such earlier date as may be otherwise mutually agreed upon, the District, without further or other notice, shall assume the care, operation and maintenance of all of the works not already covered by notice of completion heretofore given by the Secretary to the District, except Laguna Dam, the California Sluiceway and the overflow section of Imperial Dam, and the headworks and other works constructed at the east end of said dam for delivery of water to water

users in Arizona and the desilting works below said headworks, and except those works hereinafter specified in subsection (c) of this article, and thereafter the District shall care for, operate and maintain said works, in accordance with the provisions of this contract and the contract of December 1, 1932.

(c) Anything in the contract of December 1, 1932, to the contrary notwithstanding, the care, operation and maintenance of all turnout structures now or hereafter constructed in the Imperial Dam-Pilot Knob Section of the All-American Canal for service to the Siphon Drop Power Plant, the Yuma Project Main Canal and the lands of the Yuma Project in California shall be retained permanently by the United States, and said turnout structures shall be operated and maintained by the Bureau of Reclamation, without expense to the District, under such rules and regulations as may be promulgated by the Secretary, not inconsistent with this contract or the contract of December 1, 1932; provided, however, that the Secretary shall have the right, with the consent of the District, to contract with any organization of Yuma Project water users for the care, operation and maintenance of said turnouts.

(d) Anything in the contract of December 1, 1932, to the contrary notwithstanding, the care, operation and maintenance of Laguna Dam, the California Sluiceway at Imperial Dam, the overflow section of Imperial Dam and the headworks and other works constructed at the east end of said dam for delivery of water to water users in Arizona and the desilting works below said headworks, shall be retained permanently by the United States; provided, however, that the Secretary shall have the right to,

and the District agrees that he may, contract with any organization of Arizona water users for which capacity is provided in Imperial Dam, for the care, operation and maintenance of the headworks and other works constructed at the east end of said dam for the delivery of water to water users in Arizona, and the desilting works below said headworks.

(e) Immediately after the date of this contract, the District shall advance to the United States the District's share of the estimated cost of operation and maintenance of Imperial Dam and of Laguna Dam by the United States for the balance of the year ending on the last day of the month of February next following; provided, however, that if this contract becomes effective prior to March 1, 1952, the District shall in such event advance to the United States the estimated operation and maintenance costs as aforesaid for the period ending on the last day of the month of February, 1953. Such share to be advanced by the District shall be in the proportion that the capacity provided for the District in Imperial Dam, including capacity utilized in the All-Amercan Canal for water delivery under the Mexican Water Treaty, bears to the total capacity thereof. Thereafter, the District shall on March 1 of each year advance to the United States the District's share of the estimated cost of operation and maintenance of Imperial Dam and of Laguna Dam by the United States for the following twelve months, upon estimates furnished therefor on or before September 1 next preceding; provided, however, that said cost of operation and maintenance of Imperial Dam and Laguna Dam shall not include any part of the cost of the care, operation or maintenance of the headworks and other works constructed at the east end of Imperial Dam

or the desilting works below said headworks. Differences between actual costs and estimates shall be determined by the Secretary and shall be adjusted in next succeeding estimates; provided, however, that if at any time in the Secretary's judgment it shall appear that the amount advanced by the District pursuant to any estimate for a particular period will prove to be insufficient to pay the District's share of the actual costs of operation and maintenance for that period, then the District shall, within forty-five (45) days after receipt of notice advance to the United States such additional amount as may be specified in said notice.

Control of Colorado River

11. The United States, acting through the Secretary, shall continue to have control of the Colorado River for the purpose of carrying out the functions delegated to him by the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), the Colorado River Front Work and Levee System Act of June 28, 1946 (58 Stat. 150, 157), and the Mexican Water Treaty.

Scheduling of Water Diversions at Imperial Dam

12. The Secretary, through the Bureau of Reclamation, shall make appropriate arrangements to obtain a statement of water requirements from all individuals and agencies holding contracts with the United States for the delivery of Colorado River water by means of Imperial Dam, including in addition to such contracting agencies the Bureau of Reclamation and the United States Section of the International Boundary and Water Commission, United States and Mexico, not later than Wednesday of each week, of their respective daily water requirements

within their legal entitlements, which statement shall also include the additional water, if any, to be utilized by the Bureau of Reclamation for power generation at Siphon Drop and by the District for power generation at Pilot Knob, for the week commencing Monday next following. Requirements for all water to be scheduled for use through the All-American Canal except those for power use at Siphon Drop, the Yuma Project and to meet Treaty requirements shall be provided by the District. Immediately upon receipt of such statement of water requirements, the Bureau of Reclamation shall prepare a Master Schedule of all water diversions to be made at Imperial Dam for delivery and/or use in the United States, including the amounts of water to be utilized for power generation at Siphon Drop and Pilot Knob, and to Mexico through the All-American Canal under the Mexican Water Treaty during the week commencing Monday next following. In addition, such schedule shall also indicate the quantity of water, if any, reasonably required to be used in the United States during such week for river regulation below Imperial Dam (giving due consideration to the effect of such use on the availability of water for diversions at Imperial Dam and, in so far as practicable, such use shall be scheduled, after consultation with the District, at times and in amounts as will result in the least possible dislocation of such diversions at Imperial Dam) and the quantity of water, if any, to be delivered to Mexico under the Mexican Water Treaty by means other than through the All-American Canal and/or from water used for generation of power at Siphon Drop and Pilot Knob. A copy of such Master Schedule shall be furnished to the District not later than 48 hours before such schedule is to take effect. All diversions and re-

leases of water at Imperial Dam shall be in substantial accordance with such Master Schedule. Adjustments in the Schedule may be made at the request of any participant upon approval thereof by the Secretary. When thus approved such adjustments shall be made as soon as reasonably practicable. In the event of emergency occasioned by flood or for any other compelling reason of an emergent nature, the Bureau of Reclamation shall advise the District and others diverting water at Imperial Dam of any changes which may thus become necessary in scheduled diversions and deliveries, and such changes shall be promptly made and observed by the District, but the District shall not be required to increase diversions to the All-American Canal as a result thereof. Nothing herein nor operations hereunder shall be construed as intended to alter, affect, or interpret the extent of legal entitlement and/or use of any participant in said Master Schedule. The preparation and approval of a Master Schedule by the Bureau of Reclamation or the Secretary shall not constitute an administrative determination, finding or recommendation as to the water to which any agency is entitled.

Establishment of Imperial Dam Advisory Board

13. The Secretary shall promptly make arrangements for the organization of an Advisory Board, hereby designated "Imperial Dam Advisory Board," which shall be composed of one representative from each of the agencies contracting for and entitled to deliveries of water to be diverted at Imperial Dam, the Bureau of Reclamation, and the United States Section of the International Boundary and Water Commission. Meetings of the Board shall be held at such times and at such places as may be agreed

upon by a majority of its members. The purpose of the Board shall be to provide a means of consultation and cooperation in matters of mutual concern relating to the operation and maintenance of Imperial Dam and Laguna Dam, the diversion of waters to the All-American Canal and the Gila Project Main Canal, and in such other matters of mutual concern as may be agreed upon by its members. Determinations of the Board shall be advisory only.

Delivery of Treaty Water Through All-American Canal

14. (a) The District, in full accordance with the requirements set forth in this contract, shall divert at Imperial Dam, transport through the All-American Canal and deliver to the United States Section of the International Boundary and Water Commission at the junction of Pilot Knob Wasteway and the Alamo Canal the water made available by the United States at Imperial Dam which Mexico is entitled to receive under the provisions of Article 11 (c) of the Mexican Water Treaty, as shown by the Master Schedule to be furnished the District by the Bureau of Reclamation. Such deliveries shall be made under and in accordance with rules and regulations as may from time to time be promulgated by the Secretary not inconsistent with this contract or said Treaty.

(b) The works required or used and the services furnished by the District in making the water deliveries referred to in subsection (a) of this article shall be provided and furnished without in any manner modifying the obligations of the District for the repayment to the United States of the construction cost of such works under the provisions of the contract of December 1, 1932.

(c) It shall be in the sole discretion of the United States to determine the share Mexico is to pay under the provisions of Article 14 (b) of said Treaty, of the cost of operation and maintenance of All-American Canal System, and the portion, if any, of such costs which shall be paid by the United States, and how much, if any, of such amounts shall be received by the District by way of credits or otherwise.

(d) Nothing in this article shall be construed as constituting or affecting interpretation of Article 14 of said Treaty.

Assumption of Operation and Maintenance of Works by United States

15. The District's officers and/or employees concerned with the diversion of water at Imperial Dam, and those concerned with diversion at Pilot Knob Check of water destined for Mexico under the Mexican Water Treaty, shall, in the event that said officers and/or employees fail to operate said works so that diversions are made in substantial accordance with the Master Schedule prepared pursuant to Article 12 of this contract, be subject to the orders of the Bureau of Reclamation as the representative of the Secretary in the over-all coordination of river operations. If at any time, or during such times as, in the opinion of the Secretary such officers and/or employees of the District shall fail to comply with the applicable rules and regulations promulgated under this contract or the contract of December 1, 1932, with the instructions issued by the Bureau of Reclamation because of emergencies occasioned by flood or for any other compelling reason of an emergent nature, or substantially with the requirements of the Master Schedule,

in a manner satisfactory to the Secretary, then the Secretary shall, with or without notice to the District, forthwith remove District employees engaged in any of such operations and replace them with Government employees, and shall assume operation and maintenance of the headworks at Imperial Dam and the works at Pilot Knob affecting the diversion of water destined for Mexico under the Mexican Water Treaty either or both, and retain such operation and maintenance during such period or periods of time as he deems necessary; provided, however, that unless the action of such District officers and/or employees complained of creates an emergency or is such as to materially interfere with the United States carrying out its obligations under the Mexican Water Treaty, the Secretary will first, before removing such District employees and assuming operation and maintenance of said works, give notice to the District of such action complained of and a reasonable opportunity, not to exceed three (3) days after receipt of such notice by the District, for the District to correct the situation. In such event the District shall, within ten (10) days after written notice by the Secretary, advance to the United States its pro-rata share of the estimated cost of such care, operation and maintenance by the United States, plus fifteen percentum (15%) to cover overhead and general expense, for the period specified in said notice; provided, however, that said period shall not exceed sixty (60) days. Additional amounts plus a like percentage thereof shall, within ten (10) days after subsequent notices, be advanced as specified in such subsequent notices; provided, however, that each said subsequent notice shall be for a period not exceeding sixty (60) days. Any surplus of funds advanced by the District remaining unexpended and

unobligated at such time as the operation and maintenance of such works is resumed by the District shall be refunded to the District. The rights reserved to the United States to assume operation and maintenance of works under the provisions of this article shall be deemed to be in addition to any rights which the United States has under the contract of December 1, 1932, and such assumption of operation and maintenance by the Secretary shall not relieve the District from its obligations hereunder or under said contract of December 1, 1932. Operation and maintenance by the District shall be restored when the Secretary finds that the situation which occasioned the assumption of operation and maintenance by the United States has been satisfactorily corrected.

Development of Power Possibilities at Pilot Knob

16. (a) As of the date of this contract, the District shall be deemed to have the permission of the United States to proceed with the development of the power possibilities upon the All-American Canal at or near Pilot Knob, as provided by the Boulder Canyon Project Act and the contract of December 1, 1932, subject only to approval by the Secretary of the District's plans for constructing and connecting diversion works in the bank of the All-American Canal for the purposes of said power development. Upon application therefor, the Secretary will grant to the District such easements over the public and acquired lands of the United States as may be, in his opinion, reasonably necessary for the construction, operation and maintenance by the District of a power plant and appurtenant facilities at the aforesaid location. Without affecting the rights which the District has to the development of the aforesaid power possibilities, and the use

of water therefor, under the provisions of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), and the contract of December 1, 1932, the District may utilize for purposes of Pilot Knob power generation the water to be delivered to Mexico through the All-American Canal in pursuance of the Mexican Water Treaty and other water available in the river at Imperial Dam which is not required for use in the United States which latter use shall include use for river regulation below Imperial Dam as provided in Article 12 hereof; provided, however, that in no event and under no circumstances shall the use of water for power purposes at the Pilot Knob Power Plant interfere with the delivery of water for use in Mexico under the terms of the Mexican Water Treaty, and it shall be the duty and the obligation of the District to make provision for, and to so operate its power plant at Pilot Knob and the Pilot Knob Wasteway as to provide a continuous flow of water at the junction of Pilot Knob Wasteway and the Alamo Canal at times and in amounts not less than those stated in the Master Schedule of water diversions and deliveries to be furnished by the Bureau of Reclamation as provided for herein.

(b) If and when the United States shall have acquired title to the Rockwood Gate and that part of the Alamo Canal situate in the United States, Rockwood Gate shall be used by the United States as a wasteway from the All-American Canal to the Colorado River, in connection with the operation by any agency of the All-American Canal and the Pilot Knob Wasteway, or other wasteway from the said All-American Canal, or the tailrace from any power plant which may be constructed at or near the Pilot Knob Wasteway, subject to the paramount use of

said Rockwood Gate to deliver water to Mexico by means of the All-American Canal as required by Articles 11 (c) and 12 (c) of the Mexican Water Treaty; and said use of said Rockway Gate as a wasteway to the Colorado River will be permitted by any agency of the United States, or by the District, which may be operating said All-American Canal and/or Pilot Knob Wasteway, or other wasteway or tailrace as above mentioned, subject to the paramount use of said Rockwood Gate to deliver water to Mexico, as aforesaid. In consideration of the aforesaid use of Rockwood Gate by the District, the District does hereby release the United States, its agencies, officers and employees, from any and all claims for damages caused by any loss of power head arising out of such use of the Rockwood Gate for the purpose of making delivery of Treaty waters to Mexico, as aforesaid.

(c) The development of power by the District at the Pilot Knob Power Plant is made upon the express condition and with the express covenant that the District shall observe and be subject to and controlled by the Colorado River Compact, the Boulder Canyon Project Act, the California Limitation Act, and the Mexican Water Treaty, in the construction and management and operation of said power plant and the storage, diversion, delivery and use of water for the generation of power at said plant.

(d) At such time or during such times as the Secretary assumes the care, operation and maintenance of the headworks at Imperial Dam or the Imperial Dam-Pilot Knob Section of the All-American Canal, either under the provisions hereof or the provisions of the contract of December 1, 1932, the flow of water through Pilot Knob Power Plant shall be as directed by the Secretary, and

the employees of the District operating said plant shall observe and carry out all such directions. In the event said employees fail or refuse to so regulate the flow through said power plant, the Secretary shall have the right, with or without notice to the District, to close the intake gates to the penstocks of said power plant and to keep them closed for such period or periods as he deems necessary.

Effect on Contract of December 1, 1932

17. Except as expressly amended or supplemented hereby, the aforesaid contract between the United States and the District, dated December 1, 1932, shall be and remain in full force and effect.

Priority of Claims of the United States

18. Claims of the United States arising out of this contract shall have priority over all others, secured and unsecured.

Remedies under Contract not Exclusive

19. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

Interest in Contract not Transferable

20. No interest in this contract is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

Rights Reserved under Section 3737 Revised Statutes

21. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Force Majeure

22. Neither party to this contract shall be held accountable for failure to perform occasioned by Act of God or of the public enemy or other unforeseen or unavoidable cause.

Officials Not to Benefit

23. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

Secretary's Representative

24. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term "Secretary" shall mean the Secretary or his duly authorized Federal representative.

Discrimination Against Employees or Applicants for Employment Prohibited

25. The District shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all subcontracts; provided, however, that this clause does not refer to, extend to or cover the business or activities of the District which are not related to or involved in the performance of this contract.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By OSCAR L. CHAPMAN
Secretary of the Interior

IMPERIAL IRRIGATION DISTRICT,
By EVAN T. HEWES
President

[Seal]

Attest:

.....

Secretary

APPENDIX NO. 19

WATER DELIVERY CONTRACT: UNITED STATES AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

April 24, 1930

(1) This Contract, made this 24 day of April, nineteen hundred thirty, pursuant to the Act of Congress approved June 17, 1902, (32 Stat., 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928, (45 Stat., 1057), designated the Boulder Canyon Project Act, between The United States of America, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and The Metropolitan Water District of Southern California, a public corporation, hereinafter styled the District, organized and existing under the laws of the State of California;

Witnesseth:

Explanatory Recitals

(2) Whereas, for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, ade-

quate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and

(3) Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Boulder Canyon Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir and has determined that the revenues provided for by this contract, together with other contracts in accordance with the provisions of the Boulder Canyon Project Act, are adequate in his judgment to insure payment of all expenses of operation and maintenance of the Boulder Canyon Dam and appurtenant works incurred by the United States, and the repayment within fifty (50) years from the date of completion of said works of all amounts advanced to the Colorado River Dam Fund under Subdivision (b) of Section 2 of the Boulder Canyon Project Act, together with interest thereon made reimbursable under said Act; and

(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir;

(5) Now, Therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Delivery of Water by United States.

(6) The United States shall deliver to the District each year from the Boulder Canyon Reservoir at a point in the Colorado River immediately below Boulder Canyon Dam, or as provided in Article 10 hereof, up to but not to exceed one million fifty thousand (1,050,000) acre

feet of water, which shall be delivered continuously as far as reasonable diligence will permit; provided, that such amount is without prejudice to any additional rights which the District may have or acquire in or to the waters of the Colorado River, or to the power of the parties to contract hereafter with reference thereto. The United States shall not be obligated to deliver water to the District when for any reason such delivery would interfere with the use of Boulder Canyon dam, and reservoir for river regulation, improvement of navigation, flood control, and/or satisfaction of present perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact, and this contract is made upon the express condition and with the express covenant that the right of the District to waters of the Colorado River, or its tributaries, is subject to and controlled by the Colorado River Compact. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacement or installation of equipment and/or machinery at Boulder Canyon Dam, but so far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur. This contract is for permanent service, but is made subject to the express covenant and condition that in the event water for the District is not taken or diverted by the District hereunder for District purposes within a period of ten (10) years from and after completion of Boulder Canyon Dam as an-

nounced by the Secretary, it may in such event, upon the written order of the Secretary, and after hearing become null and void and of no effect.

Receipt of Water by District

(7) The District shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated and shall at its own expense convey such water to its proposed aqueduct, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

Measurement of Water

(8) The water to be delivered hereunder shall be measured at the intake of the District's proposed aqueduct by such measuring and controlling devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed and maintained by and at the expense of the District, but they shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

Record of Water Diverted

(9) The District shall make full and complete written monthly reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted, and the records

and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

Charge for Delivery of Water

(10) A charge of twenty-five cents ($0.25) per acre-foot shall be made for water delivered to the District hereunder during the Boulder Dam cost repayment period. It is understood by the District that it may divert water above Boulder Canyon Dam, but that such diversion of water above the dam will reduce the amount of power otherwise available at said dam, and may reduce the amount which would have been utilized, except at times when the reservoir is spilling, and an additional charge, determined as stated below, will be made on account of any such reduction in energy which would otherwise have been utilized in case water is diverted above the dam. The energy which could have been generated by the water diverted above the dam and which would have been utilized, at times when the reservoir is not spilling will be calculated from the effective head, the quantity of water diverted and the overall efficiency of the power plant, as determined by the Secrtary, whose determination shall be conclusive and binding upon the parties hereto. The additional charge per month for diversion above the dam will be the product of such amount of energy and the rate per kilowatt hour for firm energy at Boulder Canyon Dam in effect at the time of such diversion. Nevertheless if such diversion during any year (June 1st to May 31st, inclusive) has not reduced the amount of firm energy during such year, for which the United States has contracted, the diversion, to the extent that no reduction in firm energy has been occasioned, shall be computed at the rate for secondary energy then in force and credit given on the ensuing year's power bills of the District for

the difference between the amount charged therefor and the amount so determined. The Secretary's determination of such credit shall be conclusive. The reservoir shall be considered as spilling whenever water is being discharged in excess of the amount used for the generation of power, whether such waste occurs over the spillway or otherwise. Energy equivalent to water delivered above the dam, determined as above, for which the firm energy rate is charged, shall be included in the total firm energy available at the dam, defined as four billion, three hundred thirty million (4,330,000,000) kilowatt hours per year (June 1st to May 31st, inclusive), upon completion of the dam, as announced by the Secretary, and decreasing uniformly thereafter by eight million seven hundred sixty thousand (8,760,000) kilowatt hours per year, and also included in the District's allotment of firm energy. Nevertheless if it be determined by the Secretary that the rate of decrease above stated is not in accord with actual conditions, the Secretary reserves the right to fix a lesser rate for any year (June 1st to May 31st, inclusive) in advance.

Monthly Payments and Penalties

(11) The District shall pay monthly for all water delivered to it hereunder, or diverted by it from the Colorado River, in accordance with the rate herein in Article ten (10) established. Payments shall be due on the first of the second month immediately succeeding the month in which water is delivered and/or diverted. If such charges are not paid when due, a penalty of one per centum (1%) of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum (1%) of the amount unpaid shall be added on the first day of each calendar month during such delinquency.

Refusal of Water in Case of Default.

(12) The United States reserves the right to refuse to deliver water to the District in the event of default for a period of more than twelve (12) months in any payment due or to become due the United States under this contract.

Inspection by the United States

(13) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purposes of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

Disputes or Disagreements.

(14) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators, not so elected, shall be named by the Senior

Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Rules and Regulations

(15) There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments hereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of its diversion works and aqueduct, all such rules and regulations will be fully adhered to.

Agreement Subject to Colorado River Compact

(16) This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which Compact was approved in Section 13(a) of the Boulder Canyon Project Act.

Priority of Claims of the United States

(17) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Contingent Upon Appropriations

(18) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. This agreement is also subject to the condition that if Congress fails to appropriate moneys for the commencement of construction work within five (5) years from and after execution hereof, or if for any other reason construction of Boulder Canyon Dam is not commenced within said time and thereafter prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

Rights Reserved Under Section 3737 Revised Statutes

(19) All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies Under Contract Not Exclusive

(20) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

Interest in Contract Not Transferable

(21) No interest in this agreement is transferable, and no sublease shall be made, by the District without the written consent of the Secretary, and any such attempted transfer or sublease shall cause this contract to become subject to annulment, at the option of the United States.

Member of Congress Clause

(22) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

(Executed in quadruplicate original)

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR
Secretary of the Interior

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
By W. P. WHITSETT
Chairman of the Board of Directors
(Seal)

Attest:
NORTHCUTT ELY

Approved as to form:
W. B. MATHEWS
General Counsel

Attest:
G. H. FINLEY
Secretary of the Board of Directors

APPENDIX NO. 20

POWER CONTRACT TO PUMP WATER: UNITED STATES AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

April 26, 1930

(1) **This Contract,** made this 26th day of April, nineteen hundred thirty, pursuant to the Act of Congress approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat., 1057), designated the Boulder Canyon Project Act, between **The United States of America,** hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and **The Metropolitan Water District of Southern California,** a public corporation, organized and existing under and by virtue of the Laws of the State of California, hereinafter styled the District:

Witnesseth:

Explanatory Recitals

(2) **Whereas,** for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain

a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre feet of water; also to construct, equip, operate and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and

(3) **Whereas,** after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Boulder Canyon Dam, and has determined that the revenues provided for by this contract, together with other contracts in accordance with the provisions of the Boulder Canyon Project Act, are adequate in his judgment to insure payment of all expenses of operation and maintenance of the Boulder Canyon Dam and appurtenant works incurred by the United States, and the repayment within fifty (50) years from the date of completion of said works of all amounts advanced to the Colorado River Dam Fund under Subdivision (b) of Section 2 of the Boulder Canyon Project Act, together with interest thereon made reimbursable under said Act; and

(4) **Whereas,** the United States proposes to enter into an agreement with the City of Los Angeles and Southern California Edison Company Ltd., severally (hereinafter referred to as the lessees) for the lease, and the operation and maintenance of a Government-built power plant to be constructed at Boulder Canyon Dam, together with the right to generate electrical energy a copy of which said

proposed lease is attached hereto marked Exhibit "A," and by this reference made a part hereof, wherein the Secretary has reserved the authority to, and in consideration of the execution thereof is authorized by each of the aforesaid lessees, severally, to contract with the other allottees named in the allocation set forth therein for the furnishing of energy to such allottees at transmission voltage in accordance with the allocation to each allottee, and the Secretary is therein granted by each lessee, severally, the power in accordance with the provisions thereof to enforce as against each lessee the rights to be acquired by such other allottees by contracts to be entered into with the United States; and

(5) **Whereas,** the District is desirous of entering into a contract with the United States providing for the delivery to the District each year from the Boulder Canyon Reservoir up to but not to exceed one million fifty thousand (1,050,000) acre-feet of water, and, in connection therewith an incident thereto, the District is desirous also of entering into a contract for the purchase of electrical energy to be generated at the power plant to be leased, as aforesaid, to the City of Los Angeles (hereinafter referred to as the City) and Southern California Edison Company Ltd., (hereinafter referred to as the Company) to aid in the transportation of such water supply;

(6) **Now, Therefore,** in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to-wit:

Allocation of Electrical Energy

(7) The United States will cause to be delivered to the District under and in pursuance of and subject to the provisions of the aforesaid proposed lease, attached here-

to as Exhibit "A", for a period of fifty (50) years from the date at which energy is ready for delivery to the City, as announced by the Secretary, in accordance with the following allocation, to-wit:

Of Firm Energy

A. To the State of Nevada, for use in Nevada, not exceeding eighteen per centum (18%) of said total firm energy.

B. To the State of Arizona, for use in Arizona, not exceeding eighteen per centum (18%) of said total firm energy.

Should either of the States not take its full eighteen per centum (18%) allocation within a period of twenty (20) years hereof, the other may then contract for the energy not so taken up to four per centum (4%) of the total firm energy, provided that the combined amount used by the two states shall not, at any time, exceed thirty-six per centum (36%) of such total firm energy.

C. To the Metropolitan Water District of Southern California so much energy as may be needed and used for pumping Colorado River water into and in its aqueduct for the use of such District within the following limits:

(1) Not exceeding thirty-six per centum (36%) of said total firm energy; plus

(2) All secondary energy developed at the Boulder Dam power plant as provided in Article Fourteen (14) hereof; plus

(3) So much of the firm energy allocated to the States, the City and the Company as may

not be in use by them. Energy allocated to the States, but not in use by them, shall be released to the District by the two lessees equally (unless they agree upon a different ratio) as follows:

(a) If the District makes a firm contract with the Secretary for the balance of the lease period for part or all of such unused States energy (subject to the first right of the States thereto) such contract shall be made effective upon two years' written notice to the Secretary, and compensation to the lessees, respectively, for main transmission line property rendered idle;

(b) If the District does not so make a firm contract for such energy, then energy allocated to the States but not in use by them, shall be released to the District upon not less than fifteen months' written notice to the Secretary and at such compensation as the District and such lessees, respectively, may agree upon, to cover cost and overhead of replacing energy which otherwise would have been received at the Pacific Coast end of the main transmission lines by the lessees, respectively. Such cost shall include interest on and depreciation and operation and maintenance of the plant capacity while required for the generation of such substitute energy; and also appropriate allowance for interest on and maintenance and depreciation of plant capacity rendered idle because of cessation of generation of such substitute energy until such time

as such plant capacity would otherwise have been installed by the lessees, respectively, for their own requirements. If the District and the respective lessees fail to agree on such compensation, such energy shall nevertheless be released to the District, and the disagreement shall be determined in accordance with Article twenty-two (22) (a) hereof. Such determination shall include allowance for items of cost and overhead as specified in this paragraph. Pending such determination, energy so released shall be paid for by the District at the rate for firm energy but the determination of compensation under Article twenty-two (22) (a) hereof shall not be controlled by such rate.

During any year beginning June first, the District shall not use any secondary energy or any unused State energy, until it has first used subsequent to June first, next preceding, an amount of firm energy equivalent to one-twelfth of the amount of firm energy it is obligated to take and/or pay for annually multiplied by the number of months elapsed since June first next preceding.

(4) If, due to temporary deficiency in secondary energy regularly used by the District, substitute energy is requested by the District in excess of the energy made available under the foregoing sub-paragraph (3) (b) the City and/or the Company may release so much energy as may be practicable on the same terms as provided in sub-section (3) (b) preceding.

D. To the municipalities of Anaheim, Beverly Hills, Burbank, Colton, Fullerton, Glendale, Newport Beach, Pasadena, Riverside, San Bernardino and Santa Ana, (referred to herein as "the municipalities"), six per centum (6%) in all, to be allocated between them as they may agree; but if no agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

E. To the City of Los Angeles, Thirteen per centum (13%).

F. To Southern California Edison Company Ltd., the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company and the Los Angeles Gas and Electric Corporation, referred to herein as the companies, nine per centum (9%) in all, division whereof between the companies shall be made according to mutual agreement among them, if possible. If no such agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

The foregoing allocations are subject to the following conditions:

(i) So much of the energy allocated to the States (thirty-six per centum (36%) of the firm energy) and not in use by them, or failing their use, by the District for the above purposes, shall be taken and paid for one-half by the City and one-half by the Company.

(ii) All of the energy allocated to the municipalities may be contracted for in compliance with regulations of the Secretary, by any one or more of them, as they may agree, on or before April 15, 1931. So much of the energy allocated to the municipalities as is not so contracted for, or if contracted for, not used by them directly or under contract for municipal purposes and/or distribution to their inhabitants, shall be taken and paid for by the City.

(iii) So much of the energy allocated to the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company, and the Los Angeles Gas and Electric Corporation as is not firmly contracted for by them, severally, in compliance with regulations of the Secretary on or before April 15, 1931, shall be taken and paid for by the Company.

(iv) If any allottee is permitted by the United States to divert water from the reservoir, at a time when the reservoir is not spilling, in consequence of which the amount of energy which would have been utilized is diminished, such diminution shall be debited to the allocation of firm energy herein made to such allottee; and charge for the energy equivalent of such diversion shall be made, and the amount of energy which the allottee shall otherwise be obligated to take and pay for hereunder shall be correspondingly reduced.

The reservoir shall be considered as spilling whenever water is being discharged in excess of the amount used for the generation of power, whether such waste occurs over the spillway or otherwise.

(v) Each of the States of Arizona and Nevada may, from time to time within the period of the aforesaid lease, contract for energy for use within such State in any amount until the total allocated respectively to each is in use as provided above; and may terminate such contract, or contracts, without prejudice to the right to again contract for such energy. All such contracts shall be executed with the Secretary. A contract requiring one thousand (1000) horsepower (of maximum demand) or less may become effective or be terminated on six months written notice of requirement or termination given the Director by the State; provided, that the notice given shall be two years if in the twelve months preceding said notice of demand the total increment to such state has exceeded five thousand (5000) horsepower of maximum demand or if in the twelve months preceding said notice of termination the decrement to such state has exceeded five thousand (5000) horsepower of maximum demand. In all cases the Director shall immediately transmit such notice to each lessee. Whenever the amount in use is in excess of five thousand (5000) horsepower of maximum demand, the lessees respectively shall be compensated for

property rendered idle by use of such excess in such amount as the Secretary shall determine to be equitable. Firm energy not contracted for by the States shall be available for use by the District as herein elsewhere provided, and if not in use by the States and/or the District, shall be taken and paid for equally by the two lessees. No right which may be available to a State under section five 5 (c) of the Boulder Canyon Project Act to execute a firm contract for electrical energy for use within the State shall be impaired by any provision of this contract.

Of Secondary Energy.

The District shall have the right to purchase and use all secondary energy as provided in Article nine (9) and Article fourteen (14) hereof for the purposes stated in the first paragraph of subdivision (C) of this Article. The City and the Company shall each have the right to purchase and use one-half of all secondary energy not used by the District. Any such energy not used by one lessee shall be available, for the time being, to the other. If secondary energy is not taken by the District, the City, and/or the Company then and in such event, the United States reserves the right to take, use and dispose of such energy, from time to time, as it sees fit, giving credit therefor as provided in Article twelve (12) of Exhibit "A" hereof.

Of Firm Energy Allocated to but not Used by the District.

In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then no disposition shall be made of such firm energy by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated.

In the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take.

Of Firm Energy not Disposed of Under the Foregoing Allocations.

The United States reserves the right, in case the dam which it erects provides a maximum water surface elevation in excess of one thousand two hundred twenty-two (1222) feet above sea level (U. S. Geological Survey Datum), and thereby increases the quantity of firm energy above the quan-

tity of four billion two hundred forty million (4,240,000,000) kilowatt hours allocated above, to dispose of such increase, but not to exceed ninety million (90,000,000) kilowatt hours per year (June 1st to May 31st, inclusive) to any municipality or municipalities by firm contract executed with the Secretary on or before April 15, 1931. Such disposition shall be without prejudice to any provision of this lease or of the allocation above referred to. So much of such additional energy as is not so contracted for shall be taken and paid for by the City. Generation of such additional energy shall in any event be effected by the City.

Installation of Machinery

(8) The District shall have opportunity to be heard by the Secretary or his representatives upon the design, capacity and cost of machinery to be provided and installed as stated in Article eight (8) of Exhibit "A" hereof before contracts therefor are let.

Firm and Secondary Energy Defined

(9) The amount of firm energy for the first year of operation, (June 1 to May 31, inclusive) following the date of the completion of the dam as announced by the Secretary shall be defined as being four billion two hundred forty million (4,240,000,000) kilowatt hours at transmission voltage. For every subsequent year the amount defined as firm energy shall be decreased by eight million seven hundred sixty thousand (8,760,000) kilowatt hours from that of the previous year.

Nevertheless, if it be determined by the Secretary that the rate of decrease of kilowatt hours per year as above stated, is not in accord with actual conditions, the Secretary reserves the right to fix a lesser rate for any year (June 1st to May 31st, inclusive) in advance.

If the dam erected by the United States provides a maximum water surface elevation in excess of 1222 feet above sea level (U. S. Geological Survey Datum), the United States reserves the right to dispose of additional firm energy thereby made available, not to exceed ninety million (90,000,000) kilowatt hours per year, subject to pro rata of the eight million seven hundred sixty thousand (8,760,000) kilowatt hours annual diminution above provided for.

The term "secondary energy" wherever used herein shall mean all electrical energy generated in one year (June 1st to May 31st, inclusive) in excess of the amount of firm energy as hereinabove defined, available in such year.

If, by reason of international obligations arising through treaty or otherwise subsequent to the effective date of this contract, or by reason of interference with the program of construction and/or operation of the dam as provided for and contemplated by this contract, or by reason of other contingencies not now foreseen, the amount of firm energy available through the release of water from the Boulder Canyon reservoir shall in fact be less than the amount of firm energy as above defined, then in any such event the obligation of the District to take and pay for its allocation of firm energy shall be reduced in an amount corresponding to such change. If for any reason the United States shall be wholly unable

to fulfill its obligations hereunder in respect of the delivery of water, then the District or either of them, may terminate this contract.

The right of the District and/or lessees to take and pay for energy at the rate for secondary energy after discharge of such party's obligation to the United States to pay for energy at the rate for firm energy, shall not be impaired by reason of the fact that another allottee has not discharged its obligation to pay for energy at the rate for firm energy.

Generating Agencies

(10) In accordance with designation heretofore made by the Secretary, generation of energy allocated to the District shall be effected by the City. Nevertheless this provision is subject to the following conditions:

(i) Should it prove of material economic advantage to the District to have a portion of its energy generated as off-peak energy, the City, after generating energy for the District to the full extent of the generating capacity which has been installed at the request of the District with allowance for the contemplated margin of reserve capacity, shall also generate such additional energy as may be needed by the District and as can be generated off-peak with other generating capacity leased to and being operated by the City at such times as such use does not conflict with the needs of the City and other allottees for whom the City is generating energy. The District will pay for the off-peak use of such other generating capacity together with an allowance for a fair proportion of the operation and maintenance expenses at rates to be agreed upon between the District and the City and approved by the Secretary and if they are unable to agree

then at a rate to be determined by the Secretary. Should the amount of energy which can be obtained by the District, from the generating capacity which has been installed at the request of the District and from other capacity leased to and being operated by the City, be insufficient to satisfy the requirements of the District, then the District may arrange with Southern California Edison Company Ltd. for generation of such off-peak energy as may be needed by the District at such times and not obtainable from the City to such an extent as such generation does not conflict with the needs of the Company and other allottees for whom the Company is generating energy. Charge shall be made against the District for such service at the rate to be agreed upon between the District and the Company and approved by the Secretary and if they are unable to agree then at a rate to be determined in accordance with Article twenty-two (a) hereof.

(ii) Disputes and disagreements between any allottee and the lessee generating energy for it, with respect to such generation, and/or the cost thereof, shall be determined by the Secretary unless otherwise specifically provided in this contract.

(iii) Except for off-peak power furnished the District which shall be as provided in Paragraph (i) of this Article, all generation shall be effected at cost as determined in accordance with Article 12 of Exhibit "A" hereof.

Delivery of Electrical Energy

(11) (a) Energy shall be ready for delivery to the City and to the municipalities including those contracting under the last paragraph of Article seven (7) hereof

when the Secretary announces that one billion, two hundred fifty million (1,250,000,000) kilowatt hours of energy per year is ready for delivery.

(b) Energy shall be ready for delivery to the District when the Secretary announces that two billion (2,000,000,000) kilowatt hours of energy per year is available, which date, however, shall not be sooner than one (1) year after energy is ready for delivery to the City, provided, however, that the time when energy is ready for delivery to the District may be advanced subject to the approval of the Secretary, should the District so request, and that in such case the City shall be compensated by the District for interest and depreciation on and maintenance and operation of its main transmission line in case the total energy available to the City is reduced below one billion two hundred fifty million (1,250,000,000) kilowatt hours per annum, in the proportion that such kilowatt hours available to the City is less than one billion two hundred fifty million (1,250,000,000).

(c) Energy shall be ready for delivery to the Company when the Secretary announces that water capable of generating four billion two hundred forty million (4,240,000,000) kilowatt hours of energy per year is available, which date, however, shall not be sooner than three (3) years after commencement of delivery of energy to the City and which shall not be until the water surface in Boulder Canyon Reservoir on August first immediately preceding has reached an elevation of eleven hundred fifty (1150) feet above sea level (U. S. Geological Survey datum).

(d) Upon written notification from the Secretary that generation equipment is ready for operation by it and

water is available for generating energy therefrom, each lessee will be required to assume the operation and maintenance of its respective portion of the power plant, and thereafter the District will look to such lessee, severally, and not to the United States for compensation for injury and/or damages of any kind which may in any manner arise out of the operation and maintenance of the portion of such plant leased to it.

Charges to be Paid the United States

(12) In consideration of this contract, the District agrees:

(1) To pay the United States for the use of falling water for generation of energy for the District, (except as otherwise provided in Article 15 hereof), as follows:

(a) One and sixty-three hundredths mills ($0.00163) per kilowatt hour, (delivered at transmission voltage) for firm energy;

(b) One-Half mill ($0.0005) per kilowatt hour, (delivered at transmission voltage) for secondary energy;

(2) To pay the United States, for credit to the lessees, on account of use of the leased equipment as herein elsewhere provided; and

(3) To pay the United States, for credit to the lessees, on account of maintenance of said equipment, including repairs to and replacements of machinery, as herein elsewhere provided.

At the end of fifteen (15) years from the date of execution of this contract and every ten (10) years there-

after, the above rates of payment for firm and secondary energy shall be readjusted upon demand of any party hereto, either upward or downward as to price, as the Secretary may find to be justified by competitive conditions at distributing points or competitive centers.

The rate for falling water for generation of firm energy which shall be uniform for both lessees provided for by any such readjustment shall be arrived at by deducting from the price of electrical energy justified by competitive conditions at distributing points or competitive centers,—(1) all fixed and operating costs of transmission to such points,—(2) all fixed and operating costs of such portion of the power plant machinery as is to be operated and maintained by the several lessees, including the cost of repairs and replacements, together with such readjustment as to replacements as is provided for in paragraph 3 in this Article; it being understood that such readjusted rates shall under no circumstances exceed the value of said energy, based upon competitive conditions at distributing points or competitive centers.

"In arriving at the respective rates for "firm energy" and "secondary energy" as fixed herein, recognition has been given to the fact that "secondary energy" cannot be relied upon as being at all times available, but is subject to dimunition or temporary exhaustion; whereas "firm energy" is the amount of energy agreed upon as being available continuously as required during each year of the contract period. In the readjustment of the rate for "secondary energy", account shall be taken of the foregoing factors."

The charges agreed to be paid by the District to the United States, for credit to the City as generating agency,

in this Article, shall be such proportion of the cost incurred by such generating agency as it and the District may agree.

The term "cost", as used with reference to generating energy, shall include a proper proportionate allowance for amortization for the cost of machinery and equipment as provided in Paragraph a of Article 9 of Exhibit A hereof, a proper proportionate part of any annuity set up in accordance with regulations of the Secretary provided for in Subdivision 3 of Article sixteen (16) of Exhibit "A" hereof, for the purpose of meeting the obligation of the City to make replacements; and a proper proportionate part of the actual outlay of the City for operating such machinery and equipment and keeping the same in repair, including reasonable overhead charges. The extent of the allowance for the several items in the event of disagreement between the City and District, and the system of accounting therefor, shall be prescribed by the Secretary under uniform regulations as required by Section 6 of the Boulder Canyon Project Act.

Monthly Payments and Penalties

(13) The District shall pay monthly for energy in accordance with the rates established or provided for herein, and for the generation thereof as provided in Article twelve (12).

When energy taken in any month is not in excess of one-twelfth (1/12) of the minimum annual obligation, bill for such month shall be computed at the rate for firm energy in effect when such energy was taken on the basis of the actual amount of energy used during such month. All energy used during any month in excess of one-twelfth (1/12) of the minimum annual obligation shall be paid

for at the rate for secondary energy in effect when such energy was taken; provided, however, that the secondary rate shall not apply to any energy taken during any month unless and until an amount of energy equivalent to one-twelfth (1/12) of the minimum annual obligation has been taken for all months beginning with the month of June immediately preceding; provided, however, that the bill for the month of May shall not be less than the difference between the minimum annual payment, as provided in Article fourteen (14) hereof, and the sum of the amounts charged for firm energy during the preceding eleven months. The United States will submit bills to the District by the fifth of each month immediately following the month during which the energy is generated, and payments shall be due on the first day of the month immediately succeeding. If such charges are not paid when due, a penalty of one per centum (1%) of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum (1%) of the amount unpaid shall be added on the first day of each calendar month thereafter during such delinquency.

The monthly charge for generation of such energy to be credited to the generating agency shall be in such amount as may be determined in accordance with Article twelve (12) hereof.

Minimum Annual Payment

(14) The total payments made by the District for firm energy available in any year (June 1st to May 31st, inclusive), whether any energy is taken by it, or not, exclusive of its payments for credit to the generating agency, shall be not less than the number of kilowatt hours of firm energy which the District is obligated to take

and/or pay for during said year, multiplied by one and sixty-three hundredths mills ($0.00163), or multiplied by the adjusted rate of payment for firm energy in case the said rate is adjusted as provided in Article twelve (12) hereof. For a fractional year at the beginning or end of the contract period, the minimum annual payment for firm energy shall be proportionately adjusted in the ratio that the number of days water is available for generation of energy in such fractional year bears to three hundred sixty-five (365). Provided, however, that in order to afford a reasonable time for the District to absorb the energy contracted for, the minimum annual payments by it for the first three (3) years after energy is ready for delivery to it, as announced by the Secretary, shall be as follows, in percentages of the ultimate annual obligation, to take and/or pay for firm energy:

1st Year	55%
2nd Year	70%
3rd Year	85%
4th Year and all subsequent years	100%

During said absorption period, if the quantity of energy taken in any one year (June 1st to May 31st, inclusive) is in excess of the above percentages of the ultimate obligation during such year to take and/or pay for firm energy, such excess shall be paid for at the rate for secondary energy. Provided, further that the minimum annual payment shall be reduced in case of interruptions or curtailment of delivery of water as provided in Article sixteen (16) hereof.

The total payments made by the District for generation of such energy, to be credited to the generating agency,

shall be determined in accordance with Article twelve (12) hereof.

No Energy to be Delivered Without Payment

(15) Unless the written consent of the Secretary be first obtained, no electrical energy shall be generated for, or delivered to, the District if it shall be in arrears for more than twelve (12) months in the payment of any charge and/or penalty due or to become due the United States hereunder, whether for its own use or for credit to the generating agency.

Interruptions in Delivery of Water

(16) The United States will deliver water continuously to each lessee in the quantity, in the manner, and at the times necessary for the generation of the energy which each of said lessees has the right and/or obligation to generate under this contract in accordance with the load requirements of each of said lessees, and of allottees for which the respective lessees are generating agencies, excepting only that such delivery shall be regulated so as not to interfere with the necessary use of said Boulder Canyon Dam and Reservoir for river regulation, improvement of navigation, flood control, irrigation, or domestic uses, and the satisfaction of present perfected rights in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact, and this contract is made upon the express condition, and with the express covenant, that the rights of the District to the waters of the Colorado River, or its tributaries, are subject to, and controlled by, the Colorado River Compact. The United States reserves the right temporarily to discontinue or reduce the delivery of

water for the generation of energy at any time for the purpose of maintenance, repairs, and/or replacements, or installation of equipment, and for investigations and inspections necessary thereto; provided, however, that the United States shall except in case of emergency give to the lessees reasonable notice in advance of such temporary discontinuance or reduction, and that the United States shall make such inspections and perform such maintenance and repair work after consultation with the lessees at such times and in such manner as will cause the least inconvenience to the lessees, and shall prosecute such work with diligence, and, without unnecessary delay, will resume delivery of water so discontinued or reduced. Should the delivery of water be discontinued or reduced below the amount required, severally, for the normal generation of firm energy for the payment of which said District has hereby obligated itself, the total number of hours of such discontinuance or reduction in any year shall be determined by taking the sum of the number of hours during which the delivery of water is totally discontinued, and the product of the number of hours during which the delivery of water is partially reduced and the percentage of said partial reduction below the actual quantity of water required by the lessees, severally, for the normal generation of firm energy. Total or partial reductions in delivery of water which do not reduce the power output below the amount required at the time by such lessee for the normal generation of firm energy, will not be considered in determining the total hours of discontinuance in any year. The minimum annual payments specified in article fourteen (14) hereof shall be reduced by the ratio that the total number of hours of such discontinuance bears to eight thousand seven hundred sixty (8760). In

no event shall any liability accrue against the United States, its officers, agents and/or employees, for any damage, direct or indirect, arising on account of drought, hostile diversion, Act of God, or of the public enemy, or other similar cause; neverthless interruptions in delivery of water occasioned by such causes shall be governed as hereinabove provided in this article.

Measurement of Energy

(17) The energy received by the District shall be measured at transmission voltage at the point where the District's transmission lines connect to the switching station at Boulder Canyon dam called the point of delivery, or at the option of the Secretary, the energy received by the District shall be measured at the low voltage side of the substations serving the District, in which event suitable correction shall be made in the amounts of energy as measured to cover all losses between the points of measurement and the point of delivery at transmission voltage at Boulder Canyon dam. Suitable meter equipment satisfactory to the Secretary for measuring the energy received by the District shall be provided and maintained by and at the expense of the District. Meters may be tested at any reasonable time upon the request of either the United States of the District, and in all events they shall be tested at least once each year. If the test discloses that the error of any meter exceeds one per centum (1%) such meter shall be adjusted so that the error does not exceed one half of one per centum (½%). Meter equipment shall be tested by means of suitable testing equipment which will be provided by the United States, and which shall be calibrated by the United States Bureau of Standards as often as requested by either the United States or the

District. Meters shall be kept sealed, and the seal shall be broken only in the presence of representatives of both the United States and the District and likewise all tests of meter equipment shall be conducted only when representatives of both the United States and the District are present.

Inspection by the United States

(18) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the disposal of electrical energy, with the right at any time during office hours to make copies of or from the same.

Transmission

(19) (a) The City having, in Article twenty five (25) of Exhibit A hereof undertaken that it shall operate and maintain at cost, including allowance for necessary overhead expense, the lines required for transmitting all Boulder Canyon power from the power plant to the pumping plants of the District, allocated to and used by the District for pumping water into and in its aqueduct; provided, that in the event it should prove materially to the advantage of the District, at any time during the 50-year period of this lease, the District may operate and maintain such transmission lines itself; and provided further, that in the event of disagreement or dispute between the District and the City as to such matter, such disagreement shall be determined as provided in Article twenty-two (a)

(22a) hereof; the Secretary will, if by such determination energy allocated to and used by the District is to be transmitted by the District instead of the City, cause delivery of energy at transmission voltage to be made accordingly.

Duration of Contract

(20) This contract shall become effective as soon as the first Act of Congress appropriating funds for commencement of construction of Boulder Canyon Dam has become law, and as to the District shall remain in effect until the expiration of a period of fifty (50) years from the date at which energy is ready for delivery to the City, as determined by the Secretary. The holder of any contract for electrical energy, including the District, not in default thereunder, shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such contractor be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

Contract May Be Terminated in Case of Breach

(21) If the District shall be in arrears for more than twelve (12) months in the payment of any charge and/or penalty due or to become due to the United States hereunder, and shall not have obtained an extension of time for payment thereof, or, if such extension be obtained, has not made such payment within the time as extended, then the Secretary reserves the right thereafter, and upon two (2) years' written notice to the District, to terminate

this contract and dispose of the energy herein allocated as he may see fit; provided, he shall first give opportunity to each lessee to contract on equal and uniform terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take, and provided further, that such disposition shall be subject to the condition that the District shall have the right at any time within ten (10) years from date of the first of the defaults or breaches for which the contract is terminated, to become reinstated hereunder by payment to the United States of all arrearages and penalties, if any, together with any and all loss incurred by the United States by reason of such termination, and compensation to the contractor or contractors for equipment rendered idle by such reinstatement. In case of disagreement or dispute as to any of the items so to be paid the same shall be determined as provided in article 22 hereof. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provisions hereof, or of a subsequent breach of such provision.

Disputes and Disagreements

(22) (a) Disputes or disagreements arising under this contract between the District and any lessee or other allottee shall be arbitrated by three arbitrators, except where otherwise provided in this contract. The District shall name one arbitrator, and the other disputant shall name one. These two shall name the third. If either disputant has notified the other that arbitration is demanded and that it has named an arbitrator, and if thereafter the

other disputant fails to name an aribitrator for fifteen (15) days, the Secretary, if requested by either disputant, shall name such arbitrator, who shall proceed as though named by the disputant. The two arbitrators so named shall meet within five days after appointment of the second, and name the third. If they fail to do so, the Secretary will, on request by either disputant or arbitrator, name the third. A decision by any two of the three arbitrators shall be binding on the disputants and enforceable by court proceedings or by the Secretary in his discretion. Arbitration as herein provided, or the failure of the arbitrators to render a decision within six months of appointment of the third arbitrator, shall be a condition precedent to suit by either disputant against the other upon the matter in dispute.

(b) Disputes or disagreements between the United States and the District as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the disputants agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators, not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Use of Public and Reserved Lands of the United States

(23) The use is authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation and maintenance of main transmission lines, to transmit electrical energy generated at Boulder Canyon Dam, together with the use of such public and reserved lands of the United States as may be designated by the Secretary, from time to time, for camp sites, residences for employees, warehouses and other uses incident to the operation and maintenance of the power plant and incidental works.

Priority of Claims of the United States

(24) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Transfer of Interest in Contract

(25) No voluntary transfer of this contract, or of the rights hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the District, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the Boulder Canyon Project Act and also subject to all the provisions and conditions of this contract to the same extent as though such successor or assign were the original contractor hereunder; provided that, a mortgage or trust deed or judicial sales made thereunder shall not be deemed voluntary transfers within the meaning of this article.

Rules and Regulations

(26) This contract is subject to such rules and regulations conforming to the Boulder Canyon Project Act

as the Secretary may from time to time promulgate; provided, however, that no right of the District hereunder shall be impaired or obligation of the District hereunder shall be extended thereby; and provided further that opportunity for hearing shall be afforded the District by the Secretary prior to promulgation thereof.

Agreement Subject to Colorado River Compact

(27) This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which Compact was approved in Section 13 (a) of the Boulder Canyon Project Act.

Performance Bond

(28) The District shall, upon demand of the Secretary, furnish and keep current for the use and benefit of the United States a performance bond in a penal sum equal to the annual obligation assumed by it hereunder; or, in lieu thereof, deposit security satisfactory to the Secretary conditioned upon the faithful performance of this contract. In case security is deposited, the Secretary may make such disposition of the same as will accomplish the purpose for which submitted.

Contingent upon Appropriations

(29) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated or on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. This agreement is also subject to the condition that if Congress fails to appropriate moneys for the commencement of construction work within five (5) years from and after execution hereof, or if for any other reason construction of Boulder Canyon Dam is not commenced within said time and thereafter prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

Title to Remain in United States

(30) As provided by Section six (6) of the Boulder Canyon Project Act, the title to Boulder Canyon Dam, reservoir, plant and incidental works, shall forever remain in the United States.

Remedies under Contract not Exclusive

(31) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

Member of Congress Clause

(32) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written. (Executed in quadruplicate original.)

Attest:

NORTHCUTT ELY (S)

Approved as to form:

By W. B. Mathews (Signed)
General Counsel

Attest:

S. H. Finley (Signed)
Secretary of the Board of Directors

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR (S)
Secretary of the Interior

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
By W. P. Whitsett (Signed)
Chairman of the Board of Directors.

(Corporate Seal)

APPENDIX NO. 21

AMENDED WATER CONTRACT: UNITED STATES AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Sept. 28, 1931

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

Supplementary Contract for Delivery of Water

1. **This Supplementary Contract,** made this 28th day of September, nineteen hundred thirty-one, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between **The United States of America,** hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and **The Metropolitan Water District of Southern California,** a public corporation, hereinafter referred to as the District, organized and existing under and by virtue of the laws of the State of California:

Witnesseth:

Explanatory Recitals.

2. **Whereas,** there was executed on the 24th day of April, 1930, a contract between the **United States** and

the District, entitled "Contract for Delivery of Water," which said contract provides, among other things, for the delivery to the District each year from the Boulder Canyon Reservoir up to but not to exceed one million fifty thousand (1,050,000) acre-feet of water; and

3. **Whereas,** under date of November 5, 1930, the Secretary requested of the Chief of the Division of Water Resources of the State of California, a recommendation for the apportionment of the waters of the Colorado River available for use within the State of California, under the Colorado River Compact, the Boulder Canyon Project Act, and other applicable legislation and regulations, to the end that the same could be included as a uniform clause in each and all of the contracts under the provisions of the Boulder Canyon Project Act between the United States and applicants for water contracts in the State of California; and

4. **Whereas,** in cooperation with the District and applicants for water in the State of California, the Chief of the Division of Water Resources of the State of California made and filed his recommendations in this regard with the Secretary on August 22, 1931, and it is the desire of the parties hereto that the aforesaid contract of date April 24, 1930, be amended in certain particulars so as to conform to the recommendations of said Division of Water Resources insofar as they are set out in Article six (6) hereof;

5. **Now, Therefore,** in consideration of the mutual covenants contained herein and in the said contract of date April 24, 1930, the parties hereto agree as follows, to wit:

Delivery of Water by the United States

6. That Article six (6) of the said contract of April 24, 1930, be and the same is hereby amended so as to read as follows:

"Delivery of Water by the United States

(6) The United States shall, from storage available in the resorvoir created by Hoover Dam, deliver to the District each year at a point in the Colorado River immediately above the District's point of diversion (at or in the vicinity of the proposed Parker Dam), so much water as may be necessary to supply the District a total quantity, including all other waters diverted by the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to the availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

Section 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

Section 4. A fourth priority to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

Section 5. A fifth priority, (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to the City of San Diego and/or

County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Section 8. So far as the rights of the allottees named above are concerned, The Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time

prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other states without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other states without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

Section 10. In no event shall the amounts allotted in this agreement to The Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and

either or both may use said apportionments as may be agreed by and between said District and said City.

Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; provided, that priorities numbered fourth and fifth shall not thereby be disturbed.

Said water shall be delivered continuously as far as reasonable diligence will permit, but the United States shall not be obligated to deliver water to the District when for any reason such delivery would interfere with the use of Hoover Dam and Boulder Canyon Reservoir for river regulation, improvement of navigation, flood control, and/or satisfaction of

perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact, and this contract is made upon the express condition and with the express covenant that the right of the District to waters of the Colorado River, or its tributaries, is subject to and controlled by the Colorado River Compact. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacement or installation of equipment and/or machinery at Hoover Dam, but so far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur. This contract is for permanent service, but is made subject to the express covenant and condition that in the event water for the District is not taken or diverted by the District hereunder for District purposes within a period of ten (10) years from and after completion of Hoover Dam as announced by the Secretary, it may in such event, upon the written order of the Secretary, and after hearing become null and void and of no effect."

Contract of April 24, 1930, Effective Except as Modified

7. Except as expressly modified hereby the aforesaid contract of date April 24, 1930, shall remain in full force and effect.

Member of Congress Clause

8. No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this supplementary contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR
Secretary of the Interior.

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
By W. P. WHITSETT
Chairman of the Board
of Directors.

Attest:
NORTHCUTT ELY

Attest:
S. H. FINLEY,
Secretary of the Board of Directors

Approved as to form:
JAMES H. HOWARD,
General Counsel, The Metropolitan
Water District of Southern California.

[Seal]

APPENDIX NO. 22

PARKER DAM COOPERATIVE CONTRACT: UNITED STATES AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Feb. 10, 1933

Boulder Canyon Project

Cooperative Contract for Construction and Operation of Parker Dam

1. This contract, made this 10th day of February, 1933, pursuant to the act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the act of Congress approved March 4, 1921 (41 Stat. 1367, 1404), section 25 of the act of Congress approved April 21, 1904 (33 Stat. 189, 224), and the act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and the "Metropolitan Water District Act" of the Legislature of the State of California (Stats. 1927, Chap. 429), as amended, particularly section 5, subdivision (9) thereof, between **The United States of America,** hereinafter referred to as the United States, acting for that purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and **The Metropolitan Water District of Southern California,** a public corporation, hereinafter referred to as the District, organized and existing under and by virtue of the laws of the State of California:

Witnesseth:

Explanatory Recitals

2. **Whereas,** these parties have heretofore on April 24, 1930, and September 28, 1931, entered into two contracts entitled respectively "Contract for Delivery of Water," and "Supplementary Contract for Delivery of Water," which said contracts provide, among other things, for the delivery by the United States to the District each year from the Boulder Canyon Reservoir of quantities of water at a point in the Colorado River immediately above the District's point of diversion (at or in the vicinity of the proposed Parker Dam hereinafter referred to), and have also entered into two contracts (dated April 26, 1930, and May 31, 1930), for the purchase by the District from the United States of certain quantities of electrical energy to be generated at Hoover Dam, for the pumping of said water into and in an aqueduct to be constructed by the District; and

3. **Whereas,** the said point of delivery and the proposed Parker Dam are approximately ten (10) miles above the boundaries of the Colorado River Indian Reservation as designated by the act of Congress approved March 3, 1865 (13 Stat. 559), and there are now being irrigated, by pumping, approximately 6000 acres of land within said reservation, and water has been reserved and appropriated pursuant to said act as amended or supplemented and particularly by the act of April 4, 1910 (36 Stat. 273), for additional lands within said reservation susceptible of irrigation from the Colorado River, the reclamation of which will require diversion from the River by construction of a dam, or by pumping or both, and will require drainage of said lands by pumping, for all of which electrical energy is needed; and

4. **Whereas,** there are also in Arizona additional public and other lands in the vicinity of said reservation and also in the Gila Valley, susceptible of irrigation from the Colorado River, but requiring pumping for such purposes, for which electrical energy will be needed, and the United States has now under way an investigation of possible reclamation of such areas as authorized by section fifteen (15) of the said Boulder Canyon Project Act; and

5. **Whereas,** the reclamation of said Indian and public and other lands will be rendered more feasible by the availability of stored water and electrical energy at the proposed Parker Dam, and the floods of the tributaries of the Colorado River between Hoover Dam and Parker Dam will be controlled, and navigation improved, by said dam; and

6. **Whereas,** the Secretary is authorized by said act of April 21, 1904 (33 Stat. 224), to build the proposed Parker Dam for the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona; and such authority has been reserved in the Arizona Enabling Act (act of June 20, 1910, 36 Stat. 570, 575), and

7. **Whereas,** the District is engaged in a project involving the construction of an aqueduct for the purpose of diverting and conveying water from the Colorado River to the metropolitan area of Southern California for domestic, municipal and other useful purposes, and as a means of such diversion, desires storage in the main stream of the Colorado River at the site of the proposed Parker Dam, for the purpose, among others, of desilting water, reducing pump lift and developing incidental electrical energy for pumping water into and in said aqueduct

and other uses subordinate to the said aqueduct project, and the District desires to utilize the proposed Parker Dam in common with the United States and is willing to pay to the United States the entire capital cost of construction of said dam, as hereinafter set forth, and is further willing that one-half of the power privilege created by said dam shall be reserved to the United States for the purposes of irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation, as now constituted, and the Gila or Gila-Parker Project without contribution by the United States to the capital cost of the proposed dam, as hereinafter set forth, and is also willing that the dam be utilized by the United States for the storage and diversion of water for the requirements of Indian, public and other lands in Arizona; and

8. **Whereas,** the Secretary is authorized by the act of Congress approved March 4, 1921, to receive moneys from the District as aforesaid and to effect therewith the construction of the proposed works as though said moneys were specifically appropriated for said purposes; and

9. **Whereas,** funds are not otherwise available for the construction by the United States of said dam and the provision of storage and diversion facilities and of appurtenant works for the irrigation and drainage of said Indian, public and other lands in Arizona and the cooperative construction of the said dam and works, as herein provided, will be mutually advantageous to the parties hereto, and the cost of said dam and appurtenant works will be materially less if constructed during the period of completion of the Hoover Dam now under construction than would otherwise be the case;

Now, Therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to-wit:

Construction by the United States

10. The United States will, with funds advanced by the District as hereinafter provided, and for the purposes stated in this contract, construct in the main stream of the Colorado River at a point in the vicinity of Parker, Arizona, shown on the map attached hereto and described herein as Exhibit "A", a dam, referred to herein as the Parker Dam, creating thereby a storage reservoir having a maximum water surface elevation of approximately four hundred fifty (450) feet above sea level (U. S. Geological Survey datum). Upon like conditions the United States will also construct outlet works, pressure tunnels, penstocks and other appurtenant structures to the extent that such structures may be necessary and/or economically desirable as parts of the original installation, and such facilities for navigation as the Secretary may find necessary. All buildings intended solely for the use of either party hereto shall be constructed at the sole expense of the party for whom such facilities shall be provided. The dam and appurtenant structures shall be so constructed that subsequent installation of diversion or outlet works shall be possible in the most feasible manner for canal connections with lands within the Colorado River Indian Reservation and with public and other lands in Arizona now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and, if either party hereto requires it, so that one-half of the total installed capacity of electrical generating equipment may be located upon the Arizona side of the river and

one-half on the California side. Outlet works, pressure tunnels, penstocks, connections for canals and appurtenant structures not required by the District shall be completed under this contract only to the extent necessary to permit their subsequent completion and use without risk of damage to the remainder of the work.

In carrying out the proposed work hereunder and in acquiring supplies, materials and equipment therefor, the United States may proceed directly under the method commonly referred to as force account, or may proceed by construction contract. In the event that such contract or contracts shall be let with reference to the construction of said dam, or the acquisition of supplies, materials or equipment therefor, the letting of such contracts shall be governed by the provisions of Section 3709, United States Revised Statutes.

Funds to Be Provided by the District

11. The District will advance to the United States, not to exceed the sum of Thirteen Million Dollars ($13,000,000), or so much thereof as may be (a) the cost of preparation of plans and specifications described in Article 13 hereof; (b) the actual cost of the said dam, including acquisition of lands and rights of way for reservoir and other incidental purposes, outlet works, pressure tunnels and penstocks, to be constructed hereunder, and of the District's proportionate share as determined by the Secretary, of such power plant buildings and generating, transforming and high voltage switching equipment as may be installed for the joint use of the United States and the District, and (c) required to meet any overhead and general expense incurred by the United States in carrying out this contract.

Said funds will be furnished to the United States by payment from time to time to the Secretary or such fiscal agent as he may designate in advance of expenditure thereof by the United States. The Secretary will submit estimates of the monthly anticipated expenditures not less than sixty (60) days in advance, and the District will then advance the amount not less than thirty (30) days prior to the month in which such funds shall be estimated to be required. If the United States effects such construction by contract, such contract shall recite that the United States shall not be liable for any loss occasioned by the failure of the District to advance funds as herein provided. The District agrees to hold the United States harmless from all claims whatsoever arising from any such failure. If the funds provided by the District are at any time insufficient, the United States will stop work (if proceeding under force account), when the funds so advanced are exhausted, or give notice to the construction contractor to stop work (if proceeding by construction contract), when the funds so provided are about to be exhausted, and will not resume or give notice to resume work until additional and sufficient funds are provided by the District; and, in any event, the United States shall not be obligated by this agreement beyond the expenditure of the amount actually provided by the District, whether the proposed works are completed or not. The failure of the District to provide funds shall not impose any liability on the District other than to hold the United States harmless from the consequences thereof, but the United States may be relieved, at its option, of any obligation under this contract, if such failure continues for twelve (12) successive months, after submission of estimate therefor,

by the Secretary's giving the District written notice of the termination of any further obligation of the United States hereunder.

The cost of the proposed works shall embrace all expense of whatever kind, growing out of or resulting from said works, including any overhead and general expense (as conclusively estimated by the Secretary) incurred by the United States in carrying out this contract. Nothing contained in this article is to be construed as obligating the United States to expend or Congress to appropriate money for any share of (a) said power plant buildings or (b) said generating, transforming and high voltage switching equipment intended for the joint use of the parties hereto.

No Obligation by the United States to Pay for Works Constructed

12. The United States shall not be under any obligation to repay to the District, or otherwise contribute toward, the cost of any works built with funds provided by the District.

Preparation of Plans and Specifications

13. The designs and specifications for all construction or other work under this contract (including exploratory and preparatory work) shall be prepared by the United States with the cooperation of and at the cost of the District, and shall be approved in writing by the General Manager and Chief Engineer of the District, or such other officer as the Directors thereof may designate, prior to performance thereof or the letting of contracts for such work.

Duration of Contract

14. Upon written notice from the District to the Secretary that funds will be available to carry out the work to be constructed hereunder, the United States agrees to submit within thirty (30) days following such notice its first estimate of funds required during the first thirty (30) days of work hereunder and to proceed thereafter with reasonable diligence. It is contemplated that as far as practicable, the proposed works shall be constructed coincidentally with the construction of Hoover Dam and the filling of the reservoir thereby created and that any contract let by the United States for the erection of Parker Dam shall so provide; but neither the United States nor the District shall incur liability to the other through the non-completion of said works within said period. This contract shall terminate on December 31, 1945, unless prior thereto the District shall have advanced sufficient funds for all works to be constructed by the United States hereunder, and in the event of such termination, all rights of the District under this contract shall cease, and the uncompleted works, together with the rights to the use thereof, shall vest in the United States.

POWER AND OTHER PRIVILEGES

15. (I) The interest of both parties require and it is agreed that the water surface of the reservoir to be created by Parker Dam shall be maintained as nearly as possible at a level of 450 feet above sea level (U. S. Geological Survey datum) at the dam.

II. It is agreed that the United States shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(a) The right to control all water passing the dam; provided, however, that the water level stated in Article 15 (I) hereof shall not be arbitrarily reduced but may be temporarily reduced from time to time to a minimum elevation of 440 feet above sea level, and the water level shall not be reduced below said minimum level except in cases of emergency affecting the safety of the said dam and appurtenant works.

(b) The right, without contribution to the cost of the dam built under this contract, to one-half the power privilege created thereby for use in the irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation as now constituted and the Gila or Parker-Gila Project, as determined by the Secretary and for other purposes incidental to said Colorado River Indian Reservation and Gila or Parker-Gila Project; that is to say, the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diversions being made above the dam for the District's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to so utilize such portion of the balance of the power privilege as aforesaid as may not be used by the District for the time being.

(c) The right to connect with such transmission system as the District may construct for the purpose of utilizing any power transmission capacity in excess of the District's requirements, for the transmission of power from Hoover

Dam to Parker Dam for general use within the Colorado River Indian Reservation, as now constituted, and Gila or Parker-Gila Project, as determined by the Secretary; provided that such excess capacity shall be subject to reasonable operating conditions fixed by the District, and that the United States shall pay to the District the cost of transmission of such power as may be transmitted by use of such excess capacity hereunder;

(d) The right to connect with the Parker Dam and/or the reservoir created thereby by means of a canal (including such outlet and diversion features at Parker Dam as may be necessary or advisable) with lands within the Colorado River Indian Reservation, as now constituted, and with public and other lands in Arizona or California, now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to thereby divert such quantities of water as may be consistent with the Colorado River Compact and the Boulder Canyon Project Act.

III. It is agreed that the District shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(a) The right to one-half of the power privilege created by the proposed Parker Dam for the purpose of developing electrical energy for pumping water into and in the said aqueduct and other uses incidental to said aqueduct project in California; that is to say, the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diversions being made above the dam for the District's aqueduct and for the irrigation of

(1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to utilize for said purpose such portion of the balance of the power privilege as aforesaid as may not be used by the United States for the time being.

(b) The right to divert water from the said Parker Dam and/or the reservoir created thereby, by means of an aqueduct, canal or other appropriate works (including such outlet and diversion features at Parker Dam as may be necessary or advisable) for domestic, municipal and other beneficial use within the area of the District, as now or hereafter constituted, in California, and to thereby divert such quantities of water as may be consistent with the Boulder Canyon Project Act, the Colorado River Compact and the said contracts heretofore entered into between the United States and the District and described and referred to in Article 2 hereof.

Installation of Machinery

16. Machinery and equipment for generating, transforming, and high voltage switching of energy for the sole use of the District shall be installed, owned and operated by the District at its own expense. The District shall not be liable for the cost of generating or other electrical equipment installed for the sole use of the United States.

Operation and Maintenance of Reservoir, Dam and Outlet Works

17. The United States will operate and maintain the reservoir, dam and outlet works, to, but not including shut-off valves, and reserves the right to direct the control of all water passing the dam for any and all purposes; provided that contracts now in force between the parties hereto shall not be thereby impaired. So long as the United States shall make no use of the reservoir, the cost of operation and maintenance (which shall include repairs and replacements and a reasonable amount, as determined by the Secretary, for general expenses and overhead, but excluding contingent liabilities and/or damages) shall be paid monthly in advance by the District to the United States within sixty (60) days of submission of estimates therefor. If and when the United States shall use or authorize the use of said reservoir for diversion of water and/or development of power, the annual cost of maintenance and operation of the reservoir and dam (as hereinabove in this paragraph limited and defined) shall be pro-rated upon the basis of the diversions by each party into their respective aqueducts, canals and power plants, and shall be paid in direct proportion to the uses so made by the District and the United States.

Operation and Maintenance of Power Plant and Power Plant Buildings

18. The District will operate and maintain at its own cost all buildings and equipment used solely by it for the generation of electrical energy, from and including shut-off valves. The United States will operate and maintain at its own cost all buildings and equipment used solely by

the United States for the generation of electrical energy, subject to the availability of appropriations therefor by Congress, and said operation and maintenance shall be effected by the United States through such agency as the Secretary shall designate.

Title

19. Title to the dam and all other structures erected by the United States, whether utilized by it or by the District, or by both, shall remain in the United States.

United States to Be Held Harmless

20. The District agrees to save the United States, its officers, agents and employees harmless from all claims whatsoever arising out of the construction and maintenance of said dam, and from all claims whatsoever arising out of such operation thereof as may be necessitated by the requirements of the District. The District agrees to pay all damages resulting from the flooding of lands, and, to the extent that lands within the Chimehuevi Indian Reservation are damaged, payment therefor will be made to the United States for the benefit of said Reservation.

Access to Work and to Books and Records

21. Accredited officers of the District shall have the right of ingress to and egress from all work done under this contract, both in progress and after completion, and the right at all reasonable hours to examine and make copies of any books, records, drawings or specifications thereof; and the United States shall have a like right as to all pertinent books, records, drawings and specifications of the District. Upon demand and at not less than

thirty day intervals, the United States will furnish to the District detailed statement of all costs and expenditures in connection with and/or chargeable against the proposed Parker Dam Project.

Existing Contracts Between the United States and the District Not Affected

22. Existing contracts between the United States and the District shall remain in full force and effect and unaltered by the provisions of this agreement.

Transfer of Interest in Contract

23. No voluntary transfer of this contract, or of the rights hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the District, whether by voluntary transfer, or otherwise, shall be subject to all the conditions of the Reclamation Law and supplementary legislation, and also subject to all the provisions and conditions of this contract, to the same extent as though such successor or assign were the original contractor hereunder.

Rules and Regulations

24. This contract is subject to such rules and regulations, conforming to the Reclamation Law and supplementary legislation and other statutes cited in this contract, as the Secretary may from time to time promulgate; *provided,* however, that no right of the District hereunder shall be impaired or obligation of the District hereunder shall be extended thereby; and *provided further,* that opportunity for hearing shall be afforded the District by the Secretary prior to promulgation or modification of any such rules and regulations.

Agreement Subject to Colorado River Compact

25. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which Compact was approved in Section 13 (a) of the Boulder Canyon Project Act.

Disputes and Disagreements

26. Whenever a controversy arises out of this contract, and if the disputants then agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators, not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Member of Congress Clause

27. No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part

of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA
By RAY LYMAN WILBUR
Secretary of the Interior

Attest:
NORTHCUTT ELY

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
By W. P. WHITSETT,
Chairman of the Board of Directors

Approved as to Form
By JAMES H. HOWARD
General Counsel

Attest:
[Seal]
S. H. FINLEY
Secretary of the Board of Directors

APPENDIX NO. 23

WATER DELIVERY CONTRACT: UNITED STATES and SAN DIEGO

February 15, 1933

(1) **This contract,** made this 15th day of February nineteen hundred thirty-three, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and THE CITY OF SAN DIEGO, a municipal corporation of the State of California, hereinafter styled the City, organized under a freeholders' charter;

Witnesseth:

Explanatory Recitals

(2) **Whereas,** for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water, and a main

canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam with the Imperial and Coachella Valleys in California; and

(3) **Whereas,** the United States contemplates entering into an agreement with Imperial Irrigation District, an irrigation district organized and existing under and by virtue of the laws of the State of California, providing, among other things, for the construction of a main canal and appurtenant structures, authorized as aforesaid, and reserving under conditions to be therein stated, the right to increase the capacity of said works and to contract for such increased capacity with other agencies for the delivery of water for use within the United States; and

(4) **Whereas,** the United States and the City contemplate hereafter entering into a contract by which provision will be made for increasing, for the City's benefit and at its cost, the capacity of the main canal and appurtenant works to be constructed for Imperial Irrigation District, as aforesaid; and

(5) **Whereas,** the City is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir;

(6) **Now, therefore,** in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Delivery of Water by United States

(7) The United States shall, from storage available in the reservoir created by Hoover Dam, deliver to the City each year at a point in the Colorado River immediately above Imperial Dam, so much water as may be necessary

to supply the City a total quantity, including all other waters diverted by the City from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to the availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

Section 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adja-

cent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

Section 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

Section 5. A fifth priority, (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial

consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Section 8. So far as the rights of the allottees named above are concerned, The Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the

exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

Section 10. In no event shall the amounts allotted in this agreement to The Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of

water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; provided, that priorities numbered fourth and fifth shall not thereby be disturbed.

Said water shall be delivered continuously as far as reasonable diligence will permit, but the United States shall not be obligated to deliver water to the City when for any reason such delivery would interfere with the use of Hoover Dam and Boulder Canyon Reservoir for river regulation, improvement of navigation, flood control, and/or satisfaction of perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact, and this contract is made upon the express condition and with the express covenant that the right of the City to waters of the Colorado River, or its tributaries, is subject to and controlled by the Colorado River Compact. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements or installation of equipment and/or machinery at Hoover Dam, but so far as feasible the United States will give the City reasonable notice in advance of such tem-

porary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur.

Deliveries hereunder shall be in satisfaction of the allocation to the City and the County of San Diego, and shall be used within the County as the City and the County may agree, or as the State of California may allocate in the event of disagreement between the City and the County.

This contract is for permanent service, but is made subject to the express covenant and condition that in event water is not taken or diverted by the City hereunder within a period of ten (10) years from and after completion of Hoover Dam as announced by the Secretary, it may in such event, upon the written order of the Secretary, and after hearing, become null and void and of no effect.

Receipt of Water by City

(8) The City shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

Measurement of Water.

(9) The water to be delievered hereunder shall be measured by such measuring and controlling devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed and maintained by and at the expense of the City, but they shall be

and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the City.

Record of Water Diverted

(10) The City shall make full and complete written monthly reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted, and the records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

Charge for Delivery of Water

(11) A charge of twenty-five cents (0.25) per acre-foot shall be made for water delivered to the City hereunder during the Hoover Dam cost repayment period.

Monthly Payments and Penalties

(12) The City shall pay monthly for all water delivered to it hereunder, or diverted by it from the Colorado River, in accordance with the rate herein in Article eleven (11) established. Payments shall be due on the first of the second month immediately succeeding the month in which water is delivered and/or diverted. If such charges are not paid when due, a penalty of one per centum (1%) of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum (1%) of the amount unpaid shall be added on the first day of each calendar month during such delinquency.

Refusal of Water in Case of Default.

(13) The United States reserves the right to refuse to deliver water to the City in the event of default for a period of more than twelve (12) months in any payment due or to become due the United States under this contract.

Inspection by the United States

(14) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the City for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the City relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

Disputes or Disagreements

(15) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the City shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators, not so elected, shall be named by the Senior Judge of the United

States Circuit Court of Appeals for the ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

Rules and Regulations

(16) There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the City and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments hereof, or to protect the interests of the United States. The City hereby agrees that in the operation and maintenance of its diversion works and aqueduct, all such rules and regulations will be fully adhered to.

Agreement Subject to Colorado River Compact

(17) This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which Compact was approved in Section 13 (a) of the Boulder Canyon Project Act.

Priority of Claims of the United States

(18) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Contingent upon Appropriations

(19) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. This agreement is also subject to the condition that if for any reason construction of Hoover Dam is not prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

Rights Reserved under Section 3737 Revised Statutes

(20) All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies under Contract not Exclusive

(21) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

Interest in Contract not Transferable

(22) No interest in this agreement is transferable, and no sublease shall be made, by the City without the written consent of the Secretary, and any such attempted transfer or sublease shall cause this contract to become subject to annulment, at the option of the United States.

Member of Congress Clause

(23) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA.
By RAY LYMAN WILBUR
Secretary of the Interior.

THE CITY OF SAN DIEGO.
By JOHN HOWARD, JR.
Mayor.

Attest:
NORTHCUTT ELY
RICHARD J. COFFEY

Approved as to form
C. L. BYERS
City Attorney

Attest:
ALLEN W. WRIGHT
City Clerk

As evidence of its approval of the foregoing contract between the United States and the City, the County of San Diego has caused the signature of the Chairman of its Board of Supervisors to be affixed thereto.

THE BOARD OF SUPERVISORS OF
SAN DIEGO COUNTY
By TOM HURLEY
Chairman.

Attest:
J. B. McLEES
County Clerk

Approved as to form: Feb 7 1933
RAY LYMAN WILBUR
Ray Lyman Wilbur, Secretary of the Interior.

APPENDIX NO. 24

MERGER OF SAN DIEGO WATER DELIVERY CONTRACT WITH THAT OF METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

October 4, 1946

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
BOULDER CANYON PROJECT
Arizona-California-Nevada

Contract Merging Rights of The City of San Diego and The Metropolitan Water District of Southern California Under Contracts with the United States Dated February 15, 1933, and April 24, 1930 (Amended September 28, 1931), Respectively

1. **This Contract,** made this 4th day of October, 1946, pursuant to the Act of Congress, approved June 17, 1902 (32 Stat. 388), and Acts amendatory thereof or supplementary thereto, all of which Acts are commonly known and referred to as the Reclamation Law and particularly pursuant to the Act of Congress, approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between **The United States of America** (hereinafter referred to as the "United States"), acting for this purpose by Warner W. Gardner, Acting Secretary of the Interior (hereinafter referred to as the "Secretary"), **The City of San Diego,** a municipal corporation (hereinafter referred to as "San Diego"), the **San Diego County Water Authority,** a municipal corporation (hereinafter referred to as the "Authority"), and

The Metropolitan Water District of Southern California, a public corporation (hereinafter referred to as the "District"); **Witnesseth That:**

2. **Whereas,** under date of August 18, 1931, the Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, The City of San Diego and County of San Diego entered into an agreement fixing their respective priorities in waters of the Colorado River available for use in California under the Colorado River Compact and the Boulder Canyon Project Act, which said contract is hereinafter referred to as the "Seven-Party Priority Agreement"; and

3. **Whereas,** under date of April 24, 1930, the United States and the District entered into a water delivery contract, which contract, as amended by supplementary contract between said parties dated September 28, 1931, provides for delivery by the United States to the District of waters of the Colorado River in accordance with said schedule of priorities as fixed in the Seven-Party Priority Agreement; said Contract, as amended by said Supplementary contract of September 28, 1931, being herein referred to as the "District's Water Delivery Contract"; and

4. **Whereas,** under date of February 15, 1933, the United States and San Diego entered into a water delivery contract approved by the County of San Diego, which contract provides for the delivery by the United States to San Diego of waters of the Colorado River, in accordance with said schedule of priorities as fixed in the Seven-Party Priority Agreement, said contract being for the benefit of San Diego and the County of San Diego,

and being hereinafter referred to as the "San Diego Water Delivery Contract"; and

5. **Whereas,** the priorities so agreed upon, and set out in said Seven-Party Priority Agreement and said water delivery contracts, are as follows, to-wit:

"Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said district as it now exists and upon lands between said district and the Colorado River, aggregating (within and without said district) a gross area of 104,500 acres, such waters as may be required by said lands.

Section 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities designated in sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

Section 4. A fourth priority to The Metropolitan

Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

Section 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to The City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Section 7. A seventh priority of all remaining water available for use within California for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation;"

and

6. **Whereas,** the Authority was created pursuant to the provisions of the "County Water Authority Act" of the State of California (Stats. 1943, p. 2090) and includes the corporate area of San Diego, together with other portions of the County of San Diego, and was created to the end that San Diego and other parts of the said county may participate in the benefit of Colorado River water as contemplated by the terms of said contract between the United States and San Diego, dated February 15, 1933; and

7. **Whereas,** it is provided in the said County Water Authority Act that each public agency whose corporate area shall be a part of the Authority (San Diego, by definition, being considered a public agency for the purposes of said Act) shall have a preferential right to purchase from the Authority a percentage of the water supply of the Authority, determined as therein set out; and

8. **Whereas,** the act under which the District was incorporated provides that each city whose corporate area shall be a part thereof (the Authority, by definition, being considered a city for the purposes of said act) shall have a preferential right to purchase from the District a percentage of the water supply of the District, determined as therein set out; and

9. **Whereas,** it is proposed to submit to the electors of the Authority the proposition of annexing the corporate area of the Authority to the District, and, in the event that such corporate area of the Authority shall be so annexed to and become a part of the District, it would be against the public interest that any part of the enlarged District should participate in the water supply administered by the District, in any manner or under any sched-

ule of priority differing from that generally applicable in other parts of the District, and the public interest will be best served, in the event of such annexation, by merging the contract rights and certain priorities as herein provided, and, so far as the parties hereto are concerned, treating such priorities as a single priority, to be vested in, and administered by, the District; and

10. **Whereas,** in the event of annexation of the corporate area of the Authority to the District, under the terms of the Metropolitan Water District Act, the Authority will have a right in the aggregate water supply of the District, and San Diego, whose corporate area is a part of the Authority, under the terms of the County Water Authority Act, will have a right in the water available to the Authority; and

11. **Whereas,** the right to participate in the use of the waters of the Colorado River, which San Diego will enjoy by reason of its corporate area being a part of the Authority and the corporate area of the Authority being a part of the District, will be of great value to San Diego, and the interests of San Diego will be protected and advanced by the execution of this contract;

Now, Therefore, in consideration of the premises, it is agreed that:

12. Under the conditions set out in Article 14 hereof and not otherwise, the right to storage and delivery of Colorado River water now vested in San Diego for the benefit of San Diego and the County of San Diego and evidenced by said San Diego Water Delivery Contract, shall be and is hereby assigned and transferred to and vested in the District and shall be and is hereby merged with and added to the rights of the District under the

District's Water Delivery Contract, and the rights and obligations now vested in and imposed on San Diego as evidenced by said San Diego Water Delivery Contract shall be and are hereby accepted and assumed by said District and such rights and obligations shall be administered and observed by the District and considered a part of the water supply and a part of the rights and obligations of the District for all purposes and particularly for the purposes of Section 5½ of the Metropolitan Water District Act, without reference to priority as between the Authority and any other part or parts of the District, provided that as between the District (including the Authority) and the United States and other parties to the Seven-Party Priority Agreement, nothing herein shall be construed as increasing the amount of water available to the District and/or the Authority under the fourth priority set out in the recitals hereof, or otherwise prejudicing the respective rights of other parties to the Seven-Party Priority Agreement in the water of the Colorado River. The point of delivery of all water delivered to the District under its outstanding water delivery contract and hereunder, shall be at the District's intake above Parker Dam and the United States hereby agrees that the diversion point of water heretofore agreed to be delivered to San Diego under said water delivery contract of February 15, 1933, is hereby transferred from the point on the Colorado River immediately above the Imperial Dam to the District's intake at a point on the Colorado River immediately above Parker Dam.

13. In the event that the corporate area of the Authority shall at any time cease to be a part of the District, the said contract between the United States and San Diego dated February 15, 1933, shall be revived and re-

instated, and shall thereupon become severally operative; provided, that the right of the Secretary to cancel such contract for the nonuse of water thereunder, shall not be exercised within ten years from the date when the corporate area of the Authority shall cease to be a part of the District.

14. This contract shall be of no force or effect until and unless:

(a) The corporate area of the Authority is annexed to the corporate area of the District prior to December 31, 1946, and at a time when the corporate area of San Diego is a part of the corporate area of the Authority;

(b) A majority of the qualified electors of San Diego voting on the proposition shall authorize the transfer and assignment to the District by San Diego of San Diego's rights and obligations under the Water Delivery Contract between the United States and the City of San Diego dated February 15, 1933, relating to the waters of the Colorado River;

(c) A majority of the qualified electors of San Diego voting on the proposition shall authorize the transfer and assignment to the Authority of San Diego's rights and obligations under the contract dated October 17, 1945 (NOy-13300), granting San Diego a lease of the aqueduct being constructed by the United States Navy from San Jacinto Tunnel to San Vicente Reservoir, except San Diego's obligations under Article 2 (a) of said contract to construct a water treatment plant and other works as contemplated by the San Diego bond issue approved April 17, 1945, and the obligation under Article 2 (c)

of said contract that San Diego supply all Government agencies within the area with an adequate supply of water at nondiscriminatory rates, and on condition that if the Authority shall cease to be a portion of the corporate area of The Metropolitan Water District of Southern California, the said Lease-Contract shall revert to San Diego, subject to all modifications, defaults or acts of the Authority, affecting the said Lease Contract;

(d) A majority of the qualified electors of the Authority voting on the proposition shall authorize the acceptance of the rights and the assumption by the Authority of the obligations transferred to the Authority by the assignment of the contract dated October 17, 1945 (NOy-13300).

15. This contract is made upon the express condition, and with the express understanding, that all rights hereunder shall be subject to and controlled by, the Colorado River Compact, being the Compact signed at Santa Fe, New Mexico, November 24, 1922, which compact was approved in Section 13 (a) of the Boulder Canyon Project Act.

16. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

17. Except as expressly modified by the terms hereof, outstanding contracts between the United States and the respective parties hereto shall remain in full force and effect.

18. This contract shall be known as the "1946 Merger Contract".

In Witness Whereof, the parties hereto have executed this contract the day and year first above written.

THE UNITED STATES OF AMERICA,
By WARNER W. GARDNER
Acting Secretary of the Interior

THE CITY OF SAN DIEGO,
By F. A. RHODES
City Manager

[Seal]
Attest:
FRED W. DICK
City Clerk

SAN DIEGO COUNTY WATER AUTHORITY,
By J. L. BURKHOLDER
General Manager

[Seal]
Attest:
W. H. JENNINGS
Secretary

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,
By JULIAN HINDS
General Manager and Chief Engineer

[Seal]
Attest:
A. L. GRAIN
Executive Secretary
Approved as to Form:
JAMES H. HOWARD
General Counsel

As evidence of its approval of the foregoing contract between the United States, The City of San Diego, the San Diego County Water Authority and The Metropolitan Water District of Southern California, the County of San Diego has caused the signature of the Chairman of Its Board of Supervisors to be affixed thereto.

BOARD OF SUPERVISORS OF THE COUNTY
OF SAN DIEGO,
By DAN ROSSI
Chairman pro tem

[Seal]

Attest:
J. B. McLEES
County Clerk
By M. NASLAND, Deputy

I Hereby Approve the form and legality of the within 1946 **Merger Contract,** this 9th day of October, 1946.

J. F. DUPAUL,
J. F. DuPaul,
City Attorney, The City of San Diego.

APPENDIX NO. 25

AQUEDUCT CONSTRUCTION CONTRACT: UNITED STATES AND CITY OF SAN DIEGO

October 17, 1945

This Negotiated Contract made this 17th day of October, 1945, between the **United States of America** (hereinafter called the "Government"), represented by the **Chief of the Bureau of Yards and Docks, Navy Department** (hereinafter called the "Contracting Officer") and the **City of San Diego** (hereinafter called the "City"), a municipal corporation organized and existing under and by virtue of the laws of the State of California,

Witnesseth:

Whereas, it is recognized that the deficiency of the water supply in San Diego County, California, has become of emergency importance to the Government, owing to the large Naval, other military, Federal housing, and other Government installations in the area; and

Whereas, as a result of extended studies by the interested parties a joint program has been formulated as hereinafter provided which it is anticipated will effectively eliminate such water supply deficiency; and

Whereas, the Contracting Officer has determined that the accomplishment of the provisions of this contract, including the furnishing by the Government of extensive facilities on the terms provided, is necessary in the interest of the national defense;

Now, Therefore, it is mutually agreed as follows:

ARTICLE 1—FACILITIES TO BE FURNISHED BY GOVERNMENT AND LEASE THEREOF.

(a) The Government, at its own expense, shall diligently prosecute to completion a steel and concrete Aqueduct running from a connection with the Colorado River aqueduct of the Metropolitan Water District of Southern California near the west portal of San Jacinto tunnel in Riverside County, to San Vicente Reservoir, in San Diego County, which undertaken project is hereinafter referred to in its entirety as the "Aqueduct," and includes the entire structure and appurtenances thereto together with those rights in real property acquired by the Government for its construction or operation. The Aqueduct shall be constructed in accordance with the presently existing Government specifications therefor (such specifications being generally identified as Bureau of Yards and Docks Specifications numbered 16713, 16781, 17270, 16954, 17383, 16998, 16254, and likewise the specifications contained in Bureau of Supplies and Accounts Contract N5sy 3213, and also including such additional specifications as the Contracting Officer may deem desirable for the completion of the work), which specifications are by this reference made a part hereof. The Government may make such changes in such specifications as it may deem proper, provided, however, that no fundamental changes therein will be made without first consulting with the City. The estimated cost of the Aqueduct is $14,500,000 and the estimated completion date is May, 1947, but neither party guarantees such amount or date nor sponsors either of them as a material representation hereunder.

(b) Upon completion of the Aqueduct as determined by the Contracting Officer, the Government shall deliver the possession thereof to the City for use in its water system and upon the following lease basis:

(i) After the date of delivery of possession to it the City shall thereafter repair, maintain and operate such Aqueduct and shall be responsible for the safekeeping thereof regardless of the cause of loss or damage thereto and for all charges and assessments of whatsoever type or nature thereafter accruing against the same, it being intended that after the date of such delivery of possession under this lease the Government shall be without financial obligation or liability with respect to such property and that such property shall be maintained intact and free of encumbrance. The City shall hold the Government, its officers, agents and employees, harmless from any claims or liabilities arising out of the City's operations or other activities under this lease and shall not permit of the attachment of any encumbrance whatsoever to such Government property. The Government shall have access to the premises leased hereunder at all reasonable times for inspection or other proper purposes. Should the City fail in any of its undertakings under this paragraph, the Government, at its option and without prejudice to such other rights as it may have, may enter the premises and remedy such default or any part thereof and charge the actual cost thereof to the City plus 15% to cover overhead and general expense, which total amount together with interest at the rate of 4% per annum from the date of expenditure to the date of payment shall be paid to the Government

by the City on June 1 immediately succeeding the date when the Government completes or discontinues the remedying of such default or part thereof.

(ii) Title to the Aqueduct shall remain in, and title to all replacements and improvements thereto made during the life of this lease shall vest in, the Government.

(iii) The annual rental under this lease shall be $500,000. The lease period shall commence to run from the date the Government delivers possession of the Aqueduct to the City. Such annual payment shall be divided into quarterly payments of $125,000 each, the first of such payments to be made within three months of said date of delivery of the Aqueduct and the remainder quarterly thereafter.

(iv) This lease shall continue until such time as the City has paid to the Government in rentals the full amount of the true cost to the Government, as defined in Article 3, of the Aqueduct. During the term of this lease the City shall have the right and option to purchase said Aqueduct from the Government upon the terms and conditions contained in either of the following subparagraphs (1) and (2), the option in each being deemed independent of the option in the other:

(1) At intervals of five years the City may in writing request the Contracting Officer to name and fix a purchase price of said Aqueduct, and thereafter the City may purchase said Aqueduct for the price so named, and thus terminate the lease; provided that if the City is unable to pay the price so fixed out of the annual

revenues of said City for the year in which said option is exercised, then said purchase by said City must be first authorized by a vote of two-thirds of the qualified electors of said City voting at an election held for that purpose. The ratification of said purchase shall be authorized by said electors within one year following the notice by said City that it desires to exercise the option. This right or option on the part of the City to purchase said Aqueduct shall inure to the benefit of any assignee of the City under an assignment pursuant to the provisions of Article 5.

(2) Upon receipt in writing from said City the Contracting Officer shall furnish to said City in writing the true cost to the Government of said Aqueduct. Thereupon the City shall have the right and option to purchase said Aqueduct by paying to said Government said true cost of said Aqueduct, provided that the purchase has been first authorized by a vote of two-thirds of the qualified electors of said City voting at an election held for that purpose, if the City is unable to pay said price out of the annual revenue for said year. In event that said purchase is so authorized by said electors at said election the Government shall convey to said City all of its right, title and interest in and to said Aqueduct and appurtenances, upon payment to said Government of the full and true cost of said Aqueduct, minus any rentals theretofore paid by said City under the terms and provisions of this lease-contract.

(v) Notwithstanding any of the foregoing provisions, this lease shall not continue for a period of more than thirty-two (32) years from date of delivery to the City. Should this lease terminate by reason of the expiration of such period, except such termination as may be occasioned by the City exercising the option to purchase, as hereinabove provided, then the Aqueduct, together with all replacements and improvements, shall be redelivered to the Government, free of encumbrance, and in as good condition as when delivered to the City, reasonable wear and tear excepted.

ARTICLE 2—FACILITIES AND SERVICE TO BE FURNISHED BY CITY.

(a) The City, at its own expense, shall diligently prosecute to completion that water treatment plant and additions to the water transportation system and connections to the distribution system as contemplated by the City Bond Issue approved at the election held in said City on the 17th day of April, 1945.

(b) The City shall diligently pursue and the Council of said City shall forthwith take such legal steps as may be necessary and authorized by law to secure an adequate supply of water from the Metropolitan Water District of Southern California to be supplied through said Aqueduct.

(c) The City shall exert every reasonable effort to supply all Government agencies and establishments within the area with an adequate supply of fresh, clear and potable water at applicable and non-discriminatory rates, provided, however, that this agreement shall in no way estop the Government from taking appropriate action with re-

spect to any rates or service which it may deem unreasonable or otherwise improper. This stated obligation of service shall not be limited to any particular source of water.

ARTICLE 3—TRUE COST TO GOVERNMENT OF AQUEDUCT.

(a) The true cost to the Government of the Aqueduct is herein defined as the sum of (i) the cost of acquisition of all rights in real property acquired for either the construction or operation of the Aqueduct, including incidental costs such as appraisals, surveys, maps, title evidence, court costs, and the like, (ii) the cost of construction contracts utilized in the accomplishment of the Aqueduct plus the reasonable value of Government-furnished material and equipment furnished with respect thereto, and (iii) those costs incurred in the field for Government or other employees (exclusive of naval officers) and equipment in conection with the work on the Aqueduct (excluding that required in the preparation of presently existing specifications) which the Contracting Officer finds to be in excess of those costs which would have been incident to the ordinary maintenance of Government establishments in the absence of such work.

(b) It is anticipated that the City and the Contracting Officer will be able to agree upon all items of such true cost. To the extent agreement is reached, such agreement shall, in the absence of fraud, supersede for the items covered the application of the above stated definition of true cost. To the extent that agreement is not reached, the determination of whether disputed items are a part of true cost within said definition shall be deemed a question of fact within the meaning of Article 9 hereof.

ARTICLE 4—RIGHT OF REENTRY UPON DEFAULT.

Should the City, after the delivery to it of possession of the Aqueduct as hereinabove provided, default or continue in default in any of the rental payments to be made by it to the Government or in any of its other undertakings hereunder, whether included in the lease arrangement or otherwise, and remain in such default after sixty (60) days from written notice to it from the Contracting Officer to remedy such default, then the Government at its option and without prejudice to such other rights as it may have, may re-enter and take exclusive possession of such Aqueduct, with or without process of law, and free and clear of any obligation in respect thereto to the City or any one claiming through the City. Rental payments made by the City prior to the date of such reentry shall be retained by the Government and any rental payments accrued but unpaid on such date (and for this purpose rent shall be deemed to accrue pro rata from day to day) shall be forthwith paid to the Government, all such payments being deemed to be compensation for the use of the Aqueduct during the period of the City's possession.

ARTICLE 5—ASSIGNMENT.

Neither this contract, nor any interest therein, nor any claim arising thereunder, shall be transferred by the City to any party or parties without the written approval thereto of the Government; provided, however, that the Government will consent to the assignment of the City's rights and interests herein to either the Metropolitan Water District of Southern California and/or the San Diego County Water Authority, upon such terms and conditions as may then be deemed reasonable by the Con-

tracting Officer for the purpose of preserving the intent of this agreement and the protection of the Government's interest therein.

ARTICLE 6—FAILURE TO INSIST ON COMPLIANCE—REMEDIES NOT EXCLUSIVE.

Failure of the Government in any one or more instances to insist upon strict performance of any of the terms of this contract or to exercise any provided right or option herein conferred, shall not be construed as a waiver or relinquishment for the future of any such terms, options or rights. Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

ARTICLE 7—COVENANT AGAINST CONTINGENT FEES.

The City warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees.

ARTICLE 8—OFFICIALS NOT TO BENEFIT.

No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 9—DISPUTES.

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the City within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive. Pending decision, the City shall diligently proceed with performance.

ARTICLE 10—NONDISCRIMINATION IN EMPLOYMENT.

The City in performing work under this contract shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The City shall include an identical provision in all of its subcontracts. For the purposes of this article, subcontracts shall include all purchase orders and agreements to perform all or any part of the work, or to make or furnish any article required for the performance of this contract, except purchase orders or agreements for the furnishing of standard commercial articles or raw materials.

ARTICLE 11—LABOR PROVISIONS.

In the event the City accomplishes any of its undertakings hereunder by private contract, such contract or contracts shall contain appropriate provisions to assure compliance with the following acts to the extent the same are applicable:

Davis Bacon Act (U. S. C. 276a as amended);
Copeland Act (40 U. S. C. 276b and 276c); and
The Eight Hour Law (40 U. S. C. 321, 324-6, as in part modified by Section 303 of Pub. Act No. 781, 76th Congress, approved Sept. 9, 1940).

ARTICLE 12—CONTRACTING OFFICER.

The designation "Contracting Officer" means the Chief of the Bureau of Yards and Docks or any one authorized to act for him.

This negotiated contract is made pursuant to the provisions of the First War Powers Act, 1941, the Second War Powers Act, 1942, and the Act of July 2, 1940 (54 Stat. 712).

In Witness Whereof the parties hereto have executed this contract the day and year first above written.

UNITED STATES OF AMERICA,
By B. MAXWELL,
Chief of the Bureau of Yards and Docks, Navy Department

THE CITY OF SAN DIEGO,
By F. A. RHODES,
City Manager.

Witnesses:
KIRBY SMITH.
FRIEDA HEILBRUN.

I hereby approve the form and legality of the foregoing Contract, this 17 day of October, 1945.

J. F. DUPAUL,
City Attorney.

APPENDIX NO. 26

ASSIGNMENT BY SAN DIEGO TO METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

March 14, 1947

This Agreement made this 14th day of March, 1947, between the **City of San Diego,** a municipal corporation, and **The Metropolitan Water District of Southern California,** a public corporation of the State of California.

Witnesseth: That

1. **Whereas,** the City of San Diego, under date of April 15, 1926, filed an application with the Division of Water Resources, Department of Public Works of the State of California, seeking a permit to appropriate from the Colorado River 112,000 acre feet annually of the waters of said river for use in the City of San Diego, which application is now pending before the Division of Water Resources and is designated Application No. 4997; and

2. **Whereas,** under date of August 18, 1931, the Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, the City of Los Angeles, the City of San Diego and County of San Diego entered into an agreement fixing their respective priorities in the waters of the Colorado River available for use in California under the Colorado River Compact and the Boulder Canyon Project Act, which contract is commonly referred to as the "Seven-Party Priority Agreement"; and

3. **Whereas,** under date of February 15, 1933, the United States and San Diego entered into a water delivery contract approved by the County of San Diego, providing for the delivery by the United States to the City of San Diego of certain waters of the Colorado River in accordance with the schedule of priorities fixed in said Seven-Party Priority Agreement, said contract being for the benefit of the City of San Diego and the County of San Diego and commonly referred to as the "San Diego Water Delivery Contract"; and

4. **Whereas,** under date of October 4, 1946, a contract was entered into between the United States of America, the City of San Diego, the San Diego County Water Authority, a municipal corporation of the State of California, and The Metropolitan Water District of Southern California, providing for the merger of all the rights of the City of San Diego to the storage and delivery of Colorado River water under the "San Diego Water Delivery Contract" with the rights of The Metropolitan Water District of Southern California to the storage and delivery of Colorado River water under a water delivery contract between the United States of America and The Metropolitan Water District of Southern California, dated April 24, 1930, as amended by a Supplementary Contract dated September 28, 1931, and further providing that the diversion point of water heretofore agreed to be delivered to the City of San Diego under said water delivery contract of February 15, 1933, should be changed from a point on the Colorado River immediately above Imperial Dam to The Metropolitan Water District of Southern California's intake at a point on the Colorado River immediately above Parker Dam, said contract being contingent upon annexation of San Diego County

Water Authority to The Metropolitan Water District of Southern California prior to January 1, 1947; and

5. **Whereas,** San Diego County Water Authority, pursuant to the will of a majority of the qualified electors of said County Water Authority voting thereon at a special election held for that purpose on November 5, 1946, has become annexed to and is now a part of The Metropolitan Water District of Southern California, such annexation proceedings having been completed on the 17th day of December, 1946:

Now, Therefore, in consideration of the premises and in furtherance of the mutual covenants and agreements contained in that certain contract merging the rights of the City of San Diego and The Metropolitan Water District of Southern California, dated October 4, 1946, the City of San Diego does hereby grant and convey to The Metropolitan Water District of Southern California all of its right and interest in and to the storage and delivery of Colorado River water as evidenced by said water delivery contract of February 15, 1933, together with all of its right and interest in and to the use of the waters of the Colorado River under any act of appropriation heretofore made, and does hereby assign and transfer to The Metropolitan Water District of Southern California any and all rights it may have acquired, or may in the future acquire, under and by virtue of that certain application to appropriate water from the Colorado River heretofore referred to and designated Application No. 4997.

In Witness Whereof, the parties hereto have executed this contract the day and year first above written.

CITY OF SAN DIEGO
By F. A. RHODES
City Manager

Attest: [Seal]
FRED W. SICK
City Clerk

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
By JULIAN HINDS
J. H. H.
General Manager and Chief Engineer

Attest: [Seal]
A. L. GRAM
Executive Secretary

Approved Jan. 27, 1947

COUNTY OF SAN DIEGO
By DEGRAFF AUSTIN
Chairman, Board of Supervisors

Attest: [Seal]
J. B. McLEES,
County Clerk and ex officio Clerk
of the Board of Supervisors
By: M. NASLAND, Deputy

SAN DIEGO COUNTY WATER AUTHORITY
By J. L. BURKHOLDER
General Manager and Chief Engineer

Attest: [Seal]
ELEANOR LONGFELLOW
Executive Secretary

Approved as to form and execution
JAMES H. HOWARD
General Counsel

DMK

APPENDIX NO. 27

UNITED STATES AND SAN DIEGO: CONSTRUCTION OF A SECOND AQUEDUCT "BARREL"

April 1, 1952

This Supplemental Agreement No. 4 to Contract NOy-13300, entered into as of the 1st day of April 1952, between the **United States of America** (hereinafter called the "Government"), represented by the Chief of the Bureau of Yards and Docks, Navy Department, and **San Diego County Water Authority,** a public corporation, organized and existing under and by virture of the laws of the State of California (hereinafter called the "Authority");

Witnesseth:

Whereas, the Government and the City of San Diego on October 17, 1945 entered into Contract NOy-13300 wherein the Government undertook to construct, and the City undertook to lease, operate and maintain, an Aqueduct (hereinafter called the "Aqueduct") from a connection with the Colorado River Aqueduct of the Metropolitan Water District of Southern California, near the West Portal of the San Jacinto Tunnel in Riverside County, to San Vicente Reservoir in San Diego County; and

Whereas, by virtue of compliance with the terms and conditions of Supplemental Agreement No. 1 to Contract NOy-13300, entered into as of September 23, 1946, the Authority is the assignee in part of the City's rights and obligations under Contract NOy-13300; and

Whereas, under Supplemental Agreement No. 2 to Contract NOy-13300, entered into October 29, 1946, Contract NOy-13300 was modified to reserve title to certain transition and diversion structures in the Metropolitan Water District of Southern California (hereinafter called the "District"); and

Whereas, under Supplemental Agreement No. 3 to Contract NOy-13300, entered into as of December 11, 1947, the Authority has been in possession and use of the Aqueduct on an interim basis from January 1, 1948 to December 31, 1951, and, in consideration thereof, has paid $1,000,000 to the Government; and

Whereas, pursuant to Contract NOy-13300, the Government delivered and the Authority received possession of the Aqueduct on January 1, 1952; and

Whereas, under Public Law 171 of the 82nd Congress, the Secretary of the Navy was authorized, upon amendment of Contract NOy-13300 as therein set forth, to provide for the construction of a new aqueduct (hereinafter called the "Second Barrel") paralleling the existing Aqueduct; and

Whereas, subject to the continued availability of authority and appropriations, the Government is prepared (without guaranty, warranty or any other liability on its part in connection therewith), to undertake the construction at its own expense of the Second Barrel in accordance with such plans, drawings and specifications as the Contracting Officer (after such consultation with the Authority as he shall deem appropriate) shall in his sole and exclusive discretion approve, for the purpose of providing an estimated rated capacity of not less than approximately 80 cubic feet per second, at an estimated

cost not exceeding $18,000,000. (All of the foregoing being matter of description and not of guaranty, warranty or representation on the part of the Government);

Now, Therefore, it is mutually agreed that Contract NOy-13300, as heretofore supplemented and modified by Supplemental Agreements 1, 2 and 3, be and it hereby is further supplemented and amended as follows:

1. The Government, its contractors, and their successors, assigns, officers, agents and employees, shall have the right, free of rental or similar charge and without being considered in default or violation of any of the provisions of Contract NOy-13300, to enter upon the Aqueduct for the purpose of constructing and maintaining the Second Barrel; and the Authority shall at all times cooperate with the Government, its contractors and their successors, assigns, officers, agents and employees as may be reasonably necessary and appropriate for the construction of the Second Barrel. The Authority shall also procure, and be responsible for, such cooperation of the Metropolitan Water District of Southern California as may be reasonably necessary and appropriate for the construction, maintenance and operation of the Second Barrel.

2. Upon completion of the Second Barrel, as determined by the Contracting Officer, the Government shall deliver the possession thereof to the Authority for use in its water system and upon the following lease basis:

(a) The provisions of Article 1, subdivision (b), paragraphs (i), (ii) and (vi), and of Article 3, of Contract NOy-13300 as heretofore supplemented, are, with the substitution of "Second Barrel" for "Aqueduct" and "Authority" for "City" hereby incorporated herein and

made applicable to the Second Barrel; provided however, that the total cost to the Government of the Second Barrel shall include all costs incidental to the development of the plans, drawings and specifications therefor, except such costs as have been or may be advanced by the Authority pursuant to Contracts Symbol Nos. 176r-500 and 176r-701, respectively, entered into April 25, 1949 and November 9, 1951, between the Authority and the Government.

(b) At the end of the first quarter after completion and delivery of possession of the Second Barrel to the Authority, and quarterly thereafter, the Authority shall pay to the Government as rental under this lease one-one hundred and sixtieth (1/160th) part of the full amount of the true cost of the Second Barrel (as herein defined). In the event that the true cost shall not be determined at the time of the completion and delivery of possession of the Second Barrel hereunder, the parties hereto shall proceed upon the basis of true cost as estimated by the Contracting Officer, subject to adjustment of the agreed installment payments hereunder when true cost shall be finally determined. In addition, the Authority shall pay with each quarterly installment of rent a sum representing interest on the balance of such true cost remaining after deducting therefrom the amount of all rental installments theretofore paid hereunder, such interest to be computed at a rate of 2.599 per cent per annum. The rental and interest provided hereunder for the Second Barrel shall be in addition to the annual rental of $500,000.00 provided for the Aqueduct under Article I, subdivision (b), of Contract NOy-13300, which rental shall continue to be paid in accordance therewith until the remaining balance of the true cost of the Aqueduct is paid in full.

(c) Paragraph (iv) and (v) of Article I, subdivision (b) of Contract NOy-13300 as heretofore supplemented are hereby cancelled and in lieu thereof it is agreed that the lease of the Second Barrel and the lease of the Aqueduct shall continue until such time as the Authority has paid to the Government in rentals the full amount of the true cost to the Government (as defined for the Aqueduct in Contract NOy-13300 as heretofore supplemented and as defined herein for the Second Barrel) of the Aqueduct and the Second Barrel. The Authority at its option shall have the right at any time to pay in advance any portion of the true cost then unpaid, with accrued interest to date of payment, and in the event of such advance payment the installments remaining, if any, shall be reduced to provide for equal installments throughout the remaining lease period. Upon completion of payment of rentals by the Authority to the Government in amounts equal to the sum of the true cost of the Aqueduct and the true cost of the Second Barrel, and of all interest due in connection with the Second Barrel, the lease of the Aqueduct and the lease of the Second Barrel shall terminate and the Government shall convey to the Authority, or its assigns, all of its rights, title and interest in and to the Aqueduct and the Second Barrel and their appurtenances.

3. This agreement shall be of no force and effect until and unless the City of San Diego, the City of Chula Vista, the Fallbrook Public Utility District, the Lakeside Irrigation District, the La Mesa, Lemon Grove and Spring Valley Irrigation District, the City of National City, the City of Oceanside, the City of Escondido, the San Dieguito Irrigation District, and the Santa Fe Irrigation District, comprising all of the member agencies of the Authority, shall enter into the annexed collateral agree-

ment obligating each such member agency for itself individually, and its successors and assigns, as distributors of the water, on and after the effective date of this Supplemental Agreement, to furnish to the Government on a preferential basis and at a rate no higher than that charged to the users of comparable quantities of water for like service, a quantity of water sufficient to meet the requirements of Government activities located and to be located in the corporate area served by each such member agency; provided however, that each such member agency shall in no event be obligated for any quantity of water in excess of the quantity to which such member agency shall be entitled (in the absence of default on the part of such member agency in its obligations to the Authority or the District) or permitted to receive from the Authority or its successor, whether by firm right or by shares in surplus water. In event of any inability, failure or failures on the part of any such member agency to comply with the collateral agreement, the Authority immediately upon notice of such inability or failure, and as long and as often as may be necessary, shall make available to the Government at the rate charged such defaulting member agency, a sufficient quantity of water to remedy and supply the default or deficiency of such member agency in complying with its agreement; provided however, that the Authority shall in no event be obligated hereunder for any quantity of water in excess of the quantity which such defaulting member agency shall be entitled (in the absence of default on the part of such member agency in its obligations to the Authority or the District) or permitted to receive from the Authority or its successor, whether by firm right or by shares in surplus water; and provided further, that the Authority

shall not be obligated to deliver water hereunder to any point beyond the Aqueduct or Second Barrel but the Government shall have the right to establish and maintain at its own expense any connection and other facilities required for the receipt and distribution of such water beyond the Aqueduct and Second Barrel. The Authority shall require any new member agency hereafter admitted, as a condition of admission to membership in the Authority, to subscribe and enter into the annexed collateral agreement.

4. Neither this Supplemental Agreement No. 4 or any interest therein or any claim arising thereunder shall be assigned by the Authority to any party or parties without the written approval of the Government; provided, however, that without in any way modifying the Authority's obligations to the Government under Contract NOy-13300, as heretofore supplemented, or this Supplemental Agreement No. 4 or the obligations of the member agencies of the Authority under the annexed collateral agreement, and subject to all of the terms and conditions of such agreements, the Authority may arrange with the Metropolitan Water District of Southern California for the use, repair, maintenance and operation by the said District of that part of the Aqueduct and Second Barrel northerly of North Station 1920 / 00 as shown on Y&D Drawing No. 386014.

5. The use of all water diverted through the Aqueduct and the Second Barrel from the Colorado River shall be subject to and controlled by the Colorado River Compact, the Boulder Canyon Project Act, the California Self-Limitation Statute and the Mexican Water Treaty and shall be included within and shall in no way increase the total quantity of water to the use of which

the State of California is entitled and limited by the said compact, treaty and statutes.

6. All of the provisions of Articles 4, 6, 7, 8, 9, 10 and 11 of Contract NOy-13300 as heretofore supplemented are, with the substitution of "Second Barrel" for "Aqueduct" and "Authority" for "City," hereby incorporated herein and made applicable to the Second Barrel; provided however, that upon the exercise by the Government of any right of re-entry or termination under the lease of the Aqueduct or the lease of the Second Barrel, the Aqueduct and/or the Second Barrel, together with all replacements and improvements, shall be promptly redelivered by the Authority to the Government free of encumbrance and in as good condition as when delivered to the Authority, reasonable wear and tear excepted; provided further, that notwithstanding the exercise by the Government of any right of re-entry or termination under the lease of the Aqueduct or the lease of the Second Barrel, the Authority shall continue to be liable for all remaining installments of rental and interest due under Contract NOy-13300 as heretofore supplemented for the Aqueduct and hereunder for the Second Barrel, provided further, that after any re-entry or repossession of the Aqueduct or Second Barrel by the Government, the Authority shall from time to time, on demand, reimburse the Government for all costs (together with overhead and interest as provided in Article 1 (b) (i) of Contract NOy-13300) of maintenance, repair, replacement, reconstruction and operation of the Aqueduct and Second Barrel during any period or periods of such Government re-entry and repossession. At such time as the default or failure of performance from which such re-entry or repossession results is fully corrected or performed by

the Authority to the satisfaction of the Contracting Officer, and the costs, overhead and interest resulting from such re-entry or repossession as herein provided have been fully reimbursed, possession of the Aqueduct and the Second Barrel pursuant to the provisions of this contract shall be returned to the Authority to the same extent and with the same force and effect as though such re-entry or repossession had not existed.

7. (a) The Government may, by written notice to the Authority, terminate the right of the Authority to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Authority, or any agent or representative of the Authority, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such contract; *provided,* that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled to (i) to pursue the same remedies against the Authority as it could pursue in the event of a breach of the contract by the Authority, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall not be less than three nor more than

ten times the costs incurred by the Authority in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

8. (a) The Authority agrees that the Contracting Officer, at any time during the life of this contract, and the Comptroller General of the United States or any of his duly authorized representatives, until the expiration of three years after final payment under this contract, shall have access to and the right to examine directly pertinent books, documents, papers, and records of the Authority involving transactions related to this contract.

(b) The Authority further agrees to include the following provision, with appropriate insertions, in all its subcontracts hereunder: (Name of subcontractor) agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under prime contract (NOy-13300) between the United States of America and the San Diego County Water Authority, have access to and the right to examine directly pertinent books, documents, papers and records of (Name of subcontractor) involving transactions related to this Contract.

(c) Subject to applicable Federal laws and regulations, the proper officers or agents of the Authority shall have full and free access at all reasonable times to the books and records of the Contracting Officer, or the Bureau of Reclamation, as far as they relate to matters covered by this contract, with the right at any time during office hours to make copies of or from the same.

9. (a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Navy Department and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

10. It is further agreed that this Supplemental Agreement No. 4 shall be deemed a modification or act affecting Contract NOy-13300 within the meaning and subject to the provisions of Clause 5 of Supplemental Agreement No. 1 to Contract NOy-13300; provided that in operating said Aqueduct and/or said Second Barrel, the City shall be bound by the terms and conditions hereof and retake subject to the then existing rights of local communities to be served with water therefrom.

11. Inasmuch as the Secretary of the Navy, under the direction of the Secretary of Defense, has been authorized by Congress to construct the Second Barrel, the Authority shall pay the amount of Federal funds expended for the investigation of the Second Barrel into the special fund in the Treasury of the United States designated as "the reclamation fund", as provided in Article 8 of the con-

tract between the Authority and the United States dated April 25, 1949 (Symbol and No. 176r-500).

12. At any time prior to the letting by the Government of any contract for construction of the Second Barrel (including the procurement of supplies and equipment required therefor) or the incurring by the Government of any obligation pertaining directly to the construction of the Second Barrel, the Authority shall have the right to withdraw from the provisions of this contract by filing written notice of such withdrawal with the Chief of the Bureau of Yards and Docks, signed by its General Manager and Chief Engineer pursuant to authorization of its Board of Directors, copy of which authorization shall be forwarded with such notice; provided however, that all costs incurred by the Government in connection with the design and construction of the Second Barrel prior to fifteen days after receipt of such notice of withdrawal shall be paid promptly by the Authority. In the event of the filing of such notice of withdrawal the Authority shall not be liable for any costs incurred in connection with the Second Barrel subsequent to fifteen days after the date of the receipt of such notice by the Chief of the Bureau of Yards and Docks. The Government agrees to use its best efforts to avoid or reduce costs after receipt of such notice, but in any event the obligation of the Authority to pay costs as provided hereunder shall not be reduced or otherwise affected by reason of fault or default in this respect on the part of the Government.

In Witness Whereof, the parties hereto have executed this Agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA
By J. F. JELLEY cg
J. F. Jelley
Rear Admiral, CEC, USN
Chief of Bureau

SAN DIEGO COUNTY WATER AUTHORITY
By J. L. BURKHOLDER
General Manager and
Chief Engineer

Approved as to form and execution
this 17th day of March, 1952.
W. H. JENNINGS
W. H. Jennings, General Counsel
San Diego County Water Authority

APPENDIX NO. 28

EXTRACTS FROM PLEADINGS AND BRIEFS OF ARIZONA IN ARIZONA V. CALIFORNIA, 283 U. S. 423 (1930)

FROM THE ARIZONA BILL OF COMPLAINT:

VII.

The total average flow of the Colorado River and its tributaries in the United States is 18,000,000 acre-feet of water annually. Of said total flow, 9,000,000 acre-feet were appropriated and put to beneficial use in the United States prior to June 25, 1929, and said appropriated water has ever since been and is now being used and consumed. Of said appropriated water, 2,500,000 acre-feet are diverted annually from the Colorado River above Lee Ferry and from tributaries entering said river above Lee Ferry, and are used and consumed in Utah, New Mexico, Colorado and Wyoming, and 6,500,000 acre-feet are diverted annually from said river below Lee Ferry and from tributaries entering said river below Lee Ferry, and are used and consumed in Arizona, California, Nevada and New Mexico. Of the appropriated water so diverted below Lee Ferry, 3,500,000 acre-feet are annually diverted, used and consumed in Arizona. Of the appropriated water so diverted, used and consumed in Arizona, 2,900,000 acre-feet are diverted from the Gila River and its tributaries. Of the total flow of the Colorado River and its tributaries in the United States, 9,000,000 acre-feet were on June 25, 1929, ever since have been, and are now wholly unappropriated. All of said unappropriated water flows in Arizona and on the boundary thereof; all of it is needed and can be put to beneficial use in Arizona; and all of it is subject to appropriation under the laws of Arizona. Of said unappropriated water, 8,000,000 acre-

feet are flowing in the main stream of the Colorado River, and 1,000,000 acre-feet in tributaries entering said river between Lee Ferry and Laguna Dam. All of the water of the Gila River and its tributaries was appropriated and put to beneficial use in Arizona and New Mexico prior to June 25, 1929. There was not on said date, nor has there since been, nor is there now, any unappropriated water in the Gila River or any of its tributaries. To "appropriate" water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire, under said laws, a vested right to take and divert from the same source, and to use and consume, the same quantity of water annually forever, subject only to the rights of prior appropriators. Such is the sense in which the word "appropriate" and its derivatives are used in this bill of complaint.

XIV.

Said Colorado River Compact is grossly inequitable, unjust and unfair to the State of Arizona, for the reasons and in the respects following, to-wit:

(1) Said compact attempts to apportion to said Upper Basin more, and to said Lower Basin less, than an equitable share of the water of said Colorado River System. Said compact attempts to apportion to each of said basins the same quantity of water, to-wit, 7,500,000 acre-feet annually, but said Lower Basin needs and can put to beneficial use more than twice the quantity of water which is needed or can be put to beneficial use in said Upper Basin. That part of said Lower Basin which is in Arizona needs and can put to beneficial use more than the total quantity of water which said compact attempts to apportion to said

entire Lower Basin. Said Lower Basin includes practically all of Arizona. None of the water of said Colorado River System can be put to beneficial use in that part of Arizona which is in said Upper Basin. The 7,500,000 acre-feet of water which said compact attempts to apportion to each of said basins includes all water necessary to supply existing rights, which means all water heretofore appropriated and now being used. In said Lower Basin such appropriations amount to 6,500,000 acre-feet of water annually, whereas in said Upper Basin they amount to only 2,500,000 acre-feet annually. Thus said compact attempts to apportion to said Lower Basin only 1,000,000 acre-feet of unappropriated water, whereas it attempts to apportion to said Upper Basin 5,000,000 acre-feet of unappropriated water annually. Under said compact, said 5,000,000 acre-feet of unappropriated water could not, nor could any part of it, be appropriated in said Lower Basin. Thus said compact attempts to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate said 5,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona.

(2) Said compact does not apportion or attempt to apportion all of the water of said Colorado River System, but attempts to apportion only 15,000,000 acre-feet thereof, and leaves unapportioned the remaining water of said system, aggregating 3,000,000 acre-feet annually. Said unapportioned water is a part of the unappropriated water of said Colorado River System. Said compact attempts to withdraw said unapportioned water from appropriation and to prohibit the appropriation thereof. This said compact attempts to do by providing that Mexican rights shall be supplied from said unapportioned water, and that said

unapportioned water shall be subject to apportionment after October 1, 1963. Thus said compact attempts to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate said 3,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona.

3. Said compact defines the term "Colorado River System" so as to include therein the Gila River and its tributaries, of which the total flow, aggregating 3,000,000 acre-feet of water annually, was appropriated and put to beneficial use prior to June 25, 1929. The State of New Mexico has but a slight interest, and the States of California, Nevada, Utah, Colorado and Wyoming have no interest whatever in said water. Since said compact provides that the water apportioned thereby shall include all water necessary to supply existing rights, the effect of including the Gila River and its tributaries as a part of said system would be to reduce by 3,000,000 acre-feet annually the quantity of water now subject to appropriation in Arizona.

(4) Said compact defines the terms "Colorado River Basin," "Upper Basin" and "Lower Basin" so as to include therein not only the actual drainage basin of the Colorado River, but also all parts of Arizona, California, Nevada, Utah, Colorado, New Mexico and Wyoming outside of said drainage basin, which are now or shall hereafter be beneficially served by water diverted from said Colorado River System. Thus said compact pretends to recognize and attempts to establish a right to use said water outside of the actual drainage basin of the Colorado River, which pretended right the State of Arizona expressly denies. Arizona is almost wholly within the actual drainage basin of the Colorado River. No part of Arizona

outside of said drainage basin is or can be beneficially served by water diverted from said system. Hence the State of Arizona would not be benefited, but would be greatly injured, by including in said Upper and Lower Basins areas situated outside of said drainage basin and served by water diverted from said Colorado River System. The effect of such inclusion would be to reduce the quantity of water now subject to appropriation in Arizona by such quantity as might be diverted for use in such outside areas.

For the reasons aforesaid, and for other good and sufficient reasons, the Legislature of the State of Arizona has never ratified or approved said compact, and said compact is therefore inoperative, void and of no effect.

XVIII

Said act provides in section 4 (a) thereof that it shall not take effect and that no authority shall be exercised thereunder unless and until (1) the States of Arizona, California, Nevada, Utah, New Mexico, Colorado and Wyoming shall ratify the Colorado River Compact, and the President by public proclamation shall so declare, or (2) if said States shall fail to ratify said compact within six months from the date of the passage of said act, then until six of said States, including the State of California, shall ratify said compact and consent to waive those provisions thereof which require its approval by the legislatures of all the signatory States, and shall approve said compact without conditions, save that of such six-state approval, and the President by public proclamation shall so declare, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States, for the benefit of the

States of Arizona, Nevada, Utah, New Mexico, Colorado and Wyoming, that the aggregate annual consumptive use of water of and from the Colorado River for use in California shall not exceed 4,400,000 acre-feet of the water apportioned to said Lower Basin by the Colorado River Compact, plus not more than one-half of any excess or surplus water unapportioned by said compact, such uses always to be subject to the terms of said compact. The State of Arizona has not ratified or approved said compact, but the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming ratified said compact prior to June 25, 1929, and consented to waive those provisions thereof which require its approval by all the signatory states, and approved said compact without conditions, save that of such six-state approval, and on said last mentioned date the President of the United States by public proclamation so declared. The State of California, by an act of its legislature approved March 4, 1929, made the agreement provided for in section 4 (a) of said Boulder Canyon Project Act.

XIX

Said act further provides in section 4 (a) thereof that the States of Arizona, California and Nevada are authorized to enter into an agreement which shall provide that, of the 7,500,000 acre-feet of water apportioned to said Lower Basin by the Colorado River Compact, there shall be apportioned to the State of Nevada 300,000 acre-feet, and to the State of Arizona 2,800,000 acre-feet, for exclusive beneficial consumptive use in perpetuity; that all of the provisions of said proposed agreement shall be subject in all parts to the provisions of said compact; and that said proposed agreement shall take effect upon the

ratification of said compact by the States of Arizona, California and Nevada. Said proposed apportionment of 2,800,000 acre-feet of water is less than the quantity of water already appropriated in Arizona, and would provide no water for future appropriation in said State. Thus, under said proposed agreement, the State of Arizona, its citizens, inhabitants and property owners, would be deprived of their right to appropriate any of the unappropriated water of said Colorado River System, aggregating 9,000,000 acre-feet annually, all of which is now subject to appropriation in Arizona. The States of Arizona, California and Nevada have not entered into said proposed agreement, nor have they entered into any agreement whatsoever.

XXI

Said Boulder Canyon Project Act provides in section 5 thereof that said Secretary is authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir, for the delivery thereof for irrigation, domestic use and generation of electric power, and for the delivery thereof to States, municipal corporations, political subdivisions and private corporations, upon charges that will provide revenue which, in addition to other revenue accruing under the Reclamation Law and under said act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under said act, and the payments to the United States provided for in section 4 (b) thereof; that contracts respecting water for irrigation and domestic use shall be for permanent service; and that no person shall have or be entitled to the use of the water stored in said reservoir

except by contract with said Secretary. The effect of said act would be to withdraw from appropriation all of the water to be stored in said reservoir, including the 8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona; to prohibit the appropriation of said water; and to prohibit the use thereof, except by contract with the Secretary of the Interior. Under said act, said Secretary could not be required to deliver or to contract for the delivery of any of said water for use in Arizona, but could, if so minded, refuse to deliver or to contract for the delivery of any such water for any such use, and could thus withhold all of said water from use in Arizona. If said Secretary should choose to deliver or to contract for the delivery of any of said water for use in Arizona, he would be required by said act to make a charge for the storage and delivery of such water for such use, but said act does not require or permit said Secretary to make any charge for the storage or delivery of water for use in the Imperial and Coachella Valleys of California, it being expressly provided in section 1 of said act that no such charge shall be made. In authorizing said Secretary to contract for the delivery of said stored water, said act does not restrict the use thereof to the drainage basin of the Colorado River, but permits said Secretary to contract for the delivery of said water for use outside of said basin.

* * * * * * * * *

XXVIII

* * * * * * * * *

(3) Said act attempts to authorize the Secretary of the Interior to construct, operate and maintain a dam and reservoir in the Colorado River at Black Canyon; to store in said reservoir the 8,000,000 acre-feet of unappropriated

water now flowing in said river, all of which is now subject to appropriation in Arizona; to withhold all of said water from appropriation and to prohibit the appropriation thereof; to withhold all of said water from use in Arizona, or, if he permits any such use, to require payment of such charges therefor as he may prescribe; and to sell and dispose of any part or all of said water for use in other States, even to the extent of selling and delivering it for use outside of the drainage basin of the Colorado River; all of which is to be done without the consent of the State of Arizona and in violation of its laws. Thereby said act attempts to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate said 8,000,000 acre-feet of unappropriated water, and of their right to use any of said water in Arizona, except by contract with the Secretary of the Interior and upon payment of such charges as he may prescribe.

* * * * * * * * *

XXXII

Pursuant to and under color of said act and of said regulations, said defendant Ray Lyman Wilbur has made a pretended contract with the Metropolitan Water District of Southern California, a municipal corporation of the State of California, for the storage of water in said reservoir and for the diversion, sale and delivery of said water to said District for transportation to and consumptive use in said District. A copy of said pretended contract is appended hereto at page 79. Said District consists of the City of Los Angeles and the municipalities of Anaheim, Beverly Hills, Burbank, Colton, Glendale, Pasadena, San Bernardino, San Marino, Santa Ana and Santa Monica, which are municipal corporations of the

State of California. Said District is situated on the Pacific Coast approximately 300 miles distant from the Colorado River and outside of its drainage basin. No public land of the United States is contained within the limits of said District. Said pretended contract is for permanent service, and provides for the delivery to said District of 1,050,000 acre-feet of said stored water annually, and for the payment by said District of 25 cents per acre foot for water so delivered. Said 1,050,000 acre-feet of water, if sold and delivered to said District, as in said pretended contract provided, cannot, nor can any part thereof, be used for the reclamation of public land of the United States. Said water is a part of the 8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona. Said 1,050,000 acre-feet of water, together with the 6,500,000 acre-feet of water heretofore appropriated and now being used in said Lower Basin, will exceed the full amount of 7,500,000 acre-feet of water which said compact attempts to apportion to said Lower Basin. The delivery of said 1,050,000 acre-feet of water to said District, as in said pretended contract provided, would exhaust said apportionment, and, by the terms of said compact and of said Boulder Canyon Project Act, no water would then be available for or subject to appropriation in said Lower Basin, although there would still remain in said Colorado River System 7,950,000 acre-feet of unappropriated water per year. Thus the effect of carrying out the provisions of the Boulder Canyon Project Act and of said pretended contract would be to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate any of the unappropriated water of said Colorado River System, aggregating,

as aforesaid, 9,000,000 acre-feet annually, all of which is now subject to appropriation in Arizona.

XXXIII

Pursuant to and under color of said act, said defendant Ray Lyman Wilbur has made and prescribed general regulations for the lease of electric power to be generated at said dam. A copy of said regulations is appended hereto at page 89. Pursuant to and under color of said act and of said regulations, said defendant has made a pretended contract with said City of Los Angeles and Southern California Edison Company, Limited, a corporation of the State of California, for the lease of power privileges at said dam, and a pretended contract with said Metropolitan Water District of Southern California for the sale of electric power to be generated at said dam. Said pretended contract for the lease of power privileges provides for the leasing of certain generating machinery to be installed by said defendant, part to said City and part to said Company; for the generation by said lessees of all electric power allotted by said defendant; for the delivery to said lessees of falling water from said reservoir sufficient to generate all power so sold; for the sale to said lessees, respectively, of amounts of electric power specified therein; and for the payment by said lessees of the cost of said machinery, and certain further sums on account of electric power to be taken by said lessees. Said pretended contract is for a period of 50 years. The pretended contract with said District in this paragraph referred to provides for the sale to said District of specified amounts of electric power annually for a period of 50 years. Said power is to be used for the sole purpose of pumping into and in a proposed aqueduct, to be

constructed by said District, the 1,050,000 acre-feet of water to be sold and delivered to said District, as provided in the pretended contract referred to in the last preceding paragraph hereof. The three pretended contracts hereinabove referred to are made upon the express condition that all rights thereunder shall be subject to and controlled by the Colorado River Compact. For the reasons heretofore stated, all of said pretended contracts are void and of no effect. Nevertheless, said defendant, unless enjoined therefrom, will carry out all the provisions of said pertended contracts.

* * * * * * * * *

FROM THE ARIZONA BRIEF:

The Wilbur brief on pages 9 and 19 totally misconceives and misstates the meaning and effect of the Compact, as is shown by pages 40 and 41 of the Colorado brief. The apportionment of beneficial use of water to the two basins made in Article III of the Compact is not, as the Wilbur brief appears to believe, restricted to uses from the main stream of the Colorado River, but includes, as the Compact specifically states and as the Colorado brief affirms, uses from the whole "Colorado River System" which by definition includes its tributaries. The apportionment to the Lower Basin from the whole river system is by Article III (a) the beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water, which includes all water necessary for the supply of all rights which exist in the Lower Basin upon the whole river system.

The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten year periods, has, as the Colorado brief, page 41, correctly

states, no bearing on the amount of the apportionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt.

Under the Compact, then, the only water of which the right to exclusive beneficial use in perpetuity may be acquired in the Lower Basin is the water apportioned to that basin. Such apportionment is limited to 7,500,000 acre-feet of water per annum by Article III (a). The Colorado brief, page 40, contends that paragraph (b) of Article III operates to increase this apportionment to 8,500,000 for the Lower Basin. This, we submit, is not the case. If it had been intended to apportion the larger

amount, the Compact could easily have said so. The difference in language between paragraphs (a) and (b) is plain, and the difference in meaning is clear. Paragraph (b) does not *apportion in perpetuity,* as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of "surplus" waters, and surplus waters are defined, not as surplus over quantities "apportioned", but as surplus over quantities "*specified* in paragraphs (a) and (b)." Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs (b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c).

PLATE 1

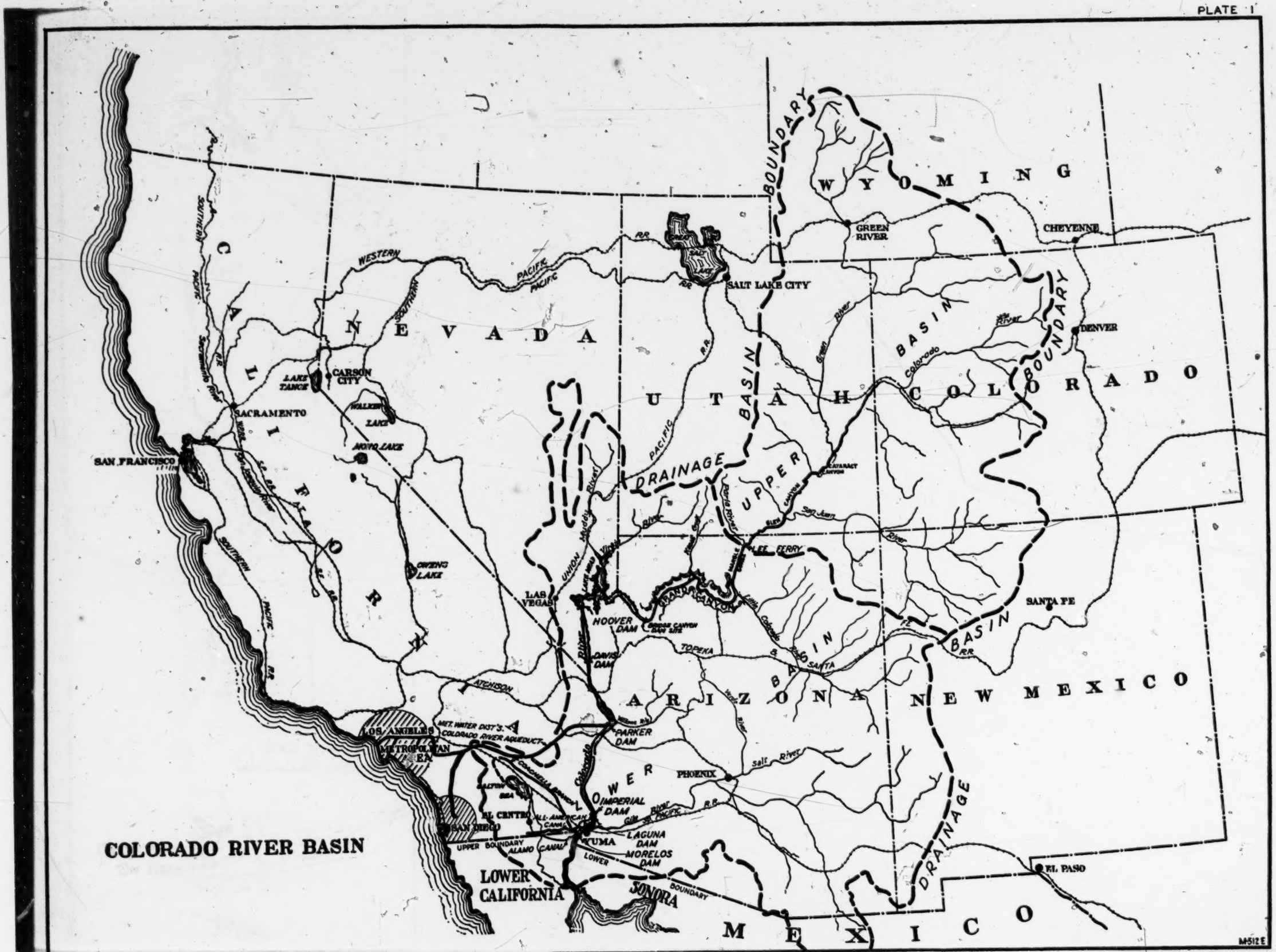

WYOMING
GREEN RIVER
CHEYENNE
SALT LAKE CITY
DENVER
NEVADA
UTAH
COLORADO
CARSON CITY
LAKE TAHOE
SACRAMENTO
WALKER LAKE
MONO LAKE
SAN FRANCISCO
OWENS LAKE
LAS VEGAS
HOOVER DAM
DAVIS DAM
PARKER DAM
IMPERIAL DAM
LAGUNA DAM
MORELOS DAM
YUMA
PHOENIX
SANTA FE
EL PASO
LEE FERRY
LOS ANGELES METROPOLITAN AREA
MET. WATER DIST'S. COLORADO RIVER AQUEDUCT
EL CENTRO
SAN DIEGO
ALL-AMERICAN CANAL
ALAMO CANAL
UPPER BOUNDARY
LOWER BOUNDARY
BOUNDARY
LOWER CALIFORNIA
SONORA
MEXICO
ARIZONA
NEW MEXICO
UPPER BASIN
LOWER BASIN
DRAINAGE
BOUNDARY
CALIFORNIA
COLORADO RIVER BASIN
M512E

PLATE 2

CALIFORNIA DEVELOPMENTS ON COLORADO RIVER

OWENS LAKE
OWENS RIVER AQUEDUCT
PANAMINT VALLEY
DEATH VALLEY
NEVADA
CALIFORNIA
MANPAH VALLEY
LAS VEGAS
LAKE MEAD
HOOVER DAM
ARIZONA
GRAND WASH
BRIDGE CANYON DAMSITE
RED LAKE
PEACH SPRINGS
LAKE MOJAVE
PIUTE
MOHAVE VALLEY
DAVIS DAM
KINGMAN
HUALPAI MTS
BAKERSFIELD
POWER LINES
SODA LAKE
MOJAVE
BARSTOW
DESERT
BOULDER
DAGGETT
LUDLOW
GOFFS
NEEDLES
TOPOCK
CHEMEHUEVIS VALLEY
CADIZ
VICTORVILLE
LUCERNE VALLEY
LAKE HAVASU
CALIFORNIA
ARIZONA
HEAD GATE ROCK DAM
WILLIAMS RIVER
PARKER DAM
PARKER
RICE
VENTURA
BURBANK
GLENDALE
PASADENA
SAN MARINO
BEVERLY HILLS
LOS ANGELES
SAN BERNARDINO
COLTON
BEAUMONT
SANTA MONICA
COMPTON
FULLERTON
RIVERSIDE
LAKE MATHEWS
PERRIS
TORRANCE
ANAHEIM
LONG BEACH
SANTA ANA
ELSINORE LAKE
LAGUNA BEACH
COLORADO RIVER AQUEDUCT
PINTO BASIN
COACHELLA VALLEY COUNTY WATER DISTRICT
COACHELLA
INDIO
VALLEY
SALTON SEA
COACHELLA BRANCH
CHUCKWALLA VALLEY
BLYTHE
WEIR
PALO VERDE IRRIGATION DISTRICT
COLORADO
SCALE IN MILES
0 5 10 25 50
SERVICE AREA OF COLORADO RIVER AQUEDUCT
IMPERIAL VALLEY
IMPERIAL IRRIGATION DISTRICT
EL CENTRO
ALL AMERICAN CANAL
PILOT KNOB
BARD IRRIGATION DIST.
IMPERIAL DAM
LAGUNA DAM
YUMA PROJECT (CALIF.)
GILA RIVER
YUMA
SIPHON DROP
MORELOS DAM
ALAMO CANAL
SAN DIEGO
CALIFORNIA
MEXICO
LOWER CALIFORNIA
ARIZONA
MEXICO
PACIFIC OCEAN

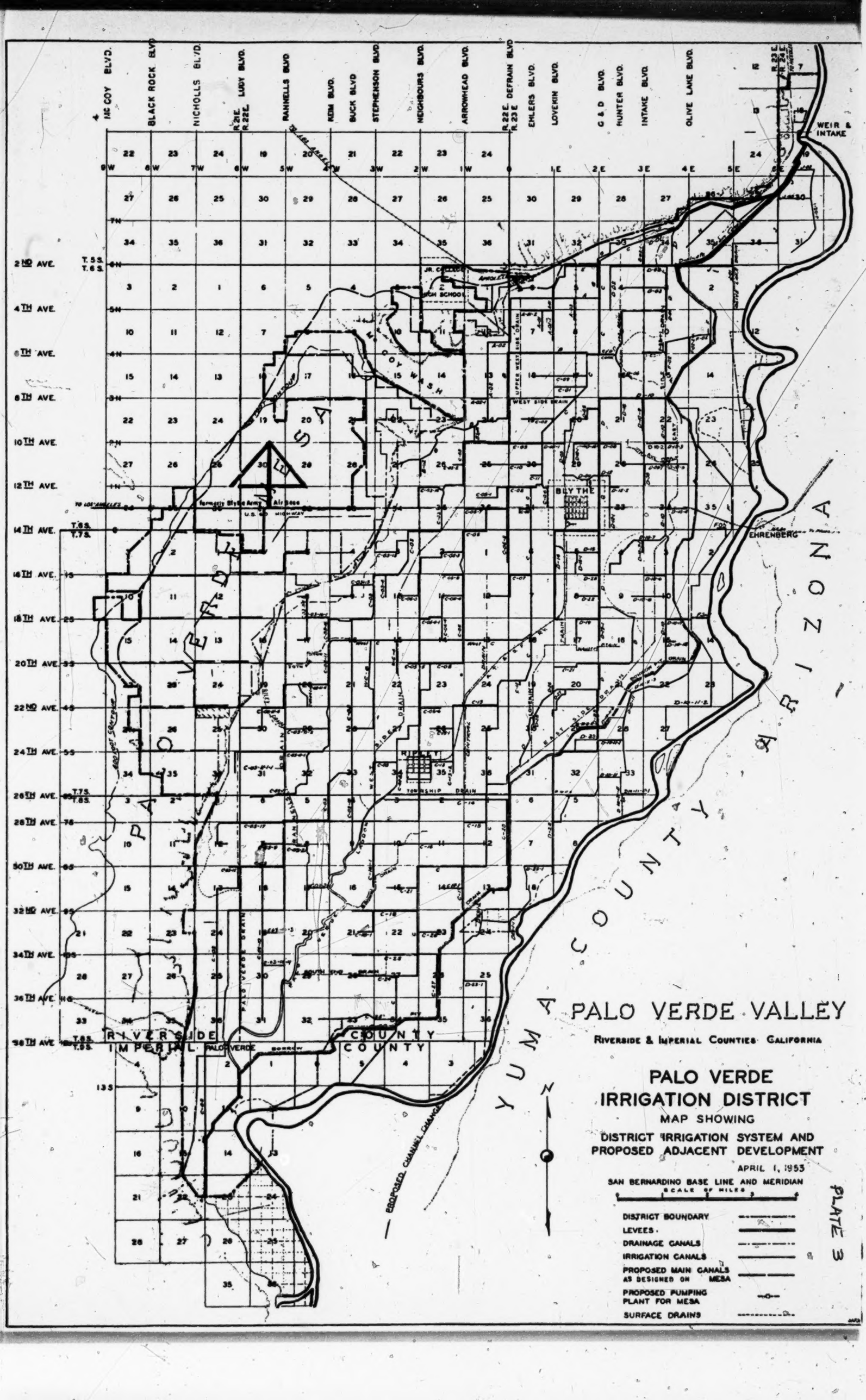
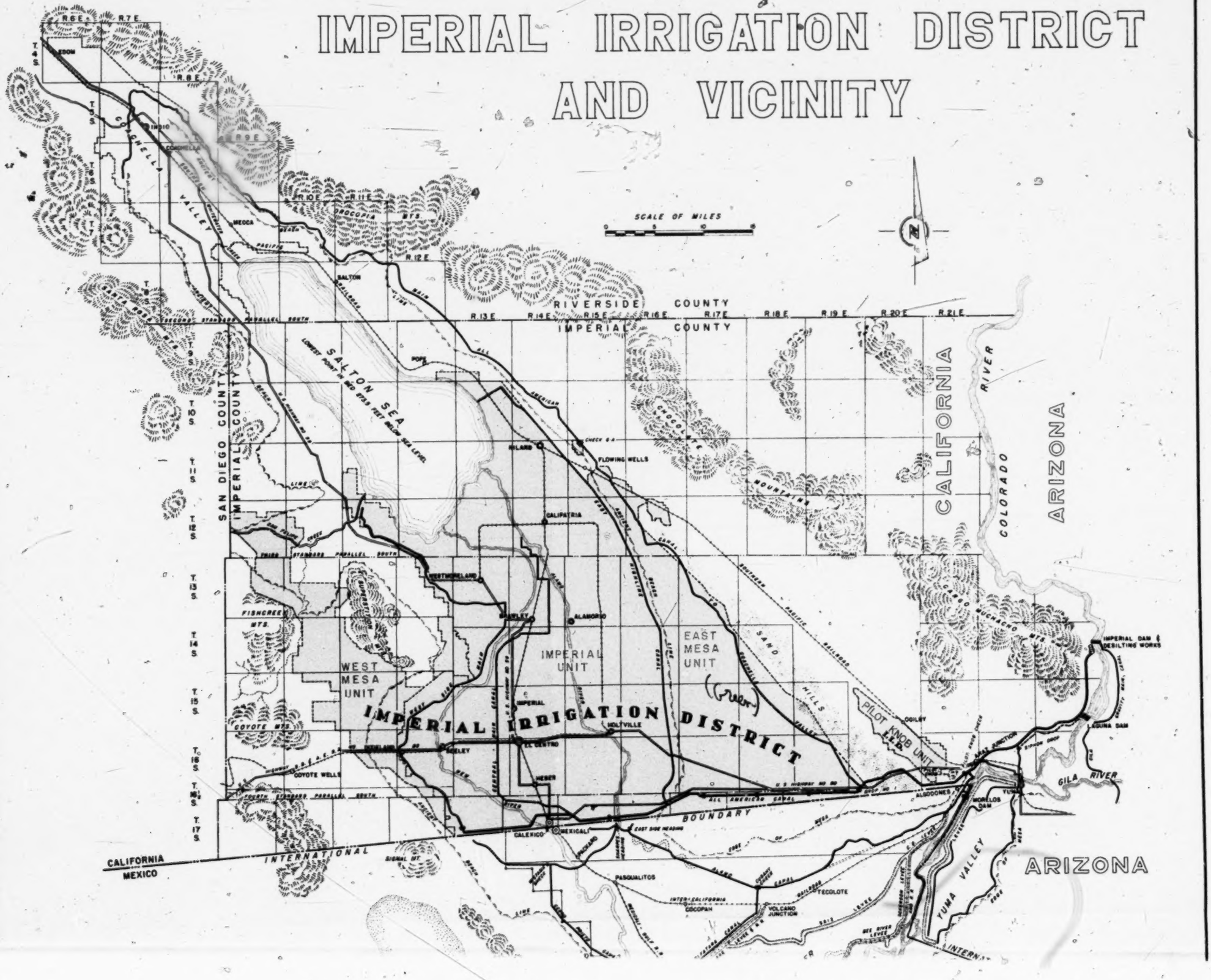
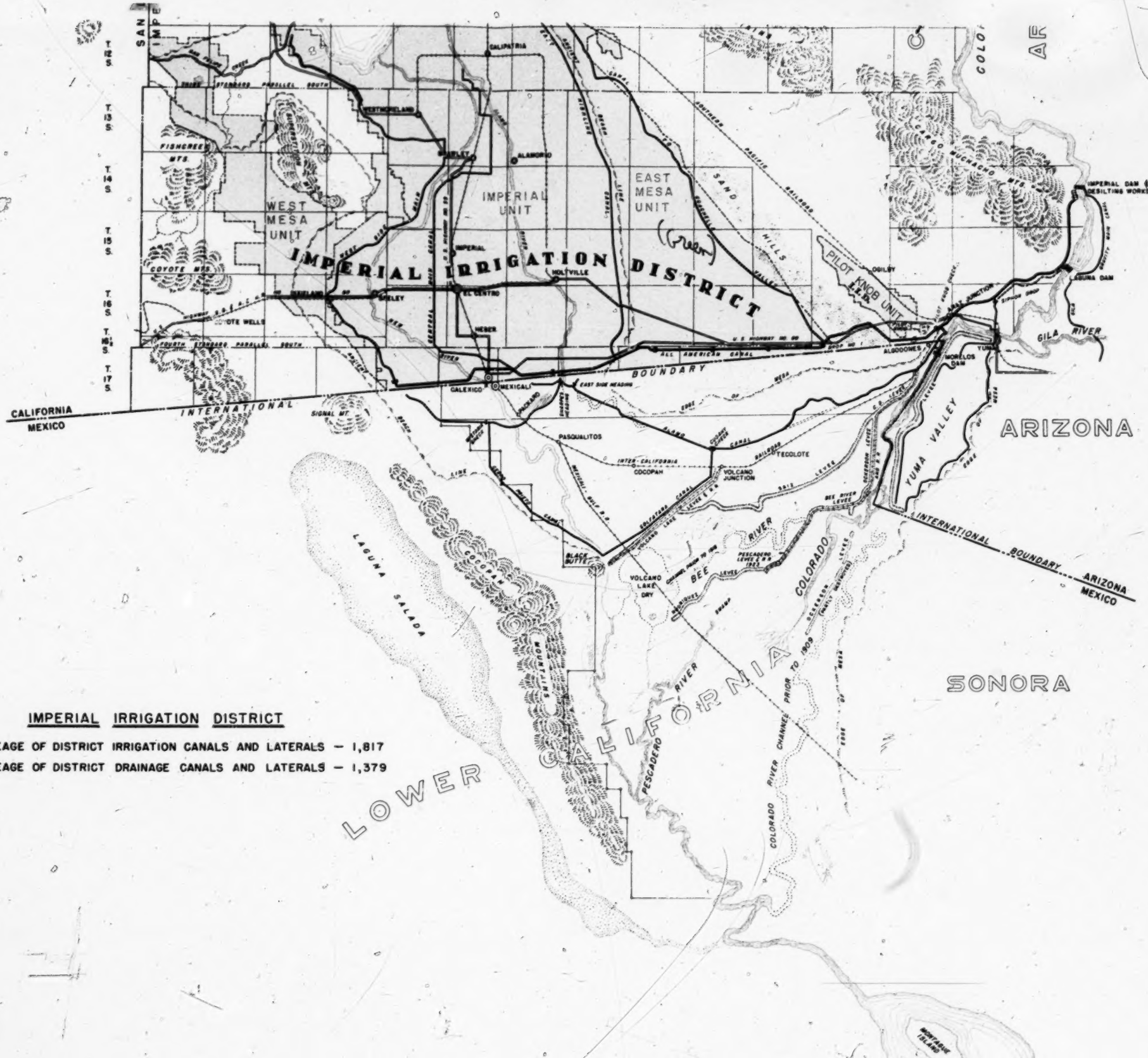

PALO VERDE VALLEY
Riverside & Imperial Counties California
PALO VERDE IRRIGATION DISTRICT
MAP SHOWING
DISTRICT IRRIGATION SYSTEM AND PROPOSED ADJACENT DEVELOPMENT
APRIL 1, 1953
SAN BERNARDINO BASE LINE AND MERIDIAN
SCALE OF MILES
DISTRICT BOUNDARY
LEVEES
DRAINAGE CANALS
IRRIGATION CANALS
PROPOSED MAIN CANALS AS DESIGNED ON MESA
PROPOSED PUMPING PLANT FOR MESA
SURFACE DRAINS
PLATE 3
YUMA COUNTY ARIZONA
RIVERSIDE COUNTY
IMPERIAL COUNTY
PALO VERDE
BLYTHE
EHRENBERG
WEIR & INTAKE
PROPOSED CHANNEL CHANGE
Mc COY BLVD.
BLACK ROCK BLVD.
NICHOLLS BLVD.
LUDY BLVD.
RANNELLS BLVD.
KOIM BLVD.
BUCK BLVD.
STEPHENSON BLVD.
NEIGHBOURS BLVD.
ARROWHEAD BLVD.
DEFRAIN BLVD.
EHLERS BLVD.
LOVEKIN BLVD.
G & D BLVD.
HUNTER BLVD.
INTAKE BLVD.
OLIVE LANE BLVD.

PLATE 4

MAP OF IMPERIAL IRRIGATION DISTRICT AND VICINITY





IMPERIAL IRRIGATION DISTRICT

TOTAL MILEAGE OF DISTRICT IRRIGATION CANALS AND LATERALS — 1,817

TOTAL MILEAGE OF DISTRICT DRAINAGE CANALS AND LATERALS — 1,379

NEVADA
CALIFORNIA
ARIZONA
MEXICO
PACIFIC OCEAN
GULF OF CALIFORNIA

KEY MAP

COACHELLA
MAIN
CANAL
INDIO

PLATE 5

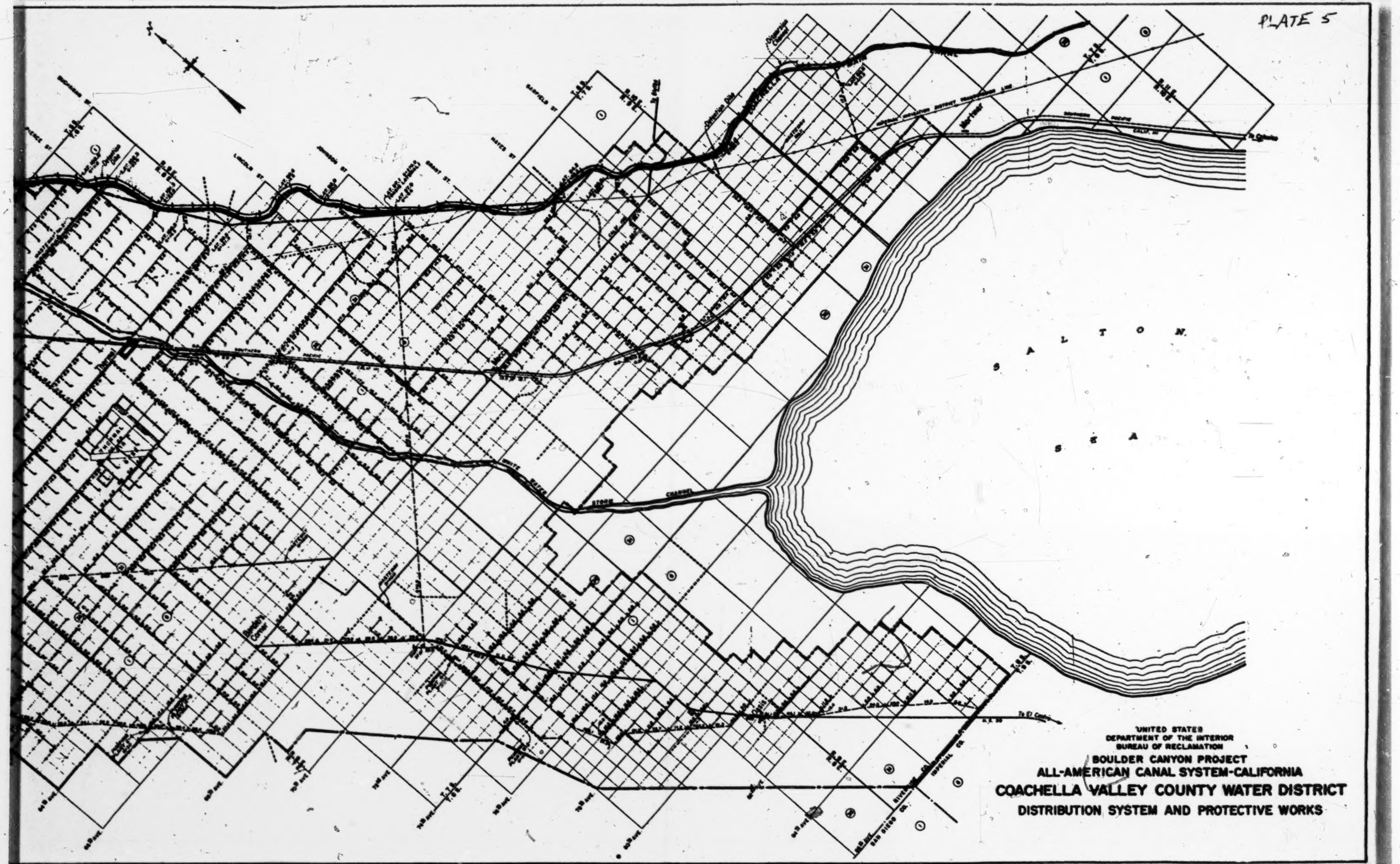

SALTON
SEA
WHITE WATER CHANNEL
Coachella Canal
Indio
Coachella
Thermal
Mecca
Oasis
Valerie Jean
Dillon Road
Avenue 48
Avenue 50
Avenue 52
Avenue 54
Avenue 56
Avenue 58
Avenue 60
Avenue 62
Avenue 64
Avenue 66
Avenue 68
Avenue 70
Avenue 72
Avenue 74
Avenue 76
Avenue 78
Avenue 80
Avenue 82
Avenue 84
Avenue 86
Avenue

PLATE 6A

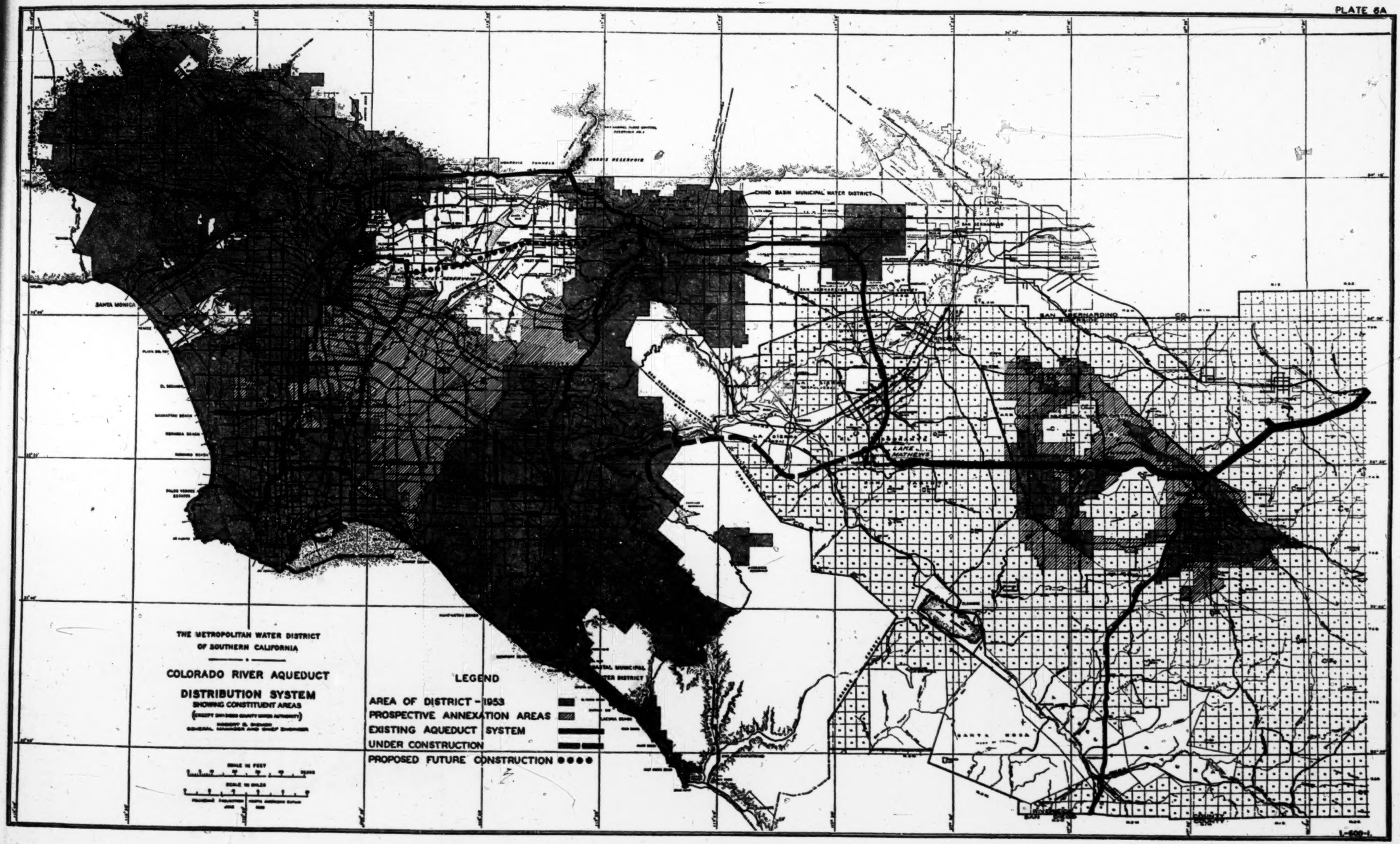
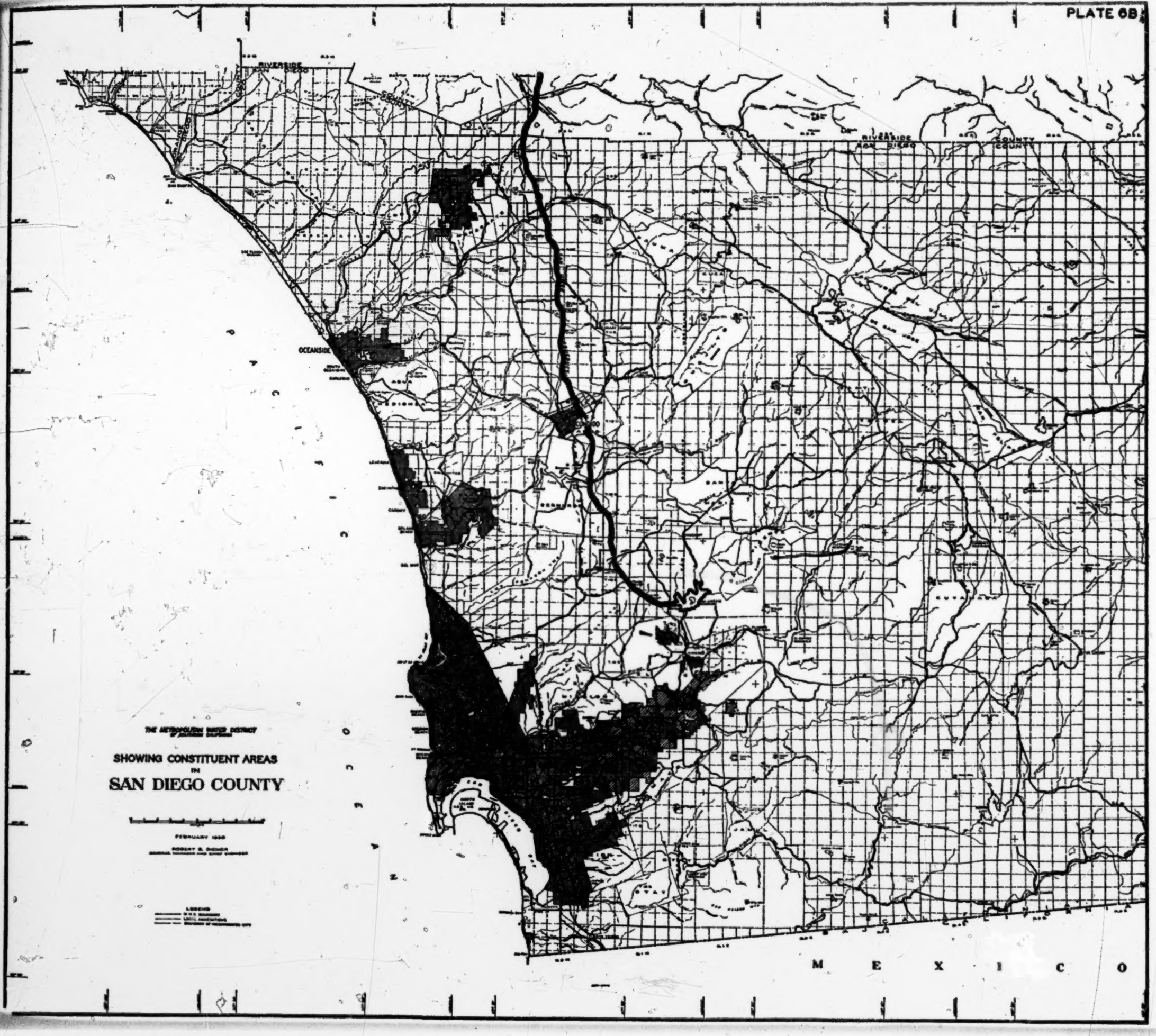

CHINO BASIN MUNICIPAL WATER DISTRICT
SANTA MONICA
SAN FERNANDO
LAKE MATHEWS
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
COLORADO RIVER AQUEDUCT
DISTRIBUTION SYSTEM
SHOWING CONSTITUENT AREAS
LEGEND
AREA OF DISTRICT - 1953
PROSPECTIVE ANNEXATION AREAS
EXISTING AQUEDUCT SYSTEM
UNDER CONSTRUCTION
PROPOSED FUTURE CONSTRUCTION

PLATE 6B



THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

SHOWING CONSTITUENT AREAS
IN
SAN DIEGO COUNTY

FEBRUARY 1950

ROBERT B. DIXON
GENERAL MANAGER AND CHIEF ENGINEER

LEGEND

LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U. S.
FILED
MAY 20 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 87 ORIGINAL

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

MOTION OF COLTER WATER PROJECT ASSOCIATION, INCORPORATED, FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

THOMAS J. CROAFF, JR.
104 South First Avenue
Phoenix, Arizona

VERNON B. CROAFF
104 South First Avenue
Phoenix, Arizona

WILLIAM H. CHESTER
15 North Second Avenue
Phoenix, Arizona

SAM S. LEVITIN
74 West Lynwood
Phoenix, Arizona

HERBERT WATSON
15 North Second Avenue
Phoenix, Arizona

Attorneys for Movant

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Arizona Daily Star, Tucson, Arizona, May 23, 1945 17

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House Document No. 136, Eighty-First Congress, 1st Session. Report and Findings on the Central Arizona Project, Secretary of Interior 7, 8, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 10 ORIGINAL

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

MOTION OF COLTER WATER PROJECT ASSOCIATION, INCORPORATED, FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

I

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Colter Water Project Association, Incorporated, a non-profit corporation organized under the laws of the State of Arizona, and respectfully moves this court for leave to file a brief amicus curiae in the above entitled cause.

The articles of incorporation of the Colter Water Project Association provide that it is organized for education regarding and promotion of the Fred T. Colter water applications or filings, made in the office of the State Land and Water

Commissioner of Arizona, beginning September 20, 1923, by which the waters and power of the Colorado River were appropriated for and on behalf of the State of Arizona and water users under the Glen-Bridge-Verde-Highline Project, to divert Colorado River water to Central Arizona and other areas of the state by exchange [1] in accordance with the statutes of the State of Arizona. [2] Members of the association include persons owning land now being farmed by irrigation, or capable of being so farmed, under said project within the State of Arizona. Members also include persons not necessarily landholders but in numerous other walks of life whose "welfare, prosperity, and happiness . . . are dependent on the appropriations in that state". [3]

This association made due request upon parties plaintiff and defendant for consent to the filing of a brief amicus curiae, and the same not being granted by all of the parties, hereby respectfully moves the court for leave to file such brief.

This association, and all others so interested in Arizona, are vitally concerned in this case. It is our desire to be assured that this case receives a full and complete hearing so that the State of Arizona and those claiming under it can begin to build for the future on a sound foundation supported by the decision and opinion of this court. This association prays this motion because we are impelled to be of help in this case. We desire

1. Water applications No. R-133, A-413, R-132, and amended applications thereafter, Office of Arizona State Land Commissioner.
2. Section 5337 of the Revised Statutes of 1913, Civil Code; Section 3281 of the Revised Code of 1928; Section 75-102 of the Arizona Code of 1939.
3. State of Wyoming v. Colorado (1922), 325 U.S. 468.

to point out not only the meaning of the facts in the complaint, but also the significance of facts omitted from it. It is our further desire to help to develop and establish facts as to equity which we believe the court will call for, since without such facts the court could not determine whether the Colorado River Compact provides equitable apportionment of the waters of the Colorado River.

II

FACTS AND ARGUMENT IN SUPPORT OF THE MOTION

1. AN INTERSTATE WATER COMPACT MUST BE EQUITABLE

Equitable apportionment is the rule in litigation concerning water rights on interstate streams.[4] The apportionment may be made either by interstate compact with consent of Congress or by a decree of this court, and is binding upon the citizens of each state and all water claimants.[5] Where the apportionment is made by compact, the court has jurisdiction to determine its validity and effect.[6]

In determining the validity and effect of such a compact, the court has laid down certain standards which must be met. The outstanding case

4. Hinderlider, State Engineer, et al., v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 101-103; Kansas v. Colorado, 206 U.S. 46, 97, Wyoming v. Colorado, 259 U.S. 419, 466; New Jersey v. New York, 283 U.S. 336, 342-43.

5. Hinderlider Case, supra; Poole v. Fleeger, 11 Pet. 185, 209; Garcia v. Lee, 12 Pet. 511, 521; Rhode Island v. Massachusetts, 12 Pet. 657, 725; Coffee v. Groover, 123 U.S. 1, 29, 30, 31; Virginia v. Tennessee, 148 U.S. 503, 525; Wyoming v. Colorado, 286 U.S. 494, 508.

6. Hinderlider, State Engineer, et al., v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 110-111.

decided by this court, and so far as we have been able to discover, the only one in which a ratified interstate water division compact has been brought before the court for review, is Hinderlider, State Engineer et al. v. La Plata River & Cherry Creek Ditch Co. 304 U.S. 92.

In that case, the court allowed the La Plata River Compact between the States of Colorado and New Mexico to stand on the grounds that there was no vitiating infirmity in the proceedings leading up to the compact or in its application; that it afforded efficient, beneficial use of water without abuse of authority; that the compact was not arrived at without due inquiry, nor without honest exercise of judgment; that no claim had been made that it was or is inequitable; and that no water claimant had at any time objected to it. The court held that the evidence conclusively established that the waters of the stream could be used more efficiently under the rotation plan provided in the compact. In the words of the court:

> "As Colorado possessed the right only to an equitable share of the water in the stream, the decree of January 12, 1898, in the Colorado water proceeding did not award to the ditch company any right greater than the equitable share. Hence the apportionment made by the compact can not have taken from the ditch company any vested right **unless there was in the proceedings leading up to the compact or in its application some vitiating infirmity. No such infirmity has been shown. There is no allegation in the pleadings, no evidence in the record, no suggestion in brief or argument,**

> **that the apportionment agreed upon by the commission was not entered into with due inquiry, or that it was not an honest exercise of judgment, or that it was or is inequitable.** . . . There is no suggestion . . . even that any water claimant objected . . . and there is not even a suggestion that either state or the ditch company, has expressed a desire to modify or terminate it." **Hinderlider case, pages 108-109.** (Emphasis supplied).

It is clear then that a ratified interstate water compact to which Congress has consented is binding upon the citizens of the states party to it and upon water claimants **only if found equitable and valid by this court.**

2. FACTS AS TO EQUITY OF THE COLORADO RIVER COMPACT MUST BE BROUGHT TO THE ATTENTION OF THE COURT

In the Hinderlider case, supra, the court has laid down the principle and made the exception. The situation of Arizona meets the exception with respect to the Colorado River Compact. A full presentation of the facts will disclose that compact to be inequitable and invalid by the tests of this court.

The complaint herein, however, does not contain the facts upon which the court can find whether the Colorado River Compact is equitable or inequitable, and whether this compact otherwise meets the required standards set by the court. The complaint merely calls for a decision on the meaning of the compact.

Without a ruling as to its equity, by standards

which the court has emphasized, no final decree can result, since any aggrieved party can nevertheless raise the question of equity in a future suit, even though the states parties to the compact are not parties to such future suit. **Hinderlider case,** pages 110-111.

The purpose of this motion is to urge that these facts be brought to the attention of the court. It is not the intention of this motion to present any such facts exhaustively, nor as pleadings. But it is conceived to be our duty to the court and to the case to present a brief summary of some of the salient facts as to the equity of this compact which do not appear in the complaint. Such facts, and many others, should be brought into this case to aid the court in the determination of this subject.

3. BRIEF SUMMARY OF FACTS SHOWS THAT THE COLORADO RIVER COMPACT IS INEQUITABLE

(1) Vitiating infirmities of the Colorado River Compact and in the proceedings leading up to Arizona's ratification.

In 1944, the Arizona Legislature ratified the compact on the understanding that Arizona would receive between four and five million acre feet from the main Colorado River, **in addition to the waters of the Gila River.**[7] (Also see Appendix).

But in 1953, the complaint (page 30) seeks an interpretation of the compact by which Arizona's title would be quieted and confirmed to only 3,800,000 acre feet annually from the main Colorado

7. Message of the Governor of Arizona to the Special Session of the Arizona Legislature called to ratify the Colorado River Compact. Journal of the Senate, 16th Arizona Legislature, 1st Special Session, page 17.

River and its tributaries, **inclusive of the Gila River.** This is much less than was promised when the compact was ratified.

These facts show that **"there was some vitiating infirmity in the proceedings leading up to the compact or in its application"**, in the words of the **Hinderlider case,** supra. Such proceeding under the compact, which promised more by far at the time of ratification in 1944 than the complaint in this action in 1953 seeks for Arizona, does not meet the required standards of this court. It is self-evident that due inquiry was either lacking or not productive of facts, that judgment was misinformed even though honest, and that the transaction was not equitable to the people of Arizona who would be the real losers if **faith has not been kept with their representatives in the legislature.**

(2) Under the complaint's interpretation of the compact Central Arizona would be deprived of 35% of its cultivated land and of 80% of its agricultural pumping of underground water.

Should the prayer of the complaint be granted, Central Arizona will be compelled to take out of cultivation 343,920 acres, or 35% of its presently cultivated lands, and will be compelled to reduce its agricultural pumping of underground water by 2,760,000 acre feet annually, or by 80%.

The complaint (page 22), seeks supplemental water only from the Colorado River for 725,000 acres in Central Arizona. No irrigation of new lands is alleged. The Central Arizona Project and plan alleged in the complaint,[8] and water ap-

8. House Document No. 136, 81st Congress, 1st Session, Report and Findings, Central Arizona Project, Secretary of the Interior, Table B-23, pages 196-197; Bill of Complaint, page 22.

plications or filings therefor made December 28, 1951[9], disclose that only 639,680 acres would be allowed to remain in cultivation in these areas.[10]

But, during 1952, in the same areas, 984,000 acres of land were irrigated.[11] Thus, if the project is to be activated, 343,920 acres which were irrigated in 1952 must be taken out of cultivation and revert to the desert.

In regard to pumping of underground water, under the Central Arizona Project plan as alleged in the complaint herein, agricultural pumping in the central valleys of the state would be permanently reduced to 718,600 acre feet as the safe annual yield.[12] But during the year 1951, in this same area, 3,478,000 acre feet of water was pumped for agriculture from the underground supply.[13] The project plan further requires an underground water code to be adopted by the Arizona legislature to effect such a reduction.[14] Thus, under the project plan, Central Arizona will be compelled to reduce its agricultural pumping of underground waters by 2,760,000 acre feet, which, in turn, will result in taking presently cultivated lands out of cultivation.

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9. Bill of Complaint, page 24; Water Application No. 3180, Office of Arizona State Land Commissioner.
10. House Document No. 136, 81st Congress, 1st Session, Report and Findings Central Arizona Project, Secretary of the Interior, Table B-23, page 197.
11. Arizona Agriculture, 1953, Bulletin 245, Agriculture Experiment Station, University of Arizona, Tucson.
12. House Document No. 136, 81st Congress, 1st Session, Report and Findings Central Arizona Project, Secretary of the Interior, Table B-23, page 197.
13. Pumping and Ground Water Levels in Arizona in 1951, by L. S. Halpenny and R. L. Cushman, United States Geological Survey. Page 3.
14. Report on Central Arizona Project, United States Department of the Interior, December 1947, page 13.

(3) The Compact actually would deprive Central Arizona of 50% of its Cultivated Land and would give Arizona even less water than it now uses.

Under the interpretation of the compact alleged in the complaint (Page 22), Arizona claims 1,200,000 acre feet for diversion to Central Arizona from the Colorado River. But actually there is no additional water available for Arizona from the Colorado River under the compact and contract thereunder.[15] (Also see Appendix).

Without Colorado River water for this area, the loss to Arizona would be yet greater. The complaint itself states (page 22) that 31% of 725,000 acres now cultivated in the Central Arizona area would go out of cultivation, or 224,750 acres, leaving only 500,250 cultivated acres. Since in 1952, there were 984,000 acres in cultivation, the total reduction or loss would be 483,750 cultivated acres. This represents a loss of almost one-half of the state's irrigated agriculture, its main industry and principal support of its people. In addition, vast potential hydroelectric power and sites located in Arizona would be lost, being nowhere alleged or claimed in the complaint.

The population of Arizona has reached 900,000, doubled since the previous census, and is at the fastest rate of increase in the nation, including that of California. Where there is both priority of right and urgency of need, for Arizona to be deprived of additional water from its only river

15. See statement in Appendix by Governor R. C. Stanford of Arizona (1937); from Bill of Complaint, page 22, Arizona v. California, 283 U.S. 423 (1930); by Professor G. E. P. Smith, (1945); explanation of vote by V. P. Richards, (1944). Many others could be cited to the same effect.

system would be to receive an apportionment which is much less than equity demands.

The Colorado River Compact does not award Arizona an equitable share of the waters of the Colorado River, which this state would receive under the law of prior appropriation and beneficial use common to the seven participating states. Under the compact Arizona's Colorado River water would go in perpetuity to other Colorado River basin states and the Republic of Mexico, which abound in other rivers, and the hydroelectric power would go to distributors outside of Arizona. Such loss of Arizona's developed and potential natural resources would be enormous and unprecedented.

(4) Complaint Fails to Claim Colorado River Water for Arizona Under the Colter Filings which would Rescue All Cultivated Lands in Central Arizona and reclaim much more in this area and throughout the state.

The complaint (pages 22, 24) alleges the dire need of supplemental irrigation water for Central Arizona from the Colorado River, and **pleads the Central Arizona Project** applications or filings made in 1951 to appropriate such water for this purpose. The complaint, however, fails to inform the court that more than 28 years earlier, in 1923, the Colter water applications were made to divert much more Colorado River Water to Central Arizona and other areas of the state by exchange. [16] (Also see Appendix).

The Colter filings and projects thereunder have been kept up with due and reasonable diligence,

16. Water Applications No. R-133, A-413, R-132, and amended applications thereafter, Office of Arizona State Land Commissioner.

in conformity with law, including all necessary engineering, technical, organizational, and other work necessary to develop a project of this magnitude, [17] as is evidenced by a record of eight volumes containing over 8000 pages.

Bills have been introduced in the Arizona legislature, including the current legislature, authorizing the construction of the Glen-Bridge-Verde-Highline Project under the Colter filings either under state authority or in cooperation with the federal government. [18]

Under the Central Arizona Project filings, the complaint claims 1,200,000 acre feet of supplemental water from the main stream of the Colorado River for 639,680 acres now irrigated in Central Arizona and no more would be allowed. [19]

But under the Colter filings more than 12,000,000 acre feet of water would be diverted from the main stream of the Colorado River through the all-gravity Glen-Bridge-Verde-Highline Project to irrigate 6,000,000 new acres, generate 5,000,000 electrical horsepower, and furnish supplemental water to all lands now cultivated in Central Arizona. Power revenues will more than pay for the construction of the project and for maximum irrigation and multiple purpose uses of the water throughout the state. [20] This project has been sup-

17. Due Diligence in Protection and Development of Arizona Water Resources, (Colter filings), 8 vols., Office of Arizona State Land Commissioner.
18. House Bill 21, Arizona House of Representatives, 21st Arizona Legislature, 1st Regular Session, 1953; House Bill 56, 20th Arizona Legislature, 2nd Regular Session, 1952; House Bill 83, 18th Arizona Legislature, Regular Session, 1947. Many others could be cited.
19. Bill of Complaint, page 22; House Document No. 136, 81st Congress, 1st Session, Report and Findings Central Arizona Project, Secretary of the Interior, Table B-23, page 196.
20. Water Applications No. R-133, A-413, R-132, and amended applications thereafter, Office of Arizona State Land Commissioner.

ported by those who consider that hydroelectric power as in the past should continue to help shoulder the financial burden of making reclamation possible in the west and is opposed by those whose views are to the contrary. The project under the Colter filings affords maximum beneficial use of Colorado River water not only for Arizona but also for the entire river system. It accords with all provisions and preferences of state and Federal law, as to beneficial use of water, and with all accepted engineering and conservational principles and practices.

4. A GENERAL ADJUDICATION SUIT IS THE METHOD TO ACHIEVE EQUITABLE APPORTIONMENT

The foregoing brief summary of some significant facts which do not appear in the complaint points to the conclusion that a more complete presentation would establish the fact that the Colorado River Compact is not equitable and does not meet the standards laid down by this court. For many years the people and water claimants of Arizona have objected to and continue to object to the terms of the compact on these grounds.[21] Since its ratification in 1944, its modification or repeal has been sought in the state legislature.[22]

---

21. Petition of Fred T. Colter, et. al., to intervene, Arizona v. California (1936) 298 U.S. 558; motion of Sidney Kartus, et al. for leave to file petition to intervene in present case. Many other objections could be cited from 1922 to the present.

22. H.R.C. 11, introduced in the 17th Arizona Legislature, Regular Session (1945); H.R. 4, 18th Arizona Legislature, Regular Session (1947); H.B. 248, 19th Arizona Legislature, Regular Session, (1949); H.B. 165 in 1st Regular Session, 20th Arizona Legislature (1951); H.B. 185, in 1st Regular Session, 21st Arizona Legislature (1953). Many other measures introduced in the Arizona Legislature to repeal, modify, and protest the Colorado River Compact could be cited.

Were it not for the exceptions laid down by the court with respect to the validity of inter-state compacts, the people of Arizona would be without recourse or remedy against the inequities of the Colorado River Compact. The constitutional property rights of the citizens of each respective state are protected under provisions of the Federal constitution which make necessary that Congress give its consent to compacts between the states, and through review of such compacts by the court. There appears to be no difference between a compact and other legislation. The court cannot and rightfully has not relieved itself of the responsibility of deciding what is fair and reasonable, and what does not violate constitutional guarantees. The fact of obtaining Congressional approval does not alter this principle. Every decision by this court as to equitable apportionment of interstate waters leaves the door open to future review. There is no final conclusion and probably never will be with things of changing aspect. This is a fundamental truth which compacts with congressional consent cannot supersede. It seems obvious that interstate compacts cannot rise higher than the power which reviews them.

Upon the facts, the court can determine whether the Colorado River Compact is equitable. Your movant is earnestly of the belief, however, that the compact method, particularly as to interstate water division controversies in the reclamation states, is not preferable, and that its use in this manner was never contemplated by the framers of the constitution. If states can enter into compacts as an attribute of sovereignty, the converse must be true that they can withdraw from them

at will. This would make futile any court decree such as that sought in this case. In its most recent decision on this question, the court did not see fit to encourage the compact method. [23] The court decided the matter by litigation, and in its decree retained jurisdiction of the case for the purpose of modifying the decree at any time as might be deemed necessary. [24]

Your movant sincerely submits that the Colorado River controversy should likewise be decided by this court in a general adjudication suit quieting title to the water rights of all states and parties concerned, and not by an interpretation of the Colorado River Compact. By such a general adjudication suit Arizona would gain lasting and immeasurable benefits while injuring no other legitimate interests.

The passage of time over thirty years has proven that the young minority state of Arizona can expect to enjoy its just rights in the Colorado River only through equity and law. It is not interpretation of the Colorado River Compact but its dissolution by legislative repeal or by decree of this court and the quieting of titles in a general adjudication suit that will most equitably serve Arizona and all other states and parties concerned. Your movant earnestly submits this motion in the interest of equity and the most beneficial use of the Colorado River for the people of Arizona and all others concerned in the use of waters and power of this stream.

23. Nebraska v. Wyoming (1945), 325 U.S. 589, 657, 658.
24. Nebraska v. Wyoming (1945), 325 U.S. 625.

III
CONCLUSION

The State of Arizona has the right to speak as parens patriae. But the legal fiction of parens patriae shall not be used in this case to impose an inequitable compact on Arizona, nor to deprive the people of Arizona of their full legal and equitable rights in this case, where the record shows:

(1) that the complaint does not contain the facts upon which the court can determine whether the compact is or is not equitable;

(2) that the complaint asks for an interpretation of the compact, regardless of whether it is equitable or not;

(3) that the nature of the case is such that it is imperative that such facts be brought to the attention of the court for a determination as to the equity of the compact.

This is the very type of a case, then, in which the principle of a brief amicus curiae must be invoked.

WHEREFORE, the movant respectfully prays this Court for leave to file a brief amicus curiae.

THOMAS J. CROAFF, JR.

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APPENDIX

Page 6, Note 7

From the message of Governor Sidney P. Osborn to the First Special Session of the Sixteenth Arizona Legislature, 1944, called for the purpose of ratifying the Colorado River Compact and contract subject thereto:

"The Gila River is ours—let's leave that out of consideration because we are using that water and it is ours and any Court in this world will so declare it. With the 2,800,000 acre feet out of the main stream and then one-half of the surplus—and we don't know yet what will be and no one can yet tell—I am confident that we will eventually get from the main stream of the Colorado River not less than four million acre feet a year, and probably as much as five million acre feet of water on Arizona lands . . .

. . . Our underground water supply is in danger of becoming depleted . . . But when we start pouring four million acre feet or more water into this underground reservoir every year, I am sure you will agree with me that today Arizona is on the threshold of the most marvelous development in its history, a development unexcelled in any state in the nation in the past . . .

. . . Of course, to effecctuate this contract it is necessary for the legislature to ratify the contract and ratify the compact, and I am in hopes that you will do that as speedily as possible . . ." Journal of the Senate, First Special Session, Sixteenth Arizona Legislature, 1944, Page 17.

Page 6, Note 7

From explanation of vote by Arizona State Senator Lloyd E. Canfil, on Senate Bill No. 2, for ratification of contract for waters from the Colorado River, subject to the Colorado River Compact:

"I intend to rely on Attorney Carson's assurance to the Senate that this is the best contract obtainable, that he made no concessions to California in this contract, and that the waters of the Gila River system are entirely exempted from the provisions of this contract and belong in toto to Arizona never to be counted against the allotment of 2,800,000 acre feet given our state by this contract, nor can they be counted against the surplus alloted.

"I am sure that this is the intent of the majority of the Senate in voting for this contract, and I hope that no future litigation will lend opportunity to any biased tri-

bunal to interpret this contract otherwise." . . . Ibid, Page 38.

Page 9, Note 15

From statement (Page 3) by Governor R. C. Stanford at Boulder Dam Power Conference before Secretary of the Interior, Washington, D. C. April 16, 1937; "Thus the (Colorado River) compact would allocate Arizona 700,000 acre feet less than it now uses . . ."

Page 9, Note 15

From Bill of Complaint, Page 22, Arizona v. California, 283 U. S. 423 (1930): "Said proposed apportionment of 2,800,000 acre feet of water is less than the quantity of water already appropriated in Arizona, and would provide no water for future appropriation in said state."

Page 9, Note 15

From speech by G. E. P. Smith, Professor of Agricultural Engineering, University of Arizona:

"Allotments of Colorado River water already made to other states and Mexico LEAVE NOTHING FOR FUTURE AUTHORIZATION IN ARIZONA, and the much-discussed plans for a great irrigation project, in the central part of the state cannot be made in fact, without a revision of the Colorado River Compact . . . There is no future allocation for Arizona. It is impossible to see it in that picture. It was 'cruel' to have Bureau of Reclamation officials last summer, travelling about the state, 'promising a 2,000,000 acre feet project for Central Arizona,' with part of the water for Florence and Casa Grande, releasing some Gila water for Safford. The only way, in which we can get future authorization, is through revision of the Colorado River Compact." Arizona Builder & Contractor, May, 1945; From Arizona Daily Star, Tucson, Arizona, May 23, 1945.

Page 9, Note 15

From explanation of vote by Arizona State Senator V. P. Richards, on Senate Bill No. 2, for ratification of contract for waters from the Colorado River, subject to the Colorado River Compact:

"I am compelled to vote "No" because I am convinced that the ratification of this proposed contract will not provide one additional gallon of water to anyone in Arizona." Journal of the Senate, First Special Session, Sixteenth Arizona Legislature, Page 48. (1944).

Page 10, Note 16

This project was initiated in 1916, and in 1923, Fred T. Colter, then a State Senator, who was one of the founding fathers of the State of Arizona, and a member of its Constitutional Convention in 1912, made these filings. Colter did this on the authority of the then Governor of the State of Arizona, George W. P. Hunt, who himself had been President of the Constitutional Convention in 1912, and the first governor of the State of Arizona, and governor for seven terms. The State of Arizona has expended large sums of money for engineering and other work toward these filings. Colter continued as Trustee for these filings until his death in 1944, and Sidney Kartus is today successor to said Fred T. Colter as such Trustee.

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IN THE

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October Term, [redacted] 1961

No. 8 Original

STATE OF ARIZONA

Complainant

v

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

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REPLY TO DEFENDANTS' ANSWER.

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Defendants

REPLY TO DEFENDANTS' ANSWER.

Complainant, by its duly authorized attorneys, replies to the Answer of Defendants herein as follows:

FOR A GENERAL REPLY TO THE ANSWER

I.

HISTORICAL BACKGROUND OF COLORADO RIVER COMPACT AND RELATED DOCUMENTS CONSTITUTING THE LAW OF THE RIVER.

A. INTRODUCTION

In their Answer to the Bill of Complaint, Defendants have set forth in some detail under the caption: "Historical and Geographical Background" some of the historical data constituting the law of the Colorado River. Many of those allegations are in no way pertinent to the issues involved in the instant case. Complainant will deal with a number of those allegations in more detail later on in this Reply, but for the information of the Court it submits that the pertinent historical background of the Colorado River Compact, (hereinafter called Compact) and the related documents constituting the law of the River is as follows:

B. GEOGRAPHICAL SITUATION

In Paragraph IV of Complainant's Bill of Complaint there is set forth in detail a description of the River, its length, its location and the area of each State within the natural basin of the River. The percentages of contribution of water to the Colorado River by the various States involved as measured at State lines are as follows:

Colorado	59.8%
Utah	14.6%
Arizona	12.1%
Wyoming	9.6%
New Mexico	2.9%
Nevada	0.7%
Mexico	0.2%
California	0.08%

California contributes practically no measurable quantity of water to the Colorado River System. Virtually all of the uses of Colorado River System water in California are outside of the natural drainage basin of the River. The only California uses that are within such natural drainage basin are in the Palo Verde Irrigation District (hereinafter called Palo Verde) and the Yuma Project in California. All uses of water within the area served by the Metropolitan Aqueduct, within the Imperial Irrigation District (hereinafter

called Imperial) and within the Coachella Valley County Water District, (hereinafter called Coachella) are served by transmountain diversions which take the water outside the natural basin of the Colorado River.

Filed with the Answer as Plate 1 in the Appendices thereto is a map which purports to show the boundary of the drainage basin of the Colorado River System. That map is in error as it purports to include within such drainage basin the Imperial Valley and Coachella Valley and surrounding areas in California, all of which drain into the Salton Sea. With this Reply Complainant presents as Appendix No. 1 a map which truly and accurately portrays the boundaries of the drainage basin of the Colorado River System.

The Gila River, a tributary of the Colorado River, flows exclusively within Arizona, with the exception of small tributaries in New Mexico, and reaches the Colorado River at a point near Yuma, Arizona. The geographical situation is such that the Gila River and its tributaries can be put to beneficial consumptive use, within the United States, only in Arizona and in a very limited area in New Mexico. The flow of the Gila River is extremely eccentric and variable. During most of the time the Gila, in many of its reaches, is dry. Water will rise to the surface, then disappear into the sands of the Gila and later come to the surface somewhere down the River. In some exceptional years the River will reach a flood stage, and it is only at those times that there is any appreciable flow from the Gila into the Colorado. In many years there is physically present in the Gila and its tributaries only enough water to permit the beneficial consumptive use of substantially less than 1,000,000 acre-feet.

C. COLORADO RIVER COMPACT

For some time prior to 1922 water was diverted from the mean stream of the Colorado River for irrigation of some land in Imperial, Palo Verde, and the Yuma Project in California. The water supply for these projects was unreliable in times of low flow. Imperial was in part inundated by a break in the Colorado River levee

system. These conditions were of great concern to California and caused that State to press for river regulation. In order that the River might be developed with due regard for the rights of all of the Basin States many conferences were held. These resulted in the creation of a commission composed of commissioners named by the governors of the various Basin States and a representative appointed by the President of the United States. Beginning in January, 1922, meetings were held in various parts of the United States. A final meeting took place in Santa Fe, New Mexico beginning on November 9, 1922 and ending on November 24, 1922, when the Compact was executed.

Early in the deliberations of the Commission it became apparent that any attempt to allocate the waters of the Colorado River System to individual States presented an insurmountable problem. By way of compromise it was agreed that the objective of the Commission should be limited to a division of the water between two basins.

In furtherance of this compromise there was drafted and submitted to the Commission on or about November 18, 1922, a proposed Compact which defined the Colorado River System so as to include the Gila River. This proposed definition was strenuously resisted by the Arizona Commissioner who refused to sign the proposed compact if it contained such definition. In order to satisfy the Arizona Commissioner and to secure unanimous approval of the Compact there was then prepared and inserted what is now Article III (b) thereof which apportioned an additional beneficial consumptive use of 1,000,000 acre-feet of water per year to the Lower Basin. This was solely and entirely for the purpose of recognizing the use by Arizona of approximately 1,000,000 acre-feet of water from the Gila River per year. That this was the understanding of the Arizona Commissioner is evidenced by the testimony introduced in the hearings of H.R. 5434 (80th Congress) at pages 367-377 of Vol. 2 (the bill for the reauthorization of the Gila Project). Pertinent excerpts from such testimony are included in Appendix

No. 2 to this Reply. In Appendix No. 3 to this Reply is a reproduction of an autographed photograph of Herbert Hoover complimenting Commissioner W. S. Norviel of Arizona on his fight for this additional 1,000,000 acre-feet of water. Excerpts from testimony of R. I. Meeker, who was engineering advisor for the State of Colorado during Compact negotiations, appear at pages 473-481 of the hearings on S. 1175 (80th Congress) and are found in Appendix No. 4 to this Reply.

Following the November 24, 1922 execution of the Compact, negotiations were undertaken by representatives of the States of Arizona, California, and Nevada to effect a Lower Basin compact.

When the Compact was being negotiated in the year 1922, there were in cultivation in Arizona approximately 415,451 acres of land. Practically all of this land was being irrigated by surface waters of the Colorado River and its tributaries in Arizona. This acreage increased until in the year 1929, the time of the Presidential Proclamation making the Compact effective, there were 481,851 acres in cultivation. In the year 1945 this cultivated acreage had increased to 688,648 acres. This increase was largely caused by the bringing into cultivation of land included in the Roosevelt Irrigation District, the Maricopa County Municipal Water Conservation District No. 1 (irrigated by water from the Agua Fria River, a tributary of the Gila), the Roosevelt Water Conservation District and the San Carlos Irrigation and Drainage District. These four districts have a total acreage of approximately 210,000 acres. Since that date the only considerable developments predicated upon the use of Colorado River System waters are the Wellton-Mohawk Irrigation District in Yuma County now under construction, and additional developments along the main stream of the Colorado River, particularly on the Fort Mohave and Colorado River Indian Reservations. Other increased agricultural development in Arizona is being served by deep wells, the operation of which does not deplete the main stream of the Colorado River or any of its tributaries. The area in cultivation in Arizona

in 1945 and the increased uses by reason of the Wellton-Mohawk Project and the Fort Mohave and Colorado River Indian Reservations are shown in Appendix No. 5 to this Reply.

D. BOULDER CANYON PROJECT ACT

For a long period prior to 1922 California greatly desired to secure river regulation, flood control, and hydroelectric power generation, and pressed Congress for legislation to attain this result. Beginning in the year 1922 a number of bills known as the "Swing-Johnson Bills" were introduced in Congress to authorize the construction of a dam at or near the site of the existing Hoover Dam. These efforts culminated in identical bills introduced in the House of Representatives on December 5, 1927, and in the Senate on December 6, 1927. The bill passed the House and was favorably recommended with amendments by the Senate Committee on Irrigation and Reclamation. It came before the Senate for consideration in December, 1928. Arizona Senators Hayden and Ashurst vigorously opposed the bill in the form in which it was presented. One of the reasons for such opposition was that there was no agreement among the Lower Basin States as to the division of water apportioned by the Compact to that Basin. Many amendments were suggested and many attempts were made to compromise the existing differences of opinion. The Upper Basin States opposed the bill in the form in which it was presented because they believed that the building of the proposed dam and canal would furnish California the opportunity to establish excessive uses of Colorado River System water to the detriment of future development in the other States of the Basin. The legislative history that preceded the final enactment of the bill was given by Senator Hayden in hearings on S.75 and S.J. Res. 4 (81st Congress) before the Senate Committee on Interior and Insular Affairs. Such testimony appears at pages 733-757 of the joint hearing on these matters and excerpts therefrom are included within Appendix No. 6 to this Reply. As stated by Senator Hayden, the bill was amended to include several important provisions

for the protection of the States of the Basin other than California. Among such provisions was that requiring the enactment of the California Limitation Act. The full text of this section appears at pages 12-15 of Appendix 2 to the Answer of the Defendants. The requirement for the California Limitation Act is specific, plain and unambiguous. California had to agree to limit its annual use of Colorado River System water to 4,400,000 acre-feet of the water apportioned by Article III (a) of the Compact and to not more than one-half of any excess or surplus water unapportioned by the Compact, and further that such uses must always be subject to the terms of the Compact. Also by Section 4 (a), Congress interpreted and construed the Compact by authorizing a Tri-State Compact whereby out of the 7,500,000 acre-feet apportioned by Article III (a) Nevada shall be entitled to 300,000 acre-feet and Arizona to 2,800,000 acre-feet, and whereby Arizona shall have the exclusive beneficial consumptive use of the water of the Gila River and its tributaries within that State. The essential provision of this authorized agreement appear on pages 13-14 of Appendix No. 2 to the Answer of the Defendants.

The Boulder Canyon Project Act, (hereinafter called Project Act) would never have been adopted except for the inclusion therein of the aforementioned provisions for the protection of the Basin States other than California. The California Legislature enacted the law containing the exact provisions required by said Section 4 (a) and limiting the California use of water to the extent stated therein. (Paragraph X of Complainant's Bill of Complaint sets forth the full text of this Act.)

E. ACTION BY ARIZONA ON THE PROPOSED TRI-STATE COMPACT

The proposed Tri-State Compact authorized by Section 4 (a) of the Project Act was before the Arizona Legislature in 1939 and such Legislature adopted and ratified that proposed Tri-State Compact and approved the Colorado River Compact upon condition that such ratification and approval would be effective if the Tri-

State Compact was ratified by California and Nevada within one year from the effective date of the Arizona Act or such later time as might be granted by the Arizona Governor (Arizona Code Annotated 1939, Section 75-1601 - 1603.) The full text of this statute appears in Appendix No. 7 to this Reply. California and Nevada did not ratify the proposed Tri-State Compact.

F. SUBSEQUENT ACTIONS

Other negotiations have been carried on in an attempt to settle the controversy. None of these negotiations has been successful. Also three unsuccessful attempts have been made by Arizona to secure a judicial solution of the controversy.

The United States Bureau of Reclamation during the years 1942-1948 expanded its Colorado River investigations to include possible additional uses of main stream water in Arizona. As a result of this investigation a report on the Central Arizona Project was made to and approved by the Secretary of the Interior. This report is contained in House Document 136, 81st Congress.

Under date of February 9, 1944, the Secretary of the Interior acting on behalf of the United States entered into a contract with Arizona whereby, subject to certain rights of New Mexico and Utah, Arizona was given the right to receive and put to beneficial consumptive use 2,800,000 acre-feet of main stream water to be delivered from Lake Mead storage, or to be diverted from the main stream and its tributaries above Lake Mead. This contract is set forth in full as Exhibit C to the Complainant's Bill of Complaint. As required by Paragraph 14 of that contract it and the Colorado River Compact were both unconditionally ratified by the Arizona Legislature on February 24, 1944 (see Appendix No. 8 to this Reply).

On October 11, 1948, the States of Arizona, Colorado, New Mexico, Utah, and Wyoming, being the States of the Upper Basin as defined by Article II (f) of the Colorado River Compact, executed a compact which, among other things, apportioned among those states

the beneficial consumptive use of water apportioned to the Upper Basin by Article III (a) of the Colorado River Compact. This Upper Basin Compact specifically provides that it shall be subject to the provisions of the Colorado River Compact (see Upper Basin Compact, preamble, Art. I (b), Art. II (b), Art. III (a), and Art. IV (a)). Arizona ratified the Upper Basin Compact in 1949 (Chap. 4, Arizona Session Laws 1949). All the other states having ratified, the required Congressional consent was given by the Act of April 6, 1949 (Chap. 48, Public Law 37, 81st Congress, first session). In the Upper Basin Compact Arizona specifically reserved its rights "as a State of the Lower Division and as a State of the Lower Basin" (Art. XVIII (a)).

(Hereinafter, the paragraph numbers will in each instance be identical with the number of the Paragraph of the Answer to which Reply is made. Instances will occur in which a numbered Paragraph of the Answer contains no affirmative allegation and hence requires no Reply. This will result in the skipping of the number of such Paragraphs.)

REPLY TO FIRST AFFIRMATIVE DEFENSE

1.

(a) As to Paragraph 1, Complainant says that the allegations thereof descriptive of California projects, water uses, water needs, water rights and water development are immaterial and irrelevant to the issues of this case for the reason that the rights of California to the use of Colorado River System water are defined and limited by the Compact, the Project Act and the California Limitation Act.

(b) Further replying to said paragraph, Complainant admits that the defendants in this action are the State of California and public agencies of that State authorized to serve water to inhabitants and lands of the State. Denies that the rights claimed by the De-

fendants are in their entirety for projects already constructed and now operating. Additions, extensions, and enlargements of such projects are planned by the Defendants with full knowledge of the limitations imposed upon California uses of Colorado River System water by the Compact, the Project Act, and the California Limitation Act. The water supply to which California is limited by the terms of its Limitation Act is for all the constructed California projects to which reference is made in the Answer. The waters of the Colorado River System furnish only a small portion of the municipal water supply of the Los Angeles and San Diego areas. The water supply available to Southern California from other than Colorado River System sources and from the Colorado River System within the limitations of the California Limitation Act is ample to sustain a population and an agricultural and industrial production substantially greater than now exists.

(c) Arizona has numerous projects where the Colorado River System water to which it now seeks to quiet its title may be beneficially and advantageously used in Arizona. Among these contemplated projects are the Central Arizona Project, the undeveloped portions of the Gila Project as originally described in the finding of feasibility by the Secretary of the Interior dated June 21, 1937, and additional acreage along the Colorado River in Arizona including lands within the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. Arizona does not seek to take water from constructed and operating California projects. Those projects are amply supplied by the quantity of Colorado River System water available to California under the Compact, the Project Act, and the California Limitation Act.

2.

(a) As to Paragraph 2, Complainant refers to and incorporates herein by reference Paragraph 1 (a) of its Reply to First Affirmative Defense.

(b) The facts stated in Paragraph 2 (a), as amplified by Plates 6A and 6B and Exhibit A, are admitted

except as herein specifically denied. The minimum water requirement of the Metropolitan Water District of Southern California is substantially less than 1,212,000 acre-feet per year. The greatest diversion of water made to date from the Colorado River System by the Metropolitan Water District was in 1951 and amounted to 210,310 acre-feet. The average diversion of Colorado River water by that District for the period ~~1930~~ 1939 1952 inclusive was 111,186 acre-feet per year. The contracts between the District and the United States contain the provisions set out in Paragraph XI (c) of the Complaint and do not create or constitute a right over and above that permitted by the Compact, Project Act, and the California Limitation Act. As heretofore alleged, the Metropolitan Water District and the area served thereby have other sources of water which when added to the Colorado River System water available to that District are ample to sustain not only the existing population, agriculture and industry, but also very substantial additions thereto. With particular reference to the City of Los Angeles the deliveries of Colorado River System water by the Colorado River Aqueduct for use in that city for the water years 1941 to 1952 inclusive have averaged 7,240 acre-feet per annum and the greatest delivery thereof occurred during the water year 1951-1952 and amounted to only 15,431 acre-feet. Complainant has no knowledge as to the amount of money that has been expended on water facilities to serve the area within the Metropolitan Water District and therefore denies the allegations relative thereto.

(c) The facts stated in Paragraph 2 (b), as amplified by Plate 3 and Exhibit B, are admitted except as herein specifically denied. The irrigated acreage within Palo Verde in 1952 amounted to 63,800 acres. Complainant has no knowledge as to whether Palo Verde is the oldest irrigated area in the Colorado River Basin or as to the amount of money which has been expended on water facilities to serve that area, and therefore denies the allegations relative thereto.

(d) The facts stated in Paragraph 2 (c), as amplified by Plates 4 and 5 and Exhibit C, are admitted ex-

cept as herein specifically denied. The irrigated acreage on the Yuma Project in California in 1952 was 11,839 acres. The irrigated acreage within Imperial in 1950 was 404,791 acres. The estimated irrigable acreage within Coachella is about 78,000 acres. The minimum water requirements of Palo Verde, the Yuma Project in California, Imperial and Coachella are substantially less than 4,150,000 acre-feet of water per annum. All of these districts, except Palo Verde, are served by the All-American Canal. The greatest diversion of water from the Colorado River System by the All-American Canal occurred in 1952 when 3,148,700 acre-feet were diverted for delivery to Imperial, and 495,800 acre-feet for delivery to Coachella. The average diversion of Colorado River System water by the All-American Canal for the period 1936-1952 inclusive was 2,705,908 acre-feet per year for Imperial, and for the period 1946-1952, 275,946 acre-feet per year for Coachella. All of the water diverted from the Colorado River by the All-American Canal is not put to beneficial consumptive use. There is wasted in the Salton Sea and not put to beneficial consumptive use quantities of water varying from 500,000 to 1,500,000 acre-feet per year. In determining the beneficial consumptive use of water diverted by the All-American Canal there must be deducted from the gross diversions the quantity of water wasted into the Salton Sea and not put to beneficial consumptive use. The appropriation rights, if any, of Palo Verde, Yuma Project in California, Imperial and Coachella have no bearing on the rights of those districts, or any of them, to receive Colorado River System water. Such rights to Colorado River System water exist by virtue of contracts made by the Secretary of the Interior pursuant to the Project Act. Such contracts of each of the districts contain the provisions set out in Paragraph XI (c) of the Complaint and do not in their total constitute a firm right to 4,150,000 acre-feet of water per year. The Complainant has no knowledge of the amount of money which has been expended on water facilities for the area served by the All-American Canal or of the amount of money which Imperial and Coachella will have to pay because of

the construction of such facilities and therefore denies the allegations relative thereto.

3.

(a) Admits Paragraph 3 (a) except as to the matters herein specifically denied. Denies that prior to 1920 appropriators in California and to a limited extent in Arizona had appropriated and put to use all of the natural flow of the main stream of the Colorado River which existed in the late summer irrigating season. Denies that any junior appropriators were interfering with uses under any senior appropriations in California or Arizona. Denies that satisfaction of any junior appropriations were dependent upon the construction of any storage works. Denies that the construction of the All-American Canal was of concern to all of the States of the Colorado River Basin. Alleges that the construction of the All-American Canal was of concern primarily to Imperial. Denies that the construction of the mentioned storage works was desired by or essential to all seven States of the Colorado River Basin. Alleges that such storage works were desired and actively promoted by Southern California and not by the basin states except California.

(b) Admits the allegations of Paragraph 3 (b).

4.

(a) As to Paragraph 4, Complainant refers to and incorporates herein Paragraph 1 (a) of its Reply to the First Affirmative Defense.

(b) The Complainant denies each and every allegation of Paragraph 4 (a) except as herein admitted. Admits that on November 24, 1922, irrigation distribution systems were in operation providing service to Palo Verde, Imperial, and the Yuma Project in California. Denies that said irrigation systems were complete. Denies that the acreage served was approximately 610,000 acres and alleges that as of said date the irrigated acreage so served did not exceed 461,000 acres and the beneficial consumptive use thereon of Colorado River System water did not exceed 2,350,000 acre-feet per year. On said date the Arizona irrigated acreage

served by water diverted from the main stream of the Colorado River amounted to 73,000 acres with appropriative rights for sufficient water to irrigate said acreage. On said date a substantially complete irrigation distribution system had been constructed in Arizona on the Gila River, a tributary of the Colorado River, to serve approximately ~~393,000~~ 343000 acres of land on which there was a beneficial consumptive use of the waters of the Gila River and its tributaries of 990,000 acre-feet per annum.

(c) Denies that on November 24, 1922, there were vested appropriative rights, valid under the laws of California, to the beneficial consumptive use of not less than 6,000,000 acre-feet of Colorado River System water per year. The appropriative rights in California as of that date are immaterial to the issues here. Such rights, if any, were and are merged into the contracts of the California districts with the Secretary of the Interior. The alleged California rights are limited by, and may not exceed, those existing by virtue of the contracts between the various California districts and the Secretary of the Interior. By the terms of each of said contracts the quantity of water to be delivered to the districts is subject to the availability of such water under the Compact and the Project Act. Allegations made by attorneys for Arizona in the case of Arizona v. California, 283 U. S. 423, are immaterial to the issues here. At the time of the presentation of said case to this Court Arizona had not ratified the Compact and had no contract with the Secretary of the Interior. Arizona has now ratified that Compact and has such a contract with the Secretary of the Interior. Its appropriative rights, whatever they may have been, are now subject to the availability of water under the Compact, the Project Act, and the Arizona contract with the Secretary of the Interior. As of November 24, 1922, the average annual beneficial consumptive use of water in Arizona from the Gila River and its tributaries amounted to 990,000 acre-feet of water per annum.

5.

As to Paragraph 5, Complainant admits the execution of the Compact as there alleged. Denies that Ari-

zona ever rejected or refused to ratify said Compact. Alleges that Arizona did ratify said Compact on February 24, 1944. Denies that the effect of the Compact, whether as a six-state compact or a seven-state compact, as pleaded in Paragraph 5 of the Answer or in any other portion of the Answer, is in conformity with the reports of the negotiators of said Compact or with the legislative history of the Project Act. Alleges that the reports of the Compact negotiators and the legislative history of the Project Act sustain the positions taken by the Complainant in its Bill of Complaint and in this Reply.

6.

Admits each and every allegation of Paragraph 6.

7.

As to Paragraph 7, Complainant admits that Article II of the Compact contains the definitions as set out in Exhibit A to the Complainant's Bill of Complaint (page 34). The Gila River which is a part of the Colorado River System rises partially in New Mexico and partially in Arizona. It flows across Arizona and joins the main stream of the Colorado River near Yuma, Arizona. Article III (b) was written into the Compact to compensate Arizona for its use of the waters of the Gila River and its tributaries. Prior to the execution of the Compact substantially all of the waters of the Gila River had been appropriated and put to beneficial consumptive use in Arizona. While the California areas served by the defendant districts are within the Colorado River Basin and the Lower Basin as defined by the Compact, such areas, except for a portion of the area served by the Palo Verde district and that portion served by the Yuma Project in California, are without the natural drainage basin of the Colorado River System and waters diverted from the Colorado River System for use in such areas do not return to the river but waters not consumptively used in such areas flow into the Salton Sea or the Pacific Ocean. (The natural drainage basin of the Colorado River and its tributaries is shown by Appendix No. 1).

8.

As to Paragraph 8, Complainant admits the allegations thereof except as specifically controverted herein. The apportionment made by Article III (a) of the Colorado River Compact does not include and was not intended to include, any of the waters of the Gila River or its tributaries. The 7,500,000 acre-feet of water per year apportioned to the Lower Basin by Article III (a) was and is within the water present in the main stream and measured at Lee Ferry, a point approximately 675 miles northerly and upstream from the confluence of the Gila River and the Colorado River. Denies that the term "beneficial consumptive use" ever had or now has the meaning alleged in said paragraph and further denies that such meaning was ever accepted or approved by the Compact negotiators or by the State legislatures which ratified the Compact, or by the Congress of the United States. Section 4 (a) of the Project Act defines "consumptive use" as "diversions less returns to the river." This does not and cannot mean that returns must be measured for each individual diversion. While diversions may be measured by the use of expensive recording devices which require the maintenance of a large and skilled staff, no method of the measurement of the extremely variable return flows has ever been devised. Return flows occur through drainage, seepage, and percolation. In a highly irrigated area, such as that existing in the basin of the Gila River and its tributaries, it is impossible to segregate the return flows from the various diversions. The only practical method of measuring beneficial consumptive use of water is by the net main stream depletion method. This was recognized by the negotiators of the Compact and by the negotiators of the Upper Colorado River Basin Compact. The definition of consumptive use as set forth in the Mexican Water Treaty was not intended to apply and does not apply to the apportionment made by the Compact. Arizona at all times has asserted, and now asserts, that it and New Mexico are entitled to the exclusive beneficial consumptive use of the waters of the Gila River and its tributaries measured in terms of main stream depletion. Such uses of the waters of the Gila

River and its tributaries are chargeable to the apportionment made by Article III (b) of the Compact and are only chargeable to the apportionment made by Article III (a) of the Compact to the extent that such uses exceed 1,000,000 acre-feet of water per annum. As of June 25, 1929 beneficial consumptive use of water of the Gila River and its tributaries was approximately 960,000 acre-feet. Such use now is estimated to amount to 1,170,000 acre-feet per annum. Admits that the words "per annum" as used in the Compact mean "each year" and not an average of uses over a period of years. Alleges that the meaning to be applied to the term "per annum" is not material to the issues of this case. From a practical standpoint beneficial consumptive use is most satisfactorily measured upon an average basis. Until such time as there is full use of the apportionment made by the Compact in either the Lower Basin or the Upper Basin, no issue is presented as to whether or not uses shall be measured annually or on an average.

9.

Admits every allegation of Paragraph 9 except those specifically controverted herein. Alleges that Article III (b) relates solely to the waters of the Gila River and its tributaries. Alleges that no States other than Arizona and New Mexico have any right to the use of the waters of the Gila River and its tributaries. California's contention that it may assert claims to water apportioned by Article III (b) is contrary to the construction placed thereon by the Arizona Legislature which ratified the Compact and by the Congress of the United States which gave its consent to the Compact. The beneficial consumptive use of water apportioned by Article III (b) is for the sole and exclusive use of Arizona and New Mexico.

10.

Complainant admits the allegations of Paragraph 10 except as herein controverted. Denies that, in the event there is a deficiency to supply the rights of Mexico to Colorado River System water, the beneficial consump-

tive use of water apportioned by Article III (b) of the Compact must be curtailed either partially or wholly before the beneficial consumptive use apportioned by Article III (a) is curtailed. When and if any curtailment of Lower Basin use is required to satisfy the Mexican right, then such curtailment must be of the use apportioned by Article III (a). Denies that the Gila River and its tributaries are subject to any obligations imposed by the Mexican Water Treaty. Alleges that the intent of Congress is shown by the provisions of the second paragraph of Section 4 (a) of the Project Act which provides that:

> "(3) the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico **."

11.

Admits the allegations of Paragraph 11 except as specifically denied herein. Denies that the quantity of 75,000,000 acre-feet specified in Article III (d) bears no quantitative relationship to the beneficial consumptive use of 7,500,000 acre-feet apportioned to either the Upper Basin or Lower Basin by Article III (a). Alleges that the 75,000,000 acre-feet specified in Article III (d) bears a direct quantitative relationship to the 7,500,000 acre-feet per year apportioned to the Lower Basin by Article III (a).

12.

Admits the allegations of Paragraph 12.

13.

Admits the allegations of Paragraph 13 except as denied herein. Denies the allegations of unnumbered subparagraph fourth of Paragraph 13. Alleges that the defendants, and none of them, have any firm rights

to the use of any waters of the Colorado River System which are surplus over that apportioned by Articles III (a), (b), and (c) of the Compact. No contract between the United States and any or all of the defendants can give the defendants or any of them any right to or claim upon such surplus water. No use of any of such surplus water by the defendants or any of them can give to the defendants or any of them any right to the continued use of such water.

14.

As to Paragraph 14, Complainant admits the provisions of Compact Article VII therein alleged. As to the other allegations of Paragraph 14, Complainant says that the facts are as stated in Paragraph XVIII of the Bill of Complaint. The rights of the Indians and Indian Tribes in or to the waters of the Colorado River System or the use thereof and the obligations of the United States to the Indians or Indian Tribes are not material or relevant to the determination of the issues presented in this case. In order to make certain that rights of Indians and Indian Tribes will not be adversely affected by this litigation, Complainant offers and firmly binds itself to stipulate with the other parties to this cause, including the intervenor the United States of America, that any decree to be entered herein may, if the Court approves, contain the following provisions so far as the rights of the Indians and Indian Tribes are concerned, to-wit:

"That the decree does not affirm, deny, validate, invalidate, or affect in any manner whatsoever any obligation or obligations of the United States of America to Indians and Indian Tribes and does not in any respect affect or deny the existence, validity or extent of such obligations; and that the decree is not intended to be and shall not be construed as establishing, validating, extending, inhibiting, or limiting existing Indian uses or the extent of rights or claims that may now exist or may hereafter be established or made by or on behalf of the Indians or Indian tribes in or to the waters of the Colorado

River System, or to the beneficial consumptive use thereof."

15.

Admits the allegations of Paragraph 15 except as denied herein. Denies that the term "unimpaired" as used in Article VIII of the Compact means unimpaired as to both quantity and quality. Alleges that said term means unimpaired as to quantity only. Denies that the defendants' rights existing on and prior to June 25, 1929 are as alleged in Paragraph 28 of the Answer and avers that such rights were and are as alleged in the Bill of Complaint and this Reply.

16.

Admits the allegations of Paragraph 16.

17.

As to Paragraph 17, admits that in the year 1923 the legislatures of California, Colorado, Nevada, New Mexico, Utah, and Wyoming ratified the proposed Compact. Denies that the Arizona Legislature rejected that Compact. Alleges that the Arizona Legislature ratified the Compact on February 24, 1944 (Appendix No. 8).

18.

As to Paragraph 18 alleges that the said governor had no authority or power to accept or reject the proposed Compact as that power and authority was vested solely in the Legislature of Arizona.

19.

As to Paragraph 19, Complainant says that as to the ratification of the Compact as a Six-State Compact prior to the enactment by California of its Limitation Act the facts are as stated herein and not otherwise. Colorado by its Act of February 26, 1925 waived the provisions of Article XI of the Compact, ratified said Compact and provided that the Compact should become effective:

" * * whenever at least six of the signatory states shall have consented thereto and the Congress of the United States shall have given its consent and ap-

proval, Provided, however, that this Act shall be of no force or effect until a similar Act or Resolution shall have been passed or adopted by the Legislatures of the States of California, Nevada, New Mexico, Utah, and Wyoming."

The Nevada Act of March 18, 1925, the New Mexico Act of March 17, 1925, the Utah Act of March 13, 1925, and the Wyoming Act of February 25, 1925 contained substantially identical language. The California Act of April 8, 1925 waived the provision of Article XI and ratified the Compact with the following proviso:

" * * provided, however, that said Colorado River Compact shall not be binding or obligatory upon the State of California by this or any former approval thereof, or in any event until the President of the United States shall certify and declare (a) that the Congress of the United States has duly authorized and directed the construction by the United States of a dam in the main stream of the Colorado River, at or below Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and, (b) that the Congress of the United States has exercised the power and jurisdiction of the United States to make the terms of said Colorado River Compact binding and effective as to the waters of said Colorado River."

Until the enactment of the Project Act on December 21, 1928, there was no consent by the Congress of the United States to a Six-State Compact. The consent granted by the Project Act was conditioned upon ratification by all seven basin states within a six months period or upon ratification by six states including California, and the passage by California of an act limiting its uses in accordance with Section 4 (a) (2) of the Project Act. In either event a proclamation by the President of the United States was required to make the Compact effective. Prior to the enactment of the Project Act, Utah, by its Act of January 19, 1927, had repealed its aforementioned Act of March 13, 1925. On January 10, 1929, California ratified the Compact

as a Seven-State Compact. On March 4, 1929, California enacted its Limitation Act and ratified the Compact as a Six-State Compact. On that date there was no effective ratification of the Compact by Utah. On March 6, 1929, Utah ratified the Compact as a Six-State Compact. Upon such action by Utah, and not before, there was a compliance with the conditions established by the Project Act except for the requisite Presidential proclamation. On June 25, 1929, the President of the United States proclaimed the Compact effective. Until such proclamation by the President the Compact had no force and effect. In the effective ratification of the Compact by each of the Colorado River Basin States, in the California Limitation Act, in the grant of consent by Congress in the Project Act, and in the presidential proclamation of June 25, 1929, there was no inhibition against the ratification of the Compact by Arizona and there was no action which would deprive Arizona of the benefits to which it was entitled under either the Project Act or the California Limitation Act in the event that the Compact should thereafter be ratified by Arizona.

20.

Admits the allegations of Paragraph 20 except as herein specifically denied. Denies that the legislation referred to in the second unnumbered subparagraph of Paragraph 20 was solely for the purpose of making possible the construction of the projects there mentioned or to assure them an adequate water supply. Alleges that such legislation had many other purposes including the grant of consent to the Compact and the protection of the rights of and water uses in the various Colorado River Basin states. Denies that the legislative history of the Project Act supports the positions taken with reference thereto by the defendants in their answer. Alleges that the legislative history of that Act supports the position of the complainant as asserted in its bill of complaint and in this reply.

21.

Admits the allegations of Paragraph 21 except as specifically denied herein. Denies that the term "ex-

cess or surplus waters unapportioned by said Compact" as used in the Project Act includes the increase of 1,000,000 acre-feet per annum permitted to the Lower Basin by Article III (b) of the Compact. Alleges that Article III (b) of the Compact pertains to the use of the waters of the Gila River and its tributaries and that the use of such waters is for the benefit of Arizona and New Mexico and the water users in these states. Alleges that Section 4 (a) of the Project Act as originally presented to the Senate Committee on Irrigation and Reclamation, 70th Congress, First Session in S. 1274 read as follows:

> "Sec. 4 (a) No work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures until the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have approved the Colorado River Compact mentioned in Section 12 hereof."

The Arizona Senators refused to accept or approve the bill in such form. Thereafter, to protect Arizona and the other Colorado River Basin states, except California, Section 4 (a) was amended and passed in the form appearing in Appendix 2 to the Answer, pp. 12-13. The effect of the Project Act as so enacted into law and of the subsequent California Limitation Act is as stated in Paragraphs XXIV and XXV of the Bill of Complaint.

22.

Admits the allegations of Paragraph 22 except as specifically denied herein. Admits that the Secretary of the Interior made contracts with the defendants as alleged in the last sentence of the first unnumbered subparagraph of Paragraph 22 but alleges that such contracts, and each and all of them, create in the defendants no rights to the use of water in excess of the rights to which California is limited by its Limitation Act.

Alleges that the Secretary has made a contract with Arizona for the delivery to and use by Arizona of 2,800,000 acre-feet of main stream water plus one-half of the surplus or excess water unapportioned by the Compact. Such contract with Arizona, in accordance with the Project Act and the California Limitation Act, leaves Arizona free to use, in addition to the quantities of water stated in said contract, 1,000,000 acre-feet per annum of the waters of the Gila River and its tributaries.

Denies Section 4 (a) (1) of the Project Act recognizes any right in California to the use of any water covered by Article III (b) of the Compact. Denies that the so-called Tri-State Agreement authorized by the second paragraph of Section 4 (a) of the Project Act recognizes "an allocation to Arizona of one-half of any excess or surplus waters unapportioned by Article III (a) of the Colorado River Compact." Alleges that such recognized allocation to Arizona includes "one-half of the excess or surplus waters unapportioned by the Colorado River Compact." The use of the water covered by Article III (b) of the Compact is apportioned. The term "excess or surplus waters" does not include and was not intended to include the use of any of the water referred to in Article III (b) of the Compact. It was the intent of the Project Act and the California Limitation Act to deny to California and its water users any rights to the use of water apportioned by Article III (b). Admits that the so-called Tri-State Agreement proposed by the second paragraph of the Project Act makes no provisions for uses by Utah and New Mexico, which States are partly within the Lower Basin. Arizona has recognized in its Complaint that its rights to the use of 3,800,000 acre-feet of water per year plus one-half of the excess or surplus waters unapportioned by the Compact are subject to the rights of Utah and New Mexico as Lower Basin States.

By act of its Legislature in 1939 (Arizona Code Annotated, Secs. 75-1601 to 75-1603 inclusive) Arizona ratified the Tri-State Compact authorized by the second paragraph of Section 4 (a) of the Project Act

upon the condition that the States of California and Nevada ratify such proposed Tri-State Compact. Both California and Nevada failed to ratify such Tri-State Compact. Such 1939 Act of the Arizona Legislature appears as Appendix No. 7 of this Reply. Said 1939 Act of the Arizona Legislature also ratified the Compact without reservation but upon the condition that the Tri-State Compact be ratified by California and Nevada within the time fixed by such Act.

23.

Admits the allegations of Paragraph 23.

24.

Admits the allegations of Paragraph 24. Alleges that the California Limitation Act is not and was not conditioned either upon the ratification or the non-ratification of the Colorado River Compact by Arizona. The limitations imposed by said Act are and were unconditional and are now, and at all times since its enactment have been, binding upon California and all of its water users.

25.

Admits the allegations of Paragraph 25.

26.

Admits the allegations of Paragraph 26 except that it denies that the effect of the Act therein referred to is as stated in Paragraph 59 of the Traverse in the Defendants' Answer.

27.

Denies the allegations of Paragraph 27. Alleges that the effect of the Compact, the Project Act, and the California Limitation Act is as stated in the Bill of Complaint and in this Reply.

28.

(a) As to Paragraph 28, Complainant refers to and incorporates herein by reference Paragraph 1 (a) of its Reply to the First Affirmative Defense.

(b) Denies the allegations of Paragraph 28. Alleges that on June 25, 1929, projects had been constructed and were in operation in California for the irrigation of no more than 473,500 acres of land which required a net main stream depletion of about 2,902,000 acre-feet of water per annum. The maximum quantity of Colorado River System water reasonably required by Palo Verde, the Colorado River Aqueduct and the All-American Canal at this time is not in excess of 3,663,000 acre-feet per annum. All uses of Colorado River System water in California are limited by the Project Act and California Limitation Act as averred in the Complaint and in this Reply. Appropriative rights, if any, to the use of Colorado River System water under California law are not binding upon the United States, Arizona or any other Colorado River Basin State except California. Such rights, if any, were and are merged into the contracts between the California districts and the United States and are subject to the provisions of the Compact, Project Act, and Limitation Act.

29.

Admits the allegations of Paragraph 29 except that it denies that the contracts therein mentioned conclusively provide for the payment of any fixed sum on account of the cost of the Imperial Dam and All-American Canal, and alleges that there is as yet no definite agreement between the United States and the California entities for the repayment of such costs. The effect of the contracts mentioned in Paragraph 29 is as set forth in the Bill of Complaint and in this Reply.

30.

Admits the allegations of Paragraph 30 except that it alleges that the effect of the contracts therein mentioned is as set forth in the Bill of Complaint and in this Reply.

31.

Admits the allegations of Paragraph 31.

32.

Admits the allegations of Paragraph 32 except that it denies that any so-called Statutory Compact relative to the use of the waters of the Colorado River System now exists or ever existed between the United States and California. Colorado River System water is available for use in California only pursuant to and in compliance with the Compact, the Project Act, and the California Limitation Act. The Seven Party Water Agreement is without any validity, force, or effect whatsoever to create any rights in California or in any of its water users to the use of Colorado River System Water in excess of 4,400,000 acre-feet per year.

33.

As to Paragraph 33, admits that the Secretary of the Interior promulgated the amended general regulations therein mentioned and that such regulations are now in full force and effect. Denies all other allegations of Paragraph 33. Alleges that such general regulations and the amendments thereto cannot and do not increase the quantity of water available for use in California under the Compact, the Project Act, and the California Limitation Act.

34.

Admits that the United States has made the contracts with the defendant Districts therein alleged and denies all other allegations of said paragraph. Alleges that the effect of said contracts is as set forth in the Bill of Complaint and in this Reply.

35.

Denies the allegations of Paragraph 35 except that it admits the existence of the so-called "Agreement of Compromise between the Imperial Irrigation District and the Coachella Valley County Water District," and admits that the rights of the Districts therein mentioned to the use of Colorado River System water are each and all subject to the availability thereof under the Compact, the Project Act, and the California Limitation Act.

36.

Denies all the allegations of Paragraph 36. Alleges that the use of Colorado River System water within the State of California is limited by the Project Act and the Limitation Act to the quantities of water therein mentioned and that no contracts between the United States and the Metropolitan District, or any other California contracting entity, and no contract between the California contracting entities can create any right to the use in California of more than 4,400,000 acre-feet of water per annum apportioned by Article III (a) of the Compact plus not more than one-half of the excess or surplus waters unapportioned by said Compact. The 1,000,000 acre-feet of water referred to in Article III (b) is not available for use in California and is not included within the term "surplus or excess water." Rights to the use of surplus or excess water have never been determined and cannot be determined until after October 1, 1963.

37.

(a) As to Paragraph 37, Complainant refers to and incorporates herein by reference Paragraph 1 (a) of its Reply to the First Affirmative Defense.

(b) Alleges that as to the use by California of 4,400,000 acre-feet of water apportioned by Article III (a) of the Compact and the use by Arizona of 2,800,000 acre-feet of water apportioned by Article III (a) of the Compact and as to the use by Nevada of 300,000 acre-feet of water apportioned by Article III (a) of the Compact, the contracts between the United States and the California contracting entities, the contract between the United States and Arizona, and the contract between the United States and Nevada are on a parity. No one of said contracts has any priority or any preferential rights over any other contract. All pertain to the apportionment of III (a) water. So far as the California contracts provide for the delivery of more than 4,400,000 acre-feet of water per annum, such contracts relate to "surplus or excess water" and the reference is to water which is surplus or excess over that apportioned by Article III (a), (b), and (c.) Such surplus

may not be determined or apportioned until after October 1, 1963. The contract between the United States and Arizona is paramount and superior to any claims by California for the use of Colorado River System water in excess of 4,400,000 acre-feet per annum.

REPLY TO SECOND AFFIRMATIVE DEFENSE

38.

Paragraph 38 of the Answer incorporates by reference all the allegations of the First Affirmative Defense (Paragraphs 1 to 37 inclusive). The plaintiff in reply incorporates by reference its reply to said paragraphs 1 to 37 inclusive.

39.

(a) As to Paragraph 39 (a) admits that California ratified the Compact as a Six-State Compact and denies each and every other allegation thereof. California has ratified the Compact as a Seven-State Compact and as a Six-State Compact. The legislative history of the ratification of said Compact by California discloses that

(1) California ratified the Compact as a Seven-State Compact on February 3, 1923 (Act of February 3, 1923; Ch. 17, 45th Session; Statutes and Amendments to the Codes, 1923, pp. 1530-1535;

(2) California conditionally ratified the Compact as a Six-State Compact on April 8, 1925 (Act of April 8, 1925; Ch. 33, 46th Session; Statutes and Amendments to the Codes, 1925, pp. 1321-1322);

(3) California again ratified the Compact as a Seven-State Compact on January 10, 1929 (Act of January 10, 1929; Ch. 1, 48th Session, Statues and Amendments to the Codes, 1929, pp. 1-7);

(4) California ratified the Compact as a Six-State Compact on March 4, 1929 (Act of March 4, 1929; Ch. 15, 48th Session; Statutes and Amendments to the Codes, 1929, pp. 37-38);

The California Limitation Act was enacted March 4, 1929, the same date as the ratification of the Compact by California by the Act referred to in (4) above. Such Act, referred to in (4) above, provides in part;

> "* * * and said Compact shall become binding and obligatory upon the State of California, and upon the other signatory states which have *ratified or may hereafter ratify said Compact when at least six of the signatory states shall have consented thereto, approved and ratified the same,* and the Congress of the United States shall have given its consent and approval; * * *." (emphasis supplied)

The Project Act was enacted December 21, 1928. Section 4 (a) thereof provides in substance that the Act shall not become effective until the seven Colorado River Basin states shall have ratified the Compact and the President of the United States shall have so publicly proclaimed or "if said states fail to ratify the said Compact within six months from the date of the passage of this Act" then until six states, including California, ratify the Compact and the President of the United States so publicly proclaims and the State of California passes an act limiting its uses as therein stated. Section 13 (a) of the Project Act provides:

> "The Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to act of Congress approved August 19, 1921, entitled "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of Article II of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have

approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided."

On June 25, 1929, the President of the United States proclaimed the Compact effective. There is nothing in the ratification of the Compact by California, or by any other state, or by the United States which precludes Arizona from ratifying said Compact. The California Limitation Act was enacted "for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming" as an express covenant and in consideration of the passage of the Project Act. There is no provision in the California Limitation Act that its provisions shall not be effective in the event Arizona ratifies the Compact. There is no provision in the Project Act that the conditions imposed by Section 4 (a) shall not be effective when and if Arizona ratifies the Compact after the expiration of the six-month period therein mentioned. There is no provision in the legislative action of any of the states of Colorado, Nevada, New Mexico, Utah, or Wyoming which destroys or in any way affects the ratification of the Compact by any of such states in the event that California passed its Limitation Act and Arizona ratified the Compact after six months from the effective date of the Project Act. By its action in passing its Limitation Act and ratifying the Compact as a Six-state Compact within less than three months after the passage of the Boulder Canyon Project Act and more than three months before the expiration of the six months period mentioned in Section 4 (a) of the Project Act, California intended that the provisions of the said Limitation Act should be effective regardless of whether Arizona thereafter ratified said Compact.

(b) Denies the allegation of Paragraph 39 (b). California could not have passed its Limitation Act only because of the alleged rejection of the Compact by Arizona because the six months period specified in Section 4 (a) of the Project Act had not half expired at the time of the enactment of the California Limitation Act. California enacted the Limitation Act because it de-

sired the construction of Hoover Dam, the All-American Canal and the other facilities authorized by the Project Act. Neither the ratification nor the non-ratification of the Compact by Arizona was any inducement to California in its enactment of the said Limitation Act.

(c) Denies the allegations of Paragraph 39 (c). As a result of the passage of the Project Act and the California Limitation Act and the ratification of the Compact the defendants received the benefits averred in Paragraph XXIV of the Complaint.

(d) Denies the allegations of Paragraph 39 (d).

40.

As to Paragraph 40 admits that the three original actions in the United States Supreme Court referred to in said paragraph were instituted by Arizona. The issues presented therein and the decisions of the Court thereon are as stated in the opinions of the Court reported at 283 U. S. 423, 292 U. S. 341, and 298 U. S. 558. All of said actions were brought and determined before Arizona ratified the Compact and before Arizona had entered into a water delivery contract with the United States (Exhibit C to Complaint). In none of said cases could Arizona rely upon or receive any benefit from the Compact or related documents. Admits that the pleadings and briefs of Arizona in the case decided in 283 U. S. 423 contained the extracts appearing at pages 386-399, Appendix 28 to Answer. None of said allegations or statements are material to the issues presented in the instant case. Denies all allegations of said Paragraph 40 not herein specifically admitted.

41.

As to Paragraph 41, admits that the capacities of the water facilities therein mentioned and the terms of the contracts therein averred were reported to the excutive and legislative branches of the United States Government. Denies that there ever has been any administrative or legislative construction by the United

States of the Compact and related documents which conflicts with the construction of those documents set forth in the Bill of Complaint and in this Reply. Denies all allegations of Paragraph 41 not herein specifically admitted.

Further replying to Paragraph 41, Complainant alleges that the Congress of the United States by its enactment of the Project Act and the Secretary of the Interior of the United States by his execution of the February 9, 1944 water contract with Arizona have construed the Compact and the rights of Arizona as follows:

(1) Arizona has the right to the beneficial consumptive use of 2,800,000 acre-feet of water diverted from the main stream of the Colorado River either above or below Hoover Dam subject only to the rights of Utah and New Mexico as Lower Basin States.

(2) If and when any surplus waters of the Colorado River System unapportioned by Article III (a), (b), and (c) of the Compact are apportioned to the Lower Basin, Arizona shall be entitled to one-half thereof less a quantity not to exceed one-twenty-fifth of the total to the State of Nevada and less whatever rights Utah and New Mexico may have in and to such surplus.

(3) Arizona has the right to the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of Arizona.

(4) The waters of the Gila River and its tributaries except return flow after the same enters the Colorado River shall never be subject to any diminution by reason of any allowance of water by treaty to Mexico.

Further replying to Paragraph 41, Complainant says that the 1949 action of Congress in granting its consent to the Upper Colorado River Basin Compact constitutes a recognition by Congress of the fact that Arizona is a party to the Colorado River Compact of 1922 and a reaffirmation by the Congress of the integrity of the

Colorado River Compact and its related statutes both state and Federal, including the California Limitation Act.

42.

(a) Denies the allegations of Paragraph 42 (a).

(b) As to Paragraph 42 (b) denies that the defendants took any of the actions therein mentioned in reliance upon any action or non-action by Arizona. The defendants were motivated entirely by a desire to obtain the construction and use of the facilities made possible by the Compact, the Project Act, and the California Limitation Act. Denies that the defendants, or any of them, have underwritten all the cost of Hoover Dam. Alleges that substantially all of the construction costs of Hoover Dam will be repaid by revenues derived from charges imposed upon the use of falling water for the production of hydroelectric power which is sold to Lower Basin consumers at rates substantially less than electric power generated by fuel can be produced and sold.

Denies that the defendants have developed an economy which is dependent upon the construction of the Compact and related documents as set forth in their Answer. Alleges that the Defendants each and all well knew that but for the enactment of the Project Act and the California Limitation Act, the Compact would not have become effective and well knew that said Limitation Act was passed for the benefit of Arizona and the other Colorado River Basin States except California. Denies that either the defendants, or any of them, or the Congress or the executive officers of the United States took any action whatsoever in reliance upon any action or non-action or representation or interpretation of Arizona. Alleges that all actions by the defendants and by the United States in connection with the development of the water resources of the Lower Colorado River Basin were taken in reliance upon the terms, conditions, and provisions of the Compact, the Project Act, and the California Limitation Act as construed

and applied in the Bill of Complaint and in this Reply. Denies all allegations of Paragraph 42 (b) not herein specifically admitted.

(c) Denies the allegations of Paragraph 42 (c).

REPLY TO THIRD AFFIRMATIVE DEFENSE

FOR A FIRST REPLY TO THE THIRD AFFIRMATIVE DEFENSE.

Complainant says that any and all allegations as to the so-called appropriative rights of California and its water users are immaterial and irrelevant to any consideration or determination of the issues in the instant case for the reasons that:

(1) Appropriative rights, if any, under California law are not binding upon the United States, the State of Arizona or any other Colorado River Basin State except the State of California.

(2) Whatever rights California and any of its water users may have had at any time to the use of the waters of the Colorado River System are now, and at all times since the effective date of the Compact have been, subject to the terms of the Compact, the Project Act, and the California Limitation Act.

(3) Any rights to the use of Colorado River System water are also subject to the terms and provisions of the various contracts between the Secretary of the Interior and the contracting California entities.

FOR A SECOND REPLY TO THE THIRD AFFIRMATIVE DEFENSE.

43.

Paragraph 43 of the Answer incorporates by reference all the allegations of the First and Second Affirmative Defenses (Paragraph 1 to 42 inclusive). The Complainant in reply incorporates by reference its Reply to said Paragraphs 1 to 42 inclusive.

44.

(a) As to Paragraph 44 (a), admits that there are approximately 120,500 acres within the boundaries of Palo Verde. This includes 16,000 acres of Mesa land which can only be served by a pump system which has not as yet been constructed. Of the total acreage only about 64,000 acres were irrigated in 1952 and only a total of 75,000 acres are irrigable. The Complainant is without knowledge or information as to the year when water was first diverted from the Colorado River System for use within the Palo Verde area and is without knowledge or information as to whether or not water has been continuously diverted for use in said area after the year in which the first diversions occurred. Palo Verde has entered into a contract with the United States for the delivery to that District of water from the Colorado River System. Such contract makes the delivery of water contingent upon the availability thereof under the Compact and the Project Act. Any and all use of Colorado River System water by Palo Verde is subject to the California Limitation Act. Admits that the District and its predecessors in title have constructed some works to divert and use water from the Colorado River System and that some works are now in operation for this purpose. Complainant is without knowledge or information as to the extent of such works or as to the facts concerning the operation thereof. Denies all allegations of Paragraph 44 (a) not specifically herein admitted.

(b) As to Paragraph 44 (b), admits that there are approximately 25,000 acres of land under the Yuma Project in California. A part of such land, the exact quantity thereof being unknown to the Complainant, lies within Indian Reservations. Of this total acreage approximately 12,000 acres are irrigable and in 1952, there were irrigated approximately 12,000 acres. Admits the statutes referred to in Paragraph 44 (b), but denies their applicability to any issues presented for determination in this case. Complainant is without knowledge or information as to the appropriative rights, if any, of the Yuma Project in California under the laws of Cali-

fornia, as to the year when water was first diverted from the Colorado River System for use on the Yuma Project in California, and as to whether water has been continuously diverted for use in said area after the year in which the first diversion occurred. The Yuma Project in California is irrigated by water diverted from the Colorado River System by the All-American Canal. The right to take Colorado River System water through the All-American Canal is contingent upon the availability of such under the Compact and the Project Act. Any and all use of Colorado River System water by or in the Yuma Project in California is subject to the California Limitation Act. Complainant denies all allegations in Paragraph 44 (b) not herein specifically admitted.

(c) As to Paragraph 44 (c), admits that there are approximately 900,000 acres within the boundaries of Imperial. Complainant has no knowledge as to whether said District is committed to include 90,000 acres or any part thereof in addition thereto. The said area of 900,000 acres includes approximately 325,000 acres in the areas known as East Mesa and West Mesa. No distribution systems have ever been constructed to serve the lands located on either the East Mesa or West Mesa. The Bureau of Reclamation, in a joint study with the University of California, has reported adversely on the irrigation of either the East Mesa or the West Mesa because of poor soil conditions. Of the total acreage within the District there is a maximum of about 600,000 acres of irrigable land and of this, approximately 400,000 acres were actually irrigated in the year 1950. The Complainant is without knowledge or information as to the appropriative rights, if any, of Imperial under the laws of the State of California, as to when water was first diverted from the Colorado River System for use within the District, and as to whether water has been continuously diverted for use in said area after the year in which the first diversion occurred. Imperial has entered into contracts with the United States for the delivery

to that District of water from the Colorado River System. Such contracts make the delivery of water contingent upon the availability thereof under the Compact and the Project Act. Any and all use of Colorado River System water by or in Imperial is subject to the California Limitation Act. Complainant admits that the District and its predecessors in title and its water users have constructed some works to divert and use water from the Colorado River System and that some works are now in operation for this purpose. Complainant is without knowledge or information as to the extent of such works, or as to the fact concerning the operation thereof. Denies all allegations of Paragraph 44 (c) not specifically admitted herein.

(d) As to Paragraph 44 (d), Complainant is without knowledge or information as to the total number of acres within the boundaries of Coachella. Alleges that the project of the United States Bureau of Reclamation for the irrigation of lands within Coachella contemplates the irrigation of only 78,000 acres of such land. Complainant has no knowledge or information as to the quantity of land now irrigated within Coachella. Complainant is without knowledge or information as to the appropriative rights, if any, of Coachella under the California law, as to when water was first diverted from the Colorado River System for use within Coachella, and as to whether water has been continuously diverted for use within said area after the year within which the first diversion occurred. Coachella has entered into a contract with the United States for the delivery of water from the Colorado River System. Such contract makes the delivery of water contingent upon the availability thereof under the Compact and the Project Act. Any and all uses of Colorado River System water by or in Coachella is subject to the California Limitation Act. Admits that Coachella, its predecessors and property owners have constructed some works to divert and use water from the Colorado River System and that some works are now in operation for this purpose. Complainant is without knowledge or information as to the extent of such works, or as to the

facts concerning the operation thereof. Denies all allegations of paragraph 44 (d) not specifically admitted herein.

(e) Denies all the allegations of Paragraph 44 (e) except that it admits the existence of the August 18, 1931 agreement and the February 14, 1934 agreement of compromise between Imperial and Coachella. The legal effect of such agreements is immaterial and irrelevent to the issues of this case. All uses of Colorado River System waters within California are controlled by the Compact, the Project Act, and the California Limitation Act.

45.

(a) As to Paragraph 45 (a) admits that the City of Los Angeles is within The Metropolitan Water District of Southern California. The Complainant is without knowledge or information as to the appropriative rights, if any, of the City of Los Angeles or The Metropolitan Water District under the laws of California and as to the commencement of construction of works for the diversion of Colorado River System water for use in the Los Angeles area. The use of Colorado River System water by The Metropolitan Water District and by the cities and communities within that District is governed by contracts between that District and the Secretary of the Interior. The delivery of water thereunder is subject to the availability thereof under the Compact and the Project Act. Any and all uses of Colorado River System water by or in the City of Los Angeles are subject to the California Limitation Act. Denies all allegations of Paragraph 45 (a) not specifically admitted.

(b) As to Paragraph 45 (b), Complainant admits that the City of San Diego is now included within The Metropolitan Water District of Southern California and that a portion of the County of San Diego is also within that District. Complainant is without knowledge or information as to the appropriative rights, if any, of the City of San Diego, County of San Diego, or the Metropolitan Water District under the laws of Cali-

fornia. Admits the existence of the October 4, 1946 agreement between the City of San Diego, County of San Diego, San Diego County Water Authority, and The Metropolitan Water District. The legal effect of such agreement is immaterial and irrelevant to the issues of this case. Any and all uses of Colorado River System water by or in either the City of San Diego or the County of San Diego are subject to the California Limitation Act. Denies all allegations of Paragraph 45 (b) not herein specifically admitted.

(c) As to Paragraph 45 (c), Complainant admits a number of cities, districts, and other entities are included within The Metropolitan Water District of Southern California but Complainant has no knowledge or information as to the number or extent thereof. Complainant has no knowledge or information as to the appropriative rights, if any, of the Cities of Los Angeles and San Diego for the use of water of the Colorado River System, as to whether or not such alleged rights are now administered by The Metropolitan District or as to the appropriations, if any, by The Metropolitan District of waters of the Colorado River System. Complainant is further without knowledge or information as to when the first diversion of water from the Colorado River System was made within The Metropolitan Water District area and as to whether Colorado River System water has been continuously used in said area since the year in which the first diversion occurred. Any and all uses of Colorado River System water by or in The Metropolitan Water District are subject to the California Limitation Act. Denies all allegations of Paragraph 45 (c) not herein specifically admitted.

(d) Complainant admits that The Metropolitan Water District and the Cities of Los Angeles and San Diego have constructed some works to divert and use water from the Colorado River and that some works are now in operation for this purpose. Complainant is without knowledge or information as to the extent of such works or as to the facts concerning the operation thereof. Denies all allegations of Paragraph 45 (d) not herein specifically admitted.

46.

Denies all the allegations of Paragraph 46. Alleges that all uses of Colorado River water within California are governed by the Compact, the Project Act, and the California Limitation Act. Appropriative rights, if any, to the use of Colorado River System water in California, are not binding upon Arizona or any other Colorado River Basin State and are immaterial to any issue presented in this case.

47.

As to Paragraph 47, Complainant admits that the appropriations of Colorado River System water for beneficial consumptive use on the Yuma Project in Arizona, portions of the Colorado River Indian Reservation, and miscellaneous uses from the main stream and tributaries of the Colorado River, including the Gila River, are prior to claimed appropriations of the Defendants. Denies that the beneficial consumptive use of the waters of the Gila River and its tributaries in Arizona is 2,000,000 acre-feet per annum, and alleges that the beneficial consumptive use of the waters of the Gila River and its tributaries in Arizona is as set forth in the Bill of Complaint and in this Reply. Denies the allegations of Paragraph 47 not heretofore expressly admitted. Alleges that all uses of Colorado River System water within California are governed by the Compact, the Project Act, and the California Limitation Act. Appropriative rights, if any, to the use of Colorado River System water in California are not binding upon the United States, Arizona, or any other Colorado River Basin state; and are immaterial to any issue presented in this case.

REPLY TO FOURTH AFFIRMATIVE DEFENSE.

48.

Paragraph 48 of the Answer incorporates by reference all the allegations of the First, Second, and Third Affirmative Defenses (Paragraphs 1 to 47 inclusive).

The complainant in reply incorporates by reference its Reply to said Paragraphs 1 to 47 inclusive.

49.

As to Paragraph 49 alleges that the question of the indispensability of the United States as a party to this case is now moot as the United States has sought and been granted leave to intervene.

50.

As to Paragraph 50, admits that the United States has been granted leave to intervene in this case. All parties whose presence is essential to a determination of this case are now before the Court.

REPLY TO AFFIRMATIVE ALLEGATIONS CONTAINED IN TRAVERSE

57.

As to Paragraph 57 (b), admits the execution and existence of the Seven-Party Agreement. Complainant is without knowledge or information as to the purpose of that agreement. Alleges that insofar as said agreement attempts to apportion among the California water users any rights to the consumptive use of Colorado River System water in excess of 4,400,000 acre-feet per year it was and is without any force, effect, or validity whatsoever. Denies all of the allegations of Paragraph 57 (b) not specifically admitted herein.

As to Paragraph 57 (d), denies that the defendants have or own rights to the use of the quantities of Colorado River System water therein set forth. Alleges that the defendants collectively have no firm right to use any Colorado River System water in excess of 4,400,000 acre-feet per year. The quantities of Colorado River System water unapportioned by Article III (a), (b), and (c) of the Compact have never been determined and may not be apportioned until after October 1, 1963. Denies all allegations of Paragraph 57 (d) not specifically admitted herein.

58.

As to Paragraph 58 (a), admits the affirmative allegations therein relating to Hoover, Parker and Davis Dams.

As to Paragraph 58 (b), alleges that the facilities therein referred to store, take and divert water only from the main stream of the Colorado River and none of them store, take or divert any water from the Gila River or any of its tributaries. Admits all other allegations of Paragraph 58 (b).

As to Paragraph 58 (c), admits that the facilities mentioned therein have the physical capacity to divert Colorado River System water greatly in excess of 4,400,000 acre-feet per year. Denies that the defendants, or any of them, have any firm right to take, divert, and use more than 4,400,000 acre-feet of Colorado River System water per year. Alleges that the quantity of surplus or excess water has never been determined and under the Compact may not be determined until after October 1, 1963. Denies that any claim of California or any of its water users to 5,362,000 acre-feet of water per year from the Colorado River System or to any quantity of water from the Colorado River System in excess of 4,400,000 acre-feet per year is rightful or that any of the defendants are lawfully entitled thereto. California and its water users have only the right to use such of the waters of the Colorado River System as are available to them under the Compact, the Project Act, and the California Limitation Act.

59.

As to Paragraph 59 (c), denies the execution, existence, and validity of the so-called Statutory Compact. Denies that the interpretation, intent, and effect of the Compact as set out in the First Affirmative Defense and as relied on by California are in conformity with the text of that document, the legislative history thereof, or the contemporaneous interpretations thereof. The intent, meaning, and effect of that Compact is as set forth in the Bill of Complaint and in this Reply, and the intent, meaning and effect so relied on by Arizona is in

conformity with the intent of the Congress of the United States as expressed in the Project Act, and in conformity with the intent of the Secretary of the Interior as shown by his execution of the February 9, 1944 Arizona water contract. Alleges that any interpretations presented by Arizona in the case of Arizona v. California, 283 U. S. 423, are irrelevant and immaterial to the issues herein presented because such case was presented and determined prior to the ratification of the Compact by Arizona and the execution by Arizona and the Secretary of the Interior of the Arizona water contract. Denies that Arizona rejected the Compact. Denies each and every allegation of Paragraph 59 (c) not specifically admitted herein.

As to Paragraph 59 (d), denies the execution, existence, or validity of the so-called Statutory Compact. Alleges that Arizona in this action seeks to establish its rights as they exist under the Compact, the Project Act, and the California Limitation Act, which Limitation Act was passed for the benefit of Arizona and other Basin States, and that Arizona is entitled to receive such benefit. Denies all allegations of Paragraph 59 (d) not specifically admitted herein.

As to Paragraph 59 (e), admits the allegations thereof. Alleges that the quotation from the Arizona contract therein referred to is only a partial quotation. The full text of the Arizona Water Contract appears as Exhibit C to the Bill of Complaint.

60.

As to Paragraph 60, admits the existence of the March 30, 1942 and January 3, 1944 contracts between the United States and the State of Nevada pertaining to the delivery of Colorado River System water for use in Nevada in a quantity not to exceed 300,000 acre-feet per year. Complainant has no knowledge or information as to whether Nevada has contended that its rights to the use of Colorado River System water are not limited to 300,000 acre-feet per year or any other specific quantity, or as to legislation for the authorization of projects in Nevada requiring an aggregate annual

beneficial consumptive use of more than 300,000 acre-feet of Colorado River System water per year.

61.

As to Paragraph 61, admits that the rights of New Mexico and Utah to the use of Colorado River System water apportioned by the Compact to the Lower Basin have never been determined. Denies that there are any present or potential controversies between Arizona and either Utah or New Mexico over the use of waters of the Colorado River apportioned by the Compact to the Lower Basin.

62.

As to Paragraph 62, admits the allegations thereof except that it denies that the term "any and all sources" as used in the Mexican Water Treaty means the entire Colorado River System. Alleges that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, are not subject to any diminution whatever by reason of the Mexican Water Treaty.

63.

As to Paragraph 63, alleges that there is available to Arizona, Nevada, New Mexico, and Utah out of the waters of the Colorado River System apportioned to the Lower Basin by the Compact the beneficial consumptive use of a total of 4,100,000 acre-feet of water per year. This includes the use of the waters of the Gila River and its tributaries. In addition said States have a right to an undetermined quantity of surplus water not apportioned by the Compact. Any and all rights to the use in the Lower Basin of main stream water are subject to a charge for losses from main stream Lower Basin reservoirs in the same proportion as the consumptive use of such storage water in each State bears to the total consumptive use of such storage water in the Lower Basin, and to a charge in some undetermined amount if and when some diminution of uses in the Lower Basin is required to satisfy the Mexican Water Treaty. Unless and until there is some need for curtailment to satisfy the Mexican Water Treaty

and until the facts under which such curtailment is required can be known, there is and can be no determination of the charge, if any, to be imposed by reason of the Mexican Water Treaty. The share of beneficial consumptive use of Colorado River System water in the Lower Basin to which Arizona, New Mexico, and Utah are entitled has been determined and is the quantity of 3,800,000 acre-feet of water per year. Likewise the share to which Nevada is entitled has been determined and is the quantity of 300,000 acre-feet of water per year. Denies all allegations of Paragraph 63 not specifically admitted herein.

64.

As to Paragraph 64, admits that the provisions of Article 7(a), 7(b), 7(d), 7(j) and 7(1) of the February 9, 1944 water contract between the United States and Arizona are as set forth in Exhibit C to the Bill of Complaint, pp. 47-50. Denies that any of said provisions relates to the rights of Indians or Indian Tribes. As to the other allegations of Paragraph 64, Complainant refers to, and by this reference incorporates herein, its reply to Paragraph 14 of the First Affirmative Defense.

65.

As to Paragraph 65, denies that there are known and defined underground sources of water in Arizona which are dependent upon the Colorado River System for water. Complainant has no knowledge or information as to the contributions, if any, of said underground water basins to the Colorado River System. Denies that the beneficial consumptive use of water by Arizona water users from underground water sources are chargeable to Arizona against its share of Colorado River System water. The use of water from underground water sources in Arizona is a beneficial consumptive use of water which would otherwise be unavailable for use either in Arizona or any other portion of the Lower Basin. Admits that there has been expansion of irrigated acreage in Arizona since 1944 and that this has occurred in part from leasing and sale of State owned lands. Denies that such expansion has occurred

with knowledge of the inadequacy of the water supply. Denies that Arizona has failed to enact effective legislation to control the use of the underground water supply, and alleges Arizona has enacted legislation for the purpose of controlling the use of underground water. Denies that there has been any reckless or speculative expansion of irrigated acreage in Arizona or waste of water in Arizona. Denies that the water supply presently available to the Central Arizona area is ample to sustain a population and industrial and agricultural production greater than that which now exists and alleges that the water supply is insufficient to sustain the present population and industrial and agricultural production. Alleges that the effect of a failure to secure a greater quantity of water for the Central Arizona area than that now available will have the effects alleged in Paragraphs XIX and XXVII of the Complaint.

As to the allegations relative to the reports of the Secretary of the Interior on the Central Arizona Project, Complainant says that none of such allegations is material or relevant to the issues presented for determination in this case.

66.

As to Paragraph 66, Complainant admits that the congressional actions therein mentioned occurred but denies that such actions, or any of them, resulted from the matters and things alleged in said Paragraph 66. Alleges that the United States Bureau of Reclamation has found that the Central Arizona Project has both engineering and economic feasibility. Denies the allegations of Paragraph 66 not specifically admitted herein.

70.

As to Paragraph 70, admits that the facilities therein mentioned were constructed under the terms, provisions, and limitations of the laws and treaty therein mentioned. Alleges that none of such facilities would have been constructed but for the Compact, the Project Act, and the California Limitation Act. Admits that the

defendants have used such facilities and have benefited therefrom, and that to the extent averred in the Bill of Complaint and in this Reply Arizona has benefited therefrom. Complainant does not deny the validity or integrity of the Compact, the Project Act, or California Limitation Act, and to the contrary the Complainant in its Bill of Complaint and Reply asserts and relies upon the validity and integrity of the Compact, the Project Act, and the California Limitation Act. Denies all allegations of Paragraph 70 not herein specifically admitted.

72.

As to Paragraph 72, alleges that by the use of the facilities therein mentioned the defendants have acquired no firm right to take and divert from the Colorado River System any quantities of water in excess of 4,400,000 acre-feet per year. The fact that such facilities are designed to take and divert more than that quantity of water does not create in the defendants, or any of them, any rights to the use of the waters of the Colorado River System in excess of 4,400,000 acre-feet of water per year. Complainant admits that the diversions stated for the year 1946-1952 inclusive are substantially correct. Admits that such quantities are greater than the beneficial consumptive uses of such water in California, and that such quantities are subject to diminution in the amount that the diversions would not result in net main stream depletions in the quantities of water so diverted. Alleges that the returns to the stream from such diversions have never been determined. Denies that all of the diversions remaining after the deductions above mentioned were or are being put to beneficial consumptive use in California. Alleges that there is wasted in the Salton Sea and not put to beneficial consumptive use quantities of water varying from 500,000 to 1,500,000 acre-feet per year, and that there are substantial quantities of Colorado River water wasted into the Pacific Ocean. Admits the intent of the defendants as stated in Paragraph 72 but alleges that such intent is wrongful and not in conformity with the Compact, the Project Act, and the Cali-

fornia Limitation Act. Denies all allegations in Paragraph 72 not specifically admitted.

75.

As to Paragraph 75, Complainant alleges that it is entitled to the relief sought in its Bill of Complaint.

REPLY TO MATTERS CONTAINED IN EXHIBITS, APPENDICES, AND PLATES.

As to Exhibits A, B, and C to the Answer, Complainant alleges that the allegations thereof have no material bearing on the issues tendered by the Bill of Complaint, the Answer and this Reply. Complainant alleges that the rights of the defendants and each of them to the use of the waters of the Colorado River System are subject to the availability thereof under the Compact, the Project Act, and the California Limitation Act. Such rights are neither enlarged nor diminished by the facts averred in the said Exhibits. Insofar as the facts set out in said Exhibits are different from the facts alleged in the Bill of Complaint and in this Reply, the Complainant neither admits nor denies them but relies on its position that they are immaterial, irrelevent, and incompetent to either prove or disprove any of the issues presented by the instant case. Insofar as the conclusions of either fact or law set forth in said Exhibits are concerned the Complainant denies each and all of them except such as are specifically admitted in the Bill of Complaint and in this Reply.

II

Complainant admits that Appendices Nos. 1 to 27 inclusive to the Answer correctly state the provisions of the various matters therein copied. Alleges that the effect of the pertinent compact, statutes, regulations,

agreements, and contracts contained in said appendices are as stated in the Bill of Complaint and in this Reply and not otherwise.

Admits that the pleadings and briefs of Arizona in the case of Arizona vs. California, 283 U. S. 423, contain the matters appearing in Appendix No. 28. Denies Appendix No. 28 contains all the pleadings and briefs in that case. Alleges that none of the pleadings and briefs in that case is material to this case.

Complainant denies the accuracy of the map appearing on Plate 1. Such map incorrectly shows the Imperial and Coachella Valleys within the natural drainage basin of the Colorado River System. The Imperial and Coachella Valleys actually drain into the Salton Sea and do not drain into the Colorado River or any of its tributaries.

Admits that the maps shown by Plates 2 to 6B inclusive are substantially accurate, but reserves the right to rely on different or other maps if the proper presentation of this case requires.

FOR FURTHER REPLY

Complainant denies each and every affirmative allegation of the Answer not specifically admitted in this Reply.

WHEREFORE, Complainant prays as in its Bill of Complaint except that Complainant says that, through inadvertence, Paragraph VI of the Prayer of the Bill of Complaint is inaccurate and does not conform to the allegations of Paragraph XXII (3) of the Bill of Complaint or with the allegations of Paragraph 63 of this Reply. In place of such Paragraph VI the Complainant prays that:

> Losses of water in and from reservoirs located in the Lower Basin on the main stream of the Colorado River shall be charged against the apportionment to Arizona and California respectively in the same proportion as the consumptive use of water delivered

from storage in such Reservoirs in the State against which the charge is made currently bears to the total consumptive use in the Lower Basin of water delivered from storage in such Reservoir.

Respectfully submitted,

JOHN H. MOEUR
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Arizona Interstate Stream Commission

BURR SUTTER
Assistant Counsel,
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PERRY M. LING
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Arizona Interstate Stream Commission

ROSS F. JONES
Attorney General of Arizona

JOHN HENLEY EVERSOLE
Chief Assistant Attorney General
of Arizona

COLORADO RIVER DRAINAGE BASIN

0 100
SCALE OF MILES

WYOMING

GREEN RIVER

GREAT SALT LAKE

SALT LAKE CITY

UTAH LAKE

GREEN R.

COLORADO R.

DENVER

NEV.

UTAH

COLO.

N

RIVER

SAN JUAN R.

BASIN

LEE FERRY

UPPER

SAN JUAN R.

COLORADO

SAN JUAN R.
LEE FERRY
UPPER BA
SAN JUAN R.
COLORADO
LITTLE LOWER BASIN
SANTA FE
N E W
RIVER
COLO.
A R I Z O N A
M E X I C O
VERDE
SALT RIVER
SALTON SEA
COLORADO
PHOENIX
GILA
GILA
RIVER
U.S.
MEXICO
UNITED STATES
MEXICO
UNITED STATES
MEXICO
GULF OF
CALIFORNIA
M E X I C O
(NOT A PART OF COLORADO RIVER
DRAINAGE BASIN)
APPENDIX No.1

APPENDIX No. 2

Excerpts From

"HEARINGS BEFORE THE COMMITTEE ON IRRIGATION AND RECLAMATION, HOUSE OF REPRESENTATIVES, SEVENTY-NINTH CONGRESS, SECOND SESSION, ON **H. R. 5434**, A BILL REAUTHORIZING THE GILA FEDERAL RECLAMATION PROJECT, AND FOR OTHER PURPOSES, PART 2, JULY 8-22, 1946;"

STATEMENT OF CHARLES A. CARSON, SPECIAL ATTORNEY, STATE OF ARIZONA, ON COLORADO RIVER MATTERS, PHOENIX, ARIZONA

Mr. CARSON. Yes, Mr. Chairman. My name is Charles A. Carson, of Phoenix, Ariz., appearing here on behalf of the State of Arizona as special attorney for the State of Arizona in connection with Colorado River matters, under an act of the Arizona Legislature, which authorized the Governor to appoint attorneys and engineers.

There has been so much said here on the question and so many questions interjected here that I would like, if I can, to make a kind of a general geographical and historical statement without interruption in order to get it clear in this record as to Arizona's view on these matters.

Chairman MURDOCK. The witness may proceed to make a connected statement without interruption. Of course, there will be questions later.

Mr. CARSON. Yes; as soon as I am through.

Mr. WHITE. That was apparently for the ranking member on the Democratic side, was it not, Mr. Chairman?

Chairman MURDOCK. The matter about asking questions, well, no, not altogether.

Mr. CARSON. I wanted to call your attention to the map on the wall there of the Colorado River Basin.

This map on the wall represents by this outline the natural drainage basin of the Colorado River system, with the one exception that down here on the California side of the river it also takes in an area which comprises the Imperial irrigation district, the Coachella Valley, the Metropolitan water district area, and the county of San Diego. That is not a natural part of the Colorado River Basin. The basin line at that point is indicated with this dotted line [indicating on map]. This map [indicating] does not show the areas in the upper basin outside of the natural drainage area of the basin from which water may be utilized.

The definition of the Colorado River compact takes into account not only the natural drainage basin but also areas upon which water from the basin might be utilized, and in that connection it is interesting to note that the natural drainage basin comprises some 240,000 square miles, of which Arizona contains 103,000 square miles; California, 4,000 square miles; Nevada, 12,000 square miles; Utah, 40,000 square miles; New Mexico, 23,000 square miles; Colorado, 39,000 square miles; and Wyoming, 19,000 square miles.

This history of the controversies concerning the Colorado River is not particularly important for the consideration of this bill, it seems to me, with some notable exceptions.

The first development, aside from a small development in the Palo Verde area was at Blythe, and the Yuma project, both in California and in Arizona was begun about 1895 by some California financiers who owned land in the Imperial Valley of California and in the Mexicali Valley of Old Mexico, and at that time they initiated the right to divert water through the old Alamo Canal through Mexico for the use of the Imperial Valley and also for the use of the Mexican land.

That contract provided that, of the water flowing through that canal, Mexico should be entitled to one-half.

The plan involved in the filing of water rights and in the operation contemplated a canal of 10,000 cubic feet

per second capacity, which, if it ran all year, would be some 7,000,000 acre-feet of water, of which Mexico would be entitled to one half.

Then coming on down, the material thing, it seems to me, to this issue is this: Remember at that time, if you please, that Arizona was a territory. In the early stages of this Arizona had not acquired the status of statehood, and did not acquire that status until 1912 when the Constitution of Arizona was adopted in accordance with the enabling act of Congress passed in 1910.

In that enabling act there is a significant provision, the United States required that Arizona by its constitution agree that the United States withdraw from entry and reserve all of the power dam sites on the Colorado River across the State of Arizona with the right to withdraw and reserve the lands bordering that stream across the State of Arizona, which Arizona did by the adoption of its constitution. So that Arizona has never had the ordinary rights enjoyed by the other basin States to control or to build or operate dams and diversion works from the Colorado River.

It has always been my thought that those provisions were inserted there for the protection of the development of the Imperial Valley and the Mexican lands then owned by California financiers.

Mr. Harry Chandler, of the Los Angeles Times, testified in 1924 before this committee that at that time he and his associates owned 833,000 acres of land in Mexico immediately below the border, of which some 600,000 acres were irrigable from the water of the Colorado River.

Now, keep that in mind, if you please. The canal right gave them the right, assuming continuous flow, to the use of 3,500,000 acre-feet in Mexico. This 600,000 acres of land had a diversion right, assuming 5 acre-feet per acre, which would make 3,000,000 acre-feet of water of the Colorado River going to Mexico, and the restrictions placed upon Arizona at the time of its admittance as a State and in the constitution assured those people, I assume, or, at least, they thought it did,

that Arizona could not divert water from the main stream of the Colorado River without the consent of Congress.

Well, Arizona became a State in 1912.

The next point I want to go to is the Colorado River compact that was signed at Santa Fe, N. Mex. in 1922. It was not ratified by Arizona, nor by the other States so as to make it effective until June, or approximately June 1929.

At that conference attempts were first made to divide the water between the States, and no agreement could be reached. Finally an agreement was reached dividing the water between the upper basin and the lower basin at Lee Ferry. They did not undertake to divide at that time all of the water of the stream because at that time it was calculated that the average annual flow was greatly in excess of the 15,000,000 acre-feet that was divided, 7,500,000 acre-feet to the Upper Basin, and 7,500,000 acre-feet to the lower basin.

Mr. PHILLIPS. That was in 1929?

Mr. CARSON. 1922 was when the compact was written.

At that conference, Arizona's representative, Mr. W. S. Norviel, was concerned because the over-all definition of the Colorado River system, as contained in the compact, did include and does now include the Gila River and its tributaries in Arizona which enter the river at Yuma below a point where they can ever be used again in the United States, and which were at that time wholly appropriated. So, Mr. Norviel refused to affix his signa ure to that compact until the provisions were written into the compact that are in article 3 (b) of the compact, which were added after this first draft had been completed and accepted by all the other States. I will read article 3 (b) for the record:

In addition to the apportionment in paragraph (a) the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

Which was then the estimated use then being made of the Gila River. He would not sign it then until there

was an oral understanding, not binding but an oral understanding and agreement between the States of California, Arizona, and Nevada, and accepted by all of the people attending that conference, that when that conference adjourned they would undertake to write out a tri-State compact between Arizona, California, and Nevada apportioning the water allocated to the lower basin, and in that compact or contemplated tri-State compact, provide that the exclusive beneficial consumptive use of the water of the Gila River should go to Arizona.

At this point I would like to insert in the record a letter and a picture, a letter from Mr. Herbert Hoover, who was chairman of that conference to Mr. W. S. Norviel, and a picture of Mr. Hoover also sent to Mr. Norviel, the picture carrying this notation. "W. S. Norviel, from Herbert Hoover—in tribute to a million acre-feet and a fine associate." The letter reads:

DEPARTMENT OF COMMERCE
OFFICE OF THE SECRETARY
WASHINGTON

LOS ANGELES, CALIF., *November 26, 1922.*

Mr. W. S. NORVIEL,
State Engineer, Phoenix, Ariz.

MY DEAR NORVIEL: This is just by way of registering again my feelings of admiration for the best fighter on the commission. Arizona should erect a monument to you and entitle it "One million acre-feet."

I am sending you herewith a photograph which does not purport to be a likeness but it is a better-looking fellow than the one you have, and I send it as an excuse for writing this letter expressing my personal appreciation of this fine association which we have had.

Faithfully yours,

HERBERT HOOVER.

Mr. ROCKWELL. What is the date of that?

Mr. CARSON. November 26, 1922. The compact was signed in Santa Fe, N. Mex., November 24, 1922.

Mr. ROCKWELL. I thought you said something about the fact that it was not signed until 1929?

Mr. CARSON. The compact was signed at Santa Fe, N. Mex., November 22, 1922. It required ratification by the various States and the Congress before it could become effective, which was not brought about until 1929.

Then I should also like to put in the record the testimony of Gov. Thomas E. Campbell, who was then Governor of Arizona and in attendance upon this Santa Fe conference, given before the Colorado River Commission of Arizona in 1933 or 1934; I think it was 1933.

Mr. PHILLIPS. What is the document from which you are reading?

Mr. CARSON. I am reading from a brief that I prepared in 1934 for submission to the Secretary of the Interior, but which was not in fact filed with the Secretary.

Chairman MURDOCK. But this is testimony of Gov. Thomas Campbell.

Mr. CARSON. Yes, sir; Gov. Thomas E. Campbell [reading]:

TESTIMONY OF GOV. THOMAS E. CAMPBELL GIVEN BEFORE THE ARIZONA-COLORADO RIVER COMMISSION

Q. Were you present at the time of the execution of the Colorado River compact, at Santa Fe, N. Mex., on November 24, 1922—A. Yes; I was present.

Q. At that time what was your official position in the State of Arizona?—A. I was governor of the State of Arizona for the years 1919, 1920, 1921, and 1922; and was governor of the State of Arizona at the time of the conference at Santa Fe, and at the time the Colorado River compact was signed.

Q. Were you present at Bishop's Lodge, near Santa Fe, N. Mex., during the negotiations and discussions leading up to the agreement that was signed at that time respecting the waters of the Colorado River?— A. Yes; I was.

Q. Had you appointed Mr. W. S. Norviel as the representative of the State of Arizona at that conference?

A. No; I did not appoint Mr. Norviel as the representative of the State of Arizona. That was taken care of by the fact that the Enabling Act, which provided for a meeting of the representatives of the several Colorado River Basin States, designated the water commissioners of the several States as representatives at the conference. I had appointed Mr. Norviel as the water commissioner of Arizona, and during that year—1922—he was the qualified water commissioner, so that when the act was passed by the United States Congress, providing for the meeting of the representatives of the several States, he automatically became the representative from Arizona.

Q. Do you recall who were present at the time of the Colorado River conference at Santa Fe during the fall of 1922?—A. Yes; I recall many of the persons who were there. The United States was represented by Herbert Hoover, who acted as chairman. He had been previously selected at a meeting in Washington. California was represented by W. F. McClure, who has since died; Colorado was represented by Delph E. Carpenter; Nevada by J. G. Scrugham; New Mexico by Stephen B. Davis, Jr.; Utah by R. E. Caldwell; Wyoming by Frank C. Emerson, who afterward became governor of Wyoming and has since died; and Arizona was represented by W. S. Norviel. The Reclamation Service was represented by Arthur P. Davis, and several advisers. Judge Richard E. Sloan was present in a legal capacity on behalf of Arizona besides Mr. Norviel and myself. California had many representatives, from the Imperial Valley and other places.

Q. How was the conference organized?—A. Mr. Hoover acted as chairman; he had tendered the services of Clarence C. Stetson, of Maine, as secretary of the conference, and Mr. Stetson acted as secretary. The proceedings were taken down in shorthand, and I presume were transcribed, although I have never seen a copy.

Q. The Enabling Act directed that the water of the river be divided among the States. Why was this not done?—A. We found it would be impossible, because

every State at that time was claiming more water than was in the system, and early in the conference we came to the conclusion that it would not be possible to arrive at a compact which would definitely allot to each State any definite amount of water.

Q. As the conference progressed, did you come to a solution of this question of division of the water?—A. Yes; we finally concluded a compact could be arrived at by dividing the water among the States represented by groups.

Q. Then what was done?—A. It was the consensus of opinion, and agreed to, that the States be separated into two divisions, known as the upper basin and the lower basin. The upper basin was to include the States of Colorado, Utah, New Mexico, and Wyoming, and those comprising the lower basin were Arizona, California, and Nevada. It was further agreed that Lee Ferry would be a division point between the two basins and that would be the point considered for a division of the water—Lee Ferry and not at the so-called dam site. The division was to be 50-50 as to the amount of water, 7½ million acre-feet to the upper basin and 7½ million acre-feet to the lower basin. When the question of the system was presented to the Arizona delegates, composed of the State water commissioner, Judge Sloan and myself, we objected vigorously to the inclusion of the waters of the Gila River, inasmuch as that water had been placed to beneficial use and would be of no value for storage at any place in the river for the lower basin States. After 2 days of discussions, mainly informal, it was finally agreed by the other participants in the compact that there would be allowed an extra million acre-feet, which was approximately the amount run off in the Gila system, to be used by Arizona to its exhaustion.

Q. What attitude did the commissioner or the representatives from Arizona take toward the compact as written, and before the arrangement was made as to the million acre-feet—did you refuse to sign the compact because of the inclusion of the waters of the Gila

River?—A. Absolutely we did. That was the reason why section 3B was put into the compact.

Q. Was anything said about designating this million acre-feet for Arizona?—A. Yes, that was discussed, and it was concluded that we could not tag that as belonging to Arizona because the plan on which we proceeded was that the waters be divided among the basins and no particular water would be allowed to any one State. If we attempted to tag it, then every other State would demand that it get a certain amount of water.

Q. Was there any agreement between the Arizona representative and the representatives of the other lower basin States as to setting aside to Arizona the water described in paragraph 3B of the proposed compact?—A. Yes, there was a definite understanding that after the seven-State compact was ratified, so far as the three States in the lower basin were concerned, they would enter into a compact in which it would be agreed that all of the water of the Gila River would go to Arizona.

Q. Who were present at the discussions which resulted in that understanding?—A. Mr. McClure, of California; Mr. Scrugham and Mr. Squires, of Nevada; and Mr. Norviel and myself, of Arizona.

Q. Did these discussions take place before the execution of the compact on November 24, 1922?—A. That understanding was arrived at before the compact was ratified and signed.

Q. For what purpose was the water of the Gila River to go to the State of Arizona?—A. For the benefit of Arizona and for use in irrigation.

Q. At the time the discussions were had with reference to putting this paragraph 3B into the compact, did all of the delegates to the conference know that Arizona had objected to the compact without such a provision?—A. Absolutely; they all knew that was the fact; it was the lock upon which we had stuck for a couple of days, and discussions were had by all of the delegates and commissioners. I assume these discussions would appear in a transcript of the minutes; the fact was well

known and discussed by everybody present. Without that provision of 3B, by which Arizona was awarded an extra million acre-feet of water for the inclusion of the water of the Gila River, the compact would never have been signed by Arizona.

Q. Then after the arrangement was made for the inclusion of paragraph 3B in the compact, it met with the approval of Arizona, and Mr. Norviel signed the compact for Arizona?—A. He did.

Q. Why was it that this understanding for the tri-State compact between California, Nevada, and Arizona, was not carried out?—A. The new administration in the State of Arizona was opposed to any compact and never went ahead.

Q. Who was the Governor-elect of Arizona?—A. Gov. George W. P. Hunt defeated me in the November election of 1922, and with my going out of office, the continuity of the negotiations with respect to the carrying out of the compact were blocked and no progress was thereafter made.

Q. Have you ever discussed this question of the Colorado River compact and the provision of this paragraph 3B since that time?—A. No, I have never been in court, or before any official body to present my knowledge of the understanding that was arrived at at that time. I have always been anxious to tell what took place at the conference and why the compact was drawn in the way that it was.

(End of testimony.)

I also have the testimony of Mr. W. S. Norviel and of Mr. C. C. Lewis, who attended that conference, to the same effect, but I think it unnecessary at this time to encumber the record with it.

Chairman MURDOCK. May we see the picture in that little pamphlet? You had a picture there that I am interested in.

Mr. CARSON. I will be glad if you will tear the picture out of this book and put it in the record, and also the letter and the other statements by the other men also.*

* The picture of Mr. Herbert Hoover is omitted from this appendix and is used as a separate appendix.

Chairman MURDOCK. I will pass this picture along to the committee. Some of you will recognize quite a change in Mr. Herbert Hoover of 1922—this picture may have been taken before 1922—and the elder statesman of today. I think this is material evidence that goes to show just what took place.

Without objection, we will include the testimony of Mr. Norviel and Mr. Lewis.

Mr. CARSON. The testimony is in this brief, and it is to the same effect as that of Governor Campbell.

Chairman MURDOCK. It was testimony given before the same board as Governor Campbell's testimony?

Mr. CARSON. Yes.

(The matter referred to is as follows:)

TESTIMONY OF MR. W. S. NORVIEL GIVEN BEFORE THE ARIZONA-COLORADO RIVER COMMISSION

Q. State your name, residence, and profession.—A. W. S. Norviel, Phoenix, Ariz., attorney at law.

Q. How long have you been a practicing lawyer in Arizona?—A. Since 1916, except two short periods.

Q. Are you still active in the practice?—A. Yes.

Q. In 1922, what, if any, was your official position in Arizona?—A. State water commissioner.

Q. By reason of your being water commissioner, were you designated as a commissioner under the Federal enabling act respecting the division of the waters of the Colorado River?—A. Yes.

Q. Did the State water commissioners of the State of Arizona, California, Nevada, New Mexico, Wyoming, Utah, and Colorado meet pursuant to the provisions of the enabling act?—A. Yes. That is, those having charge of public waters, mostly called State engineers, met.

Q. Where did you first meet?—A. Washington.

Q. Who was elected chairman?—A. Herbert Hoover, then Secretary of Commerce.

Q. Was Mr. Hoover designated by the Federal authorities as the United States representative?—A. Yes.

Q. Who was the secretary of the conference?—A. Clarence C. Stetson was made executive secretary.

Q. How long did the meeting at Washington last?—A. Four or five days.

Q. What matters were discussed at Washington?—A. It was the first coming together of the commissioners. After the organization, the representatives were called upon to express ideas as to the proper procedure to accomplish the purpose of the congressional act and the acts of the several State legislatures. I presented a written proposed compact, and discussion then followed upon it.

Q. Did the question first come up at the Washington conference of dividing the waters, not among the States, but between two groups of States, namely, the upper basin and the lower basin?—A. At the Washington meeting we discussed the division of the waters among the several States, but it immediately was apparent that there never could be an accord as to the proper allocation to each State.

Q. Before the conference broke up at Washington in January 1922 did you accomplish anything definite with respect to an agreement on the division of the waters?—A. No. The commissioners were without sufficient information and were unwilling to be bound to anything definite, save procedure.

Q. After the Washington meeting in January 1922, when did you next meet?—A. Public hearings were held in various cities of the interested States.

Q. Did the conference convene in Santa Fe, N. Mex., in November 1922?—A. Yes.

Q. Was the meeting in Santa Fe, N. Mex., in November 1922, a continuation of the Washington meeting, with the same persons present and the same States represented?—A. Yes.

Q. Was Mr. Hoover present?—A. Yes.

Q. Did Mr. Hoover preside as chairman and did Mr. Stetson serve as secretary?—A. Yes. At all the meetings.

Q. Were the minutes of that meeting taken down stenographically?—A. Yes.

Q. Have you a copy of those minutes?—A. No.

Q. Have you ever seen a transcript of the stenographic record?—A. No.

Q. Did you at that meeting agree to divide the waters of the Colorado River between two groups of States, designated as the upper and lower basins?—A. Yes.

Q. Why was that done, rather than divide the waters among the several States, allocating to each State a definite amount?—A. It was agreed that insurmountable difficulties would block any effort to allocate to the several States a definite portion of the water. The general consensus being often expressed that nothing should be granted to a single State, no State or stream particularly or otherwise favored or hindered.

Q. In the compact that was finally signed, in paragraph (a), article II, the Colorado River system is defined, and in paragraph (b), article II, the Colorado River Basin is defined, which terms include the Gila River and its tributaries. Why was the Gila River included in the Colorado River compact?—A. The terms "Colorado River system" and "Colorado River Basin" were defined to include all the streams tributary to the Colorado River and the area draining into the Colorado River, and it was deemed advisable to make no exceptions of any particular tributary. Arizona objected vigorously to the inclusion of the Gila River, but our objections were overruled.

Q. Is it true that in November 1922 the Gila River was then in use, or had been appropriated completely?—A. Yes.

Q. Is it not a fact that the Gila River enters the Colorado River below the point where all interested parties contemplated the dam would be built?—A. Yes.

Q. At the November 1922 conference, what was the consensus of opinion as to where the first dam would be built in the River?—A. It was the general opinion that such dam would be located in Boulder Canyon.

Q. Was this point not above the point where the Gila River enters the Colorado River?—A. Yes.

Q. Could any States benefit by the fact that the Gila was included in the Colorado River system?—A. No. Its waters enter the main stream of the Colorado at a point which prevents the use of the Gila waters within the United States.

Q. Were those matters discussed at this meeting?—A. Yes. It was my contention that only Arizona could use or had a right to Gila waters.

Q. Did you point out that the definition "Colorado River system" included the Gila River system in the division of the waters?—A. I raised the question and demanded the Gila be specifically excluded.

Q. What position did you take on the inclusion of the Gila River in the compact?—A. That it be excluded entirely from the discussion. Later we compromised when the conference granted an extra million acre-feet to Arizona. This extra million acre-feet was intended for the sole use of Arizona to compensate for the inclusion of the Gila River as part of the Colorado River system. Following the predetermined plan of allocating no water to any particular State, but to groups or basins only, the provision for this extra million acre-feet was couched in language as used elsewhere in the compact; that is, it read to the lower basin, rather than to Arizona, but it was definitely understood that this additional water was for the exclusive use of Arizona.

Q. Was the draft of the compact prepared and submitted to the conference before it was finally signed up?—A. Yes.

Q. After the compact was submitted, how many days elapsed before it was actually signed?—A. Some 4 or 5 days elapsed, during which time we were attempting to dispose of this Gila River matter.

Q. At the time the draft was submitted, and you testify that it was several days before it was signed, did that draft include paragraph (b) of article III, of the Colorado River compact?—A. No. The draft merely included the Gila as part of the Colorado River system. It did not contain the provision now known as

III (b) which made provision for the allocation of the extra million acre-feet to the lower basin.

Q. Do you have the copy of the proposed contract which did not contain the provision with reference to the million acre-feet, to which you have referred?—A. Yes.

Q. Is this the original copy that you had at the meeting in Santa Fe?—A. Yes; except that there are some notes that I made in this copy at or during the meeting November 22, or in the succeeding days.

Q. I hand you a document and ask you if that is the original.—A. Yes. It is.

Q. It shows the date of November 18, 1922. Is that the date that you first received it.—A. It would indicate that it was first handed in at that time, and we then began the discussion.

Q. You refused to sign that draft of the compact?—A. Yes.

Q. Why?—A. Because it included the Gila River and made no provision for compensation to Arizona.

Q. You had that draft before you, and you declared Arizona's position before the Conference?—A. Yes.

Q. After that a new compact was prepared which did contain a provision for compensation to Arizona, known as paragraph (b) of article III?—A. Yes.

Q. That compact was consented to by you and executed on November 24, 1922?—A. Yes.

Q. Who prepared paragraph (b) of article III of the Colorado River compact as signed?—A. Judge Sloan and Stephen B. Davis, and one other whom I do not recall.

Q. What discussion was had relating to the said paragraph (b) of article III and its meaning and purpose?—A. I had steadfastly refused to agree to the original draft that merely included the Gila River and after several days of discussion and argument, during which the conference refused to exclude the Gila and I refused to accept the draft which included the Gila, a compromise was reached in the form of article III (b) which provided the extra million acre-feet to compen-

sate Arizona for the inclusion of the Gila River in the Colorado River system. It was fully understood by all that this million acre-feet was for the sole and exclusive use of Arizona, although the language used provided for its use by the lower basin. I have explained why such wording was used.

Q. Was the answer that you have given of the meaning and purpose discussed at the full meeting of all the delegates at this conference, including California and Nevada?—A. Yes. All the delegates, including California and Nevada, understood and agreed that this additional water was for Arizona's use.

Q. Will you state if you made any statement to the Colorado River Commission with reference to the definition given to the Colorado River system and the Colorado River Basin, and the meaning of paragraph (b), article III?—A. Yes. I did make a statement. I asked the conference if it was the understanding of the Commission that the million acre-feet of water set out in article III (b) was for the sole and exclusive use of Arizona and stated that if that was the understanding I would sign the compact, if it was not the understanding I would refuse to sign. The unanimous reply was that this million acre-feet was for Arizona alone. With that understanding I signed the compact for Arizona.

Q. Were these statements which you made stated to the open conference?—A. All delegates and representatives were present. We were having a final meeting preparatory to the signing of the compact.

Q. What response did delegates from the other States, including California and Nevada, make in regard to your statements?—A. They agreed in the understanding which I have just stated. Mr. McClure, of California, stated to me and to the conference that he, as the California representative at the conference agreed to the understanding that this water of article III (b) was for the exclusive use of Arizona.

Q. What response did Mr. Hoover make?—A. Mr. Hoover did not take part in the discussion, did not state his views on any part, as I remember. He urged us to

agree, and sometimes referred us to a former agreement, or purported agreement.

Q. Was there any statement made at that time contrary to the explanations that had been given as to the meaning and intent of paragraph (b) article III of the compact?—A. None whatever; there was a full accord and agreement by all delegates.

Q. At that time, what, if anything, was said in reference to a tri-State agreement between the representatives of California and Nevada and Arizona and Mr. Hoover?—A. It was several times suggested that there should be no difficulty for the three lower States to agree to a division of the waters allocated to the lower basin.

Q. Were these statements, with reference to a tri-State agreement, made prior to the time the compact was actually signed?—A. Yes, and Mr. Squires made some statements afterward. Mr. McClure, Mr. Scrugham, and Mr. Squires expressed their willingness to enter into such a compact. It seemed very feasible.

Q. Did each and every one signing the Colorado River Compact know of the discussion with reference to the supplemental tri-State compact to be executed by California, Nevada, and Arizona?—A. Yes. It had been discussed in the open conference and Mr. Hoover made several suggestions regarding such a tri-State compact.

Q. Was there ever any statement made by anyone at the conference that the waters of the Gila River were to go to anybody except the State of Arizona?—A. None whatever.

Q. Was any claim ever made at that time that any other State had any interest in the waters of the Gila River?—A. No.

Q. Was there a universal agreement by each and every one of the delegates that the Gila River belonged to the State of Arizona?—A. That was the agreement upon which I consented to sign the compact for Arizona.

Q. In addition to the waters of the Gila River, was Arizona to participate in the division of the waters in the main stream of the Colorado River?—A. Yes. Arizona was to share in the main stream waters.

Q. Were these matters discussed at the time of the conference?—A. Yes. To the extent that Arizona, Nevada, and California were to all share in the main stream waters and Arizona was to have the exclusive use of the waters of the Gila.

Q. Did you make any statement that if the Colorado River had any different meaning from what you have testified, you would not sign the compact?—A. I stated that I would absolutely refuse to sign the compact if it had any other meaning.

Q. Did the representatives of the other States and the chairman agree to your statement?—A. Yes. All, including California and Nevada, agreed.

Testimony of Mr. C. C. Lewis Given Before the Arizona-Colorado River Commission

Q. State your name, residence, and profession.—A. C. C. Lewis, Phoenix, Ariz., statistician.

Q. How long have you been in Arizona?—A. Twenty-four years.

Q. In 1922, what, if any, was your official position in Arizona?—A. Assistant State water commission. (sic)

Q. By reason of your being deputy water commissioner, did you attend the meetings held under the Federal Enabling Act, respecting the division of the waters of the Colorado River?—A. Yes; except the first meeting held at Washington, D. C.

Q. Did the conference convene in Santa Fe, N. Mex., in November 1922?—A. Yes.

Q. Was the meeting in Santa Fe, N. Mex., in November 1922 a continuation of the Washington meeting, with the same persons present and the same States represented?—A. Yes; as I recall it, the same persons were representatives.

Q. Was Mr. Hoover present?—A. Yes.

Q. Did Mr. Hoover preside as chairman and did Mr. Stassen (sic) serve as secretary?—A. Yes.

Q. Were the minutes of that meeting taken down stenographically?—A. Yes.

Q. Have you a copy of those minutes?—A. No.

Q. Have you ever seen a transcript of the stenographic record?—A. No.

Q. Did you at that meeting agree to divide the waters of the Colorado River between two groups of States, designated as the upper and lower basins?—A. Mr. Norviel, Arizona State water commissioner, did.

Q. Why was that done, rather than divide the waters among the several States, allocating to each State a definite amount?—A. Because of the impossibility of ever agreeing on an apportionment among the seven States. It was not practical. Further, there was a point provided by nature for the division line between the upper and lower basins.

Q. In the compact that was finally signed, in paragraph (a), article II, the Colorado River system is defined, and in paragraph (b), article II, the Colorado River Basin is defined, which terms include the Gila River and its tributaries. Why was the Gila River included in the Colorado River compact?—A. The Gila River was included, because it was determined that the drainage area should include all tributaries of the Colorado River in all of the seven States, and that it was inadvisable to make any exceptions. Arizona objected to the inclusion of the Gila River because of the fact the waters could be applied to beneficial use only by Arizona.

Q. Is it true that in November 1922 the Gila River was then in use, or had been appropriated completely?—A. Yes. That which was not being used had been appropriated.

Q. Is it not a fact that the Gila River enters the Colorado River below the point where all interested parties contemplated the (dam) would be built?—A. Yes.

Q. At the November 1922 conference, what was the consensus of opinion as to where the first dam would be built in the river?—A. Boulder Canyon.

Q. Was this point not above the point where the Gila River enters the Colorado River?—A. Yes.

Q. Could any States benefit by the fact that the Gila was included in the Colorado River system?—A. Not by the use of the Gila waters because the Gila enters at a point that would prevent the use of same in the United States.

Q. Were those matters discussed at this meeting?—A. Yes. It was contended that Arizona only could use the Gila waters, and it being entirely appropriated, it should be excluded.

Q. Did Mr. Norviel point out that the definition "Colorado River system" included the Gila River system in the division of the waters?—A. Yes. On this point he was firm.

Q. What position did Mr. Norviel and the Arizona delegation take on the inclusion of the Gila River in the compact?—A. That it should be excluded and did not yield until a million acre-feet additional was granted the lower basin States with a definite understanding by all that this additional million acre-feet was for Arizona's use and not to be considered in the final apportionment of the Colorado River water.

Q. Was the draft of the compact prepared and submitted to the conference before it was finally signed up?—A. Yes.

Q. After the compact was submitted, how many days elapsed before it was actually signed?—A. I do not remember, but a few days on account of Gila River matters.

Q. At the time the draft was submitted, and you testify that it was several days before it was signed, did that draft include paragraph (b) of article III, of the Colorado River compact?—A. No.

Q. Did you see the copy of the proposed contract which did not contain the provision with reference to the million acre-feet, to which you have referred?—A. Yes.

Q. This instrument which I hand you. Is this the original copy which you and Mr. Norviel had at the meeting at Santa Fe?—A. Yes.

Q. It shows the date of November 18, 1922. Is that the date that you first received it?—A. I could not say, but it seems the date thereon would so indicate.

Q. Mr. Norviel refused to sign that draft of the compact?—A. Yes.

Q. Why?—A. Because of the inclusion of the Gila River.

Q. This draft was before the Arizona delegation and Arizona's position was made known to the conference?—A. Yes. It was contended that the Gila River water was not only all appropriated, but if it were never appropriated no other State could possibly use it because of the physical situation obtaining.

Q. After that a new compact was prepared which did contain a provision for compensation to Arizona known as paragraph (b) of article III?—A. Yes.

Q. That compact was consented to by Mr. Norviel and the Arizona delegation and executed on November 24, 1922?—A. Yes.

Q. Who prepared paragraph (b) of article III of the Colorado River compact as signed?—A. Judge Sloan, Judge S. B. Davis, and Frank C. Emerson.

Q. What discussion was had relating to the said paragraph (b) of article III and its meaning and purpose?—A. Due to Mr. Norviel's firm refusal to sign the compact with the Gila River included there were several days' delay and the final result was paragraph (b) of article III, with the definite understanding that this million acre-feet belonged to Arizona in compensation for inclusion of the Gila River in the Colorado River system.

Q. Was the answer that you have given of the meaning and purpose discussed at the full meeting of all the delegates at this conference, including California and Nevada?—A. Yes.

Q. Will you state if Mr. Norviel and the Arizona delegation made any statement to the Colorado River Commission with reference to the definition given to the Colorado River system and the Colorado River Basin, and the meaning of paragraph (b), article III?—A. Yes. Mr. Norviel made it very clear that he

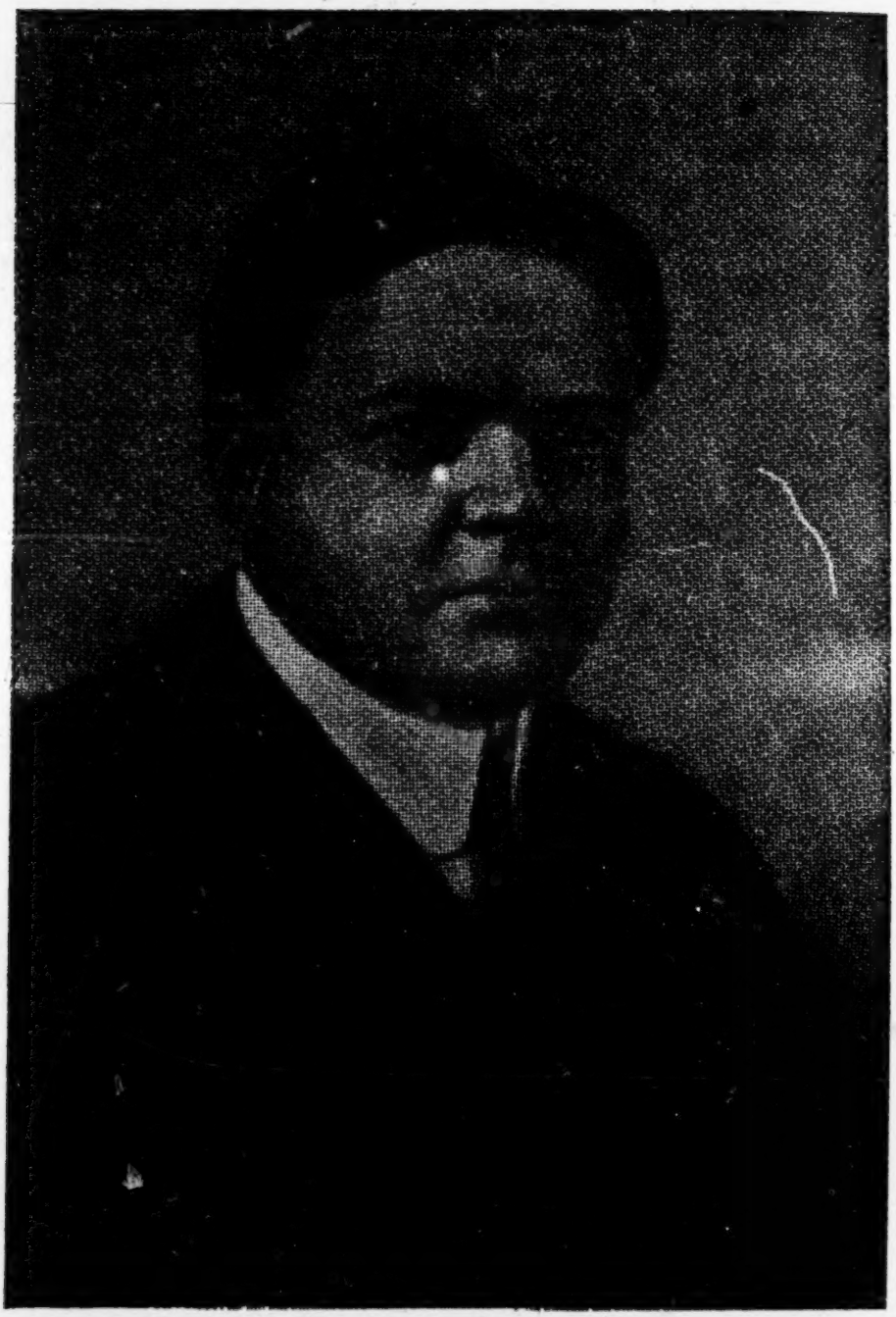
would sign the final draft of the compact only on the full and complete understanding by all that the additional million acre-feet was for the use of Arizona alone. To this Mr. McClure, representing California, agreed and all others joined in and agreed to this understanding.

Q. Were these statements made to the open conference?—A. Yes.

Q. What response did delegates from the other States, including California and Nevada, make in regard to these statements?—A. They all agreed, Mr. McClure making a statement to this effect, all others agreeing, including Nevada.

APPENDIX No. 3

EXCERPT FROM "HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC LANDS, UNITED STATES SENATE, EIGHTIETH CONGRESS, FIRST SESSION, ON **S. 1175,** A BILL AUTHORIZING THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF A DAM AND INCIDENTAL WORKS IN THE MAIN STREAM OF THE COLORADO RIVER AT BRIDGE CANYON, TOGETHER WITH CERTAIN APPURTENANT DAMS AND CANALS AND FOR OTHER PURPOSES, JUNE 23, 24, 25, 26, 27, 28, 30, AND JULY 1, 2, AND 3, 1947."



Yours Sincerely Herbert Hoover —
In tribute to a million acre feet and a
fine associate.

APPENDIX No. 4

EXCERPTS FROM "HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE OF PUBLIC LANDS, UNITED STATES SENATE, EIGHTIETH CONGRESS, FIRST SESSION, ON S. 1175, A BILL AUTHORIZING THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF A DAM AND INCIDENTAL WORKS IN THE MAIN STREAM OF THE COLORADO RIVER AT BRIDGE CANYON TOGETHER WITH CERTAIN APPURTENANT DAMS AND CANALS AND FOR OTHER PURPOSES, JUNE 23, 24, 25, 26, 27, 28, 30, AND JULY 1, 2, AND 3, 1947."

STATEMENT OF RALPH I. MEEKER, IRRIGATION ENGINEER

Senator MCFARLAND. Mr. Meeker, will you come forward?

Senator MILLIKIN. Mr. Meeker, will you state your full name, your residence, and your business.

Mr. MEEKER. My name is Ralph I. Meeker, irrigation engineer, Phoenix, Ariz.

Employment by the State of Arizona on cooperative investigations with the United States Bureau of Reclamation water resources of Arizona, Phoenix office, 1945 to 1947.

Senator MCFARLAND. Mr. Meeker, would you mind stating your qualifications? I mean as an engineer, in particular your experience as an engineer. I believe you have that in your statement, though.

Mr. MEEKER. Yes. That follows immediately.

Prior to the Arizona work, was located in Denver, 1903 to 1945. Specialty, interstate river problems. Scope of work, engineering investigations of the Laramie, Rio Grande, La Plata, Colorado, North Platte, and Arkansas Rivers. Employed by the State of Colorado

on interstate river compacts, 1919 to 1929. In private practice as consulting engineer in Denver, 1930 to 1942. Served as chairman of the irrigation division of the American Society of Civil Engineers in 1926.

Colorado River compact: During the negotiations of the Colorado River compact at Santa Fe in November 1922, was engineering adviser for the State of Colorado; participated in the compact sessions and familiar with the background of the compact. At the request of Chairman Hoover, I assisted Mr. A. P. Davis—that was Arthur P. Davis, the director of the Reclamation Service and adviser to the Federal representative—in "reconstructing" the Colorado River flow at Lee Ferry to natural or virgin run-off conditions. It was necessary to know the total water fund to be divided.

Senator DOWNEY. Mr. Chairman, could I secure one bit of information from Mr. Meeker?

Senator MILLIKIN. Yes.

Senator DOWNEY. At that time that these figures were issued, was it expected that there would be 22,000,000 acre-feet of water available in the Colorado River?

Mr. MEEKER. No. About 20,000,000.

Senator DOWNEY. And that figure has presently been reduced to about 17,000,000?

Mr. MEEKER. Yes; nearer 18,000,000; 17,700,000.

"Consumptive use" is an engineering term, first used in the Laramie River interstate suit, 1912-14, to deplete and "reconstruct" river flows. I served as engineer to Wyoming in the Laramie River controversy. During 1918-19 I acted as engineer for Wyoming in a cooperative investigation and report with the Bureau of Reclamation on the North Platte River, where extensive use was made of "consumptive use" to deplete and "reconstruct" the flows of the North Platte River in Colorado, Wyoming, and Nebraska. The "consumptive use" values for irrigated land were based on "valley consumptive use" (inflow minus outflow) of the Little Laramie and the Cache La Pondre (sic) Rivers in Wyoming and Colorado, respectively; also other engineering data.

During the negotiations of the Colorado River compact, the above engineering terms were used and applied to Colorado River water. The river flow at Lee Ferry was "reconstructed" to virgin conditions and depleted to 1920 conditions of irrigation development in the upper basin.

Senator MILLIKIN. Just a moment. Give me a little more enlightenment on that phrase "valley consumptive use."

Mr. MEEKER. Well, we have "farm consumptive use," "project consumptive use," and "valley consumptive use." The method whereby "consumptive use" was determined, "valley consumptive use," taking the valley, the inflow up at the canyon where the river emerges from the mountain and the outflow discharging into the river, and the difference between the two representing the consumptive use.

Senator MILLIKIN. The valley consumptive use does not contemplate the separate evaluation of all the contributing streams?

Mr. MEEKER. Those occur automatically.

Senator MILLIKIN. Those occur automatically.

Mr. MEEKER. Any tributaries that come in below.

Senator MILLIKIN. In other words, you look to the end result in the main stream.

Mr. MEEKER. Yes. There are practically no tributaries in here, they are very minor.

Senator MILLIKIN. But, if there were tributaries in a stream basin or stream valley, in the use of the term which you have mentioned you would look to the net result on the main stream. Is that the point?

Mr. MEEKER. Yes. But they would be accounted for. There would be an allowance for those tributaries if there were such.

Senator MILLIKIN. Yes.

Proceed.

Mr. MEEKER. The Compact Commission had in mind a depletion by the upper basin of 7,500,000 acre-feet,

and a depletion of 8,500,000 acre-feet by the lower basin of the flow of the Colorado River.

I took to the Colorado River compact meeting 10 years of knowledge on "consumptive use" values and experience on river depletion by irrigated lands.

Delivery of upper basin water to lower basin:

Under the terms of the compact, the point of delivery for upper basin water is set at Lee Ferry, 1 mile below the mouth of the Paria River (art. II (e)). Lee Ferry is therefore the point on the Colorado River where the aggregate beneficial consumptive use or depletion by irrigation uses of the upper basin is applied to river flow.

In a similar manner the depletion of the lower basin is properly measured at the United States-Mexican boundary, where delivery is made to the Republic of Mexico. Likewise, the depletion of the Gila River is properly measured at its mouth where its contribution reaches the Colorado River.

By the above procedure, the natural channel losses along the main stream of the Colorado and along the Gila are eliminated from river flow arriving at the usable water fund of the lower basin. Such channel losses — large in volume — were common to the two designated river channels prior to man-made depletion by irrigation uses.

Lower basin apportionment of 1,000,000 acre-feet per annum: Under the terms of the compact, 1,000,000 acre-feet of additional water (from the lower basin run-off) is apportioned to the lower basin, designated III (b) water. Of my own knowledge this apportionment was made as the result of demands by Arizona for water to cover irrigation consumption in the Gila River Basin, estimated as rapidly approaching 1,000,000 acre-feet per annum in 1922. This allotment for Arizona was well understood by those present during the compact negotiations. In support thereof, the following citations are offered.

I am now reading from the report and supplemental report of Delph E. Carpenter, commissioner for Colo-

rado in Colorado River matters to the Governor of Colorado, page 4:

By reason of development upon the Gila River and the probable rapid future development incident to the necessary construction of flood works on the lower river, the lower basin is permitted to increase its development to the extent of an additional 1,000,000 acre-feet annual beneficial consumptive use before being authorized to call for a further apportionment of any of the surplus waters of the river.

I shall now read from the report of Frank C. Emerson, commissioner for the State of Wyoming in re Colorado River compact, to William B. Ross, Governor of Wyoming, January 18, 1923, page 15.

The lower basin is allowed to increase its use of water 1,000,000 acre-feet per annum in addition to the 7,500,000 acre-feet apportioned for its use by reason of possible developments upon the Gila River, and the probable rapid development generally upon the lower river. This additional development is at the peril of the lower division as no provision is made for delivery of water at Lee Ferry for this additional amount.

Senator MILLIKIN. Now, the words "and the probable development generally upon the river," does that refer to the Colorado River or the Gila River?

Mr. MEEKER. The Colorado River, the lower basin.

I am going to read from a citation from the Colorado River compact by Reuel Leslie Olson, September 1926, (see footnote 73, p. 39). Now, I have that here in the building but I do not have it with me, so I will read from the text:

Mr. Bannister erroneously asserts that this paragraph was inserted because the Commissioner from Arizona "was so persistently obstinate."

You may wonder why the three Southern States have received in this compact a million more acre-feet of water than has been received by the Northern States. I have wondered about it myself but the explanation is that the Commissioner of Arizona was so persistently

obstinate, and, in the opinion of the upper States, so unreasonably obstinate, that he would not sign the compact unless he obtained an extra pound of flesh. Hence, the bonus of 1,000,000 acre-feet to the three States of the south.

I might say that L. Ward Bannister was a special representative for Colorado at compact negotiations.

The 1,000,000 acre-feet apportionment is reflected in the Boulder Canyon Project Act of December 21, 1928 (sec. 4), where the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, undiminished (except for return flow) by any treaty that may hereafter be made with Mexico.

Senator MILLIKIN. Any questions?

Senator MCFARLAND. Mr. Meeker, was there quite a bit of discussion about this 1,000,000 acre-feet at the compact negotiations?

Mr. MEEKER. Yes. The draft compact was made without that originally and then later, after objection by Mr. Norviel, the Arizona Commissioner, it was inserted.

His position first was that the Gila River should be omitted from the compact, but that was denied on the grounds that it was a part of the Colorado River system. And then, after he felt that he couldn't get it cut out, he demanded a million acre-feet for the Gila.

Senator MCFARLAND. Well, during this discussion was the discussion to the effect that this water was to be allotted to Arizona? Was that the effect of the discussion?

Mr. MEEKER. Absolutely; to cover the water that was then being consumed in the Gila River Basin.

Senator MCFARLAND. Was that understood by all of those present?

Mr. MEEKER. Yes, sir.

Senator MCFARLAND. Now, in your discussions what water were you talking about? Was it the surface water which reached the streams?

Mr. MEEKER. Surface water only.

Senator MCFARLAND. Surface water only.

I believe that is all, Mr. Chairman.

Senator DOWNEY. I have a few questions, Mr. Chairman.

Mr. Meeker, you read in this statement the paragraph about which the chairman inquired:

By reason of the development upon the Gila River and the probable rapid future development incident to the necessary construction of flood works on the lower river, the lower basin is permitted to increase its development to the extent of an additional 1,000,000 acre-feet annual beneficial consumptive use before being authorized to call for a further apportionment of any surplus waters of the river.

That is a quotation from Mr. Carpenter?

Mr. MEEKER. That is correct.

Senator DOWNEY. Did you read this short paragraph that appears in his report before that paragraph, follows:

7,500,000 acre-feet, exclusive annual beneficial consumptive use in perpetuity to the upper basin and a like amount to the lower basin.

Mr. MEEKER. I know there is much more material that I didn't read. I only read that which is pertinent to the Gila River.

Senator DOWNEY. This last paragraph is in the Carpenter report antedating the part you read?

Mr. MEEKER. Certainly.

Senator DOWNEY. Do I understand that in these two paragraphs you interpret "annual beneficial consumptive use" as not to mean the amount of beneficial use that the landowners actually have in acre-feet but the amount they deplete the river?

Mr. MEEKER. Yes. It is the aggregate beneficial consumptive use or water that is "burned up," as Mr. Carpenter used to use the term, at the point on the river where the delivery is to be made. And in that sense "consumptive use" is stream depletion. You have to determine your consumptive use and apply it to the irrigated areas in the upper basin and arrive at the total and apply that as depletion.

Senator DOWNEY. Well, as I understand you, you say it is measured at the point where the water is taken from and then when it returns to the stream.

Mr. MEEKER. No. In this sense, the consumptive use values have been derived that way but the consumptive use so derived are then applied to the irrigated lands in the basin and from that the depletion fund built up and then applied at the point of delivery.

Senator DOWNEY. Again, Mr. Meeker, I am somewhat at a loss. I have known you for a number of years by reputation. I originally came from Wyoming.

Mr. MEEKER. So I understand.

Senator DOWNEY. I still don't clearly understand you. You gave your method of determining consumptive use in a prior answer to me which, as I understand it, I agree with. But, apparently, you would not apply that measure to diversions and returns on the Gila River.

Mr. MEEKER. No; for the reason that you have got a million acre-feet of lost water that never reached the river.

Senator DOWNEY. Then, you don't apply that definition of consumptive use that you gave me to the Gila water.

Mr. MEEKER. Oh, yes, absolutely. No preferential treatment for any stream. They are all on the same basis.

Senator DOWNEY. Well, Mr. Meeker, you said you would measure the water at the point of diversion and then take the amount where the water returned to the stream and deducting one from the other you would have the beneficial consumptive use.

Mr. MEEKER. Yes. That is the engineering procedure for determining consumptive use in various areas, say 1 acre-foot per annum or 3 acre-feet per annum, or whatever it may be.

Then, having determined that—maybe not from the area in question, maybe some nearby area, some adjacent area, then the consumptive use values are applied to the irrigated land so much water per acre-foot.

Senator DOWNEY. Do you agree with the definition of "consumptive use" as used in the treaty with Mexico?

Mr. MEEKER. Why, yes. There is no discrepancy there. There is a good deal of confusion that has gone out on this because perhaps everybody does not understand the engineering procedure in arriving at these results.

Senator DOWNEY. Let me read the definition of "consumptive use."

Mr. MEEKER. I know what it is.

Senator DOWNEY. May I read it, please?

"Consumptive use" means the use of water by evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream.

Do you accept that definition given in the treaty with Mexico as applicable to the lands in the Colorado River Basin in the United States?

Mr MEEKER. Certainly, when you are applying that to the river flow by irrigation uses.

Senator DOWNEY. This definition isn't applied to the main stream of the Colorado River, is it?

Mr. MEEKER. Why, the definition is applied to all over the basin.

Senator DOWNEY. Are you familiar with Mr. Tipton's explanation of the expression "consumptive use"?

Mr. MEEKER. I have read it.

Senator DOWNEY. Do you agree with that? [Reading]:

The extraordinary drought provisions of this treaty will be invoked, as I say, when these areas up in here begin to suffer deficiencies. We indicated to the Mexican negotiators that the entire basin must be considered—

I emphasize "the entire basin must be considered"—

and we put the words "consumptive use" in because it would be more practical to use it as a measure than the thousands of diversions. It is very practical to use as a measure the consumptive use, because many gaging stations are installed throughout the irrigated areas, and many more will be installed, for the purpose of determining for compact administration what the various States are consuming.

And later Mr. Tipton says it is consumptive uses, the plural—

Because we have a consumptive use on this little tributary, a consumptive use on this tributary, a consumptive use on this stream, and so forth. So we have a series of consumptive uses, and that is what we are talking about in the treaty. The amount of these consumptive uses is readily acertainable (sic) by measuring the inflow to the areas and the outflow from the areas; and when those begin to reduce, this provision can be invoked, and that is long before there can be any material depletion of storage in these various main-stream reservoirs.

Do you agree with that statement, Mr. Meeker?

Mr. MEEKER. I concur with that, absolutely.

Senator DOWNEY. That is all I have to ask.

Mr. MEEKER. Just a moment.

Senator DOWNEY. First, you would apply that same language and that same rule set up by Mr. Tipton in his explanation of the definition of "consumptive use" in the treaty to the lands in the United States?

Mr. MEEKER. Yes. And that is the reason Mr. Carpenter had selected Lee Ferry, where all the depletions would accumulate and could be measured at the point of delivery.

But I think the point that you haven't clearly in mind is that it isn't practical to measure every tributary and find out the consumptive use on every one, or every small tract of land. Therefore, the engineers have evolved the procedure of determining the consumptive use for selected areas, for thereon the inflow and outflow can be measured and a valid result secured. And that's for different climates, that is, for meadowlands—the meadowlands of Wyoming, for instance.

In the meadowlands the consumptive use is around nine-tenths to 1 acre-foot per acre per annum. That is in high altitudes where you have a short growing season and low temperatures.

You come down into the western part of Colorado, and your consumptive use may be around 1½ or 1.6 acre-feet.

You come down here into—or, rather, come down into Arizona; your consumptive use is over 3, and when you get down to Imperial Valley, it is almost 4 acre-feet per acre per annum.

So, applying your consumptive-use values to the irrigated lands, all the irrigated lands being used, different variations in acres with the different climatic conditions, you arrive at a total fund of depletion, which is then applied at the point of delivery on the river.

Senator DOWNEY. Mr. Meeker, you use the expression "consumptive use" as being applicable to the amount of water delivered at Lees Ferry by the upper basin for the benefit of the lower basin. That is the 75,000,000 acre-feet delivered over a 10-year consecutive period?

Mr. MEEKER. That is right. That is the water burned up, instead of using the headgate diversion and then finding out what the return—

Senator DOWNEY. Mr. Meeker, haven't we an entirely different measure there? Doesn't the compact recognize it in this language—the obligation of the upper basin is to deliver physically in the river at Lees Ferry, not any amount of consumptive use or depletion or anything else, but 75,000,000 acre-feet of water physically in the river?

Mr. MEEKER. Yes. But that is beneficial consumptive use. You have the beneficial consumptive use of 7½ million acre-feet.

Senator DOWNEY. Oh, I am not talking about that, Mr. Meeker. The compact calls for the delivery of 75,000,000 acre-feet of water physically in the river?

Mr. MEEKER. Oh, yes. Certainly.

Senator DOWNEY. That has nothing to do with consumptive use.

Mr. MEEKER. Well, pardon me; I think I was in error there in that particular statement.

Senator DOWNEY. Well, Mr. Meeker, that was your principal reason for your interpretation. You said that Lees Ferry had been set aside because it was in the main stream to measure this 75,000,000 acre-feet in terms of consumptive use.

Mr. MEEKER. That is where the depletion of the upper basin is measured, your one-half acre feet depletion of the upper basin.

Senator DOWNEY. Well, so far as the obligation of the upper basin is concerned, there isn't any question of depletion or of consumptive use involved. Theirs is the obligation to deliver physically in the river at Lees Ferry a physical volume of 75,000,000 acre-feet.

Mr. MEEKER. Oh, yes. I assented to that. I was wrong.

Senator DOWNEY. All right. That is all.

Senator MILLIKIN. Mr. Meeker, let us consider an abstract problem. Let us pass the rights of States to water of the main stream. Let us pass basic questions. Let us assume that the sole engineering problem were to determine the consumptive use occurring on a main stream—any main stream.

Am I correct in this—that under your theory of the proper use of the words "consumptive use" you would measure the virgin outflow of that stream at its mouth, and you would put that against the actual outflow, and the difference would represent the consumptive use on that main stream? Is that correct?

Mr. MEEKER. Well, that is, in substance, what it amounts to. Yes.

Senator MILLIKIN. With that problem.

Now, if the problem were to measure the consumptive use of a tributary to that main stream, would not the procedure be exactly the same as to that tributary?

Mr. MEEKER. Yes; and at the point of delivery to the parent stream.

Senator MILLIKIN. Now, then, if you take that main stream and chop it up into upper and lower-basin obligations in terms of consumptive use, is it your theory that you apply exactly the same formula under that particular problem?

Mr. MEEKER. Yes, sir.

Senator MILLIKIN. And if the problem cut itself down further into figuring out the allocations to States of consumptive use, you would allocate the results achieved in that way to the States according to whatever contract obligations might be. Is that correct?

Mr. MEEKER. Yes, sir; the same procedure.

Senator MILLIKIN. Thank you.

Senator MCFARLAND. As I understand it, then, Mr. Meeker, what would be charged, for instance, on the Green River in Wyoming, would be what Wyoming depletes the Green River at the point it empties into the Colorado River?

Mr. MEEKER. Yes; if you are now speaking of the beneficial consumptive use of the upper basin at Lee Ferry.

Senator MCFARLAND. Yes. Would that be true with the tributaries in New Mexico, the Gunnison in Colorado, and the San Juan in New Mexico?

Mr. MEEKER. That is correct.

Senator MCFARLAND. And, of course, that same rule would apply in the lower basin?

Mr. MEEKER. Yes, sir.

Senator MCFARLAND. That is all.

Senator DOWNEY. That is all.

Senator MILLIKIN. Thank you very much, Mr. Meeker.

Explanatory legend with map immediately following.

1. Springerville
2. St. Johns
3. Concho & Hay Hollow
4. Silver Creek
5. Woodruff
6. Black Creek
7. Holbrook
8. Hopi, Ganado & Leupp
9. Moenkopi
10. Kanab Creek
11. Havasu Creek
12. Hualpai & Meriwitica
13. Grand Wash
14. Short Creek
15. Littlefield
16. Davis Dam to Topock, including Mohave Indian Lands
17. Big Sandy River
18. Santa Maria River
19. Colorado River Indian Reservation
20. Bouse Valley & Vicinity
21. North & South Gila Valleys
22. Yuma Valley
23. Yuma Mesa
24. Duncan Valley
25. Alpine
26. San Francisco River
27. Eagle Creek
28. Portal
29. San Simon Creek
30. Safford Valley
31. San Carlos Indian Reservation
32. Hereford Valley
33. Middle San Pedro River
34. Lower San Pedro River
35. Coolidge Dam to Kelvin
36. San Rafael Ranch
37. Santa Cruz County
38. Pima County
39. Pinal County
40. Black River
41. Fort Apache Indian Reservation
42. Cherry Creek
43. Salt River Canyon to Roosevelt
44. Tonto Creek
45. Verde River upstream from Camp Verde
46. Middle Verde River
47. Ft. McDowell Indian Reservation
48. Upper Agua Fria River
49. Maricopa County upstream from Gillespie Dam
50. Gillespie Dam to Dome

APPENDIX No. 6

EXCERPTS FROM TESTIMONY OF THE HONORABLE CARL HAYDEN, UNITED STATES SENATOR FROM ARIZONA, AS APPEARING IN "HEARINGS BEFORE THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, UNITED STATES SENATE, EIGHTY-FIRST CONGRESS, FIRST SESSION, ON **S. 75,** A BILL AUTHORIZING THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF A DAM AND INCIDENTAL WORKS IN THE MAIN STREAM OF THE COLORADO RIVER AT BRIDGE CANYON, TOGETHER WITH CERTAIN APPURTENANT DAMS AND CANALS, AND OTHER PURPOSES, AND **S. J. RES. 4,** A JOINT RESOLUTION GRANTING THE CONSENT OF CONGRESS TO JOINDER OF THE UNITED STATES IN SUIT IN THE U. S. SUPREME COURT FOR ADJUDICATION OF CLAIMS TO WATERS OF THE COLORADO RIVER SYSTEM, MARCH 21, 22, 23, 24, 26, 28, 29, 30, AND 31, APRIL 2, 9, 11, 12, 13, 14, 26, 27, 28, AND 30, AND MAY 2, 1949."

Senator HAYDEN. My contention is, and I think it is as clear as a bell from the record, that Arizona is entitled to 2,800,000 acre-feet of water out of the main stream of the Colorado River, out of the 7,500,000 acre-feet apportioned to the lower basin. I know how those figures came about. I was here in Congress at the time.

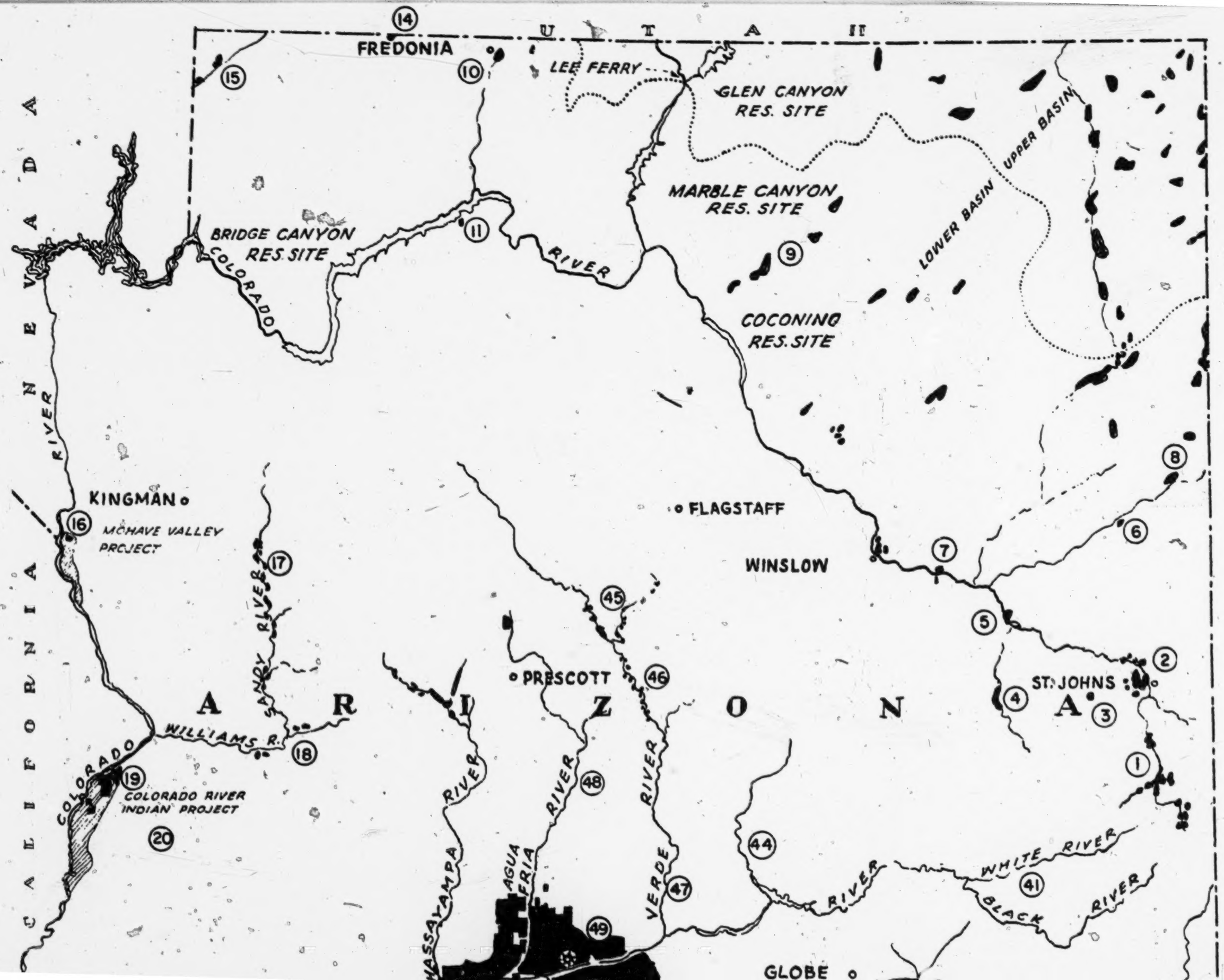
What happened historically was that the Colorado River, combined with floods from the Gila, broke over into the Imperial Valley and drowned out a lot of valuable agricultural land. All of the river ran into the Salton Sea for a while. To adequately protect people of the Imperial Valley it was necessary to go up

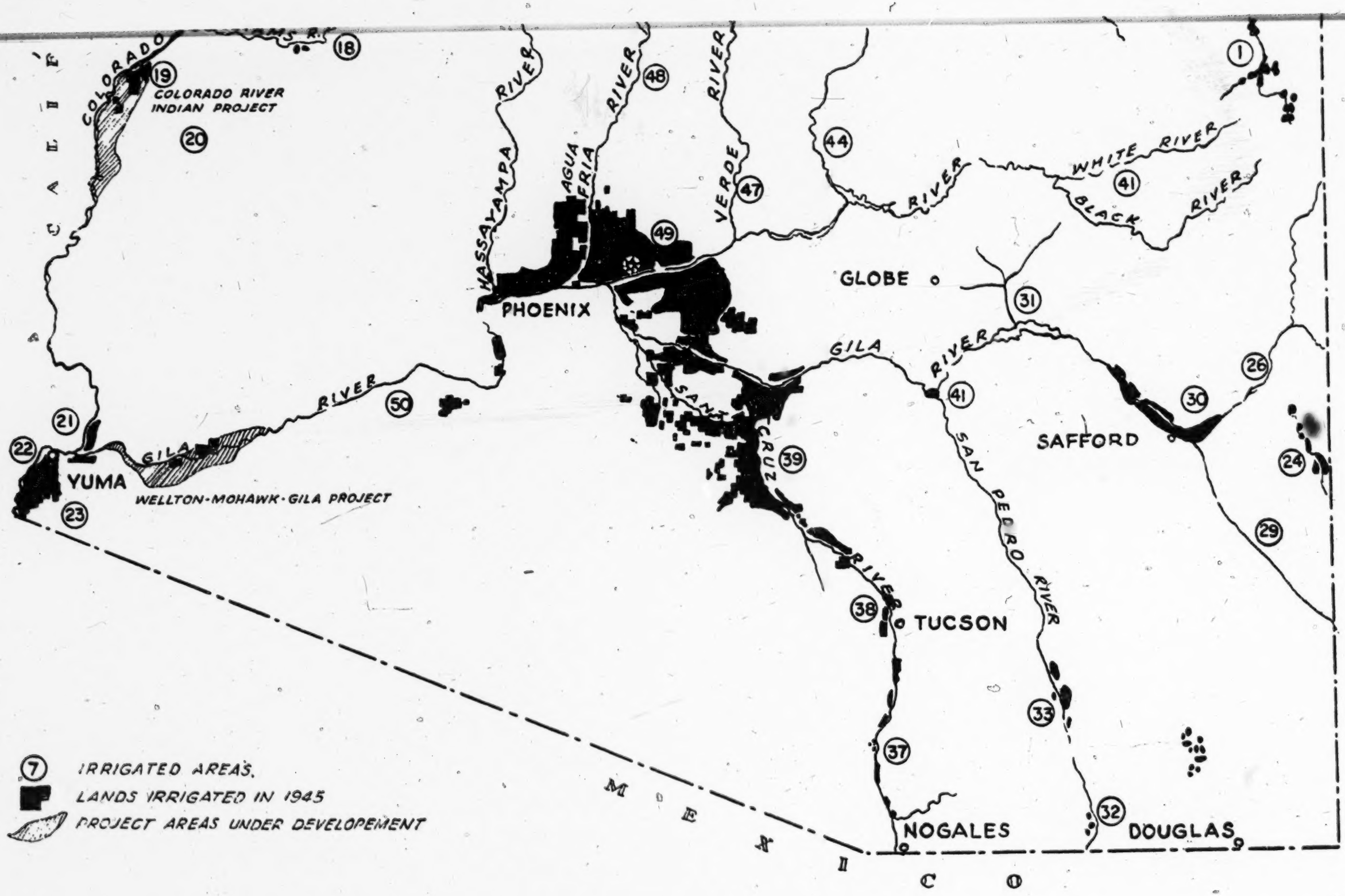
somewhere along the river and build a great dam to control the floods, and the Boulder Canyon site was selected.

To build the Boulder Canyon Dam required an authorizing act by Congress. The states of the upper basin looking the situation over, said, "Before any dam is built on the Colorado River we must have an understanding about how the waters of that river are going to be divided. We want to know what water will be left for us, because California is lower down, has lands that are level and more susceptible of irrigation, and if nothing is done about dividing the water, they will put it to beneficial use; and once land is irrigated in California we never could take the water away from them. Whatever the future situation may be, it will not be possible to turn existing irrigated farms back into the desert."

It was the upper basin States which insisted that there should be a Colorado River compact. It was at their request that Congress, in the act of August 19, 1921, authorized the making of a compact among the basin States for the apportionment of the water of the Colorado River. The act was conditioned upon the appointment of, and participation in the compact sessions by, a representative of the Federal Government. Herbert Hoover, who was then Secretary of Commerce, was persuaded to be the Federal representative because everyone wanted an engineer of standing and national reputation to be at the head of the Commission.

The commissioners from the seven States negotiated all summer and did not get anywhere. I remember talking to Mr. Hoover one day about it, and he said they just could not agree on anything at all. I said, "What you say is due to your political inexperience; there is an election coming on this fall, and it does not make any difference what a State official should now agree, because his opponent is going to say that he has traded away the heritage of his people. But if you will just wait until after the election and then get the State commissioners together, they will write a compact." And that is exactly what they did.


14
FREDONIA
U T A H
15
10
LEE FERRY
GLEN CANYON
RES. SITE
UPPER BASIN
LOWER BASIN
MARBLE CANYON
RES. SITE
BRIDGE CANYON
RES. SITE
11
COLORADO
RIVER
9
COCONINO
RES. SITE
NEVADA
RIVER
8
KINGMAN
16
MOHAVE VALLEY
PROJECT
17
SANDY RIVER
FLAGSTAFF
WINSLOW
7
6
45
5
46
PRESCOTT
2
ST. JOHNS
4
A R I Z O N A
3
WILLIAMS R.
18
COLORADO
19
COLORADO RIVER
INDIAN PROJECT
20
CALIFORNIA
HASSAYAMPA
RIVER
AGUA
FRIA
RIVER
48
VERDE
RIVER
47
1
44
WHITE RIVER
41
BLACK
RIVER
49
GLOBE



IRRIGATED LAND IN ARIZONA

They went over to Santa Fe and agreed upon the Colorado River compact, which was signed November 24, 1922. It was found impossible at that time to make a division of the water among the seven States; so they agreed to divide the Colorado River Basin into two parts, and that 7,500,000 acre-feet should be allocated to the upper basin and 7,500,000 feet to the lower basin out of the main stream at Lee's Ferry near the Utah-Arizona boundary line.

Then again, having had difficulty with California in getting that State to come together with them on the compact, the representatives of the upper basin States decided that they had better have a further assurance before Congress authorized the construction of the Boulder Canyon project. "We insist that the California Legislature shall meet and irrevocably bind that State for the benefit of the United States and all the other States of the basin; that California will never claim more than 4,400,000 acre-feet out of that 7,500,000 coming down the Colorado River." The Boulder Canyon Project Act accordingly was passed by Congress with the specific provision that it would not be effective until the California Legislature made that irrevocable agreement.

Subtract 4,400,000 acre-feet from 7,500,000 acre-feet, and what is left could go only to two other States, Arizona and Nevada.

The 4,400,000 acre-feet apportionment to California as worked out was in close accord, but not quite identical, with an arbitration award that Arizona accepted at one time in order to get a settlement with California. Arizona submitted to the Governors of the upper basin States and their representatives this question: How should the lower basin water be divided?

The governors came back with a finding that Arizona should get 3,000,000 acre-feet, California 4,200,000, and Nevada 300,000. When the time came to write the Boulder Canyon Project Act, California took another 200,000 acre-feet. That is how it gets up to 4,400,000. I remember the argument made to us during consideration of that act: "Arizona has been allocated under

the governors' arbitration 3,000,000 acre-feet, your State is losing less than 10 percent of that amount of water and you had better go along," and that is the way it was done.

Unfortunately, the State of Arizona failed promptly to ratify the Colorado River compact. We then had a group of folks in Arizona who were perfect fanatics about Colorado River water. They would look at a map of the State, see a level place on it somewhere, figure up the number of irrigable acres, and insist that there were millions of acres of desert land in Arizona that could be irrigated. We had one gentleman, Mr. George H. Maxwell, who even argued that, based upon the doctrine of riparian rights, the State of Arizona had the right to have the Colorado River come down its northern border with an undiminished flow.

Approval of the Colorado River compact got mixed up into politics because the defeated Governor of Arizona went over to Santa Fe when the compact was signed, and came back saying that it was a wonderful document. The Governor who had defeated him a few weeks before in the State election, of course, did not like that. So when it came to the ratification of the compact much trouble developed in the Arizona Legislature.

In an effort to straighten out that situation, I addressed a long series of questions to Mr. Hoover as to what the compact meant. All of the questions were asked in order to satisfy people in Arizona who were alleging that somehow or other our State was going to suffer great injury if we ratified the Colorado River compact. The questions were not based upon any fear that California would not do the right thing, or that the other States in the basin would not do right by us, but just simply to satisfy local sentiment at home.

But we did not succeed in that effort, and my recollection is that the Colorado River compact failed of ratification in one house of the Arizona Legislature by about two votes and by one vote in the other. So Arizona was not in the compact when the time came for Congress to pass the Boulder Canyon Project Act. And

because Arizona had not approved it, the other six States said, "We are going to fix it so that Arizona cannot get any water out of the Boulder Canyon Reservoir until Arizona joins the compact." If Senators will read through the Boulder Canyon Project Act they will find one place after another where it is in effect provided that unless a State had approved the compact it did not get any water out of the Colorado River.

The bill to authorize the construction of the Boulder Canyon project was reported in the Senate in the spring of 1928. Senator Ashurst and I were there to represent our State. Here was a bill which absolutely deprived Arizona of any benefits whatsoever from the construction of that project. We concluded that our only recourse was to fight the bill. So we tied it up for over a month, toward the close of the summer session of Congress, which was not difficult because the appropriation bills and other business frequently caused it to be set aside. The bill finally was made the exclusive unfinished business of the Senate, when Congress reconvened on the first Monday in December 1928. Then we started talking again. There were just the two of us—

Senator KERR. Not a filibuster, Senator.

Senator HAYDEN. We did filibuster; there was no fooling about it at all. [Laughter].

We did it all day long and then when the Senate ran into night sessions we kept on—insisting that there must be some indication in the bill that Arizona had some right to water in the Colorado River.

Finally—I very well remember the last night; I talked until about 11 o'clock when a quorum did not develop; so I went to sleep on a couch. The last of the Senators to make a quorum straggled in just as the sun was coming up. I told all the Senators to go home, get a bath, get breakfast, and take their time, because I was not going to yield the floor until at least half past 10. I knew there were then in progress negotiations to work out something in the bill that would help Arizona.

Senator Pittman of Nevada was the principal negotiator who was trying to get our trouble straightened

out. He thoroughly understood our attitude with regard to the legislation.

He had told me the evening before, and then again that morning—I remember I yielded the floor to my colleague and talked to Senator Pittman in the Democratic cloakroom. He said, "We have fixed up an amendment which clearly indicates what water in the Colorado River Arizona is entitled to." That is the provision in the Boulder Canyon Project Act by which Congress authorized in advance the approval of a supplemental compact between the three States of the lower basin for a division of Colorado River water. It gave advance congressional approval. Ordinarily an interstate compact is approved after the States have negotiated it, but this was another way of getting at it.

It is provided in the Boulder Canyon Project Act that:

> The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico. * * *

One of the allegations made by some of the fanatics in Arizona was that if Arizona should ratify the Colorado River compact and a shortage of water occurred in Mexico, we would have to open up the Roosevelt

Dam and all the other Arizona reservoirs, turn the water down the Gila River, and let it run to Mexico; that we would have to open up the floodgate and turn the water down, even though it would never get to Mexico, but would be soaked up in the sands.

But that is what some people in Arizona construed the compact to mean. Those words last quoted were used in the act, not for fear of California or the other basin States, but to answer the fears of the fanatics in Arizona. That is also why the following language is in the Boulder Canyon Project Act:

If it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water which cannot reasonably be applied to domestic and agricultural uses, and that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact. * * *

Senator Pittman brought us this solution. I remember very well that Senator Kendrick came to talk to me in the cloakroom and said, "Now, this is what you have been talking about: You want a clear definition of Arizona's rights to water out of the Colorado River. We have given it to you and you ought to abandon this filibuster." We could have kept it up. We were not afraid of cloture. That had been tried once before and failed to get the necessary votes. We could have tied the bill up for good. And I can assure you that I would have been right there talking yet if we had not made this agreement.

Senator MCFARLAND. Senator, pardon me just a minute. Did you read the earlier portion of that section of the Project Act which provided for the appor-

tionment of 2,800,000 acre-feet of III (a) water to Arizona, plus the waters of the Gila?

Senator KERR. Yes; he read that.

Senator MCFARLAND. Pardon me; I did not hear that.

Senator HAYDEN. There is another provision in the act about an additional million acre-feet allocated to the lower basin.

Senator KERR. That is III (b).

Senator HAYDEN. III (b). Everybody knew that was Arizona water. The California Senators knew it better than anybody else because if you will look at that map the Gila River runs into the Colorado River below any point where California could divert it into that State. It could not be used by any other State. The old Laguna Dam and the present Imperial Dam are above the mouth of the Gila River. So everybody agreed that no other State could have any claim to any water that could be physically used in one State alone. That was the Gila River situation.

But we had to put all that language in the act in order to satisfy a lot of our people that Arizona would not be required to deliver any Gila River water to Mexico and that no one else had any claim to it. That is why it was written.

The language was not adopted, as I say, because any representation had been made at any time by any Senator from any State that Gila River water did not belong to Arizona.

That was thoroughly understood by Senator Johnson and Senator Shortridge, the then Senators from California.

If the representations made with respect to the Gila River in later years, on behalf of the State of California, had been so much as whispered at that time, the Boulder Canyon Project Act would never have been passed. I know that positively, because these later representations are so different from the concept that was in the minds of all the Senators who had to do with the

passage of that act, that such later representations just would not fit the true original situation.

Since that time the intent of that act has been twisted and squirmed and distorted. Sometimes I think the way some people in California, and particularly the groups over in the Imperial Valley, try to twist the meaning of words and to distort the record of history, and to welch on the solemn agreements that the State of California made—the best group I can compare them with is the Politburo in Moscow. That is about as close a comparison as I can summon as to anyone acting to twist and distort the meaning of words and the distinct understanding that we had at the time.

Senator DOWNEY. Mr. Chairman, in view of that very bitter statement that I think is totally uncalled for and that I very much resent, on which specific act does the Senator base that statement? What specific act?

Senator HAYDEN. The assertion, for example, that the State of California could count in the waters of the Gila River as a part of the lower basin waters to which they might lay claim. That is perfectly idiotic. There is not a thing like it in the record. It never was in the mind of Senator Hiram Johnson. It never was in the mind of Sam Shortridge. It never was in the mind of any Senator that any such cockeyed idea could ever be advanced, and yet it has since been seriously advanced by California over and over again.

Senator DOWNEY. Mr. Chairman, I want to say we will certainly endeavor to present very persuasive evidence that the statement just made by the Senator from Arizona is not correct.

Senator HAYDEN. All I can say to the Senator is that no such idea had been advanced at that time by any Senator or Congressman from California, nor were any of these extravagant claims that are now being made, whether based upon a subsequent contract with the Secretary of the Interior for nearly a million additional acre-feet of water out of the surplus or otherwise. That idea was not dreamed of at the time of adoption of the Boulder Canyon Project Act. Nobody even thought it or ever mentioned that California could firm up a con-

tract above the 4,400,000 acre-feet of water by taking water away from Arizona. If that proposal had ever been before the Congress there would not have been a Boulder Canyon Project Act and you could not have gotten a Senator from any State to support it.

Senator Johnson and Senator Shortridge never advocated anything of the kind. I know what I am talking about because I was there.

That is the situation the way I see it, and that is why I have recited this history to the committee.

APPENDIX No. 7

Session Laws of Arizona, 1933 Chapter 33, Sec. 75-1601, 2 & 3 Arizona Code Annotated 1939.

COLORADO RIVER COMPACT

75-1601. TRI-STATE COMPACT.—The State of Arizona, desiring to enter into a compact with the States of California and Nevada under the authority of and in accordance with the provisions of the act of Congress of the United States of America approved December 21, 1928 (45 Stat. 1057 "Boulder Canyon Project Act"), proposes the following compact or agreement between the States of Arizona, California and Nevada:

COMPACT BETWEEN THE STATES OF ARIZONA, CALIFORNIA AND NEVADA

The states of Arizona, California and Nevada, desiring to enter into a compact or agreement under the Act of Congress of the United States of America approved December 21, 1928 (45 Statutes at Large, page 1057, "Boulder Canyon Project Act"), have agreed upon the following articles:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of waters of the Colorado River System apportioned to the Lower Basin under the Colorado River Compact; to establish the relative importance of different beneficial uses of such water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Lower Basin, the storage of its waters, and the protection of life and property from floods.

ARTICLE II

As used in this compact:

"Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America;

"Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied;

"States of the Upper Division" means the states of Colorado, New Mexico, Utah, and Wyoming;

"States of the Lower Division" means the states of Arizona, California and Nevada;

"Lee's Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River;

"Upper Basin" means those parts of the states of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee's Ferry, also all parts of said states located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system above Lee's Ferry;

"Lower Basin" means those parts of the states of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee's Ferry, and also all parts of said states located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by the waters diverted from the system below Lee's Ferry;

"Domestic use" includes the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but excludes the generation of electrical power.

ARTICLE III

(a) The aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the state of California, including all uses under contracts made under the provisions of the Boulder Canyon Project Act and all waters necessary for the supply of any rights which may now exist, shall not exceed four million, four hun-

dred thousand acre-feet of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Colorado River Compact, such uses always to be subject to the terms of said compact.

(b) Of the seven million, five hundred thousand acre-feet annually apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River Compact, there is hereby apportioned annually to the state of Nevada three hundred thousand acre-feet and annually to the state of Arizona two million, eight hundred thousand acre-feet for the exclusive beneficial consumptive use by said states of Nevada and Arizona, respectively, in perpetuity.

(c) The state of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River Compact.

(d) In addition to the water covered by paragraphs (b) and (c) hereof, the state of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of the state of Arizona in perpetuity.

(e) The waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico, but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said Colorado River Compact, then the state of California shall and does mutually agree with the state of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the Lower Basin.

(f) Neither the states of Arizona, California nor Nevada will withhold water nor require the delivery of water which can not reasonably be applied to domestic and agricultural uses.

(g) All the provisions of this compact or agreement shall be subject in all particulars to the provisions of the Colorado River Compact.

ARTICLE IV

This compact or agreement shall take effect and become binding and obligatory when it shall have been approved by the Congress of the United States of America, by the legislatures of each of the states of Arizona, California and Nevada and when the states of Arizona, California and Nevada shall have ratified the Colorado River Compact. When approved by the legislature of a signatory state the original and four copies of this compact or agreement shall be signed by the governor of such state and notice of such approval and signing shall be given by such governor to the governors of the other signatory states and to the President of the United States of America. The governor last signing shall forward the original copy for deposit in the archives of the Department of State of the United States of America and one copy to the governor of each of the other signatory states.

IN WITNESS WHEREOF this compact or agreement is executed.

STATE OF ARIZONA
By .....
Governor, at Phoenix, Arizona
....., 19.....

STATE OF CALIFORNIA
By .....
Governor, at Sacramento, Cal.
....., 19.....

STATE OF NEVADA
By .....
Governor, at Carson City, Nev.
....., 19.....

75-1602. ACCEPTANCE BY ARIZONA. — The proposed agreement between the states of Arizona, California and Nevada, as set forth in section 1 [75-1601] of this act, is approved and accepted for the state

of Arizona. The governor of the state of Arizona is authorized and directed to sign said agreement for the state of Arizona, and to give notice of its approval as in said agreement provided.

75-1603. CONDITIONAL APPROVAL OF COLORADO RIVER COMPACT.—If the agreement set forth in section 1 [75-1601], of this act, be approved by the Congress of the United States, and the states of California and Nevada within one [1] year after the effective date of this act, or within a period of one [1] additional year thereafter provided the governor of the state of Arizona shall by proclamation so extend the period for such approval, the Colorado River Compact shall thereupon be and become by the terms of this act ratified for and on behalf of the state of Arizona.

APPENDIX No. 8

1944 LEGISLATION RATIFYING THE SEVEN-STATE COMPACT ARIZONA

(Act approved February 24, 1944; Ch. 5, 17th Legislature; Session Laws of Arizona, 1944, pp. 427-428)

CHAPTER 5
(Senate Bill No. 1)

An Act ratifying the Colorado River Compact, and declaring an emergency.

Be it enacted by the Legislature of the State of Arizona:

SECTION 1. RATIFICATION. The Colorado River Compact executed at Santa Fe, New Mexico, November 24, 1922, by representatives of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming is unconditionally ratified, approved and confirmed.

SEC. 2. EMERGENCY. To preserve the public peace, health and safety it is necessary that this Act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

Approved by the Governor February 24, 1944.

Filed in the Office of the Secretary of State February 24, 1944.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 8 Original

STATE OF ARIZONA

v.

STATE OF CALIFORNIA, ET AL.

REJOINDER OF DEFENDANTS TO COMPLAINANT'S REPLY TO DEFENDANTS' ANSWER

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(Continued on Inside Cover)

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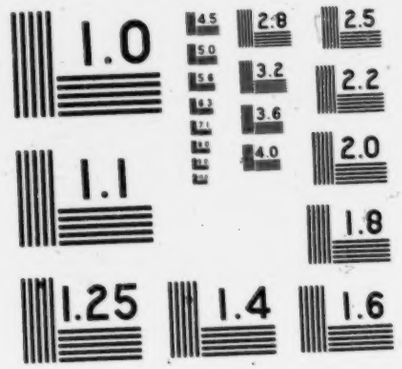

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 10 Original

STATE OF ARIZONA

v.

STATE OF CALIFORNIA, ET AL.

REJOINDER OF DEFENDANTS TO COMPLAINANT'S REPLY TO DEFENDANTS' ANSWER

Defendants, by their duly authorized attorneys, jointly make the following Rejoinder to Complainant's Reply to Defendants' Answer herein.

1.

As to the new allegations contained at page 4 of Complainant's Reply, to the effect that on or about November 18, 1922, at Santa Fe, New Mexico, the provisions of Article III (b) of the Colorado River Compact were prepared and inserted in said Compact solely and entirely for the purpose of recognizing the use by Arizona of approximately

1,000,000 acre-feet per year of water of the Gila River, and that such was the understanding of the Arizona Commissioner, defendants allege and deny as follows:

(a) Defendants allege that evidence of the said alleged understanding was held by this Court in *Arizona* v. *California*, 292 U. S. 341 (1934), to be inadmissible to contravene the terms of the Colorado River Compact, and further allege that Appendixes 2, 3, 4 and 6 annexed to the Reply are substantially the same evidence as was sought to be perpetuated in that case by Arizona.

(b) The Complaint and Arizona's Reply fail to allege that any such alleged understanding was ever communicated to the legislature of any State or to the Congress. Defendants allege: Neither the Congress which approved the Colorado River Compact nor the Legislatures of the States which ratified said Compact were advised of Complainant's present contention that the water referred to in Article III (b) was earmarked by the Colorado River Commissioners for Arizona as distinguished from the states of the Lower Basin collectively, and this contention was not asserted in any form until many years after the Legislatures of Colorado, Wyoming, Utah, New Mexico, California, and Nevada had ratified, and the Congress had granted its consent to, the Colorado River Compact. For said reasons, evidence of any such understanding as is alleged in the said Reply would be inadmissible for any purpose in this case.

(c) If the understandings or purposes of the Colorado River Commissioners at Santa Fe in November 1922 should be deemed material, relevant or competent, defendants deny that said Commissioners or any

of them prepared or inserted the provisions of Article III (b) in the Colorado River Compact solely or entirely for the purpose of recognizing Arizona's use of 1,000,000 acre-feet or any other amount of water of the Gila River. To the contrary, defendants allege as follows: The Colorado River Commissioners intended and understood that the provisions of Article III(b) of the Colorado River Compact related to the use of the waters of the Colorado River System as a whole and not to any specific part thereof such as the Gila River or its tributaries, and said Commissioners further intended and understood that the increase of use of 1,000,000 acre-feet per annum referred to in Article III (b) was made available for use in the Lower Basin States collectively and not in any one State individually. Defendants further allege that the express provisions of the Colorado River Compact are in accordance with said intentions and understandings of said Commissioners.

2.

As to the new allegations contained at pages 7 and 8 of Complainant's Reply under the heading "Action by Arizona on the Proposed Tri-State Compact", defendants deny that the Arizona Legislature in 1939 or at any other time ratified the Tri-State Compact authorized by Paragraph 2 of Section 4(a) of the Boulder Canyon Project Act. The proposed Tri-State Compact which Complainant alleges it ratified, as the same appears in Appendix 7 to the Reply, differs materially from the terms of the Tri-State Compact authorized by Paragraph 2 of Section 4(a) of the Boulder Canyon Project Act (Appendix 2 to California's Answer) especially as follows: Whereas the Tri-State Compact authorized by the Boulder Canyon

Project Act would allot to Arizona the use of 2,800,000 acre-feet per year of water apportioned to the Lower Basin by Article III (a) of the Colorado River Compact and one-half of the excess or surplus water unapportioned by the Colorado River Compact, which said allotment to Arizona would by definition include the water of the Gila River and its tributaries, the proposed Tri-State Compact allegedly ratified by Arizona would allot to that State the use of the water of the Gila River and its tributaries "in addition to" (rather than as part of) 2,800,000 acre-feet per annum of water, the use of which is apportioned by Article III (a), and one-half of the excess or surplus water.

3.

As to Appendixes 2, 3, 4 and 6 to the Complainant's Reply, which said Appendixes purport to contain excerpts from testimony and evidence presented to various committees of the 79th, 80th and 81st Congresses of the United States in the years 1946, 1947 and 1949, defendants allege and deny as follows:

(a) The alleged testimony and evidence contained in said appendixes were held inadmissible by this Court in *Arizona* v. *California,* 292 U. S. 341 (1934).

(b) The testimony and evidence contained in said Appendixes are inadmissible in evidence, being incompetent, immaterial, and irrelevant to the issues of this case, in violation of the rules against the admission of hearsay evidence, and in violation of the parol evidence rule as in contravention of the Colorado River Compact.

(c) The Complaint and Reply fail to allege that the testimony and evidence contained in said appendixes were communicated to, presented to, or consid-

ered by the Congress which granted consent to the Colorado River Compact or the legislature of any State which ratified said Compact, and defendants allege that in fact, said testimony and evidence were not so communicated, presented, or considered.

(d) Defendants deny that the testimony contained in said Appendixes is in any way an accurate account of the facts and events referred to in said testimony.

4.

Reserving the right to object to the competency, materiality and relevancy of the allegations of Complainant's Reply and the Appendixes thereto, defendants deny all allegations of said Reply and the Appendixes thereto except as said allegations conform to the facts as alleged in Defendants' Answer and in this Rejoinder.

PRAYER

WHEREFORE, defendants pray:

1. That the Court decree that Complainant take nothing by its pleadings herein, and that defendants recover their costs and disbursements herein expended.

2. That the Court grant to the defendants such other and further relief as to the Court may seem meet and proper.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 10, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS;

UNITED STATES OF AMERICA, INTERVENER

PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES OF AMERICA

The United States of America, by HERBERT BROWNELL, JR., the ATTORNEY GENERAL, and by leave first had and obtained, files this Petition of Intervention in the above entitled cause, and alleges and declares as follows:

PART ONE: INTRODUCTION AND BACKGROUND

I

The State of Arizona, as complainant, has invoked the original jurisdiction of this Court pursuant to the provisions of Article III, Section 2, Clause 2, of the Constitution of the United States of America in regard to the rights and interests which it asserts in the Colorado River, a navigable, interstate stream. Named by the State of Arizona as defendants in the cause are the State of California together with seven municipal corporations or public corporations existing pursuant to the laws of the State of California, all of which claim rights to the use of water in the Colorado River, which are described with particularity in the answer of those defendants to Arizona's Bill of Complaint. Arizona's motion for leave to file the complaint was granted on January 19, 1953.[1]

There was filed with this Court on December 31, 1952, by the United States of America a motion for leave to intervene in the cause initiated by the State of Arizona. This Court by its order of January 19, 1953, granted that motion to intervene.[2]

The State of California with the other defendants named by the State of Arizona answered the latter's Bill of Complaint, averring, among

[1] *Arizona* v. *California, et al.*, 344 U. S. 919 (1952).
[2] *Arizona* v. *California, et al.*, 344 U. S. 919 (1952).

other things, certain affirmative defenses.[3] Pursuant to leave granted by this Court,[4] the State of Arizona filed on August 28, 1953, its Reply to Defendants' Answer, to which defendants filed a Rejoinder on October 8, 1953.

II

The State of Arizona, by its Bill of Complaint, seeks to have quieted its title to the rights to the use of certain water of the Colorado River System, as against the defendants; to have construed in the manner which it alleges in its Bill of Complaint the Colorado River Compact, the Boulder Canyon Project Act,[5] related laws, contracts and documents. It likewise seeks ancillary injunctive relief.

III

The State of California, joined by the other defendants, answered the Bill of Complaint; denied the principal contentions of the State of Arizona; asserted affirmative defenses; and averred their interpretation of the Colorado River Compact, the Boulder Canyon Project Act, related laws, contracts and documents.

---

[3] *Arizona* v. *California, et al.*, 345 U. S. 968 (1952).
[4] *Arizona* v. *California, et al.*, 345 U. S. 968 (1952).
[5] 43 U. S. C. 617, et seq.

IV

DESCRIPTION OF THE COLORADO RIVER

Important in regard to the dispute between the principal litigants in this proceeding are the physical phenomena of the Colorado River and the region traversed by it. Rising in the State of Colorado near the crest of the Continental Divide at an elevation of approximately nine thousand feet above sea level, it flows for a distance of 1,293 miles, draining portions of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.

In its course the Colorado River traverses a semiarid area of approximately 240,000 square miles in which agriculture can be successfully practiced only through artificial irrigation. However, marked geographical and climatological differences exist between the upper reaches of the river and the lower.

Nearly 1,000 miles of canyon separate the lands upon which water may be beneficially applied in the upper States of the Colorado River Basin and those upon which water may be beneficially used in the Lower Basin.[6] The Upper Basin area is comprised of high elevations resulting in shorter growing seasons and lower demands for water and, by reason of the conformation of the

[6] The Colorado River Compact, Article II (f), (g), defines "Upper Basin" and "Lower Basin" as follows:

"Upper Basin" means those parts of the States of Arizona,

area, has a relatively high return flow. In the lower reaches of the stream, large areas susceptible of irrigation are found. Due to the extreme aridity of climate and the long growing season, the demand for water for each acre irrigated is high. Works of great magnitude with commensurate costs are required to irrigate those lands. Historically, commerce was carried on in the navigable lower reaches of the stream. Moreover, certain upper reaches of the stream have been declared by this Court to be navigable.

V

In its course the stream in question flows through the Western half of Colorado, the State of its origin, and then through the State of Utah where it has its confluence with the Green River which rises in Wyoming. After crossing the common boundary of Utah and Arizona, it proceeds

---

Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River above Lee Ferry.

"Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry. Likewise included in the Upper and Lower Basins are all parts of the States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above or below Lee Ferry.

"Lee Ferry" means a point on the main stream of the Colorado River a short distance below the common boundary of the States of Utah and Arizona.

in a south and westerly direction to a point where it forms the boundary between the State last mentioned and Nevada. For a distance of 145 miles, it separates the two States. Thereafter, for 235 miles it constitutes the boundary between Arizona and California. For 688 miles, more than half its length, the Colorado River flows in or upon the boundary of the State of Arizona.

VI

The Colorado River for a distance of sixteen miles constitutes the international boundary between the United States of America and the United Mexican States. The stream thence flows for a distance of 75 miles across Mexico where it empties into the Gulf of California.

VII

THE HISTORICAL NEED FOR SETTLEMENT OF THE CONFLICT BETWEEN THE BASINS

Shortly after the turn of the present century the claims to rights to the use of water in the natural flow of the Lower Basin of the Colorado River exceeded the available supply during the later summer months, with the attendant loss of crops due to the shortage of irrigation water. By way of contrast, early spring floods intermittently caused severe damage. Conservation of the run-off of the stream in the Lower Basin in high water periods, through regulatory dams and im-

pounding reservoirs, was essential. That development in the lower reaches of the river was impeded, however, by the need for an apportionment of the available supply of water between the Upper and Lower Basins of the river. Understandably, the States of the Upper Basin viewed with concern the possible loss of their rights to the Lower Basin should that development take place without some assurance that their future needs in the river would be protected.

VIII

THE "LAW OF THE RIVER"

To accomplish the required allotment and to insure the Upper Basin States that their rights would not be impaired by the development in the Lower Basin, the Colorado River Compact was formulated and signed November 24, 1922, by the several States of the Basin—Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.[7] By specific Act of Congress[8] and Presidential Proclamation,[9] the Colorado River Compact became effective June 25, 1929, though Arizona at that time failed to ratify it. Thus from its inception until ratified by the State of Arizona, the Colorado River Compact was a Six-State Compact.

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[7] Appendix VII A, Colorado River Compact.

[8] Appendix VII B, Boulder Canyon Project Act, 43 U. S. C. 617, et seq.

[9] 46 Stat. 3000.

One of the conditions to the requisite Congressional consent to the Compact was that "the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."[10] California complied with that condition.[11] It was not until February 24, 1944, that the State of Arizona ratified the Compact.

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[10] 43 U. S. C. 617c.

[11] Appendix VII C, Statutes and Amendments to the Codes of California, 1929 Extra Session, c. 16 "An act to limit the use by California of the waters of the Colorado River in compliance with the act of Congress known as the 'Boulder canyon project act' * * *."

IX

A. THE COLORADO RIVER COMPACT

By the Colorado River Compact there was apportioned in perpetuity from the Colorado River System to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use annually of 7,500,000 acre-feet of water.[12] In addition, there was given to the Lower Basin the right to increase its beneficial consumptive use of water by 1,000,000 acre-feet annually.[13] The point of division between the Upper and the Lower Basins is Lee Ferry, 23 miles below the common boundary of the State of Arizona and the State of Utah.[14] Provision is likewise made in the Compact that under prescribed conditions water unapportioned by the Compact may be allocated at any time subsequent to October, 1963.[15]

X

B. THE UPPER COLORADO RIVER BASIN COMPACT

Subject to the provisions of the Colorado River Compact, on October 11, 1948, the Upper Colo-

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[12] An acre-foot of water is equivalent to the quantity of water that will cover 1 acre (43,560 square feet) 1 foot deep.

[13] See footnote 6, supra, for the definitions of the "Upper Basin" and the "Lower Basin" of the Colorado River.

[14] Appendix VII A, Colorado River Compact, Article II (e), (f), (g).

[15] Appendix VII A, Colorado River Compact, Article III (a), (b), (c), (f).

rado River Basin Compact was entered into by the States of Arizona, Colorado, New Mexico, Utah and Wyoming, by which there was apportioned in perpetuity among those States the consumptive use of water apportioned in perpetuity and available for use each year to the Upper Basin under the Colorado River Compact.

XI

All of the federal laws to which reference has been made in the preceding paragraphs were enacted, and virtually all of the contracts regarding the delivery of water alluded to hereafter in this pleading were entered into, prior to the effective date of the Treaty between the United States of America and the United Mexican States referred to below in paragraph XIII.

PART TWO: INTERESTS OF THE UNITED STATES OF AMERICA IN THE COLORADO RIVER SYSTEM

XII

There follows, in paragraphs XIII through XXX of this pleading, a description of the specific interests of the United States of America in the Colorado River System and in the resolution of the controversy between the plaintiff and the defendants. These interests fall into the following main categories:

A. The Treaty with Mexico (paragraph XIII).

B. Contracts for the delivery of im-

pounded water which depend for their proper performance on the meaning of the Colorado River Compact and the Boulder Canyon Project Act (paragraphs XV through XX).

C. The structures and projects constructed under or pursuant to the Reclamation Act of 1902, or comparable statutory authority or international obligations, and in which the United States has a present, direct interest which will be affected by the resolution of the controversy between the parties. These are the Boulder Canyon Project, Davis Dam and appurtenant structures, Parker Dam and appurtenant structures, the Yuma Project, including Laguna Dam, the Gila Project, the Yuma Auxiliary Project, and the Salt River Project (paragraphs XIV, XXII, XXIII, XXIV).

D. The claims of the Indians and the Indian Tribes (paragraphs XXV through XXVII).

E. Other federal interests, including the generation of electricity, flood control and navigation interests and projects, fish and wildlife projects, and the public lands in that area (paragraphs XXI, XXVIII and XXIX).

Because of the adverse character of the claims asserted by the parties to this cause and their divergent construction of the fundamental laws upon which each predicates its respective claims, the United States of America is in grave doubt

in regard to its rights and obligations with respect to the waters of the Colorado River System and cannot safely exercise its rights, fulfill its responsibilities, or perform its duties, without great hazard to itself and to the parties themselves, in connection with the foregoing five categories of interests. For these reasons, it is important to the United States that the conflicts between the parties be resolved and that the rights and interests of the United States be protected in the course of that resolution.

XIII

TREATY WITH MEXICO

The United States of America in connection with the Colorado River has international obligations arising from its Treaty with the United Mexican States relating to the utilization of the waters of that stream, the Tijuana River and the Rio Grande River. That covenant was signed February 3, 1944, was ratified by the Senate of the United States of America on April 18, 1945, and by the United Mexican States on October 16, 1945. It was proclaimed by the President of the United States on November 27, 1945, and became effective November 8, 1945.[16] Pursuant to that Treaty, the United States of America, among other things, and subject to certain limitations, "guaranteed" to Mexico an annual quan-

[16] Treaty between the United States of America and the United Mexican States—See 59 Stat. 1219.

tity of 1,500,000 acre-feet of Colorado River water.

XIV

BOULDER CANYON PROJECT AND OTHER DEVELOPMENTS TO IMPOUND OR DIVERT THE WATERS OF THE COLORADO RIVER FROM THE MAIN CHANNEL OF THAT STREAM

Pursuant to the Boulder Canyon Project Act and to the Reclamation Act of 1902,[17] and acts amendatory of those acts or supplementary to them, and international obligations of the United States of America, the Secretary of the Interior undertook the construction of gigantic projects involving the expenditure of virtually one-half billion dollars. The objectives of the Boulder Canyon Project Act in connection with the development of the Colorado River in the Lower Basin are: the controlling of the floods, improving navigation, regulating the flow of the Colorado River, providing for storage, for the delivery of the stored waters for reclamation of public lands, the generation of electrical energy, and other beneficial uses.[18] In addition, certain of the structures are operated for the purposes, among others, of making possible the regulation of the waters of the Colorado River to meet the demands of Mexico under the Mexican Water

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[17] Act of June 17, 1902, Ch. 1093, 32 Stat. 388, 43 U. S. C. 391.

[18] 43 U. S. C. 617.

Treaty. Included in that development of the Lower Basin of the Colorado River are the following components in the operation of which the United States has a direct and immediate interest, and which it owns and operates through the Department of the Interior: Hoover Dam, Davis Dam, Parker Dam, Imperial Dam, Laguna Dam. The United States also owns but does not operate the All-American Canal and Coachella Canal. Other structures on the main river are the Colorado River Aqueduct, which is owned and operated by the Metropolitan Water District of Southern California, a defendant in this cause, and the Palo Verde Weir, which is owned and operated by the United States of America, but is the means by which water from the Colorado River is diverted for use for the Palo Verde Irrigation District, a defendant in this cause. All those structures are more fully described in Appendix I A of this Petition.

XV

FEDERAL CONTRACTS FOR THE DELIVERY OF WATER IMPOUNDED BY HOOVER DAM

Pursuant to and in accordance with the authority vested in him by the Boulder Canyon Project Act, the Secretary of the Interior has entered into contracts with the defendants Metropolitan Water District of Southern California, the Imperial Irrigation District, Palo Verde Irrigation District and Coachella Valley County Water District for the delivery annually of

5,362,000 acre-feet of Colorado River water stored at Hoover Dam. A contract originally entered into with the defendant City of San Diego has been superseded by subsequent arrangement with the Metropolitan Water District of Southern California. Moreover, though the defendant City of Los Angeles does not have a contract, it is a prime beneficiary of the contract between the United States of America and the defendant Metropolitan Water District of Southern California.[19]

XVI

Pursuant to an agreement dated August 18, 1931, the defendants Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California, entered into an agreement "Requesting the Division of Water Resources of the State of California to Apportion California's Share of the Waters of the Colorado River Among the Various Applicants and Water Users Therefrom in the State, Consenting to Such Apportionments, and Requesting Similar Apportionments by the Secretary of the Interior of the United States."[20]

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[19] Appendix IV D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, List of Water Contracts.

[20] Appendix VII D, Seven-Party Water Agreement, August 18, 1931.

The provisions of this covenant, generally referred to as the Seven-Party Agreement, relating to the respective priorities of those joining in it are set forth in full in each of the contracts referred to in paragraph XV. By it, the waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act are apportioned in amounts and in accordance with the priorities therein stipulated.

XVII

The United States of America, pursuant to the contracts above described and in accordance with the Seven-Party Agreement, delivers the waters impounded at Lake Mead for beneficial uses:[n]

1. To the Metropolitan Water District of Southern California for diversion at Parker Dam, through the Colorado River Aqueduct.

2. To the Palo Verde Irrigation District, at the Palo Verde Weir situated approximately 212 miles downstream from Hoover Dam.

3. To the Imperial Irrigation District and the Coachella Valley County Water District, at the Imperial Dam situated 303 miles below Hoover Dam.

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[n] Lake Mead is the storage reservoir of Hoover Dam.

(The structures referred to in this paragraph, as well as other structures and projects on the main channel of the Colorado River in which the United States has an interest, are described in Appendix I A.)

XVIII

Exercising the authority vested in him by the Boulder Canyon Project Act, the Secretary of the Interior, on behalf of the United States, entered into a contract dated March 30, 1942, as amended January 3, 1944, with the State of Nevada for the delivery annually of 300,000 acre-feet of water.[22]

XIX

Exercising the authority vested in him by the Boulder Canyon Project Act, the Secretary of the Interior, on behalf of the United States, entered into a contract dated February 9, 1944, with the State of Arizona for the delivery annually of 2,800,000 acre-feet of water, subject to the terms and conditions prescribed in that contract. Subject to the contract last mentioned, the Secretary of the Interior likewise entered into a contract dated March 4, 1952, with the Wellton-Mohawk Irrigation and Drainage District for the delivery of water to the Gila Project in the State of Arizona (described below in paragraph XXIII).[23]

[22] Appendix IV B, C, List of Water Contracts; Appendix VI A and B.

[23] Appendix IV A, T, List of Water Contracts.

XX

The contracts which the Secretary of the Interior entered into as set forth in the preceding paragraphs XV through XIX provide for the delivery annually of 8,462,000 acre-feet of water stored at Hoover Dam. Contained in each of the contracts is a provision that the delivery of water by the United States will be from available storage, all to be in accordance with the Colorado River Compact and the Boulder Canyon Project Act. Because of the incorporation in these contracts of the limitations and provisions of the Boulder Canyon Project Act and the Colorado River Compact, it is essential that the United States know the proper interpretation of those provisions of the Act last mentioned and the Compact which are in dispute between the parties. As more particularly alleged in paragraphs XXXI through XXXIX below, Arizona and the defendants are in controversy as to the meaning of the limiting provisions of the Boulder Canyon Project Act and the Colorado River Compact, and the United States is therefore uncertain as to how much water it may properly deliver annually under the aforesaid contracts.

XXI

POWER CONTRACTS

The United States of America, pursuant to the Boulder Canyon Project Act and the Boulder

Canyon Project Adjustment Act,[24] has also entered into contracts for the sale of electricity generated through the use by the United States of Colorado River water at the power plant constructed and operated by the United States in connection with the Boulder Canyon Project. Contracts have likewise been entered into by the United States for the sale of electricity generated at Parker and Davis Dams through the use by the United States of Colorado River water.[25] For that reason, the United States has an additional interest in connection with the proper operation of the structures of the Boulder Canyon Project and the dams last mentioned.

XXII

YUMA PROJECT

The Yuma Project, situated in the States of Arizona and California, was constructed pursuant to the Reclamation Act of 1902 and acts amendatory thereof and supplementary thereto. Title to the principal project works is in the United States and those structures are operated and maintained by it.

Colorado River water for the Yuma Project is diverted through the All-American Canal. For that land situated in the State of California, turn-

[24] 54 Stat. 774.

[25] Appendix V, Tabulation of sources of electricity and those holding contracts for its purchase.

outs have been constructed in the All-American Canal. The lands of the Yuma Project situated in the State of Arizona receive Colorado River water through the All-American Canal by means of a turnout from that structure at a point approximately 15 miles from the point of diversion, which is known as Siphon Drop. (See the description of the All-American Canal in Appendix I A.) There, 2,000 c. f. s.[26] of water are diverted through the Siphon Drop Power Plant and approximately 800 c. f. s. are thence taken by siphon under the Colorado River for use in Arizona. The Yuma Project is more specifically described in Appendix I B of this Petition.

XXIII

GILA PROJECT

Subject to the provisions of the Boulder Canyon Project Act and the provisions of the Colorado River Compact, the United States of America undertook the construction of the Gila Project; the United States retains title to the principal project works which it operates and maintains. Colorado River water is delivered to that Project pursuant to the contract between the United States of America, the State of Arizona, and the Wellton-Mohawk Irrigation and Drainage District.[27] The following excerpt from the Congressional en-

[26] "c. f. s." is the measure of the number of cubic feet of water passing a given point in one second of time.

[27] Appendix IV T, List of Water Contracts.

actment authorizing the Gila Project defines its scope and purpose:

> That for the purpose of reclaiming and irrigating lands in the State of Arizona and other beneficial uses, the reclamation project known as Gila project, heretofore authorized and established under the provisions of the reclamation laws, the Act of June 16, 1933 (48 Stat. 195), and various appropriation Acts, is hereby reduced in area to approximately forty thousand irrigable acres of land (twenty-five thousand acres thereof situated on the Yuma Mesa and fifteen thousand acres thereof within the North and South Gila Valleys), or such number of acres as can be adequately irrigated by the beneficial consumptive use of no more than three hundred thousand acre-feet of water per annum diverted from the Colorado River, and as thus reduced is hereby reauthorized and redesignated the Yuma Mesa division, Gila project, and the Wellton-Mohawk division, Gila project, comprising approximately seventy-five thousand irrigable acres of land, or such number of acres as can be adequately irrigated by the beneficial consumptive use of no more than three hundred thousand acre-feet of water per annum diverted from the Colorado River, * * *.[28]

The Gila Gravity Main Canal serves the Gila Project in the State of Arizona. Its headworks

[28] Act of July 30, 1947, Public Law No. 272, 80th Cong., 1st Sess.

are situated on the Arizona side of the Imperial Dam described in Appendix I A. This Project is more particularly described in Appendix I C of this Petition. Water is also delivered through Gila Project works to the Yuma Auxiliary Project in Arizona.

XXIV

SALT RIVER PROJECT

The Salt River Project in the State of Arizona has its source of supply from the Salt River, a tributary of the Gila River. The project was undertaken pursuant to the Reclamation Act of 1902, and acts amendatory thereof and supplementary thereto. This Project is more particularly described in Appendix I D of this Petition. Certain of the structures comprising the Project have been financed by others; however, the United States has title to those and to the other principal structures of the Project. The structures of the Salt River Project are: Roosevelt Dam, Bartlett Dam, Horse Mesa Dam, Mormon Flat Dam, Stewart Mountain Dam, Cave Creek Dam, Horseshoe Dam and Granite Reef Diversion Dam.

CLAIMS FOR AND ON BEHALF OF THE INDIANS AND INDIAN TRIBES IN THE LOWER BASIN OF THE COLORADO RIVER IN THE STATES OF ARIZONA AND CALIFORNIA

XXV

It is provided in the Colorado River Compact that:

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.[29]

XXVI

Headgate Rock Dam is a principal structure across the main channel of the Colorado River diverting water for the Colorado River Indian Reservation. On the Gila River is situated Coolidge Dam which impounds waters for diversion and use on the San Carlos Indian Project and for other uses. These structures are more particularly described in Appendix II B of this Petition.

XXVII

The United States of America, as trustee for the Indians and Indian Tribes, claims in the aggregate on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin of that stream in the States of Arizona and California as set forth in Appendix II A of this Petition.

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[29] Appendix VII A, Colorado River Compact, Article VII.

XXVIII

FISH AND WILDLIFE PROJECTS

The United States of America, in connection with the waters of the Colorado River, has international obligations stemming from conventions concluded between it and Great Britain,[30] and between it and Mexico,[31] having as their objective the conservation of wildlife. The United States of America, pursuant to those international conventions, has the duty to preserve, develop and replace natural wildlife habitat through the establishment and maintenance of wildlife refuges and management areas. Those wildlife refuges and management areas together with the claims in connection with them are set forth in Appendix III of this Petition.

XXIX

FLOOD CONTROL AND NAVIGATION

Pursuant to the Boulder Canyon Project Act and related laws, Hoover Dam, Davis Dam and Parker Dam are operated, among other things, "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, * * *." The waters impounded by those structures are administered in a manner which effectuates the Congressional intendment in regard to flood control and navigation.

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[30] 39 Stat. 1702.

[31] 50 Stat. 1311.

Other flood control activities of the United States of America involve the Gila River and its tributaries [32] and the Bill Williams River.[33]

XXX

GENERAL CLAIMS OF THE UNITED STATES OF AMERICA IN THE COLORADO RIVER SYSTEM IN THE LOWER BASIN

The United States of America asserts claims, as against the parties to this cause, of rights to the use of water in the Colorado River and its tributaries (a) for the purposes of, and which will yield quantities of water sufficient to satisfy the maximum legal demands for, the various projects and the components of which those projects are comprised, all as alluded to in this Petition or its appendixes, to the full capacity of the diversion, carrying, and storage structures described in this Petition and its appendixes; (b) to fulfill its obligations arising from its international treaties or conventions, and from its contracts to deliver water and electric power; (c) to fulfill the obligations emanating from its status as trustee for the Indians and Indian Tribes; and (d) to protect its interests in fish and wildlife, flood control, and navigation.

These claims of the United States are jeopardized because the aggregate of the claims of the present parties to this cause far exceeds the quantity of water apportioned to the Lower Basin

[32] House Document No. 331, 81st Cong., 1st Sess.
[33] House Document No. 625, 78th Cong., 2d Sess.

of the Colorado River by the Colorado River Compact, and a resolution of the controversy between the parties may therefore infringe upon the interests of the United States to its detriment. In addition, the United States is in doubt as to its obligations and responsibilities under its contracts, the Colorado River Compact, and the Boulder Canyon Project Act, as amended and supplemented, because the parties have put forth differing and inconsistent interpretations of significant portions of those documents which affect the rights, obligations, and responsibilities of the United States. See paragraphs XXXI through XXXIX below.

The United States of America also has claims throughout the States of Arizona and California in connection with the Colorado River and its tributaries for the use of the National Park Service and the Bureau of Land Management of the Department of the Interior, and the Forest Service of the Department of Agriculture. In the event those claims are in any way put in issue or jeopardized in this litigation, the United States of America reserves the right to assert them.

Due to the insufficient supply of water apportioned to the Lower Basin by the Colorado River Compact to meet the aggregate of the adverse claims of all parties to this cause, there is a pressing need for a decree by this Court declaring, determining, confirming and quieting the title of all parties to their respective rights and interests in and to the waters of the Colorado

River. Absent such a decree by this Court, the protracted conflict giving rise to this cause will continue to the detriment of all parties.

PART THREE: SPECIFIC RESPONSE OF THE UNITED STATES OF AMERICA TO THE PLEADINGS OF THE PARTIES

XXXI

The United States of America, in response to the Bill of Complaint of the State of Arizona, the answer of the defendants to the Bill of Complaint, the reply of the State of Arizona to the defendants' answer, and defendants' rejoinder to Arizona's reply, makes the following additional allegations, averments and denials:

(a) The United States of America alleges that its treaties and international conventions alluded to above are legal and enforceable obligations assumed by the United States of America and binding upon itself and all parties to this cause; that the Colorado River Compact is a valid and binding covenant among all of the States in the Colorado River Basin; that the Reclamation Act of 1902 and acts amendatory thereof and supplementary thereto, the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act and all supplemental legislation, both Federal and State, are valid and enforceable enactments pursuant to which the parties to the cause have received benefits; that each and every contract entered into by the United States of America

involving the use and delivery of water or electric power pursuant to the aforesaid compacts and legislation are valid, binding covenants constituting the measure of the rights of the parties to the extent that they are reflected by those covenants.

(b) The United States of America denies each and every allegation of the parties to the cause in their respective pleadings with reference to these treaties, conventions, compacts, documents, laws and contracts which in any way contravenes, contests, or challenges the validity of them or any provision or provisions of them; admits that the excerpts in the pleading from the laws, compacts, contracts and documents are correct as alleged, but for greater clarity and certainty in connection with each, refers to the laws, compacts, contracts and documents themselves.

XXXII

The United States of America, in response to paragraphs VII and XXII of the Bill of Complaint (which set forth the principal questions which the State of Arizona petitions this Court to decide), to paragraph 53 of the Traverse in the Answer of Defendants, to paragraph 8 of the First Affirmative Defense, to the corresponding paragraphs of the Reply of Arizona to the Defendants' Answer and the Rejoinder of Defendants to Arizona's Reply, as well as to the other

portions of the pleadings relating to the interpretation of the Colorado River Compact, admits that a controversy exists between the State of Arizona and the defendants as to the interpretation, construction, and application of the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, all as alleged in those portions of the pleadings.

1. By way of further response, the United States of America refers to the inquiry presented in subdivision (1) of paragraph XXII of the Bill of Complaint, which is as follows: "Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?" The State of Arizona avers that the waters in question are apportioned and that by reason of the Boulder Canyon Project Act and the California Limitation Act the defendants are precluded from participating in the so-called Article III (b) water.

In paragraph 68 of their Traverse and in paragraph 27 of the First Affirmative Defense in their Answer, the defendants deny Arizona's contention respecting the interpretation to be placed upon the clause of the Colorado River Compact in question.

Respecting those diametrically opposed positions, the United States is informed and believes and therefore alleges that if the interpretation urged by the State of Arizona is declared by this

Court to be correct, there will accrue to that State the right to the beneficial consumptive use of virtually all of the water referred to in the aforesaid Article III (b) of the Colorado River Compact, or approximately 1,000,000 acre-feet of water annually; whereas if the contentions of the defendants are declared by this Court to be correct, the State of Arizona will be entitled to the right to the beneficial consumptive use of approximately 500,000 acre-feet of water annually under Article III (b) of the Compact with a commensurate increase in the right to the beneficial consumptive use of water to the defendants under Article III (b) of the Compact. The obligations of the United States under the contracts referred to in this Petition, the operation of the projects and structures likewise described in this Petition, as well as the nature, character and extent of the rights and interests of the United States of America in the Lower Basin of the Colorado River, depend upon the resolution of this controversy between the parties; the United States is therefore in doubt as to its duties and rights and needs the determination by this Court of this issue.

2. By way of further response to the above-mentioned paragraph XXII, the United States of America refers to the inquiry presented in subdivision (2) of paragraph XXII which is as follows: "How is beneficial consumptive use to be

measured?" The State of Arizona avers that the Colorado River Compact does not apportion water but rather apportions the beneficial consumptive use of water, further alleging that beneficial consumptive use is measured in the terms of man-made depletions to the main stream of the Colorado River.

In paragraph 68 of the Traverse of their answer, the defendants specifically deny the interpretation urged by the State of Arizona, alleging in substance (in paragraphs 8 and 9 of their First Affirmative Defense in their answer) that beneficial consumptive use as used in the Compact is to be measured by diversion of water less return flow to the river.

The United States of America is informed and believes and therefore alleges that the difference between the two methods of measuring beneficial consumptive use of water asserted by the parties involves approximately 1,000,000 acre-feet; that if this Court declares that the interpretation of the clause in question urged by the State of Arizona is correct, there will accrue annually to that State all or most of that approximately 1,000,000 acre-feet of water over that quantity the State would receive if the defendants' interpretation is declared by this Court to be correct; and should defendants' interpretation be declared by this Court to be correct, there will be an attendant increase annually to the defendants of that

quantity of water. The obligations of the United States under the contracts referred to in this Petition, the operation of the projects and structures likewise described in this Petition, as well as the nature, character and extent of the rights and interests of the United States of America in the Lower Basin of the Colorado River, depend upon the resolution of this controversy between the parties; the United States is therefore in doubt as to its duties and rights and needs the determination by this Court of this issue.

3. By way of further response, the United States of America refers to the inquiry presented in subdivision (3) of paragraph XXII which is as follows: "How are evaporation losses from Lower Basin main stream storage reservoirs to be charged?" The State of Arizona alleges that the losses amount to over 700,000 acre-feet of water annually and that such losses should be apportioned among the users from the main stream storage in the Lower Basin in the same proportion as the consumptive use of each is to the total consumptive use of such storage in the Lower Basin.

The defendants specifically controvert that allegation in paragraph 68 of their Traverse and in paragraph 27 of the First Affirmative Defense in their answer, denying that the quantities of water which they are entitled to have delivered to them by the United States of America are sub-

ject to reduction as a consequence of reservoir evaporation.

Regarding the extent of the evaporation losses to which reference is made in the inquiry in question, the United States of America is informed and believes and therefore alleges that the losses will be in excess of 900,000 acre-feet annually. The obligations of the United States under the contracts referred to in this Petition, the operation of the projects and structures likewise described in this Petition, as well as the nature, character and extent of the rights and interests of the United States of America in the Lower Basin of the Colorado River, depend upon the resolution of this controversy between the parties; the United States is therefore in doubt as to its duties and rights and needs the determination by this Court of this issue.

XXXIII

The United States of America avers that the aggregate of the claims to rights to the use of water in the Lower Basin of the Colorado River far exceeds the 8,500,000 acre-feet of water available to that Basin under the Colorado River Compact. Thus it is an imperative necessity to have finally resolved the questions propounded by the State of Arizona and the correlative inquiries presented by the defendants in connection with paragraph XXII of the Bill of Complaint.

Absent a determination by this Court in regard to each of the questions presented, the United States of America, in connection with its interests, obligations, and responsibilities alluded to above, is and will be in grave doubt and cannot safely exercise its rights or perform its duties relating to the projects and rights to the use of water above described without great hazard to itself and to the parties themselves, and therefore respectfully requests this Court to resolve the conflicts as to the meaning of the Compact to which reference has been made in paragraph XXXII above, to the end that there may be delivered to the respective parties the quantities of water to which they are legally entitled.

XXXIV

The United States of America, responding to Paragraph IX of the Bill of Complaint, particularly subdivisions (c) and (d), denies that Section 8 and Section 13 (b), (c) and (d) of the Boulder Canyon Project Act subject all of its rights to the provisions of the Colorado River Compact and in that connection refers to the Colorado River Compact itself for greater certainty and clarity, particularly Article VII of the Compact. The United States of America, in regard to the aforesaid Paragraph IX of the Bill of Complaint and to the Traverse of the defendants, paragraph 55, as well as other por-

tions of the pleadings heretofore filed, points to the conflict among the parties in regard to the interpretation to be placed upon the Boulder Canyon Project Act and avers that, in the absence of a determination by this Court in regard to that Act and the several controversial provisions of it, the United States of America is and will be in grave doubt and cannot safely exercise its rights and perform its duties in connection with its rights, responsibilities, and obligations respecting the Colorado River without grave hazard to itself and to the parties themselves and, therefore, respectfully requests this Court to resolve the conflict as to the Boulder Canyon Project Act, presented by the paragraphs of the pleadings to which reference has here been made.

XXXV

The United States of America, in response to Paragraph XI of the Bill of Complaint of Arizona and to the Traverse of the defendants, paragraph 57, the corresponding paragraph of Arizona's reply to the defendants' answer, as well as other relevant portions of the pleadings, admits that the Secretary of the Interior contracted for the delivery of Colorado River water in the quantities mentioned in that paragraph of the Bill of Complaint, and for greater clarity and certainty refers to the contracts themselves, which are described above and in Appendix IV;

denies the allegations respecting the validity of those contracts and in that regard refers to the conflict among the parties to the cause, and avers that, in the absence of a determination by this Court as to the validity and construction of the contracts in question, the United States of America is and will be in grave doubt and cannot safely exercise its rights, perform its duties, meet its responsibilities or fulfill its obligations respecting the Colorado River without great hazard to itself and to the parties themselves, and therefore respectfully requests this Court to resolve the conflict as to the validity and construction of these contracts, presented by the paragraphs of the pleadings to which reference has here been made.

XXXVI

The United States of America, in response to Paragraph XIII of the Bill of Complaint of Arizona and to the Traverse of the defendants, paragraph 59, the corresponding paragraphs of Arizona's reply, and other relevant portions of the pleadings, admits the ratification by the State of Arizona of the Colorado River Compact on February 24, 1944, and that the United States entered into a contract as alleged in Paragraph XIII of the Bill of Complaint; refers to the allegation, denied by the defendants, that the aforesaid contract does not apply to the Gila

River or its tributaries, but for greater clarity and certainty refers to the contract itself, which is described above; the United States of America avers that, in the absence of a construction by this Court of the contract alluded to in that paragraph of the Bill of Complaint, the United States is in grave doubt and cannot safely exercise its rights and perform its duties in connection with its rights, responsibilities and obligations respecting the Colorado River without great hazard to itself and to the parties themselves and therefore respectfully requests this Court to resolve the conflict as to this contract with Arizona, presented by the paragraphs of the pleadings to which reference has here been made.

XXXVII

The United States of America, in response to Paragraph XVIII of the Bill of Complaint, to paragraph 14 of the First Affirmative Defense of the defendants, to the Traverse of the defendants, paragraph 64, to the corresponding paragraphs of the reply of the State of Arizona to the defendants' answer, and to other relevant portions of the pleadings, refers to the allegation of the State of Arizona that there is no controversy which relates to the use of the waters of the Colorado River System by Indians or Indian Tribes and to the counter allegation of the defendants denying the assertions of the State of Arizona and declaring that all beneficial consump-

tive uses of water by Indian Tribes pursuant to obligations of the United States to such Tribes are chargeable to the beneficial consumptive uses available to the Basin under the Compact, and to the State in which such uses are situated, and to the allegations of the defendants that all beneficial consumptive uses in Arizona of Colorado River System water, whether by Indians or others, are chargeable to Arizona under its contract with the United States of America; makes reference to paragraph XXVII of this Petition, in which the rights of the Indians and Indian Tribes as asserted by the United States are set forth, and for greater clarity and certainty to the Colorado River Compact itself, particularly Article VII thereof, and likewise makes reference to the contract between the United States of America and the State of Arizona.

The United States of America denies each and every allegation of the paragraphs of the pleadings of the parties to which reference has here been made and alleges that the rights to the use of water of the Indians and Indian Tribes are in no way subject to or affected by the Colorado River Compact. Further in response to the allegations of the parties, the United States of America refers to its obligations to the Indians and Indian Tribes; to the conflicting claims of the parties over their respective rights to the use of water; to the fact that the aggregate of the

claims of the parties to this cause far exceeds the supply of water available under the Colorado River Compact to the Lower Basin of that river; and to the claims asserted by the parties adverse to the rights to the use of water in the Colorado River System of the Indians and Indian Tribes in the States of Arizona and California. The United States of America further alleges that the conflict among the parties to this cause directly and adversely affects the rights to the use of water in the Colorado River System of the Indians and Indian Tribes in the States of Arizona and California; and that until the respective rights of the parties to this cause and the rights of the Indians and Indian Tribes are determined, the United States of America will be in grave doubt and cannot exercise the claims which it asserts for itself and on behalf of the Indians and Indian Tribes or perform its duties in connection with those rights, responsibilities and obligations in regard to the Colorado River without great hazard to itself and to the parties themselves. Therefore the United States of America respectfully requests this Court to declare and determine the rights of the Indians and Indian Tribes in the Lower Basin of the Colorado River and to resolve the conflicts on this issue presented by the respective pleadings of the parties to this cause.

XXXVIII

Responding further to the allegations of the parties as set forth in the Bill of Complaint of the State of Arizona, the Answer of Defendants to Bill of Complaint, the Reply to Defendants' Answer by the State of Arizona, and the Rejoinder of Defendants to Complainant's Reply to Defendants' Answer, the United States of America:

a. Denies each and every argument, conclusion of law and allegation containing mixed conclusions of law and averments of fact alleged in the respective pleadings of the State of Arizona and the defendants;

b. Denies each and every allegation of fact in the respective pleadings of the State of Arizona and the defendants which is substantially at variance with or contrary to the facts as alleged in this Petition or in the appendixes of this Petition; each and every appendix referred to in this Petition is incorporated into it by reference and made a part of it.

c. Admits each and every other well-pleaded fact alleged by the State of Arizona and the defendants in their respective pleadings, except as to those facts which are expressly denied or are substantially at variance with the facts as herein alleged.

CONCLUSION AND PRAYER

XXXIX

In summary and conclusion, the United States of America alleges that the aggregate of the claims of the parties to this cause far exceeds the quantity of water available to the Lower Basin of the Colorado River under the Colorado River Compact; that the parties assert claims to rights to the use of water adverse to each other, and bring into question and allege rights adverse to the rights to the use of water and the interests, responsibilities, claims, and obligations of the United States of America in the Lower Basin of the Colorado River; that the parties likewise seek different interpretations of the several provisions of the Colorado River Compact, the Boulder Canyon Project Act, and related laws and documents by reason of which the United States is and will be in grave doubt and cannot safely exercise its rights and perform its duties in connection with the projects and rights of the United States above described without great hazard to itself and to the parties themselves.

WHEREFORE, the United States of America respectfully prays this Court

(1) To adjudge and declare the validity of the treaties and international conventions, compacts, laws, contracts and federal documents to which reference has been made

throughout this Petition and the pleadings of the parties;

(2) To interpret, construe, and resolve the conflicts which have arisen among the parties to this proceeding in connection with the laws, contracts, and documents referred to above;

(3) To quiet the title of the United States of America in and to each and every right to the use of water claimed and exercised by it, all as asserted in this Petition, including but not limited to those of its Indian wards, against the adverse claims of the State of Arizona and the above-named defendants.

And that the United States of America have such other and further relief as shall appear proper.

The United States also respectfully prays leave to amend this Petition of Intervention if that should hereafter become necessary or appropriate in the course of the proceedings herein.

HERBERT BROWNELL, JR.,
Attorney General.

DECEMBER 1953.

APPENDIXES

APPENDIX I

A. BOULDER CANYON PROJECT AND OTHER DEVELOPMENTS TO IMPOUND OR DIVERT THE WATERS OF THE COLORADO RIVER FROM THE MAIN CHANNEL OF THAT STREAM

Hoover Dam: This is the principal structure of the Lower Basin development impounding the waters of the Colorado River which comprise Lake Mead. It is situated in Black Canyon on the main channel of the Colorado River 325 miles above the Mexican border. The middle channel of the river at the site in question is the common boundary between the States of Nevada and Arizona.

This is the world's highest dam: a concrete arch, gravity type structure having a height of 726.4 feet and a hydraulic height of 575.8 feet. There have been constructed in connection with it two side-channel spillways with a capacity of 400,000 cubic feet of water per second of time.[1] The outlet works have a capacity of 91,000 c. f. s. The power plant discharge (17 turbines) is 30,560 c. f. s. The rating of the generators presently installed, including two small station-service units, is 1,249,800 kw.; ultimately the generator

[1] *Second foot:* A unit of measure of the rate of stream flow. It is the flow of one cubic foot (7.48 gallons) of water passing a given point per second of time; hereafter referred to as c. f. s.

rating installation will be 1,354,300 kw. Total storage capacity of Lake Mead is 32,359,000 acre-feet;[2] at elevation 1229, the maximum surface area is 162,700 acres.

Lake Mead has a maximum length of 115 miles and a maximum width of 8 miles.

Construction was initiated on Hoover Dam September 17, 1930 and water was first impounded on February 1, 1935. The first power was generated on September 11, 1936.

Water is pumped from Lake Mead to Boulder City and Henderson for municipal and industrial purposes; the average diversion is approximately 10,000 acre-feet annually.

Title to Hoover Dam is in the United States, and it is operated and maintained by the Department of the Interior.

Davis Dam: This structure is located 67 miles below Hoover Dam on the Main Colorado River and is directly west of Kingman, Arizona. The middle of the channel at the site of this structure is the common boundary between the States of Arizona and Nevada. This dam implements the regulation of the river by Hoover Dam. By express provision of the Treaty with the United Mexican States (Treaty Executive A, 78th Cong., 2d sess.; Protocol Executive A, 78th Cong., 2d sess. (59 Stat. 1219)), the United States of America was required to build Davis Dam to effect the regulation of the river provided for in the Treaty. Title to Davis Dam is in the United

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[2] *Acre foot:* A unit of measure of volume. It is equivalent to the quantity of water that will cover 1 acre (43,560 square feet) 1 foot deep.

States and it is operated and maintained by the Department of the Interior.

The dam is an earth and rock fill structure with a bypass channel on the Arizona side of the spillway, outlets and power plant. The height of this structure is 200 feet and its hydraulic height is 138 feet. It has a spillway capacity of 192,000 c. f. s. with an outlet capacity of 60,000 c. f. s. The generating facilities are composed of five units with a total of 225,000 kw.

The Davis Reservoir has a total capacity of 1,820,000 acre-feet; at elevation 647 the surface area is 28,500 acres and the reservoir is 67 miles in length.

Construction was initiated on Davis Dam on July 29, 1942 and water was first impounded on January 17, 1950. The first power was generated on January 12, 1951.

Parker Dam: This structure is situated on the main channel of the Colorado River near Needles, California, 155 miles below Hoover Dam. The middle of the channel at the site of this dam is the common boundary line between the States of Arizona and California. It creates Havasu Lake and is the diversion point of the Colorado River Aqueduct of the Metropolitan Water District of Southern California. The waters impounded by Parker Dam are utilized to generate electricity.

Parker Dam is a concrete variable-radius arch structure with power plant intakes and penstocks through the abutments on the California end of the dam. The structural height of the dam is 320 feet and the hydraulic height is 75 feet. The overflow spillway is controlled by five 50 ft. x 50 ft. regulating gates. There has

been constructed in connection with it a power plant with four 30,000 kw. units for a total of 120,000 kw.

The total storage capacity of Havasu Lake is 717,000 acre-feet; at elevation 450 the surface area is 25,100 acres.

Construction of Parker Dam was initiated on October 1, 1934 and water was first impounded on June 29, 1938. The first power was generated on December 13, 1942.

The Metropolitan Water District of Southern California entered into a cooperative agreement for the construction of Parker Dam and the power plant. It receives a share of the power generated for use on the Colorado River Aqueduct and for resale. Title to Parker Dam is in the United States and it is operated by the Department of the Interior.

Water is pumped from Lake Havasu for municipal and industrial uses in the Southern California coastal areas.

Imperial Dam: This structure is situated on the main channel of the Colorado River 303 miles below Hoover Dam, and 18 miles above Yuma, Arizona. The middle of the channel at the site of the dam constitutes the common boundary between the States of Arizona and California. It is the diversion point for the All-American Canal and the Yuma Project (described in Appendix I B). It is likewise the point of diversion for the Gila Project in Arizona (described in Appendix I C).

Imperial Dam is a slab and buttress type concrete facility with a structural height of 31 feet at the overflow sections. The hydraulic height

is 23 feet. The overflow spillway has a capacity of 180,000 c. f. s. at elevation 191. Construction was initiated on Imperial Dam on January 15, 1936 and water was first diverted to the Imperial Irrigation District by means of it on September 11, 1939.

Title to Imperial Dam is in the United States and it is operated and maintained by the Department of the Interior.

Laguna Dam: This structure is situated approximately 308 miles below Hoover Dam, on the main channel of the Colorado River, and approximately 13 miles upstream from the City of Yuma, Arizona. The middle of the channel at that point is the common boundary between the States of California and Arizona. It is a rock filled weir with concrete surface. Its structural height is 43 feet and its hydraulic height is 10 feet. It was originally the diversion dam for the Yuma Project. Title to Laguna Dam is in the United States and it is operated and maintained by the Department of the Interior.

Construction of Laguna Dam was initiated on July 19, 1905 and water was first diverted by means of it on March 14, 1910.

All-American Canal System: Pursuant to the Boulder Canyon Project Act and acts amendatory thereof and supplementary thereto, the United States of America undertook the construction of the All-American Canal. That canal has its headworks on the California end of the Imperial Dam, described above. The headworks discharge Colorado River water into a concrete lined channel approximately 360 feet in width, which is divided into four channels directing

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water into the desilting basins. These basins are adjacent to the California abutment of the Imperial Dam and consist of six rectangular basins each about 270 ft. x 770 ft. with a water depth of 12.5 feet. Each basin has a designed capacity of 2,000 c. f. s. Plans provide for the construction of two additional basins as needed.

The initial capacity of the All-American Canal is 15,155 c. f. s. The canal has a width of 232 feet at normal water surface; a bottom width of 160 feet and a depth of 21 feet. The initial capacity of the canal remains unchanged for a distance of 15 miles to Siphon Drop at which point 2,000 c. f. s. can be delivered to the Yuma Project (described in Appendix I B through the Siphon Drop Power Plant. From that point, the capacity of the All-American Canal is 13,155 c. f. s. which is maintained for approximately 6 miles to Pilot Knob. At that point, the water may be discharged into the Colorado River through the Pilot Knob Wasteway or eventually through the Pilot Knob Power Plant. From Pilot Knob, the All-American Canal has a capacity of 10,155 c. f. s. to a point 15 miles from Pilot Knob, known as Drop No. 1. At that point, the Coachella Canal takes out. From there the main canal of the All-American Canal continues west, parallel to the common boundary between the United States of America and Mexico, for a distance of approximately 44 miles and reducing in capacity from 7,655 c. f. s. to 2,655 c. f. s.

Coachella Canal: From the above-mentioned takeout at Drop No. 1 of the All-American Canal, the Coachella Canal proceeds in a northwesterly direction. At the takeout, the Coachella Canal

has an initial capacity of 2,500 c. f. s. From the first turnout on the Coachella Valley County Water District, it has a capacity of 1,300 c. f. s. which is gradually reduced to its terminal point. The total length of the Coachella Canal is 123 miles. The canal is operated and maintained by the Coachella Valley County Water District.

Imperial Irrigation District alleges there are 900,000 acres of land within its boundaries and that it is committed to include an additional 90,-000 acres. (Answer of Defendants to Bill of Complaint, page 47, paragraph 44 (c).) The total irrigable acreage which may be served by the Coachella Canal is 78,530 acres and the Coachella Valley County Water District asserts that within its boundaries there are 278,000 acres. (Answer of Defendants to Bill of Complaint, page 48, paragraph 44 (d).) In the year 1951, there were actually irrigated within the Imperial Irrigation District boundaries approximately 425,000 acres of land. In that same year, there were irrigated within the Coachella Valley County Water District 33,489 acres.

Construction of the All-American Canal was commenced in August 1934, and water was first delivered through the All-American Canal to the Imperial Irrigation District on October 13, 1940. Construction of the Coachella Main Canal was started in 1938.

The Colorado River Aqueduct: This structure diverts water impounded at Hoover Dam and at Parker Dam through headworks situated at the latter structure. The Aqueduct is 242 miles long; will have a maximum carrying capacity of 1,605 c. f. s. and is designed to carry all of the Colorado River water to which the Metropolitan Water

District of Southern California, the City of San Diego and the San Diego County Water Authority are entitled to receive under their contracts with the United States of America (i. e. 1,212,000 acre-feet annually). The City of San Diego and the San Diego County Water Authority receive the Colorado River water to which they are entitled under their contracts by means of the San Diego Aqueduct, which takes out of the Colorado River Aqueduct.

The Colorado River Aqueduct was financed and constructed entirely by the Metropolitan Water District of Southern California. Title to the aqueduct is in the Water District which operates and maintains it. However, the San Diego Aqueduct now built and the Second Barrel of that Aqueduct which is now being built, were financed and constructed entirely by the United States of America, and title is in the United States, which operates and maintains those aqueducts.

Palo Verde Weir: The United States of America delivers water to the Palo Verde Irrigation District pursuant to its contract with that District (Appendix IV D) at the Palo Verde Weir situated approximately 212 miles below Hoover Dam. Situated within the service area of the Palo Verde Irrigation District are 102,000 acres, of which 62,800 acres were irrigated in 1952. The weir was constructed and is operated and maintained by the United States of America which retains title to the structure.

B. DESCRIPTION OF YUMA PROJECT

There are 53,610 irrigable acres of land in the Yuma Project in the State of Arizona, of which

45,728 were irrigated with Colorado River water in the year 1951. Situated within the Yuma Project in the State of California are 15,124 irrigable acres, of which 9,305 acres were irrigated with Colorado River water in the year 1951.

Colorado River water for the Yuma Project is diverted through the All-American Canal. For that land situated in the State of California, turnouts have been constructed in the All-American Canal. The lands of the Yuma Project situated in the State of Arizona receive Colorado River water through the All-American Canal by means of a turnout from that structure at a point approximately 15 miles from the point of diversion, which is known as Siphon Drop. (See the description of the All-American Canal in Appendix I A.) There, 2,000 c. f. s. of water are diverted through the Siphon Drop Power Plant and approximately 800 c. f. s. are thence taken by siphon under the Colorado River for use in Arizona.

C. DESCRIPTION OF GILA PROJECT

The Gila Gravity Main Canal, with its headworks on the Arizona side of the Imperial Dam, described in Appendix I A, has an initial carrying capacity of 2,200 c. f. s. At about Mile 15 in the canal, the water is carried under the Gila River channel by siphon. On the south side of the river at approximately Mile 15 is situated the turnout for the Wellton-Mohawk Canal which has an initial capacity of 1,300 c. f. s. At Mile 18 is the terminal point of the Wellton-Mohawk Canal and the headworks of the Mohawk Canal which has an initial capacity of 900 c. f. s. The

Wellton Canal takes out of the Wellton-Mohawk Canal at approximately Mile 18; that structure has an initial capacity of 500 c. f. s. and a length of approximately 15 miles.

Respecting the size of the Gila Project, reference is made to the pertinent excerpt from the Act of July 30, 1947, Public Law No. 272, 80th Cong., 1st Sess., in paragraph XXIII of the Petition.

The Yuma Auxiliary Project, situated in the State of Arizona, comprised of approximately 3,000 acres of land, is served by the Gila Project works. (Act of June 13, 1949 (63 Stat. 172).)

D. DESCRIPTION OF SALT RIVER PROJECT PRINCIPAL STRUCTURES

Roosevelt Dam: This structure is situated on the Salt River 30 miles northwest of Globe, Arizona. It is a rubble masonry, arch gravity type dam with a structural height of 280 feet and a hydraulic height of 225 feet. The overflow spillways at both abutments have a capacity of 150,000 c. f. s. At the toe of the dam there is a 7-unit power plant with a generating capacity of 15,400 kw.

The Roosevelt Reservoir impounds 1,398,430 acre-feet of water which is utilized to irrigate the Salt River Project.

Construction was initiated on Roosevelt Dam in March 1904 and water was first impounded in May 1909. The first power was generated on August 1, 1909.

Bartlett Dam: This structure is situated on the Verde River 36 miles northeast of Phoenix, Ari-

zona. It is a concrete multiple arch type dam with a structural height of 287 feet and a hydraulic height of 188 feet. It has an open channel spillway with a capacity of 175,000 c. f. s.

The reservoir has a maximum storage capacity of 179,480 acre-feet. The waters impounded by this reservoir are utilized to irrigate lands within the Salt River Project.

Construction was initiated on Bartlett Dam on August 12, 1936 and water was first impounded on February 5, 1939.

Horse Mesa Dam: This structure, which was constructed by the Salt River Valley Water Users' Association, is situated on the Salt River 43 miles northeast of Phoenix, Arizona. Title to the structure is in the United States of America. It is a concrete variable-radius arch type dam with a structural height of 300 feet and a hydraulic height of 266 feet. Over fall spillways at both abutments have a capacity of 150,000 c. f. s. Situated at the toe of the dam is a power plant with a capacity of 30,000 kw.

The capacity of the reservoir is 245,138 acre-feet and the waters are utilized to irrigate the Salt River Project.

Construction was initiated on Horse Mesa Dam in August 1924 and water was first impounded on May 27, 1927. The first power was generated in April 1927.

Mormon Flat Dam: This structure, which was constructed by the Salt River Valley Water Users' Association, is situated on the Salt River 37 miles northeast of Phoenix, Arizona. Title to this structure is in the United States of America. It is a concrete variable-radius arch type dam with a

structural height of 224 feet and a hydraulic height of 142 feet. It has an open channel spillway with a capacity of 150,000 c. f. s. Situated at the toe of the dam is a power plant with a generating capacity of 7,000 kw.

The capacity of the reservoir is 57,852 acre-feet and the waters impounded in this structure are utilized to irrigate the Salt River Project.

Construction was initiated on Mormon Flat Dam in February 1923 and water was first impounded on January 13, 1925. The first power was generated on May 19, 1926.

Stewart Mountain Dam: This structure, which was constructed by the Salt River Valley Water Users' Association, is situated on the Salt River 29 miles northeast of Phoenix, Arizona. Title to this structure is in the United States of America. It is a concrete variable-radius arch type dam with gravity abutments with a structural height of 207 feet and a hydraulic height of 116 feet. It has an open channel spillway with a capacity of 150,000 c. f. s. Situated at the toe of the dam is a power plant with a capacity of 10,400 kw.

The capacity of the reservoir is 69,765 acre-feet and the waters impounded in this reservoir are utilized to irrigate the Salt River Project.

Construction was initiated on Stewart Mountain Dam on October 1, 1928 and water was first impounded on February 22, 1930. The first power was generated on March 8, 1930.

Cave Creek Dam: This structure, which was constructed by the Salt River Valley Water Users' Association, is situated on Cave Creek, a tributary of the Salt River, 20 miles north of

Phoenix, Arizona. Title to this structure is in the United States of America. It is a concrete multiple arch dam with a structural height of 109 feet and a hydraulic height of 57 feet.

The capacity of the reservoir is 11,000 acre-feet and the waters impounded in this reservoir primarily for flood control are utilized to irrigate the Salt River Project.

Construction was initiated on Cave Creek Dam on February 16, 1922 and water was first impounded on March 4, 1923.

Horseshoe Dam: This structure, which was constructed by the Phelps-Dodge Corporation with Federal funds, is situated on the Verde River 55 miles northeast of Phoenix, Arizona. Title to the structure is in the United States of America. It is an earth and rock fill type dam, with a structural height of 194 feet and a hydraulic height of 145 feet. The spillway has a capacity of 250,000 c. f. s.

The capacity of the reservoir is 67,900 acre-feet. The waters impounded in this reservoir are utilized to irrigate the Salt River Project and also for municipal purposes by the City of Phoenix, Arizona.

Construction was initiated on Horseshoe Dam on November 30, 1943, and water was first impounded on November 16, 1945.

Granite Reef Diversion Dam: This structure is located on the Salt River 22 miles east of Phoenix, Arizona. It is a concrete weir and has a structural height of 29 feet and a hydraulic height of 18 feet.

Diversion Structures and Ditches—Salt River Project: The Arizona Canal serving part of the

Salt River Project north of the Salt River has its headworks at the north end of the above described Granite Reef Dam. It has an initial carrying capacity of 2,000 c. f. s. The Grand Canal which takes out of the Arizona Canal likewise serves an area of the project in question lying north of the Salt River.

The Salt River Project situated south of the Salt River is served by the South Canal, Eastern Canal, Consolidated Canal, Tempe Canal and Western Canal.

The headworks of the South Canal are situated on the south end of the Granite Reef Dam and the canal has an initial carrying capacity of 1,600 c. f. s.

In the year 1951, there were irrigated 214,000 acres of land within the Salt River Project, which has an ultimate maximum irrigable acreage of approximately 243,000 acres.

APPENDIX II

A. CLAIMS FOR THE INDIANS AND INDIAN TRIBES IN THE LOWER BASIN OF THE COLORADO RIVER IN THE STATES OF ARIZONA AND CALIFORNIA

Project or Reservation	Source of Water Supply	Annual Diversions (Acre Feet)	
		Present	Ultimate
MAIN STREAM, COLORADO RIVER, ARIZONA			
Colorado River Reservation.			
Bottom Lands	Colorado River	195,600	600,000
Mesa Lands	do	0	72,000
Cocopah Reservation	do	600	3,100
Fort Mohave Reservation	do	0	55,000
Yuma Homesteads	do	2,450	3,350
Sub-Total, Main Stream, Arizona.		198,650	733,450

Project or Reservation	Source of Water Supply	Annual Diversions (Acre Feet)	
		Present	Ultimate
GILA RIVER BASIN, ARIZONA			
Ak Chin Reservation	Santa Cruz River	1,000	3,000
Camp Verde	Verde River	2,100	2,100
Fort McDowell Reservation	do	3,600	8,400
Fort Apache	White, Black and Cibique Rivers.	11,500	30,000
Salt River Reservation	Salt and Verde Rivers	39,200	40,000
San Carlos Project	Gila River	370,000	603,300
Gila River Reservation (Non-Project)	Gila and Salt Rivers	25,570	27,000
San Carlos Reservation	Gila and San Carlos Rivers	6,000	9,000
San Xavier Reservation	Santa Cruz River	8,200	17,000
Sub-Total, Gila River Basin, Arizona.		467,170	739,800
LITTLE COLORADO RIVER BASIN, ARIZONA			
Navajo Reservation (Small units)	Streams and washes	29,400	51,950
Winslow Project (Navajo Reservation).	Little Colorado		25,000
Hopi Reservation	do	3,200	3,600
Sub-Total, Little Colorado River, Arizona.		32,700	80,550
MINOR TRIBUTARIES			
Hualapai Reservation	Big Sandy River	350	850
Havasupai Reservation	Cataract Creek	1,000	1,200
Kaibab Reservation	Spring	300	400
Sub-Total Minor Tributaries		1,650	2,450
MAIN STREAM, COLORADO RIVER, CALIFORNIA			
Colorado River Reservation	Colorado River	0	42,000
Fort Yuma Reservation	do	47,000	47,000
Coachella Valley Reservation	do	0	72,000
Fort Mohave Reservation	do	0	24,000
Chemehuevi Reservation	do	0	6,000
Total, Main Stream, California		47,000	191,000
Total—Arizona and California		747,170	1,747,250

B. DESCRIPTION OF INDIAN SERVICE STRUCTURES

Headgate Rock Dam: This structure is situated below Hoover Dam a distance of 169 miles. It was constructed by the United States which has title and operates and maintains its through the Department of the Interior, Bureau of Indian Affairs.

Water is diverted for use on the Colorado River Indian Reservation.

Coolidge Dam: This structure is situated on the Gila River 21 miles southeast of Globe, Arizona. Title resides in the United States of America. It is a reinforced concrete multiple dome structure rising 250 feet above the stream bed. Water was first impounded in the year 1928. Coolidge Dam creates a reservoir with a capacity of 1,285,000 acre-feet; with a generating capacity of 12,500 kw. The stored waters irrigate approximately 50,000 acres on the Gila River Indian Reservation and 50,000 acres of privately owned lands immediately adjacent to the Indian Reservation.

APPENDIX III

CLAIMS FOR FISH AND WILDLIFE PROJECTS

	Acre-feet annually
Havasu Lake National Wildlife Refuge situated on the main channel of the Colorado River	35,000
The Imperial National Wildlife Refuge on the main channel of the Colorado River	20,000
For wildlife management and conservation in Cibola Valley on the main channel of the Colorado River	15,000
Salton Sea Wildlife Refuge	6,000

APPENDIX IV

LIST OF CONTRACTS FOR THE DELIVERY OF WATER IMPOUNDED BY HOOVER DAM

A. Contract dated February 9, 1944, between the United States of America and the State of Arizona—Exhibit C of the Bill of Complaint of the State of Arizona.

B. Contract dated March 30, 1942, between the United States of America and the State of Nevada. Appendix VI A of this Petition.

C. Contract dated March 30, 1942, as amended by the contract of January 3, 1944, between the United States of America and the State of Nevada. Appendix VI B of this Petition.

D. Contract dated February 7, 1933, between the United States of America and the Palo Verde Irrigation District—Appendixes to the Answer of Defendants, Appendix No. 11.

E. Contract dated October 23, 1918, between the United States of America and the Imperial Irrigation District—Appendixes to the Answer of Defendants, Appendix No. 12.

F. Contract dated December 1, 1932, between the United States of America and the Imperial Irrigation District—Appendixes to the Answer of Defendants, Appendix No. 13.

G. Contract dated March 4, 1952, between the United States of America and the Imperial Irrigation District—Appendixes to the Answer of Defendants, Appendix No. 18.

H. Contract dated February 14, 1934, between the Imperial Irrigation District and the Coachella Valley County Water District—Appendixes to the Answer of Defendants, Appendix No. 14.

I. Contract dated October 15, 1934, between the United States of America and the Coachella Valley County Water District—Appendixes to the Answer of Defendants, Appendix No. 16.

J. Contract dated December 22, 1947, between the United States of America and the Coachella Valley County Water District—Appendixes to the Answer of Defendants, Appendix No. 17.

K. Contract dated April 24, 1930, between the United States of America and the Metropolitan Water District of Southern California—Appendixes to the Answer of Defendants, Appendix No. 19.

L. Contract dated April 24, 1930, as amended and supplemented by the contract dated September 28, 1931, between the United States of America and the Metropolitan Water District of Southern California—Appendixes to the Answer of Defendants, Appendix No. 21.

M. Contract dated February 15, 1933, between the United States of America and the City of San Diego—Appendixes to the Answer of Defendants, Appendix No. 23.

N. Contract dated February 15, 1933, as amended by the contract dated October 4, 1946, between the United States of America, the City of San Diego, the San Diego County Water Authority, and the Metropolitan Water District of Southern California—Appendixes to the Answer of Defendants, Appendix No. 24.

O. Contract dated March 14, 1947, between the City of San Diego and the Metropolitan Water District of Southern California—Appendixes to the Answer of Defendants, Appendix No. 26.

P. Contract dated February 10, 1933, between the United States of America and the Metropolitan Water District of Southern California for the construction and operation of Parker Dam—Appendixes to the Answer of Defendants, Appendix No. 22.

Q. Contract dated October 2, 1934, between the United States of America and the City of San Diego—Appendixes to the Answer of Defendants, Appendix No. 15.

R. Contract dated October 17, 1945, between the United States of America and the City of San Diego for aqueduct construction—Appendixes of Defendants, Appendix No. 25.

S. Contract dated April 1, 1952, between the United States of America and the San Diego County Water Authority for construction of second "barrel"—Appendixes to the Answer of Defendants, Appendix No. 27.

T. Contract dated March 4, 1952, between the United States of America and the Wellton-Mohawk Irrigation and Drainage District.

APPENDIX V

TABULATION OF SOURCES OF ELECTRICITY AND THOSE HOLDING CONTRACTS FOR ITS PURCHASE

Hoover Dam

Private Utilities
- California Electric Power Company
- California Pacific Utilities Company
- Citizens Utility Company
- Southern California Edison Company

Municipalities
- City of Burbank
- City of Glendale
- City of Pasadena
- City of Los Angeles

State Governments
- Nevada

Public Authorities
- Metropolitan Water District

Federal Interdepartmental Sales

Parker-Davis System

Private Utilities
- Arizona Edison Company
- Central Arizona Light & Power Company
- Tucson Gas Electric Light & Power Company

State Government Utilities
- Gila Valley Power District
- Wellton Mohawk Operation Company
- Imperial Irrigation District
- Colorado River Commission of Nevada
- Arizona Power Authority
- Salt River Project Power District
- Yuma Irrigation District.

Federal Government Utilities
- Colorado River Indians
- San Carlos Indians
- Air Force
- Army

Residential and Domestic

Commercial and Industrial

Public Authorities

Federal Interdepartmental Sales

Yuma

Siphon Drop
Residential and Domestic
Commercial and Industrial
Public Authorities
Federal Interdepartmental Sales

APPENDIX VI

A. UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

Arizona-California-Nevada

Contract for Delivery of Water

1. THIS CONTRACT, made this 30th day of March, nineteen hundred forty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Harold L. Ickes, Secretary of the Interior (hereinafter referred to as the "Secretary"), and the STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the

State; the term State as used in this contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act", approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

WITNESSETH THAT:

Explanatory Recitals

2. WHEREAS, for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, acting under and in pursuance of the provisions of the Colorado River Compact and the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead; and

3. WHEREAS, the State is desirous of entering into a contract for the delivery to it of water from Lake Mead:

4. NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Delivery of Water by the United States

5. (a) Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year. The right of the State to contract for the delivery to it from storage in Lake Mead of additional water is not limited by this contract. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power.

(b) Water agreed to be delivered to the State hereunder shall be delivered continuously as far as reasonable diligence will permit, but the United States shall not be obligated to deliver water to the State when for any reason, as conclusively but not arbitrarily determined by the Secretary, such delivery would interfere with the use of Boulder Dam or Lake Mead for river regulation, improvement of navigation, flood control, and/or satisfaction of perfected rights, in or to the waters of the Colorado River, or its tributaries, in

pursuance of Article VIII of the Colorado River Compact.

(c) The United States reserves the right, for the purpose of investigation, inspection, maintenance, repairs and replacement or installation of equipment or machinery at Boulder Dam, to discontinue temporarily or reduce the amount of water to be delivered hereunder, but so far as feasible the United States will give the State reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur.

(d) This contract is for permanent service, and is made subject to the express condition that the State, upon request of the Secretary, shall submit in writing prior to January 1st of any year, an estimate of the amount of water to be required under this contract for the succeeding calendar year.

Receipt of Water by the State

6. The State shall receive the water to be diverted by or delivered to it by the United States under the terms hereof at the point or points of delivery to be hereafter designated as stated in the next preceding article hereof, and shall perform all acts required by law or custom in order to maintain control over such water and to secure and maintain its lawful use and proper diversion from Lake Mead. The diversion and conveyance of such water to places of use shall be without expense to the United States.

Measurement of Water

7. The water to be delivered to the State hereunder shall be measured at the point or points of diversion from Lake Mead, or at such point or points in any works used by the State to convey water from Lake Mead to its place or places of use as shall be satisfactory to the Seceretary, and by such measuring and controlling devices or such automatic gauges or otherwise as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained in manner satisfactory to the Secretary, by and at the expense of the State, but they shall be and remain at all times under the complete control of the United States. The State's authorized representative shall be allowed access at all times to said measuring and controlling devices or automatic gauges.

Record of Water Diverted

8. The State shall make full and complete written monthly reports as directed by the Secretary on forms to be supplied by the United States of all water delivered to or diverted by the State from Lake Mead. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted.

Charge for Delivery of Water

9. A charge of fifty cents ($0.50) per acre-foot shall be made for the diversion by or delivery of water to the State hereunder during the Boulder Dam cost-repayment period, subject to reduction

by the Secretary in the amount of the charge if studies show to his satisfaction that the charge is too high. Thereafter, charges shall be on such basis as may hereafter be prescribed by the Congress. Charges shall be made against the State only for the number of acre-feet of water actually delivered to or diverted by it from Lake Mead.

Billing and Payments

10. The State shall pay monthly for all water delivered to it hereunder, or diverted by it from Lake Mead, in accordance with the charge in Article nine (9) hereof established. The United States will submit bills to the State by the tenth day of each month immediately following the month during which the water is delivered or diverted and payments shall be due on the first day of the month immediately succeeding. If such charges are not paid when due, an interest charge of one per centum (1%) of the amount unpaid shall be added thereto as liquidated damages, and, thereafter, as further liquidated damages, an additional interest charge of one per centum (1%) of the principal sum unpaid shall be added on the first day of each succeeding calendar month until the amount due, including such interest is paid in full.

Refusal of Water in Case of Default

11. The United States reserves the right to refuse to deliver water to the State, or to permit water to be diverted by the State from Lake Mead, in the event of default for a period of more than twelve (12) months in any payment due or to

become due to the United States under this contract.

Inspection by the United States

12. The Secretary or his representatives shall at all times have the right of ingress to and egress from all works of the State for the purpose of inspection, repairs, and maintenance of works of the United States, and for all other proper purposes. In each contract made by the State for the redelivery of any part of the water agreed to be delivered to the State hereunder, it shall be provided, for the use and benefit of the United States, that the authorized representatives of the United States shall at all times have access to measuring and controlling devices, or automatic gauges, over the lands and rights of way of the contractee. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the State relating to the diversion and distribution of water delivered to or diverted by the State from Lake Mead with the right at any time during office hours to make copies of or from the same.

Rules and Regulations

13. There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised, and/or extended from time to time after notice to the State and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of

this contract, or amendments hereof, or to protect the interests of the United States. The State hereby agrees that in the operation and maintenance of its diversion works and conduits, all such rules and regulations will be fully adhered to.

Agreement Subject to Colorado River Compact

14. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to an Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which compact was approved in section 13 (a) of the Boulder Canyon Project Act.

Priority of Claims of the United States

15. Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Contract Contingent Upon Appropriations

16. This contract is subject to appropriations being made by Congress from time to time of money sufficient to provide for the doing and performance of all things on the part of the United States to be done and performed under the terms hereof, and to there being sufficient money avail-

able in the Colorado River Dam fund for such purposes. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient money not being so appropriated, or on account of there not being sufficient money in the Colorado River Dam fund for such purposes.

Effect of Waiver of Breach of Contract

17. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any provision hereof, or of any other subsequent breach of any provision hereof.

Remedies Under Contract Not Exclusive

18. Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States or the State of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

Transfer of Interest in Contract

19. No voluntary transfer of this contract, or of the rights of the State hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the State, whether by voluntary transfer, judicial sale, trustee's sale, or otherwise, shall be subject

to all the conditions of the Boulder Canyon Project Act, and also subject to all the provisions and conditions of this contract to the same extent as though such successor or assign were the original contractor hereunder; provided, that the execution of a mortgage or trust deed, or judicial or trustee's sale made thereunder, shall not be deemed a voluntary transfer within the meaning of this Article.

Notices

20. (a) Any notice, demand or request required or authorized by this contract to be given or made to or upon the United States shall be delivered, or mailed postage prepaid, to the Director of Power, United States Bureau of Reclamation, Boulder City, Nevada, except where, by the terms hereof, the same is to be given or made to or upon the Secretary, in which event it shall be delivered, or mailed postage prepaid, to the Secretary, at Washington, D. C.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the State shall be delivered, or mailed postage prepaid, to the Secretary of the Colorado River Commission of Nevada, Carson City, Nevada.

(c) The designation of any person specified in this article or in any such request for notice, or the address of any such person, may be changed

at any time by notice given in the same manner as provided in this article for other notices.

Officials Not To Benefit

21. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

Uncontrollable Forces

22. Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed, for the purposes of this contract, to mean any cause beyond the control of the party affected, including but not limited to inadequacy of water, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall exercise due diligence to remove such inability with all reasonable dispatch.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By ABE FORTAS,
Acting Secretary of the Interior.

STATE OF NEVADA, acting by and through its Colorado River Commission,
By E. P. CARVILLE, *Chairman.*
Attest:
ALFRED MERRITT SMITH,
Secretary.

COLORADO RIVER COMMISSION OF NEVADA,
By E. P. CARVILLE, *Chairman.* [SEAL]
Attest:
ALFRED MERRITT SMITH,
Secretary

Ratified and approved this 21st day of April 1943.

E. P. CARVILLE,
Governor of the State of Nevada.

Attest:
MALCOLM MCEACHIN [SEAL]
Secretary of State.

Approved as to form:
ALAN BIBLE,
Attorney-General of Nevada.

APPENDIX VI

B. UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

Arizona-California-Nevada

Supplemental Contract for Delivery of Water

1. THIS SUPPLEMENTAL CONTRACT, made this 3rd day of January, nineteen hundred forty-four, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Harold L. Ickes, Secretary of the Interior (hereinafter styled "Secretary"), and STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this supplemental contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, definding its powers and

duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

WITNESSETH:

Explanatory Recitals

2. WHEREAS, under date of March 30, 1942, the parties hereto entered into a contract providing, among other things, for the delivery of water to the State each year, from storage in Lake Mead, subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year, and it is now desired to amend said contract so as to provide for the delivery each calendar year of not to exceed an additional 200,000 acre-feet of water to the State;

3. NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

Delivery of Water by the United States

4. Article 5 (a) of the aforesaid contract of date March 30, 1942, is hereby amended to read as follows:

"Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or

points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power."

Modification of Prior Contract

5. Except as expressly herein amended, the aforesaid contract of date March 30, 1942, shall be and remain in full force and effect.

Effective Date of Supplemental Contract

6. This supplemental contract shall be of full force and effect immediately upon its execution for and on behalf of the United States.

Officials Not To Benefit

7. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

IN WITNESS WHEREOF, the parties hereto have caused this supplemental contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By HAROLD L. ICKES, *Secretary of the Interior.*
STATE OF NEVADA, acting by and through its Colorado River Commission,
By E. P. CARVILLE, *Chairman.*
Attest:
ALFRED MERRITT SMITH,
Secretary.
COLORADO RIVER COMMISSION OF NEVADA,
By E. P. CARVILLE, *Chairman.*
Attest:
ALFRED MERRITT SMITH,
Secretary.

Ratified and approved this 3rd day of January 1944.

E. P. CARVILLE,
Governor of the State of Nevada.

Attest:
MALCOLM MCEACHIN,
Secretary of State,
By MURIEL LITTLEFIELD,
Deputy.

Approved as to form:
ALAN BIBLE,
Attorney General of Nevada.

APPENDIX VII

A—The Colorado River Compact (Arizona's Bill of Complaint, Exhibit A).

B—The Boulder Canyon Project Act (Defendants' Appendixes to the Answer, Appendix No. 2).

C—The California Limitation Act (Defendants' Appendixes to the Answer, Appendix No. 3).

D—The Seven Party Priority Water Agreement (Arizona's Bill of Complaint, Exhibit B).

U. S. GOVERNMENT PRINTING OFFICE: 1953

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

NO. 9, ORIGINAL
October Term, [redacted] 1961

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

UNITED STATES OF AMERICA, INTERVENER.

JOHN H. MOEUR
Chief Counsel,
Arizona Interstate Stream Commission
BURR SUTTER
Assistant Counsel,
Arizona Interstate Stream Commission
PERRY M. LING
Special Counsel,
Arizona Interstate Stream Commission
ROSS F. JONES
Attorney General of Arizona
HOWARD F. THOMPSON
Special Assistant to the Attorney General of Arizona

RESPONSE OF COMPLAINANT THE STATE OF ARIZONA TO MOTION OF STATE OF NEVADA FOR LEAVE TO INTERVENE.

IN THE

Supreme Court of the United States

NO. 10, ORIGINAL

October Term, 1953

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

UNITED STATES OF AMERICA, INTERVENER.

RESPONSE OF COMPLAINANT THE STATE OF ARIZONA TO MOTION OF STATE OF NEVADA FOR LEAVE TO INTERVENE.

COMES Now the Complainant above named and in response to the motion of the State of Nevada for leave to intervene says that it has no objection to the intervention in this case by the State of Nevada when and if the State of Nevada tenders or files a Petition of Intervention setting forth facts sufficient to constitute a claim or cause of action against the Plaintiff, the Defendants, or any of them, or the Intervener, the United States of America. Complainant further says that the Petition of Intervention tendered by the State of Nevada does not state facts sufficient to constitute a claim or cause of action against any of the present parties of this case because:

1.

None of the parties to this cause has questioned the allocation to the State of Nevada of the beneficial consumptive use of 300,000 acre feet of Colorado River System water as provided by the January 3, 1944 amendment of the March 30, 1942 contract between the United States of America and the State of Nevada.

2.

Section 5 of the Boulder Canyon Project Act (45 Stat. 1057) authorizes the Secretary of the Interior to contract for the storage of water in and delivery of water from the reservoir created by the dam authorized for construction by said Act and provides that:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

3.

Paragraph 4 of the January 3, 1944 contract between the United States of America and the State of Nevada provides:

> "Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, *so much water, including all other waters diverted for use within the State of Nevada from the Colorado River System, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year.* Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power." (emphasis supplied)

4.

The State of Nevada in its Motion for Leave to Intervene and in its tendered Petition of Intervention fails to allege that (a) it has or can obtain any contract from the United States of America for any greater quantity of water than that referred to in the aforementioned January 3, 1944 contract, and (b) that there is physically available for use within the State of Nevada any quantity of Colorado River System water, other than that possibly available from Lake Mead Storage, in excess of the 300,000 acre feet referred to in said January 3, 1944 contract.

5.

The State of Nevada fails to allege that it has any fixed, definite plans for the use, within any reasonable time, of any greater quantity of Colorado River System water than that referred to in the said January 3, 1944 contract.

WHEREFORE, the Complainant asks that the Motion by the State of Nevada for leave to file a Petition of Intervention be denied.

JOHN H. MOEUR
Chief Counsel,
Arizona Interstate Stream Commission

BURR SUTTER
Assistant Counsel,
Arizona Interstate Stream Commission

PERRY M. LING
Special Counsel,
Arizona Interstate Stream Commission

ROSS F. JONES
Attorney General of Arizona

HOWARD F. THOMPSON
Special Assistant to the Attorney General of Arizona

ANSWER OF COMPLAINANT TO PETITION OF INTERVENTION

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Office - Supreme Court, U. S.
FILED
FEB 11 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10, Original

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

UNITED STATES OF AMERICA, INTERVENER.

JOHN H. MOEUR
Chief Counsel,
Arizona Interstate Stream Commission
BURR SUTTER
Assistant Counsel,
Arizona Interstate Stream Commission
PERRY M. LING
Special Counsel,
Arizona Interstate Stream Commission
ROSS F. JONES
Attorney General of Arizona
HOWARD F. THOMPSON
Special Assistant Attorney General of Arizona

ANSWER OF COMPLAINANT STATE OF ARIZONA TO PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States

October Term, 1953

No. 10, Original

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

UNITED STATES OF AMERICA, INTERVENER.

ANSWER OF COMPLAINANT STATE OF ARIZONA TO PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES OF AMERICA.

Comes now the State of Arizona, Complainant above named, and for its Answer to the Petition of Intervention of the United States of America says:

1.

Admits the allegations of Paragraphs I to VI, inclusive.

2.

Answering Paragraph VII, Complainant says that claims of rights to the use of Colorado River water existing prior to the adoption of the Colorado River Compact of 1922 are immaterial to a decision of the issues of

this case. Whatever rights any state or any water user of the Lower Basin may have had at any time to the use of the waters of the Colorado River System are subject to the terms of the Compact, the Project Act, and the California Limitation Act. Denies the other allegations of Paragraph VII except as such allegations conform to the facts set out in the Complaint and in the Complainant's Reply to the Defendant's Answer. *

3.

Admits the allegations of Paragraph VIII.

4.

Admits the allegations of Paragraph IX and in addition alleges that by Article III (d) of that Compact it is provided that the States of the Upper Division, i.e., Colorado, Utah, Wyoming and New Mexico will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series.

5.

Admits the allegations of Paragraphs X and XI.

6.

As to Paragraph XII admits that the United States asserts the interests therein specified. Alleges that the existence of such interests, or of any of them, does not permit or require the allocation to the United States of any quantity of water of the Colorado River. Admits that the claims asserted by the Complainant and by the Defendants are adverse. Alleges that the recognition of the claims asserted by the Complainant contitutes no hazard to the United States but to the

*Consistent with prior pleadings, the term: "Compact" refers to the Colorado River Compact of 1922. The term: "Project Act" refers to the Boulder Canyon Project Act (Act of Dec. 21, 1928). The term: "California Limitation Act" refers to that certain act of the California Legislature known as the Act of March 4, 1929, Chapter 16 of the 48th Session Statutes and Amendment to the California Codes 1929, Pages 88-89.

contrary constitutes a protection of the interests of the United States and is in accord with the legislative and administrative interpretation given by the United States to the various instruments constituting the law of the river.

7.

Admits the allegations of Paragraph XIII and alleges that the treaty therein referred to provides in its Article 10 (b) that the quantity of water allotted to Mexico shall be reduced "in the event of extraordinary drought or serious accident to the irrigation system in the United States."

8.

As to Paragraphs XIV to XVIII inclusive, Complainant admits that the projects there referred to have been constructed or are in the process of construction substantially as alleged in said paragraphs and in the appendices there referred to. Complainant also admits the existence of the contracts and agreements therein referred to. Alleges all of said projects, contracts and agreements are subject to and governed by the Compact, the Project Act, and the California Limitation Act and none of them can or do create any rights to the use of water in excess of the rights existing under and by virtue of the Compact, the Project Act, and the California Limitation Act. The impoundment, diversion, and use of water by any and all projects and facilities there referred to are governed, limited and controlled by the Compact, the Project Act and the California Limitation Act. The effect of these instruments and the rights to the use of water thereunder are as alleged in the Complaint and the Reply to the Answer of the Defendants.

9.

Admits the allegations of Paragraph XIX. Alleges that there are other contracts between the United States and Arizona entities covering the use of main stream water within the State of Arizona in addition

to the March 4, 1952 contract with the Wellton-Mohawk Irrigation and Drainage District. Said contracts are more specifically later referred to herein.

10.

As to Paragraphs XX and XXI Complainant refers to and by this reference incorporates herein its Paragraph 8 above.

11.

Admits the allegations of Paragraph XXII. Alleges that uses of main stream water within Arizona on the Yuma Project are covered by the following contracts:

Contract dated June 15, 1951, between the United States of America and the Yuma County Water Users Association.

Contract dated December 22, 1952, between the United States of America and the Unit B Irrigation and Drainage District.

12.

Admits the allegations of Paragraph XXIII. Alleges that the North Gila Valley Irrigation District, originally authorized as a part of the Yuma Project, and located in the North Gila Valley in Arizona, uses main stream water pursuant to a contract dated September 24, 1918, between the United States of America and the North Gila Valley Irrigation District. An amended and supplemental contract has been negotiated between the United States of America and North Gila Valley Irrigation District, but the required judicial confirmation of the validity of the contract has not yet been obtained.

13.

Admits the allegations of Paragraphs XXIV, XXV and XXVI.

14.

(a) As to Paragraph XXVII, Complainant admits the United States is the trustee or guardian for Indians

and Indian Tribes living within the Lower Basin of the Colorado River. Such Indians and Indian Tribes have existing rights to the beneficial use of water of the Colorado River and its tributaries in the Lower Basin. Alleges it is not necessary to determine in this case the extent of such rights. The relief sought by the parties does not injure or threaten to injure such existing rights. Potential rights to the use of water by Indians and Indian Tribes are and will be on the same basis as potential rights to the use of water by non-Indians. Admits that the United States claims for the benefit of the Indians and Indian Tribes rights to the use of water as set forth in said Paragraph XXVIII and in Appendix II-A of the Petition of Intervention. Alleges that the quantities of water referred to in said Appendix II-A are stated in terms of headgate diversions and not in terms of beneficial consumptive use. Denies that the present uses of water by Indians and Indian Tribes in the Lower Basin are as stated in Intervener's Appendix II-A. Alleges that such present uses of water by Indians and Indian Tribes in the Lower Basin in Arizona are as set forth in Appendix I hereto to which reference is hereby made. Alleges that claims for ultimate use of water are immaterial to the determination of the issues in this case. No decree may be entered herein allocating to the United States any specific quantities of water for Indian or any other uses. Complainant renews its offer to stipulate in accordance with the allegations of Paragraph 14 of its Reply to the Defendants' Answer.

(b) Uses of water from the Gila River and its tributaries by Indians and Indian Tribes are covered by court decrees and contracts binding upon the United States. Decrees covering the rights of the Indians to the use of such water have been entered in numerous cases in which the United States, as the Trustee or Guardian of the Indians and Indian Tribes, was a voluntary party. Such decrees, together with the title of the case in which they were rendered and the date of entry thereof, are set forth by title in Appendix II hereto. On behalf of the Indians and pursuant to speci-

fic acts of the Congress, the United States has entered into the water use contracts listed in Appendix III hereto.

(c) By reason of the acts of Congress referred to in the contracts listed in Appendix III, the execution of such contracts by the United States, the voluntary participation by the United States in the judicial proceedings wherein the decrees listed in Appendix II were entered, the long acquiescence in such contracts and decrees by the United States and the acceptance of the benefits arising from the use of water thereunder, the United States as Trustee and Guardian for the Indians and Indian Tribes, and the Indians and Indian Tribes, are now estopped and precluded from asserting any rights contrary thereto. The United States, by the abovementioned actions of its legislative and executive branches occurring over a long period of years, has made legislative and administrative interpretations of the rights of the Indians and Indian Tribes to the use of the waters of the Lower Basin of the Colorado River and is now bound by such legislative and administrative interpretations.

15.

As to Paragraphs XXVIII and XXIX, admits that the United States asserts the interests therein specified. Alleges that the relief sought by the Complainant will not interfere with or injure any uses of water by the United States for the purposes mentioned in said paragraphs.

16.

As to Paragraph XXX admits that the United States makes the claims there mentioned. Denies that any lawful claims of the United States are jeopardized by the relief sought by the Complainant. Admits that there is a pressing need for a decree of this Court determining and settling the controversies specifically referred to in Paragraph XXII of the Complaint.

17.

As to the allegations of Paragraph XXXI (a), admits the existence of the various instruments therein mentioned. Alleges that in addition to such instruments specifically mentioned the uses of the water in the Lower Basin are subject to the California Limitation Act. The effect of each and all of such instruments is as stated in the Complaint, the Reply to the Answer of the Defendants, and this Answer to the Petition of Intervention.

18.

As to the matters and things contained in Paragraphs XXXII to XXXVI inclusive Complainant admits that the issues therein mentioned are presented for determination and says that the allegations and contentions of the parties are as set out in Complaint, Answer, Reply and Rejoinder now filed in this case to which reference is hereby made. Alleges that the relief sought by Arizona will not injure any right of the United States.

19.

Answering Paragraph XXXVII, Complainant refers to and by this reference incorporates herein Paragraph 14 of this Answer. Alleges that rights to the use of water by Indians and Indian Tribes are subject to and affected by the Compact. Article VII of said Compact refers to and excepts from the effect of the Compact the "obligations" of the United States to Indian Tribes. It was not and is not the intent of the Compact to prefer Indian uses or to reserve water for Indian uses. The Petition of Intervention does not allege, and the Complainant does not know, what the obligations of the United States are to Indian Tribes. Denies that the relief sought by the Complainant adversely affects any rights of the Indians or Indian Tribes. Denies that any determination of the rights of the Indians and Indian Tribes in the Lower Basin to the use of any water of the Colorado River or its tributaries is necessary or material to a determination of the issues of this case.

20.

Answering Paragraph XXXIX, denies the allegations of said paragraph except as such allegations conform to the facts alleged or admitted by the Complainant.

21.

As to Intervener's Appendices I, II-B, IV and V, Complainant says that the statements therein contained have no material bearing on the issues tendered or proper for determination in this case. The rights of the parties and each of them to the use of the waters of the Colorado River System are subject to the availability thereof under the Compact, the Project Act, and the California Limitation Act. Such rights are neither enlarged nor diminished by the facts averred in the said Appendices. Insofar as the facts set out in said Appendices are different from the facts alleged in the Complaint, the Reply to the Defendants' Answer, and this Answer to the Petition of Intervention, the Complainant neither admits nor denies them but relies on its position that they are immaterial, irrelevant and incompetent to either prove or disprove any of the issues presented for determination in the case. Insofar as the conclusions of either fact or law set forth in said Appendices are concerned, the Complainant denies each and all of them except such as are specifically admitted in the Complaint, the Reply to the Defendants' Answer, and in this Answer to the Petition of Intervention.

22.

As to Intervener's Appendix II-A the Complainant refers to and by this reference incorporates herein its Paragraph 14 of this Answer to the Petition of Intervention and Appendices I, II and III.

23.

As to Intervener's Appendix III, Complainant says that it has no knowledge or information as to the claims therein mentioned and denies that said claims

or any of them have any materiality, relevancy or competency so far as the issues for determination in this case are concerned.

24.

As to Intervener's Appendices VI and VII, Complainant admits the execution and existence of the contracts therein referred to.

25.

Complainant denies each and every affirmative allegation of the Petition of Intervention not specifically admitted in this Answer.

WHEREFORE, Complainant prays as in its Complaint and Reply to the Answer of the Defendants.

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APPENDIX I

PRESENT USES BY INDIANS AND INDIAN TRIBES IN THE LOWER BASIN OF THE COLORADO RIVER IN THE STATE OF ARIZONA

Project or Reservation	*Source of Water Supply*	*Annual Diversions (Acre-Feet)*	*Estimated Depletion at Mainstream (Acre-Feet)*
Main Stream, Colorado River, Arizona			
Colorado River Reservation Bottom Lands	Colorado River	195,600	75,000
Cocopah & Yuma Reservations	Colorado River	3,050	1,500
Gila River Basin, Arizona			
Camp Verde & Ft. McDowell Reservations	Verde River	5,700	800
Fort Apache Reservation	White, Black & Cibique Rivers	11,500	1,500
Salt River Reservation	Salt & Verde Rivers	39,200	12,500
*San Carlos Project (Indian)	Gila River	111,000	45,000
Gila River Reservation	Gila & Salt Rivers	25,570	9,200
San Carlos Reservation	Gila & San Carlos Rivers	6,000	1,000
San Xavier Reservation	Santa Cruz River	8,200	800
Little Colorado River Basin, Arizona			
Navajo and Hopi Reservations	Streams and Washes & Little Colorado	32,700	2,000
Minor Tributaries			
Haulapai Reservation, Havasupai and Kaibab Reservations	Big Sandy River Cataract Creek and Spring	1,650	1,000
		440,170	150,300

*Average diversion 1930 to 1952 was 223,000 ac. ft. per year. Approximately 50% was delivered to Indian lands.

Water used on Ak Chin Reservation is produced from deep wells: not a part of water of Colorado River system.

APPENDIX II

Decrees covering the use of waters of the Gila River and its tributaries:

1. *United States of America as guardian of certain Indians* vs. *N. W. Haggard, et al,* District Court of the Third Judicial District of the Territory of Arizona, Docket #19, dated June 11, 1903.
2. *Patrick T. Hurley* vs. *Charles F. Abbott, et al,* United States of America, Intervener, in the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa, Docket #4564, dated May 1, 1910. (Commonly known as the Kent decree).
3. *Nels Benson* vs. *John Allison, et al,* in the Superior Court of Maricopa County, Arizona, Docket #7589 dated November 14, 1917.*
4. *The United States of America* vs. *Gila Valley Irrigation District, et al,* in the United States District Court for the District of Arizona, Docket # Globe Equity 59, dated June 29, 1935.

*This decree and the amendment thereto dated November 13, 1919, did not specifically deal with any Indian uses but did refer to and approve the Haggard decree.

APPENDIX III

Contracts by the United States of America covering certain Indian uses of waters of the Gila River and its tributaries:

1. Agreement between the United States of America and the Salt River Valley Water Users Association dated June 3, 1935 covering the rights of the Indians on the Salt River Indian Reservation to certain storage capacity behind Bartlett Dam on the Verde River.
2. Contract between the United States of America and Salt River Valley Water Users Association dated May 5, 1936 for pumping water to irrigate 1,080 acres of land by the Maricopa Indians on the Gila River Reservation.

SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 5 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

Answer of California Defendants to Petition of Intervention on Behalf of the United States of America

and

Summary of the Controversy (Exhibit A)

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OUTLINE OF ANSWER

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First Affirmative Defense—Defendants have the right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of waters of the Colorado River System under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Contracts of the Secretary of the Interior executed pursuant thereto 4

Second Affirmative Defense—Defendants have appropriative rights, recognized by the Boulder Canyon Project Act and protected by the Statutory Compact between the United States and California, to the beneficial consumptive use in California of not less than 5,362,000 acre-feet of Colorado River System water per annum, senior to the claims made by the United States to water for consumptive use, with certain exceptions 29

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IN THE

Supreme Court of the United States

October Term, 1953.

No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

ANSWER OF CALIFORNIA DEFENDANTS TO PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES OF AMERICA.

Defendants State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, by their duly authorized attorneys, jointly answer the Petition of Intervention on behalf of the United States of America as follows:

Introduction.

1.

The Petition of Intervention of the United States declares that by reason of the issues stated in this cause, the United States is and will be in grave doubt as to its rights and duties in connection with projects and rights of the United States within the Colorado River Basin, until a determination of these issues is had by this Court. Through facts pleaded in this Answer, defendants allege that these uncertainties and doubts were not in evidence at the time of the enactment of the Boulder Canyon Project Act (1928) of the Statutory Compact between the United States and California (1929), and in the period 1930-1934 when the United States negotiated the contracts with the California defendants which made the present state of development on the lower Colorado River possible, nor on numerous occasions since that period, pointed out by defendants, on which the Congress and agencies of the United States have had cause to inquire into projects affecting this Basin.

The Petition shows that substantially all of the waters of the Colorado River System in controversy among Arizona, California (and now Nevada) are under the physical control of the United States, inasmuch as they are intercepted and impounded in reservoirs owned by the United States, both on the main stream and on the Gila River. Moreover, by far the greater part of the water supply of the Lower Basin flows to it from the

Upper Basin. Plans have been put forward to impound this water in the Upper Basin by dams, which would be built by the United States, capable of retaining several years flow of the river. Reports in furtherance of these plans have been submitted to the Congress by the Department of the Interior, and Congressional Committees are currently considering the merits of legislation which would put these plans into effect. As understood by defendants, the Petition asserts certain rights of the United States to the waters of the Colorado River System, not only as against complainant and defendants but as against the other States of the Colorado River Basin as well.

In this Answer defendants state their affirmative defenses against these federal claims, as well as their traverse of the Government's allegations. So far as possible, this is done by cross-reference to the defendants' Answer to Arizona's Bill of Complaint.

2.

Defendants refer to their "Appendixes to the Answer" to Arizona's Bill of Complaint, cite various of these Appendixes throughout this Answer, and incorporate these Appendixes by reference as a part of their present Answer to the Petition of Intervention on behalf of the United States of America, as though the same were here set out at length.

FIRST AFFIRMATIVE DEFENSE.

Defendants Have the Right to the Beneficial Consumptive Use in California of 5,362,000 Acre-feet Per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto.

3.

The General Scope of the Boulder Canyon Project Act.

The Congress of the United States, by the terms of the Boulder Canyon Project Act (Appendix 2), hereinafter referred to as the "Project Act," undertook to impound and control the disposition of the water of the Colorado River, a navigable stream.

In general, this act:

(1) Authorized the construction of Hoover Dam and power plant (Sec. 1), but on condition (Sec. 4(b), par. 1) that the Secretary of the Interior provide for revenues, in advance of construction, by the sale of electric energy so as to liquidate the investment within fifty years. This was done by contracts with California entities, including the defendants City of Los Angeles and The Metropolitan Water District of Southern California, as hereinafter related.

(2) Authorized the construction of the All-American Canal (Sec. 1) from the Colorado River to Imperial and Coachella Valleys, but on condition (Sec. 4(b), par. 2) that the Secretary of the Interior first provide for revenues, in advance of construction, by repayment contracts under the reclamation law. Section 1 stipulated that no charge be made for the use, storage or delivery

of water in Imperial and Coachella Valleys, in recognition of the pre-existing rights of these areas in the waters of the Colorado River System. Contracts to repay the government's investment in the All-American Canal were made by defendants Imperial Irrigation District, Coachella Valley County Water District, and City of San Diego, as hereinafter alleged.

(3) Offered to California, upon certain conditions, a Statutory Compact (Sec. 4(a), par. 1), defining and limiting this State's rights to the waters of the Colorado River System, in terms of the quantities available, "for use in California." This was accepted by California, in the manner hereinafter described. A second paragraph of Section 4(a) authorized a compact among Arizona, California and Nevada, but no State accepted or ratified it.

(4) Authorized the Secretary of the Interior (Sec. 5) to enter into contracts for the storage and delivery of water at points to be agreed upon, on the river or All-American Canal, for permanent service, in conformity with the Colorado River Compact and the Statutory Compact between the United States and California, and directed that no person should have the use of stored water except by such contracts. Contracts pursuant to these provisions were made with defendants Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, and City of San Diego, as hereinafter alleged.

(5) Consented, on certain conditions, to the Colorado River Compact (Secs. 4(a), 13(a)), and subjected the rights of the United States and those claiming under it thereto (Secs. 8(a), 13(b), (c), (d)).

4.

Consent to the Colorado River Compact.

By the terms of the Project Act (Secs. 4(a), 13(a)), the Congress consented to the Colorado River Compact, signed by representatives of the seven States of the Colorado River Basin at Santa Fe, New Mexico, on the 24th day of November, 1922 (Appendix 1), either as a seven-state compact or as a six-state compact, to be accompanied, in the latter event only, by an agreement on the part of California to limit the consumptive use in California of waters of the Colorado River System as hereinafter described.

5.

Offer and Acceptance of a Statutory Compact with California.

(a) The Project Act (Sec. 4(a), par. 1) provided that it should not take effect unless and until (1) the seven States of the Colorado River Basin should have ratified the Colorado River Compact, and the President, by public proclamation, should have so declared, or (2) if the said seven States should fail to ratify the said Compact within six months from the date of the passage of the act (December 21, 1928), then until six of the States, including California, should have ratified the Compact, waived the requirement of seven-state ratification, and the President, by public proclamation, should have so declared, and further, until

> ". . . the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in

consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

(b) During the six-months period referred to in the Project Act, to wit, on March 4, 1929, the legislature of California enacted the legislation proposed by Section 4(a) of the Project Act (Appendix 3), on the following terms:

". . . in the event that the Colorado river compact . . . is not approved within six months from the date of the passage of . . . the 'Boulder canyon project act' . . . by the legislatures of each of the seven states signatory thereto . . . then when six of said states, including California, shall have ratified . . . and the President by public proclamation shall have so declared . . . the State of California as of the date of such proclamation agrees . . ."

to the proposal made by the Project Act.

(c) The State of California's acceptance of the Statutory Compact became effective only in consequence of the refusal of Arizona to ratify the Colorado River Compact, and if Arizona had made timely ratification of the Colorado River Compact, within six months of the ap-

proval of the Project Act, said Limitation Act, by its terms, would not have taken effect.

(d) At the expiration of six months following the passage of the Project Act, and pursuant to the authority vested in him by said act, and in accordance with the facts, the President, by public proclamation dated June 25, 1929 (Appendix 4), announced (1) that seven States had not ratified the Colorado River Compact within six months from the date of approval of the Project Act, (2) that six of the States, including California, had ratified the compact and waived the requirement of seven-state ratification, and (3) that California had met the requirements of the first paragraph of Section 4(a) of the Project Act, *i.e.*, the adoption of the California Limitation Act (Appendix 3).

(e) By said proclamation the President placed the Project Act, the Colorado River Compact as a Six-State Compact, and a Statutory Compact between the United States and California evidenced by the Project Act and the California Limitation Act (Appendix 3), in effect, and the said compacts since said date (June 25, 1929) have been, and now are, effective.

6.

Terms of the Statutory Compact Between the United States and California.

(a) During the consideration by the Congress of the successive bills which culminated in the enactment of the Boulder Canyon Project Act, the entire Boulder Canyon Project as an integrated plan was fully considered and made the subject of extensive hearings and floor debate. The plan which was the basis of Congressional

action included (1) the construction by the United States of Hoover Dam and the All-American Canal and works appurtenant to these structures, (2) the assumption by California agencies of financial obligations to repay the cost of these works, (3) the construction by California agencies with their own funds of the Colorado River Aqueduct, transmission lines and other works, and (4) the delivery from storage by the United States, under contract, of adequate supplies of water for the Colorado River Aqueduct, the Palo Verde Irrigation District and the All-American Canal. The water requirements of these California projects, now represented by the defendants herein, were well known to Congress to aggregate approximately 5,400,000 acre-feet per annum, substantially the quantities now evidenced by the water storage and delivery contracts hereinafter referred to. These requirements were encompassed by the expression "uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist," in the first paragraph of Section 4(a) of the Project Act. It was recognized by the Congress that this quantity was approximately 1,000,000 acre-feet per annum in excess of the 4,400,000 acre-feet per annum of waters apportioned by Article III(a) of the Colorado River Compact referred to in the Statutory Compact, and the Congress intended that, by the offer and acceptance of the Statutory Compact, the said 1,000,000 acre-feet of excess waters, to the extent that such waters might be physically available, should be made presently and permanently available by water delivery contracts for the service of these projects. The Congress recognized further that the Statutory Compact, in restricting California to the use of approximately 5,400,000 acre-feet per an-

num, would provide water only for the Colorado River Aqueduct, Palo Verde Irrigation District and the All-American Canal, and would require the abandonment of the claims of other California projects for which valid appropriations had been made, and which, together with those of the three projects above named, greatly exceeded 5,400,000 acre-feet per annum.

(b) California was induced to, and did, enact the Limitation Act and thus enter into the said Statutory Compact, in the light of the text of the Project Act and the legislative history thereof, and with the understanding that under the terms of the Colorado River Compact, the Project Act and the Statutory Compact, water in substantially the amounts now evidenced by the said water storage and delivery contracts would be made available for use in California, and that the United States would not impair its ability to perform such contracts by entering into agreements with others inconsistent with that understanding. Otherwise, the plan of the Project Act would have been infeasible. Water in substantially said quantities was, and is, essential to an economy in California able to sustain the contracts for electrical energy, and the contracts for repayment of the cost of the All-American Canal, upon which the financing of the Boulder Canyon project depended and depends. These facts were well known to, and recognized by, the Congress.

(c) California enacted the Limitation Act and thereby accepted the offer of a Statutory Compact in the light of its text and legislative history, which disclosed the following interpretations thereof:

(1) Said Statutory Compact authorized and permitted the Secretary of the Interior, on behalf of

the United States, to then contract to deliver from storage at Lake Mead to users in California, water up to the full quantities each year, stated in said Statutory Compact, and authorized and permitted users in California to then contract for and to presently receive and permanently use such waters in those quantities. Nothing in the Colorado River Compact or the Statutory Compact postpones or defers to 1963, or any other time, the authority of the United States and the defendants herein to contract with reference to, or the right of the defendants to use excess or surplus waters unapportioned by Article III(a) of the Colorado River Compact.

(2) Said quantities are those required to enable the aggregate annual beneficial consumptive use in California (diversions less returns to the river) of not to exceed:

a. 4,400,000 acre-feet of the waters apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, plus

b. One-half of all excess or surplus waters not apportioned by Article III(a) of the Colorado River Compact, including in such excess or surplus the waters referred to in Article III(b) of said Compact.

(3) The waters so contracted to be delivered by the United States are for permanent service and are available, among other purposes, to serve all uses under contracts made under the provisions of the Project Act and for the supply of any rights which existed in California as of June 25, 1929, the effective date of the Six-State Colorado River Compact

and the Statutory Compact between the United States and California.

(4) The said Statutory Compact does not provide for the reduction of said quantities in consequence of reservoir evaporation or other losses occurring prior to delivery of said waters at the points of diversion in California specified in the contracts hereinafter referred to.

7.

Performance of the Statutory Compact by the Principal Parties Thereto.

Prior to the time when Arizona claimed rights under the said Statutory Compact as a third party beneficiary thereof, and prior to the assertion by the United States of rights and claims adverse to defendants, now stated in the pending Petition of Intervention, the principal parties thereto (the United States and California) had confirmed and applied the meaning and intent thereof above stated, in the manner hereinafter described.

8.

Contracts of the Defendants With the United States.

(a) *Regulations of 1930.* On April 23, 1930, the Secretary of the Interior, pursuant to the authority vested in him by the Boulder Canyon Project Act, promulgated general regulations for the storage and delivery of water (Appendix 9). On November 5, 1930, he requested the Division of Water Resources of the State of California to recommend the proper apportionment, among the claimants in California, of the waters (stated in acre-feet per annum) to which California might be entitled

under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, in the following categories, as stated by the Secretary (H. Doc. 717, 80th Cong., p. A477):

> "I. Of the water which may be available to California by paragraph (a) of Article III of the Colorado River Compact . . .
>
> "II. Of the water which may be available to California by paragraph (b) of Article III of the Colorado River Compact . . .
>
> "III. Of the water which may be available to California over and above the foregoing . . ."

(b) *Seven Party Water Priority Agreement.* On August 18, 1931, pursuant to the request of the Secretary dated May 9, 1930, the defendant public agencies of the State of California entered into the so-called Seven Party Agreement (Appendix 10) establishing priorities, as among themselves, to the waters which might be available for use in California, and the Division of Water Resources of the State of California recommended to the Secretary of the Interior the inclusion of the same in the water delivery contracts into which the United States might enter with each of them.

(c) *Regulations of 1931.* On September 28, 1931, the Secretary of the Interior promulgated general regulations (Appendix 8) incorporating the foregoing recommendations. The said regulations are now in full force and effect with respect to the delivery of water from storage for use in California. Their full text appears as Appendix 8 and the effect of the schedule of priorities therein contained is tabulated below:

Priority No.	Agency and description	Annual quantity in acre-feet (beneficial consumptive use)
1.	Palo Verde Irrigation District—104,500 acres in and adjoining existing district	
2.	Yuma project (California division)—not exceeding 25,000 acres.....	
3.	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal	3,850,000
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa....	
4.	The Metropolitan Water District and/or City of Los Angeles.....	550,000
5.	(a) The Metropolitan Water District and/or City of Los Angeles	550,000
	(b) City and/or County of San Diego	112,000
6.	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal	300,000
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa....	
		5,362,000
7.	Agricultural use in the Colorado River Basin in California, as designated on Map 23000, U. S. Bureau of Reclamation.	All remaining water available for use in California.

The quantities tabulated aggregate 5,362,000 acre-feet per annum. To the extent of 962,000 acre-feet per annum, these are "excess or surplus waters" within the meaning of the Statutory Compact. These regulations authorize contracts to be made with the defendants for permanent service in that net quantity, for use in California, without provision for further reduction in consequence of reservoir or other losses occurring prior to delivery thereof in California; require that the uses of Indians in California (which are included as part of the requirements of the Yuma project and of the Coachella Valley County Water District), and the uses on public lands of the United States (which are included as part of the requirements of Palo Verde Irrigation District, Imperial Irrigation District and Coachella Valley County Water District) be charged against the uses available to California under the Colorado River Compact and the Statutory Compact; and direct that all beneficial consumptive uses shall be measured in terms of diversions less returns to the river.

(d) *Water delivery contracts.* Pursuant to the aforesaid statutory authority and in accord with the aforesaid regulations, the United States subsequently entered into contracts with the defendant public agencies of California for the delivery of water to them at stated points of diversion, in the quantities and in accord with the priorities stated in said regulations. These contracts are tabulated in paragraph 34 of Defendants' Answer to Arizona's Bill of Complaint, herein incorporated by reference as though fully stated, and the texts thereof appear in appendixes identified in that tabulation. Inherent in said contracts was and is the right to the present and perma-

nent use of excess and surplus waters, if such waters are physically available.

(e) *Hoover Dam power contracts.* Pursuant to the requirement of the first paragraph of Section 4(b) of the Project Act, that the Secretary of the Interior, in advance of construction, "make provision for revenues by contract" adequate to repay the Government's investment in Hoover Dam, the Secretary of the Interior, on April 26, 1930, entered into contracts with entities in California whereby they undertook to pay for, whether used or not, all of the firm energy to be produced by Hoover Dam. Defendant City of Los Angeles underwrote such an obligation with respect to approximately 33% of such firm energy, and defendant The Metropolitan Water District of Southern California with respect to approximately 36% of such firm energy (Appendix 20), the use thereof, in the case of that District, being restricted by the terms of its power contract to the pumping of water into and in the Colorado River Aqueduct. Said District assumed that obligation only on the clear understanding that such water would be made available concurrently with the District's obligation to pay for the power required to pump it. The satisfaction of that District's water delivery contracts (Appendixes 19, 21) as appears from the table of priorities above referred to, was then dependent to the extent of 550,000 acre-feet per annum upon the use of "excess or surplus waters" within the meaning of the Statutory Compact.

(f) *All-American Canal repayment contracts.* Pursuant to the provisions of the second paragraph of Section 4(b) of the Project Act, requiring the Secretary of the Interior, in advance of the construction of the All-

American Canal, to "make provision for revenues by contract or otherwise," to repay the government's investment therein, the Secretary entered into contracts with defendants Imperial Irrigation District (Appendix 13), City of San Diego (Appendixes 15, 23) and Coachella Valley County Water District (Appendix 16), whereby the United States agreed to deliver water pursuant to the regulations dated September 28, 1931 (Appendix 8), and to construct the All-American Canal to the capacity required to deliver these quantities, and these defendants agreed to repay the cost of the All-American Canal built to that capacity.[1] The water agreed to be delivered to San Diego, to enable the beneficial consumptive use of 112,000 acre-feet per annum, as appears from said table of priorities, was to be provided in its entirety from "excess or surplus" waters within the meaning of the Statutory Compact between the United States and California,[2] and the waters to be delivered to Imperial Irrigation District and Coachella Valley County Water District included 300,000 acre-feet per annum of water of that category. The All-American Canal was designed and constructed by the Department of the Interior to carry the quantities of water to which said defendants were entitled under the said regulations.

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[1]The All-American Canal contracts combine the water delivery features of Section 5 and the repayment requirements of Section 4(b) of the Project Act.

[2]The water rights of San Diego were subsequently merged with those of the Metropolitan Water District of Southern California (Appendixes 24, 26), and it receives water as a part of that District through the Colorado River Aqueduct.

9.

Legislative and Administrative Interpretation of the Statutory Compact.

(a) *Boulder Canyon Project Appropriation Acts.* The contracts of the defendants and other entities in California with the United States, described in Paragraph 8 of this Answer, were reported by the Secretary of the Interior to the Congress and accepted by the Congress, in conformity with Section 4(b) of the Project Act, as the basis for the appropriation of more than $160,000,000 for the construction of Hoover Dam and power plant, and more than $50,000,000 for the construction of the All-American Canal, and the said sums were expended and the said dam and canal were constructed by the United States and are now in operation. Without the contracts of the defendants, attacked by Arizona in this action, the United States could not have built the Boulder Canyon Project upon the conditions prescribed by the Congress.

(b) *Colorado River Aqueduct Act.* In 1932 the Congress granted to the defendant, The Metropolitan Water District of Southern California, a right of way 250 feet in width across Government lands in Riverside, San Bernardino and Los Angeles Counties, together with other lands and rights of way, all for the purpose of constructing an aqueduct some 242 miles long of a capacity sufficient to transport water in the quantity so contracted for by the said Metropolitan Water District (Act of June 18, 1932, 47 Stat. 324).

(c) *Parker Dam Reauthorization Act.* In 1935 the Congress authorized the construction of the Parker Dam and ratified all contracts theretofore made in connection therewith (Appendix 5, Act of August 30, 1935, 49 Stat. 1028, p. 1039). Contracts so ratified included the contract (Appendix 22) under which The Metropolitan Water District had undertaken to finance the construction of Parker Dam for the specific purpose, among other things, of providing a diversion point for water so contracted to be delivered from storage, and also the contracts between the United States and The Metropolitan Water District for the delivery from storage of waters of the Colorado River (Appendixes 19, 21) and the contract for electrical energy from Hoover Dam (Appendix 20). The Parker Dam contract so ratified, like the District's Hoover Dam power contract, restricted the use of power to pumping water into and in the aqueduct.

(d) *Boulder Canyon Project Adjustment Act.* In the Boulder Canyon Project Adjustment Act (Act of July 19, 1940, 54 Stat. 774) the Congress authorized the amendment of the power contracts entered into under the Boulder Canyon Project Act. The Hoover Dam power and water delivery contracts were fully considered by the Congress during the consideration of this measure. On May 20, 1941, the Secretary of the Interior promulgated regulations thereunder, allocating a minimum of 17.5554% and a maximum of 36.9439% of the firm energy to be generated at Hoover Dam to the defendant City of Los Angeles and 35.2517% of such firm energy to the defen-

dant The Metropolitan Water District of Southern California, the latter specifically restricted to "pumping Colorado River Water into and in its aqueduct." (H. Doc. 717, 80th Cong., p. A279.) On May 29, 1941, said City and District entered into contracts with the United States (*id.*, pp. A301, A369, A417) pursuant to said regulations, whereby they committed themselves to pay for said energy. The firm financial obligation of the Metropolitan Water District thereunder is not less than $75,000,000, for energy which it may use only in pumping the water to be delivered to it by the United States pursuant to the water delivery contracts between the United States and that District. (Appendixes 19, 21, 24.)

(e) *San Diego Aqueduct Legislation.* In a contract between the United States and the City of San Diego (October 17, 1945; Appendix 25), the United States undertook to build an aqueduct "running from a connection with the Colorado River aqueduct of the Metropolitan Water District of Southern California near the west portal of San Jacinto tunnel in Riverside County, to San Vicente Reservoir, in San Diego County. . . ." The contract rights of the City of San Diego, 112,000 acre-feet per annum (Appendix 23), being in the fifth priority (Appendix 10), could not be satisfied from the 4,400,000 acre-feet of water apportioned to the Lower Basin by Article III(a) of the Colorado River Compact permitted and authorized to be used in California, but could be supplied only from "excess or surplus waters unapportioned by the Compact." Said contract was ratified by

the Congress (Act of April 15, 1948, 62 Stat. 171; Appendix 6). The Congress subsequently authorized a second barrel to be added to this Aqueduct by the United States (Act of Oct. 11, 1951, 65 Stat. 404; Appendix No. 7). The contract for the construction of the second barrel was entered into between the United States and the San Diego County Water Authority, dated April 1, 1952 (Appendix 27). The combined capacity of the two barrels is in excess of 200 c. f. s., capable of transporting 112,000 acre-feet per annum.

(f) *All-American Canal Appropriation Acts.* The requirements of the All-American Canal, built for the service of Imperial Irrigation District and Coachella Valley County Water District, not only were made known to the Congress through reports and House documents throughout a long period of years commencing in 1918, but said canal was designed and built by the United States to carry the full quantities of water which it had agreed to deliver from storage to Imperial Irrigation District, Coachella Valley County Water District, lands of the Yuma Project in California, and the City of San Diego. These requirements approximate 4,000,000 acre-feet per annum. Such requirements and capacity and the progress of construction were reported to the Congress during the consideration of more than twenty appropriation acts, between the years 1934 and 1952, and money was appropriated by the Congress in knowledge and approval thereof.

(g) *Coachella Distribution Works Authorization.* The Act of June 26, 1947, 61 Stat. 183, reauthorized appropriations for the construction of distribution and drainage systems in the Imperial and Coachella Valleys. During the consideration of this measure, the contracts of defendants Imperial Irrigation District and Coachella Valley County Water District were again reported and referred to in the Congress. The Coachella Valley County Water District participates in the 300,000 acre-feet of excess and surplus waters referred to in the sixth priority of the Interior Department regulations (Appendix 8), as well as in waters in the second priority, subject to the prior rights of Imperial Irrigation District. On July 22, 1947, the Secretary of the Interior transmitted to the President and to the Congress (H. Doc. 415, 80th Cong., reprinted in H. Doc. 717, 80th Cong., p. A659) a finding of feasibility of a "distribution system and appurtenant protective works" for the Coachella Valley Division of the All-American Canal. In this finding, which had the effect of an authorization for construction under Sections 7(b) and 9(a) of the Reclamation Project Act of 1939, the Secretary reported the water requirements of the defendant Coachella Valley County Water District, and the progress of construction of the Coachella Branch of the All-American Canal, in accordance with that district's water delivery contract with the United States (Appendix 16). On December 22, 1947, a supplemental contract, relating to repayment of cost of these distribution works (Appendix 17), was entered into between the United States and

Coachella Valley County Water District, appropriations for the construction of these works were made by the Congress, and said works were constructed and are now in operation.

(h) In the manner herein recited, and in other ways, the principal parties to the said Statutory Compact, the United States and California, have confirmed the interpretation, meaning and intent thereof.

10.

Investments by the Defendants.

Long before Arizona asserted her present interpretations of the said Statutory Compact, or the United States asserted the claims or expressed the doubts stated in its Petition for Intervention, the California water-using agencies, defendants herein, entered upon the construction of costly works and assumed irrevocable obligations in reliance upon, and dependent upon, delivery of water under their said contracts with the United States and the Statutory Compact between the United States and California entered into, interpreted and applied by the parties thereto as hereinbefore alleged. The investments or obligations of the defendant public agencies in works dependent upon the fulfillment by the United States of these contracts, are tabulated below:

Investments and Obligations of the Defendant Public Agencies of the State of California in Works Served by Water Delivered by the United States Under Contracts With These Agencies (to nearest million dollars).

Palo Verde Irrigation District: Diversion works, canals, and distribution works	(See Note 1)
Imperial Irrigation District: All-American Canal and distribution work	$ 25,000,000[2]
Coachella Valley County Water District: All-American Canal and distribution works	27,000,000
Metropolitan Water District of Southern California: Parker Dam, Colorado River Aqueduct, and distribution works	321,000,000
City of Los Angeles: Reservoirs to receive Colorado River water, and related distribution works	9,000,000
San Diego (including San Diego County Water Authority): All-American Canal and San Diego extension of Colorado River Aqueduct	20,000,000
Subtotal	$402,000,000[3]

Notes:

[1]Palo Verde Irrigation District has expended an additional $6,000,000 on its works dependent on the waters of the Colorado River, but much of this was invested prior to its contract with the United States, and the entire sum is excluded from this tabulation.

[2]Imperial Irrigation District, in addition to its All-American Canal obligation of about $25,000,000 has invested about $29,000,000 in distribution and other works dependent on the Colorado River.

[3]If all the direct investments of the defendants in their water supply works were included, *i. e.*, Palo Verde Irrigation District's additional $6,000,000 and Imperial Irrigation District's additional $29,000,000, this total would become $437,000,000.

Other Investments and Obligations of California Entities Pursuant to Contracts With the United States Under the Boulder Canyon Project Act and Boulder Canyon Project Adjustment Act.

Hoover Dam: Energy contracts by which the repayment of the federal investment in Hoover Dam and power plant was underwritten by California power users	$196,000,000[4]
Electric transmission facilities built by California power users to perform their obligations to take Hoover Dam power	43,000,000
All-American Canal hydroelectric facilities	18,000,000
Subtotal	$257,000,000
Subtotal from previous page	402,000,000
Total	$659,000,000[5]

[4]The Government's investment in Hoover Dam and power plant is approximately $166,000,000. Of this, $25,000,000 is allocated to flood control and repayment is deferred until the balance of the investment is first repaid. In addition, however, the power rates are required to produce, during 50 years, $25,000,000 for payment to a "Colorado River Development Fund" in the federal treasury, and $30,000,000 for payment to Arizona and Nevada in lieu of taxes. (See the Boulder Canyon Project Adjustment Act: Act of July 19, 1940, 54 Stat. 774.) With these adjustments, the obligation reflected in the power contracts is approximately $196,000,000. The California contractors underwrote all of this, subject to the option of Arizona and Nevada to take, release, and take again from time to time, 35.2518% of the firm energy. (See H. Doc. 717, 80th Cong., p. 94.)

[5]The defendants' total investments and obligations undertaken in reliance on Government contracts, $659,000,000, compares with total investments dependent on the Colorado River in the amount of $694,000,000. (See Note 3.)

11.

Arizona's Status as a Third Party Beneficiary of the Statutory Compact.

(a) Arizona, as a third party beneficiary of said Statutory Compact, was well and fully aware of the construction, interpretation and application of the said Statutory Compact by the principal parties thereto, to wit, the United States and California, long before Arizona sought to avail herself of any benefits as a third party beneficiary thereof or asserted her present interpretations thereof. Such knowledge on the part of Arizona is disclosed in the pleadings and briefs submitted by that State to this Court in *Arizona v. California, et al.*, 283 U. S. 423 (1931); *Arizona v. California, et al.*, 292 U. S. 341 (1934); and *Arizona v. California, et al.*, 298 U. S. 558 (1936); in the legislative history of the statutes heretofore referred to; in the published reports of the executive departments; and disclosed otherwise by the course of conduct of Arizona in opposing the Boulder Canyon Project, the Colorado River Compact, the construction of Parker Dam, and the appropriations by Congress to construct Hoover Dam and the All-American Canal.

(b) Any rights of Arizona as a third party beneficiary are governed by the said Statutory Compact as interpreted, construed and applied by the principal parties thereto, and said State cannot lawfully assert rights as against either the United States or California, nor can the United States lawfully accord to Arizona benefits, inconsistent therewith.

12.

Obligations of the United States.

(a) The United States is bound by the said Statutory Compact and the California water-delivery contracts herein referred to, in accordance with the intent and meaning thereof as evidenced by the contemporaneous interpretations and application thereof as hereinabove alleged, and has the right to, and is obligated to fully perform, such Statutory Compact and contracts in accordance with said intent and meaning. Failure or refusal of the United States to continue to so fully perform its obligations under said Statutory Compact and contracts would result in great and irreparable injury and damage to defendants herein.

(b) The California water-using agencies, defendants herein, have fully performed to date, and are performing, all obligations of all of the said contracts with the United States.

(c) The aggregate of the quantities of water which the United States has agreed in said contracts (subject to availability under the Colorado River Compact and the Boulder Canyon Project Act) to deliver to the defendants from storage is the quantity required to enable them to make aggregate annual beneficial consumptive use (diversions less returns to the river) in California of 5,362,000 acre-feet. There are so available for delivery from storage by the United States for permanent service, and for receipt and beneficial consumptive use by the

defendants, without violating the Colorado River Compact or the Boulder Canyon Project Act or the said Statutory Compact, quantities of water at least equal to that amount.

(d) Within the authority and limitation of said Statutory Compact, construed and applied as herein alleged, said contract rights of the defendants, severally and collectively, are senior in time and right to any and all rights which may exist by virtue of contracts between the United States and any other parties for the delivery of water from Hoover Dam storage to, or for use in, Arizona and Nevada, and are senior to all claims of the United States to the right to make consumptive uses of water anywhere in the Colorado River Basin adverse to the claims of California and these defendants, other than those claims of the United States specifically admitted in Paragraph 44 of this Answer.

SECOND AFFIRMATIVE DEFENSE.

Defendants Have Appropriative Rights, Recognized by the Boulder Canyon Project Act and Protected by the Statutory Compact Between the United States and California, to the Beneficial Consumptive Use in California of Not Less Than 5,362,000 Acre-feet of Colorado River System Water Per Annum, Senior to the Claims Made by the United States to Water for Consumptive Use, With Certain Exceptions.

13.

Incorporation by Reference of First Affirmative Defense.

All of the allegations of the First Affirmative Defense of this Answer are referred to and made a part of this Second Affirmative Defense as though fully here set out.

14.

Incorporation by Reference of Portion of Answer to Arizona.

All of the allegations contained in Paragraphs 44 and 45 of the Defendants' Answer to Arizona's Bill of Complaint are referred to and made a part of this Second Affirmative Defense as though here fully set out.

15.

Total Appropriations of Defendants.

(a) Appropriative rights of the defendants, as described in Paragraphs 44 and 45 of their Answer to Arizona's Bill of Complaint, were initiated during the period 1877 to 1926, the greater portion of them antedating 1900.

(b) Prior to June 25, 1929, the defendants herein and other appropriators in California were vested with valid appropriative rights entitling said defendants to the beneficial consumptive use (diversions less returns

to the river) in California, of an aggregate quantity of water from the Colorado River System greatly in excess of 5,362,000 acre-feet per annum. In addition to the projects of the defendants in this action, there are large areas in California readily susceptible of irrigation from the Colorado River System by means of feasible projects for which valid appropriations had been made under the laws of California long prior to the enactment of the Boulder Canyon Project Act. In consequence, however, of the limitation imposed upon California's uses by the said Statutory Compact, California's appropriations, otherwise valid, were restricted by the formula stated in said Statutory Compact to a basis adequate only to supply the amounts required by the Palo Verde Project, the Colorado River Aqueduct, and the All-American Canal. Since that date defendants have been, and now are, vested with valid appropriative rights entitling said defendants to such beneficial consumptive use of an aggregate quantity of water not less than 5,362,000 acre-feet per annum. Said rights were on said date, and are, within, protected by and capable of being satisfied from the beneficial consumptive uses provided for California by the Statutory Compact between California and the United States.

(c) All of said quantity can be put to beneficial consumptive use by the defendant public agencies of California and is required by said defendants for the service of their inhabitants and lands. They have built costly works and assumed irrevocable obligations for that purpose, referred to in Paragraph 10 of this Answer, in reliance upon these appropriations and the recognition thereof in the Colorado River Compact, the Boulder Canyon Project Act, and the Statutory Compact between the United States and California, and have at all times exer-

cised due diligence, and are now exercising due diligence, to use all of the water so appropriated.

16.

Seniority of California's Appropriations.

All of the appropriations of each of the defendants above alleged are senior in time and right to all claims of the United States for the consumptive use of waters of the Colorado River System in any state with the partial exception of certain beneficial consumptive uses which may have been initiated by the United States prior to one or more of the dates of the initiation of defendants' appropriative rights. The exact claims to appropriative rights by the United States are unknown to the defendants, but, upon information and belief, defendants allege that the quantities thereof are not sufficient to interfere with the fulfillment of the appropriative rights of the defendants as such rights are recognized by the Boulder Canyon Project Act and the Statutory Compact.

17.

Present Perfected Rights of California.

(a) Section 6 of the Boulder Canyon Project Act requires the United States to use Hoover Dam and the reservoir thereby created for the purpose, among others, of satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact.

(b) Article VIII of the Colorado River Compact provides, among other things, that:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any,

by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III."

(c) As of June 25, 1929, the effective date of the Colorado River Compact, the Boulder Canyon Project Act and the Statutory Compact, projects had been constructed and were in operation in California with rights to the beneficial consumptive use of more than 4,950,000 acre-feet per annum of the water of the Colorado River System. Rights to the use of that quantity were part of then vested appropriative rights of the defendants valid under the laws of California, and valid under the Reclamation Laws of the United States, to the beneficial consumptive use of a quantity greatly in excess of 5,362,000 acre-feet per annum of waters of the Colorado River System.

(d) The present perfected rights of the defendants, within the meaning of Article VIII of the Compact and Section 6 of the Boulder Canyon Project Act, as of June 25, 1929, the effective date of said Compact and Act, were not less than 4,950,000 acre-feet per annum.

18.

Conformity With Act and Compacts.

The appropriative rights of the defendants to the beneficial consumptive use of 5,362,000 acre-feet per annum of the waters of the Colorado River System can be satisfied without violating the terms of the Colorado River Compact, the Boulder Canyon Project Act or the Statutory Compact between the United States and California and are recognized and confirmed by their water delivery contracts with the United States.

TRAVERSE OF THE ALLEGATIONS OF THE PETITION.

19.

Incorporation by Reference of First and Second Affirmative Defenses.

All of the allegations of the First and Second Affirmative Defenses of this Answer are referred to and made a part of this Traverse of the Petition for Intervention of the United States as though here fully set out.

Traverse of Part One: Introduction and Background.

20.

Answering Paragraph I of the Petition of Intervention on Behalf of the United States of America, defendants admit the allegations thereof are substantially correct, but allege that the rights, interests and claims of Arizona and defendants referred to in said paragraph relate to the use of waters of the Colorado River System as defined in Article II of the Colorado River Compact, and not merely to the waters of the main stream of the Colorado River. Defendants also call attention to the fact that subsequent to the filing of the Petition for Intervention of the United States, the State of Nevada, on December 14, 1953, filed its Motion for Leave to Intervene and Petition of Intervention, claiming as follows:

> ". . . The State of Nevada being a signatory to the Colorado River Compact, and being one of the Lower Basin States defined in said Compact and being a user of and entitled to the right to the beneficial consumptive use of a portion of the Colorado River System water is, by reasons thereof, an indispensable party to this suit . . ."

21.

Answering Paragraphs II and III of said Petition, admit that the allegations of said paragraphs are substantially correct, but allege that Arizona, in the present action, seeks to quiet title not only as against the defendants, but also as against the other States of the Colorado River Basin.

22.

Answering Paragraphs IV, V, and VI of said Petition, admit that the allegations of said paragraphs are substantially correct.

23.

Answering Paragraph VII of said Petition, allege that the facts therein referred to are set forth with more particularity and accuracy in Paragraphs 3 and 4 of the Answer of Defendants to Arizona's Bill of Complaint in this action.

24.

Answering Paragraph VIII of said Petition:

(a) Deny all of the allegations of said paragraph except insofar as said allegations conform to the allegations of this paragraph of this Answer.

(b) Deny that enactment by California of a Limitation Act was a condition to the requisite Congressional consent to a Seven-State Compact, and allege that such was a condition only to Congressional consent to a Six-State Compact.

(c) Allege that the proposed Seven-State Compact never became effective, but that, in the manner described in the First Affirmative Defense, a Six-State Compact

among California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and a Statutory Compact between the United States and California, did become effective June 25, 1929.

(d) Deny that the State of Arizona, on February 24, 1944, or at any other time, effectively ratified the Colorado River Compact either as a Seven-State or Six-State agreement. Allege that the Congress has consented to a Six-State Compact but not, after June 25, 1929, to a Seven-State Compact.

25.

Answering Paragraph IX of said Petition, allege that the provisions of the Colorado River Compact are set forth with more particularity in Paragraphs 5 to 15 inclusive of the Answer of Defendants to Arizona's Bill of Complaint. The text of that Compact appears in Appendix 1.

26.

Answering Paragraph X of said Petition, admit that the Upper Colorado River Basin Compact was signed October 11, 1948, and became effective April 6, 1949. Allege that said Upper Colorado River Basin Compact is, by its terms, subject to the Colorado River Compact proclaimed effective June 25, 1929, as a Six-State Compact among California, Colorado, Nevada, New Mexico, Utah and Wyoming. Allege that California is not a party to the Upper Colorado River Basin Compact, and that neither California nor the United States is bound by any provision thereof nor any interpretation of the Colorado River Compact appearing or implied therein. Allege that the interpretation and administration of the Upper Colo-

rado River Basin Compact will be controlled by the interpretation of the Colorado River Compact in the present action.

27.

Answering Paragraph XI of said Petition, admit the allegations of said paragraph, but allege that the purported contract dated February 9, 1944, between the United States and the State of Arizona was entered into after signature and publication, and with full knowledge, of the terms of the Treaty between the United States of America and the United Mexican States which had been executed by the plenipotentiaries of the respective countries on February 3, 1944 (Treaty Series 994, 59 Stat. 1219). Certain of the terms of that Treaty are recited in Paragraph 29 of this Answer.

Traverse of Part Two: Interests of the United States of America in the Colorado River System.

28.

Answering Paragraph XII of said Petition, admit and allege that it is important to all the parties that this court resolve the issues framed by all the pleadings on file herein. Allege further with respect to the five categories of interests of the United States set forth under subparagraphs A, B, C, D, and E of said Paragraph XII, that a determination of the rights, responsibilities and duties of the United States with respect to each of these categories will affect the interests of all of the States of the Colorado River Basin, as well as of the complainant and defendants herein. To the extent that Paragraph XII of said Petition incorporates by reference Paragraphs XIII through XXX thereof, defendants incorporate herein

by reference the allegations, admissions and denials of Paragraphs 29 through 44 of this Answer to the Petition of Intervention on Behalf of the United States.

29.

Answering Paragraph XIII of said Petition:

(a) Deny that the obligations of the United States under the Treaty with the United Mexican States are accurately alleged in said paragraph.

(b) Allege that said Treaty allots to Mexico a guaranteed annual quantity of 1,500,000 acre-feet of water, from any and all sources in the Colorado River System within the United States, as well as any other quantities arriving at the Mexican points of diversion on the Colorado River. Said Treaty also provides that in any year in which there exists a surplus of waters of the Colorado River System in excess of the amount necessary to supply all uses in the United States and the guaranteed quantity to Mexico, the United States will deliver additional waters of the Colorado River System so as to provide a total quantity not to exceed 1,700,000 acre-feet in such year. Allege that said guaranteed quantity of 1,500,000 acre-feet may be reduced in the event of extraordinary drought or serious accident to the irrigation system in the United States, in the same proportion as consumptive uses in the United States are reduced. Allege that the term "any and all sources" includes all the waters of the Colorado River System, including those of the Gila River and its tributaries.

(c) Allege that the Treaty definitions relating to "consumptive use" are as follows:

> Article I(j): " 'Consumptive use' means the use of water by evaporation, plant transpiration or other

manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream."

Article I(d): "'To divert' means the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stock-raising or industrial purposes whether this be done by means of dams across the channel, partition weirs, lateral intakes, pumps or any other methods."

Article I(h): "'Return flow' means that portion of diverted water that eventually finds its way back to the source from which it was diverted."

and allege that said definition is binding upon the United States and the States of the Colorado River Basin and is confirmatory of the meaning of "consumptive use" in the Colorado River Compact and the Boulder Canyon Project Act.

(d) Allege that Article III(c) of the Colorado River Compact provides that the waters to be delivered to Mexico shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in Paragraphs (a) and (b) of Article III, and if such surplus shall prove insufficient, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to their obligation, stated in Paragraph (d) of Article III, not to cause the flow of the River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for

any period of ten consecutive years reckoned in continuing progressive series commencing October 1, 1929. Allege that the United States, in conformity with the Mexican Water Treaty and said Compact, is obligated to make delivery to Mexico first from the waters surplus to those specified in Paragraphs (a) and (b) of Article III of said Compact, utilizing for that purpose first the waters which may be available without violation of the provisions of the Statutory Compact between the United States and California which recognize the right in California to the use of one-half of all waters in excess of those apportioned by Article III(a) of the Colorado River Compact. Allege that if the waters surplus to those specified in Paragraphs III(a) and III(b) of the Colorado River Compact shall prove insufficient to supply the water required to be delivered to Mexico, then the United States is obligated to deliver the deficiency to the extent of one-half by reduction of the beneficial consumptive uses apportioned to the Upper Basin by Article III(a) of said Compact, and one-half by reduction of the "increase of use" permitted to the Lower Basin by Article III(b) of said Compact.

30.

Answering Paragraph XIV of said Petition:

(a) Admit all of the allegations thereof not herein specifically denied.

(b) Deny that said Paragraph XIV fully or accurately states the objectives of the Boulder Canyon Project Act. Allege that Section 1 of that Act authorized the construction of Hoover Dam and the All-American Canal

> ". . . for the purpose of controlling the floods, improving navigation and regulating the flow of the

Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, . . ."

Section 6 of that Act directs that:

". . . the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. . . ."

Section 9 of that Act, referring to the All-American Canal, directs that the public lands ". . . practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry," and thereafter opened for entry under the reclamation law with preference to veterans.

Sections 8(a), 13(b), (c), (d) of that Act subjected all the rights of the United States, and of those claiming under it, to the Six-State Colorado River Compact.

(c) Further answering Paragraph XIV of said Petition, admit that, pursuant to the statutes therein referred to, the United States has undertaken the construction of large projects in the Lower Basin involving the expenditure of several hundred million dollars, but allege that the expenditure of substantially all of the said sum in the construction of the projects enumerated in said Paragraph XIV, with the sole exception of Davis Dam, was, by the

terms of Section 4(b) of the Boulder Canyon Project Act and by the terms of the Reclamation Law, conditioned upon and made possible by the assumption by the defendants, and other entities in California, of the obligation to repay the cost thereof, and that defendants incurred said obligations in reliance upon agreements with the United States recited in the First Affirmative Defense of this Answer. These works, the obligations which the defendants and other California entities have assumed to make possible their construction by the United States, and the additional expenditures which the defendants have made from their own funds (amounting together to more than $600,000,000) to enable them to discharge said obligations, are described in Paragraph 10 of this Answer, and in Exhibits A, B and C accompanying Defendants' Answer to Arizona's Bill of Complaint.

Traverse of Part Three: Specific Response of the United States of America to the Pleadings of the Parties.

31.

Answering Paragraph XV of said Petition, allege that the contracts referred to therein are described with more particularity in the First Affirmative Defense of this Answer, and in the Appendixes enumerated in said Affirmative Defense. Deny that the quantity of water to which defendants are entitled under said contracts is as stated in said Paragraph XV of said Petition, and allege that the United States is obligated pursuant to the Statutory Compact and said Contracts to deliver, at the defendants' points of diversion on the Colorado River, so much water (including all other water diverted by the defendants for use within the State of California from the Colorado River

System), as may be necessary to enable defendants to make aggregate annual beneficial consumptive use (diversions less returns to the river) in California of 5,362,000 acre-feet.

32.

Answering Paragraph XVI of said Petition, admit the allegations of said paragraph and allege that the facts relating to the Seven-Party Agreement and the terms thereof are more fully set forth in the First Affirmative Defense of this Answer and in Paragraphs 32 and 33 of the Answer of Defendants to Arizona's Bill of Complaint. The text of the Seven-Party agreement appears in Appendix 10.

33.

Answering Paragraph XVII of said Petition, admit the allegations of said paragraph. Allege that the deliveries of water to the Metropolitan Water District of Southern California are inclusive of the deliveries to the City of San Diego.

34.

Answering Paragraph XVIII of said Petition, deny the allegations of said paragraph, and allege that the quantity of water covered by the contracts between the United States and the State of Nevada referred to in said paragraph (subject to availability for use in Nevada under the Colorado River Compact and the Boulder Canyon Project Act) is "so much water, including all other waters diverted for use within the State of Nevada from the Colorado River System, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year."

35.

Answering the allegations of Paragraph XIX of the Petition:

(a) Admit that on February 9, 1944, the Secretary of the Interior signed a purported contract with the State of Arizona for the storage and delivery of water, but deny that the same is valid or effective.

(b) Deny that said purported contract provided for the delivery annually of 2,800,000 acre-feet or any other specific quantity of water, and allege that it purported only to provide for the delivery, under specified terms and conditions, of water which, when added to other quantities used by Arizona, would not exceed a maximum of 2,800,000 acre-feet per annum. Said contract also makes reference to the availability to Arizona of one-half of the excess or surplus waters unapportioned by the Colorado River Compact.

(c) Allege that said purported contract contained the following, among other provisions, and that if said contract has any validity or effect, the United States and Arizona are bound as follows:

> Article 7. "(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies."

"Article 10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III(a) of the Colorado River Compact; (3) what part, if any, is within Article III(b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III(a) of the Colorado River Compact between the Upper Basin and the Lower Basin."

"Article 18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract."

(d) Allege that all deliveries under said purported contract are subject to the rights of the defendants to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of waters of the Colorado River System.

(e) Allege that said purported contract was executed after signature of the Mexican Water Treaty and with knowledge of its terms, and that if said contract has any validity or effect the United States and Arizona are bound by the definition of consumptive use, and other terms, ap-

pearing in said treaty, in the interpretation and administration of that contract.

(f) With respect to the contract dated March 4, 1952, between the United States and Wellton-Mohawk Irrigation and Drainage District, allege that said contract, and, upon information and belief, all other water delivery contracts between the United States and users in Arizona, fail to refer in any manner to the purported contract dated February 9, 1944, between the United States and the State of Arizona, and are not, in terms, made subject thereto, but do provide for the use of Colorado River System water.

36.

Answering Paragraph XX of said Petition, defendants deny that the quantity of water covered by the contracts referred to in Paragraph XX of said Petition is correctly stated in said Paragraph XX, and refer to Paragraphs 31, 34 and 35 of this Answer to the Petition of Intervention on Behalf of the United States. Admit that controversies exist between Arizona and the defendants herein, but deny that the subjects of said controversies are fully or accurately set out in Paragraphs XXXI through XXXIX of said Petition, and allege that said controversies are more fully stated in Exhibit A to this Answer. Allege further that the determination of a number of these controversies will affect the interest of all of the States of the Colorado River Basin in and to the waters of the Colorado River System.

37.

Answering Paragraph XXI of said Petition, admit the allegations of said paragraph, and allege that certain of

the defendants, and other entities authorized by the laws of California, have entered into contracts with the United States requiring the payment to the United States of large sums for said electric energy generated at Hoover Dam, as alleged in Paragraph 10 of this Answer. Allege further that under the Boulder Canyon Project Act, Section 4(b), the Secretary of the Interior, for the United States, was required to make contracts, in advance of any appropriations or expenditures, adequate to insure repayment of the costs of construction of the project, and the costs of operation and maintenance. Allege that the contracts made by the United States under such Act to insure such repayment were entered into with the defendants and other California entities, and made possible the Boulder Canyon Project and related works to which Arizona made no contribution.

38.

Answering Paragraph XXII of said Petition, admit the allegations of said paragraph and allege that the works therein referred to are described with more particularity in Exhibit "C" to the Answer of Defendants to Arizona's Bill of Complaint.

39.

Answering Paragraph XXIII of said Petition, deny that the State of Arizona is a party to the contract therein referred to between the United States and the Wellton-Mohawk Irrigation and Drainage District. Admit that the other allegations of said paragraph are substantially correct.

40.

Answering Paragraphs XXIV, XXV and XXVI of said Petition, admit the allegations of said paragraphs.

41.

(a) Answering Paragraph XXVII of said Petition and Appendix II-A thereto, defendants refer to Paragraph 51 of this Answer and allege that defendants are without information or belief as to the extent of the rights of Indians or Indian Tribes to the use of water of the Colorado River System, and placing their denial on that ground, deny that the rights claimed in said Petition by the United States as trustee for said Indians or Indian Tribes are as set forth in Appendix II-A to said Petition. Defendants note that the claims tabulated therein are stated in terms of "Diversions," and allege that the Colorado River Compact relates to beneficial consumptive use, not diversions; allege that the Boulder Canyon Project Act defines consumptive use as "diversions less returns to the river"; and allege that said definition and the amplification thereof contained in Article I of the Mexican Water Treaty is binding upon the United States. Defendants allege that it is necessary for the United States to state and prove its claims on behalf of Indians in terms of beneficial consumptive use, place of use, and alleged priority, with respect to each of said claims wheresoever located in the Colorado River Basin.

(b) Further answering said Paragraph XXVII, allege that no priority attaches to any claims of the United States to the use of water of the Colorado River System for or by Indians and Indian Tribes, in consequence of the Indian status of the users, that such claims would not possess in the absence of such status.

(c) Allege that any and all uses of water by Indians or Indian Tribes pursuant to obligations of the United States to such Indians or Indian Tribes are chargeable under the Colorado River Compact and the Boulder

Canyon Project Act to the Basin and to the State in which such uses are situate; and, at least, to the extent that such rights existed on June 25, 1929, are chargeable under Article III(a) of that Compact.

(d) Allege that Article VII of the Upper Colorado River Basin Compact (Act of April 6, 1949, 63 Stat. 31), which has been ratified by Arizona, Colorado, New Mexico, Utah, and Wyoming and to which the Congress has consented, provides with respect to water available for use in that Basin under the Colorado River Compact, that:

> "The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made . . ."

That Compact is subject, by its terms, to the Colorado River Compact as proclaimed by the President June 25, 1929.

(e) Allege that rights in the United States to beneficial consumptive uses of water, in quantities unknown to defendants, for and on behalf of Indians and Indian Tribes, exist throughout the entire Colorado River System, and are not confined to the Lower Basin. Allege that any determination as to the status, methods of measurement, and tests of priority of Indian rights in the Lower Basin will apply with equal force and effect to Indian rights in all States of the Colorado River Basin.

42.

Answering Paragraph XXVIII of said Petition and Appendix III thereto:

(a) Deny that any treaty to which the United States is a party authorizes it to make consumptive use of the

water of the Colorado River System for the support of fish or wildlife, and allege that no treaty or federal statute has undertaken to authorize any officer of the United States so to do.

(b) Allege that the United States, in Sections 8(a) and 13(b), (c), and (d) of the Boulder Canyon Project Act, subjected its rights and the rights of those claiming under it to the Colorado River Compact, and that these statutory provisions are applicable to uses for the benefit of fish and wildlife.

(c) Allege that, pursuant to the provisions of Article IV of the Colorado River Compact, if any right exists to the consumptive use of water for the support of fish and wildlife, such right is subservient to the use and consumption of water for agricultural and domestic purposes and for the generation of electric energy, and that the rights of the defendants are of these dominant categories.

(d) Allege that if the United States has rights to the consumptive uses of water for the support of fish and wildlife, such uses are chargeable under the Colorado River Compact to the Basin and to the State in which such uses are situate, and, at least, to the extent that such rights existed on June 25, 1929, are chargeable under Article III(a) of the Compact.

43.

Answering Paragraph XXIX of said Petition, admit that the statutes require Hoover Dam, Davis Dam and Parker Dam to be operated, for the purposes, among others, stated in Section 6 of the Boulder Canyon Project Act, of controlling the floods, improving navigation and regulating the flow of the Colorado River, and admit that

the waters impounded by those structures are required to be administered to effectuate said purposes, among others stated in said statutes, subject, however, to the terms of the Mexican Water Treaty. Defendants refer to Paragraph 30 of this Answer for a more complete statement of the relationship of these functions to other functions authorized in the Boulder Canyon Project Act.

44.

(a) Answering the allegations of Paragraph XXX of said Petition, deny that the United States has any rights to the use of water of the Colorado River and its tributaries as against the defendants, except as the same are specifically admitted in this Answer, and deny all other allegations of Paragraph XXX not specifically admitted.

(b) Answering the allegations of the first unnumbered subparagraph of said Paragraph XXX, which itemizes four categories of claims, lettered respectively (a), (b), (c), (d):

1. Referring to the claims under category "(a)," defendants deny that the United States has, as against the defendants or otherwise, any rights to the use of water for the projects stated in the said Petition and its Appendixes or any other projects in the Colorado River Basin (other than projects which are for the use of Indians) except rights which are subject to and controlled by the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California; and allege that to the extent that water is delivered by the United States to the defendants under contracts between the United States and the defendants for the delivery of stored water, such delivery is

not made in discharge of any right or claim of the United States adverse to California, but in satisfaction of the rights of the defendants recognized by said Act and Compacts and established, confirmed and administered under their respective contracts with the United States, all as stated in the First Affirmative Defense of this Answer. Allege that to the extent that the United States claims rights to the use of water to the full capacity of diversion, carrying and storage structures described in said Petition and its Appendixes, the present and future interests of all of the States of the Colorado River Basin are affected.

2. Referring to the claims under category "(b)," defendants admit that the United States has rights to the use of water of the Colorado River and its tributaries, as against the parties to this cause, to fulfill its valid obligations arising from its international treaties or obligations, but allege that such rights are not only as against complainant and defendants, but also as against the other States of the Colorado River Basin. Allege that no international treaty or obligation authorizes or requires the United States or any officer or employee thereof to breach or evade any obligation to the defendants. Deny that the United States has any right to the use of water of the Colorado River or its tributaries, as against the defendants, to fulfill any obligations it may have assumed by its contracts with others to deliver water and electric power, except as the same may be consistent with the terms of the Colorado River Compact, the Boulder Canyon Project Act, and the Statutory Compact between the United States and California, consistent with and subject to the contracts between the United States and the defendants referred to in the First Affirmative Defense of

this Answer, and consistent with and subject to the rights of the defendants alleged in the Second Affirmative Defense of this Answer.

3. Referring to the claims under category "(c)," defendants admit that the United States has rights, as against the parties to this cause, to the use of water in the Colorado River and its tributaries to fulfill the obligations emanating from its status as trustee for the Indians and Indian Tribes, but allege that such rights are not only as against complainant and defendants but also as against all other States of the Colorado River Basin. As to the nature and extent of such claims defendants here incorporate by reference Paragraph 41 of this Answer.

4. Referring to the claims under category "(d)," defendants admit that the United States has rights to the use of water in the Colorado River and its tributaries, as against the parties to this cause, to protect its interests in flood control and navigation to the extent that the same are necessary and have been specifically authorized by Acts of Congress, subject, however, to the provisions of the Mexican Water Treaty, but allege that such rights are rights not only as against complainant and defendants but also as against all other States of the Colorado River Basin. With reference to the allegations concerning fish and wildlife, defendants incorporate by reference Paragraph 42 of this Answer.

Inasmuch as the United States, in Paragraph XXX of its Petition, does not identify any of the enumerated claims therein with respect to quantity, place of use or priority, the admissions made with respect to them in this Answer do not relate to any specific quantity, place of

use or priority, and the defendants reserve the right to require proof thereof at the trial of this action.

(c) Aswering the allegations of the second unnumbered subparagraph of Paragraph XXX, defendants admit that the aggregate of the claims to the beneficial consumptive use of water in the five States in the Lower Basin, including the claims of the United States, exceeds the quantity of water, the beneficial consumptive use of which is apportioned to the Lower Basin of the Colorado River by the Colorado River Compact; allege that the amount so apportioned is 7,500,000 acre-feet per annum as stated in Article III(a) of the Colorado River Compact, and allege that said aggregate claims also exceed any probable quantity of water of the Colorado River System which may be permanently available for beneficial consumptive use in the Lower Basin, including both the water apportioned to the Lower Basin by Article III(a) of the Colorado River Compact and the excess or surplus water, the use of which is unapportioned by said Compact, including in such excess or surplus the increase of use permitted to the Lower Basin by Article III(b) of said Compact. Deny that a resolution of the controversy as contended for by defendants will infringe upon the interests of the United States to its detriment.

(d) Answering the allegations of the third unnumbered subparagraph of said Paragraph XXX, defendants have no knowledge or information sufficient to form a belief as to the claims of the United States therein referred to for use of the National Park Service, Bureau of Land Management or Forest Service, and, placing their denial on that ground, deny said claims, and allege that the United States by the Boulder Canyon Project Act has

subjected its rights, and the rights of those claiming under it, to the provisions of the Colorado River Compact; allege that the rights of the defendants to the use of the water of the Colorado River System are prior and superior to said claims; allege that uses under said claims, if effected, will be chargeable under the Colorado River Compact to the Basin and the State in which they are situate; and allege that at least to the extent such rights existed on June 25, 1929, uses thereunder are chargeable under Article III(a) of the Colorado River Compact.

(e) Answering the allegations of the fourth unnumbered subparagraph of said Paragraph XXX, defendants deny the accuracy of the allegations of said subparagraph, and allege that, due to the insufficient supply of water permanently available to the Lower Basin under the Colorado River Compact to meet the aggregate of the claims to the uses in the Lower Basin of the waters of the Colorado River System, there is need for a decree of this Court determining the controversies disclosed by the pleadings in this cause. Allege further that a resolution of the controversy between complainant and defendants with respect to the interpretation of the various compacts, acts, contracts and other documents pleaded in this cause, and of the claims of the United States as alleged by the United States to be involved, will necessarily affect all of the states of the Colorado River Basin.

45.

(a) Answering the allegations of Paragraph XXXI(a) of said Petition: Deny all of the allegations of said paragraph not specifically admitted. Admit that the treaties and international conventions alluded to are valid and enforceable obligations binding the United States and all

parties to this cause, but deny that such treaties and conventions have the effects ascribed to them in said Petition, and refer to the defendants' allegations with respect thereto in Paragraphs 29, 42 and 44 of this Answer. Admit and allege that the Colorado River Compact is a valid and binding covenant among only the six States named in the Presidential proclamation of June 25, 1929, to wit, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and allege that the same is binding upon the United States. Admit that the Reclamation Act of 1902 and such acts amendatory thereof and supplemental thereto as are referred to in the pleadings in this cause, as well as the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act, are valid and enforceable enactments pursuant to which all of the parties to this cause, and all of the States of the Colorado River Basin, have received benefits. Admit and allege that contracts of the defendants with the United States involving the use and delivery of water and electric power are valid and binding upon the parties thereto.

(b) The allegations of Paragraph XXXI(b) do not appear to require answer by these defendants.

46.

Answering Paragraph XXXII of said Petition, deny that the questions in this controversy or their effect measured in acre-feet per annum are fully or accurately stated therein, and allege that the controversy, as developed in the pleadings to date, is summarized in Exhibit "A" annexed hereto, and herein incorporated by reference as though fully stated.

47.

Answering Paragraph XXXIII of said Petition:

(a) Deny that the quantity of water available to the Lower Basin under the Colorado River Compact is 8,500,000 acre-feet per annum, and allege that the quantity so available (subject to the terms of the Mexican Water Treaty), is in excess of that amount, and comprises the following:

1. Not less than an aggregate of 75,000,000 acre-feet for any period of ten consecutive years from and after October 1, 1929, measured at Lee Ferry, resulting from the obligation assumed in Article III(d) of the Colorado River Compact by the States of the Upper Division not to deplete the flow of the river at that point below that quantity. In addition:

2. Such quantities as may be required to flow from the Upper Basin into the Lower Basin in consequence of (i) the Statutory Compact between the United States and California, (ii) the obligation assumed by the States of the Upper Division in Article III(e) of the Colorado River Compact that they shall not withhold water which cannot reasonably be applied to domestic and agricultural uses, and (iii) prior appropriations in the Lower Basin not inconsistent with the apportionment made to the Upper Basin in Article III(a) of that Compact. In addition:

3. Such quantities as may be made available by the temporary draw-down of the reservoirs in the Lower Basin, consistent with the statutory directions as to

the functions of those reservoirs, notably Hoover Dam (Lake Mead). In addition:

4. The waters of the tributaries of the Colorado River in the Lower Basin, available for beneficial consumptive use. The waters of the tributaries so available aggregate approximately 3,000,000 acre-feet per annum. Of this amount, approximately 2,000,000 acre-feet per annum are available at places of use on the tributaries which make up the Gila River System in Arizona and New Mexico and 1,000,000 acre-feet per annum are available at places of use on other tributaries, particularly the Virgin River in Nevada and Utah, and the Little Colorado, Bill Williams, and miscellaneous other tributaries, in Arizona.

(b) Allege that the amount of 8,500,000 acre-feet, referred to in Paragraph XXXIII of said Petition, relates only to the aggregate of the beneficial consumptive uses governed by Articles III(a) and III(b) of said compact, but has no relation to either the quantities of water physically available in the Lower Basin or to the total quantities of the uses which may lawfully be made of the available water.

(c) Admit that the aggregate of the claims to rights to the beneficial consumptive use of water of the Colorado River System in the Lower Basin by claimants in Arizona, California, Nevada, Utah and New Mexico, exceeds 8,500,000 acre-feet per annum, and exceeds also the much larger quantity which is physically and lawfully available for permanent use in the Lower Basin.

Allege that the claim of Arizona to 3,800,000 acre-feet of beneficial consumptive use per annum of the water

of the Colorado River System measured in terms of "main stream depletion," is equivalent to more than 5,000,000 acre-feet measured at the place of use in terms of diversions less returns to the river.

(d) Allege that all of the water permanently available for beneficial consumptive use in the Lower Basin will be required to satisfy the rights of projects heretofore constructed or authorized in that Basin, with reasonable allowance for the future requirements of Nevada, Utah and New Mexico.

48.

Answering Paragraph XXXIV of said Petition:

Defendants concur in the request of the United States that the conflict with respect to the Boulder Canyon Project Act be resolved; extend this request to include the conflict with reference to the Colorado River Compact and the Statutory Compact between the United States and California; allege that the conflicts with reference to all three enactments are substantially as summarized in Exhibit A to this Answer; and allege that these conflicts involve the rights, responsibilities and obligations of the United States with respect to the entire Colorado River System and not merely the Colorado River, if that term in said Petition is intended to refer only to the main stream, and further, involve the rights and obligations of the United States with respect to all of the States of the Colorado River Basin.

49.

Answering Paragraph XXXV of said Petition, allege that the Secretary of the Interior on behalf of the United States contracted to deliver water from storage to defen-

dants in the amounts and on the terms set forth in the First Affirmative Defense of this Answer, and allege that said contracts are valid and binding and that the United States has the right and the duty to perform its obligations with respect to the Colorado River System in such way as to enable it to fulfill its contracts with defendants according to the terms thereof. Deny the allegations of said paragraph as they relate to the purported contract between the United States and Arizona dated February 9, 1944.

50.

Answering Paragraph XXXVI of said Petition:

With reference to the allegations of said paragraph concerning the purported ratification of the Colorado River Compact by Arizona on February 24, 1944, and the purported contract between the State of Arizona and the Secretary of the Interior dated February 9, 1944, defendants refer to Paragraphs 24 and 35 of this Answer, and in more detail, to Paragraph 59 of their Answer to Arizona's Bill of Complaint, which they here incorporate by reference. Deny that the United States is under any obligation or responsibility to the State of Arizona or any user of water in that State in consequence of either of those events.

51.

Answering Paragraph XXXVII of said Petition, defendants refer to Paragraph 41 of this Answer, and:

(a) Noting the allegation that the rights to the beneficial consumptive use of water by Indians and Indian Tribes are in no way subject to or affected by the Colorado River Compact, allege that Article VII of the Colorado

River Compact merely provides that nothing in said Compact shall be construed as affecting the obligations of the United States to Indian Tribes, but does not provide or imply that beneficial consumptive uses by Indian Tribes are not chargeable under said Compact to the Basin and the State in which they are situate in like manner as uses by others are charged. Allege that if the rights of Indians are not subject to and protected by the Colorado River Compact, they are subject to prior appropriations of other users in the Colorado River Basin, including those of these defendants.

(b) Join in the request of the United States that this Court declare and determine the rights of the Indians and Indian Tribes, but allege that the conflicts on this issue extend to the entire Colorado River System and not merely to the Lower Basin, and that the United States cannot exercise the claims which it asserts for itself and on behalf of Indians and Indian Tribes or perform its duties, not only with respect to Indians and Indian Tribes but also with respect to those with whom it has made contracts to store and deliver water, until such conflicts have been resolved. Defendants refer to the conflicts arising from the assertion in Paragraph XXVII of the Petition and its Appendix II-A of claims on behalf of Indians in terms of diversion rights and not beneficial consumptive uses, refer to the conflicts arising from the denial by the United States, in Paragraph XXXVII of its Petition, of the allegation of the defendants that all beneficial consumptive uses by Indians are chargeable to the beneficial consumptive uses available to the Basin under the Compact, and to the State, in which such uses are situate, refer to the provisions of Article VII of the Upper Colorado River Basin Compact quoted in

Paragraph 41 of this Answer, and refer to Section 13(b) of the Boulder Canyon Project Act, as well as the allegation made in Paragraph XXXVII of the Petition that uses by Indians and Indian Tribes are in no way subject to or affected by the Colorado River Compact. Defendants point to the resulting uncertainty as to (1) the beneficial consumptive uses claimed on behalf of Indians, (2) what quantities, if any, the United States may withhold from delivery to the Lower Basin by reason of its claims on behalf of Indians in the Upper Basin, (3) whether uses by Indians in both the Upper and Lower Basins are permissible in addition to the uses chargeable to such Basin under the Colorado River Compact or are chargeable as a part thereof, (4) the effect upon the obligations of the States of the Upper Division under Articles III(d) and III(e) of that Compact, (5) the extent to which such Indian claims may be affected by prior appropriations of others, including these defendants, and, finally, (6) whether, if the claims of the United States on behalf of Indians are sustained, the Colorado River Compact is capable of performance by any State.

(c) Allege that the determination of the issues tendered by the Petition in Paragraph XXXVII thereof will necessarily affect the substantial interests of all of the States of the Colorado River Basin.

52.

Answering Paragraph XXXVIII of said Petition, defendants deny each and every allegation of fact in said Petition which is substantially at variance with or contrary to the facts alleged in this Answer, in the pleadings of the defendants directed to those of Arizona and Nevada, and in the Exhibits and Appendixes to those pleadings of the defendants.

53.

As to Intervener's Appendix I, defendants allege as follows:

1. Referring to the allegations relating to Parker Dam (Pet. p. 45), defendants allege further that said dam was constructed by the United States with funds advanced to it by The Metropolitan Water District of Southern California, without reimbursement. The United States reserved the right to one-half the power privilege created by said dam. The facts with respect to Parker Dam are alleged with more particularity in Exhibit A to Defendants' Answer to Arizona's Bill of Complaint.

2. Referring to the allegations relating to the All-American Canal System, which includes the Coachella Canal (Pet. pp. 47 to 49, incl.), defendants allege that pursuant to contract dated December 1, 1932 (Appendix 13) as supplemented by contract dated March 4, 1952, entered into between the United States and Imperial Irrigation District (Appendix 18), Imperial Irrigation District has assumed the care, operation and maintenance of the main All-American Canal and the upper fifty miles of the Coachella Canal, and that the care, operation and maintenance of the remaining distance of the Coachella Canal has been assumed by the Coachella Valley County Water District pursuant to a contract entered into between the United States and that district dated October 15, 1934. (Appendix 16.)

3. Referring to the allegations relating to the area irrigated within the boundaries of Imperial Irrigation District (Pet. p. 49), defendants allege the fact to be that in the year 1951, the gross area irrigated amounted to approximately 600,000 acres of land and not 425,000 acres as therein stated.

4. Referring to the allegations relating to the Colorado River Aqueduct (Pet. p. 49), defendants allege the fact to be that the Colorado River Aqueduct will have a maximum carrying capacity of 1800 c.f.s. and not 1605 c.f.s. as therein stated.

5. Referring to the allegations relating to the San Diego Aqueduct (Pet. p. 50), defendants allege the facts to be that the San Diego Aqueduct is operated and maintained in part by the San Diego County Water Authority and in part by the Metropolitan Water District of Southern California and these agencies are sharing in repayment to the United States of the entire cost of said aqueduct.

54.

Prayer.

Wherefore, defendants pray:

1. That the rights and interests of defendants as against all parties to this cause, including the United States of America, be adjudged and decreed, as alleged herein;

2. That the Court grant to defendants such other and further relief as to the Court may seem meet and proper;

3. That in consequence of the disagreement of the parties on complex questions of fact and law, this Court appoint some suitable person as Special Master and refer this cause to such Special Master with authority to take evidence and to report the same to the Court with his findings of fact, conclusions of law and recommendations for decree, all to be subject to review and approval or other disposal by this Court.

The defendants also respectfully pray leave to amend this Answer if that should hereafter become appropriate or necessary during the course of the proceedings in this cause.

Respectfully submitted,

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EXHIBIT A.

Summary of the Controversy

The pleadings filed by Arizona, Nevada, the United States and California, to date, disclose complex questions of fact and law, many of which are interrelated. The summary of principal questions presented below is divided into four parts: (I) the quantities of water in controversy; (II) the ultimate issues, from the standpoint of the respective prayers; (III) a tabulation of factual issues; and (IV) the issues of interpretation of the basic documents involved. Under this division, certain questions reappear and to this extent reflect the interlocking nature of the problem.

I. The Quantities of Water in Controversy.

The United States seeks to quiet title to rights to the use of water, consumptive and otherwise, "as against the parties to this cause," for federal purposes, in unstated amounts.

Arizona seeks to quiet title to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters of the Colorado River System (measured by "man-made depletion of the virgin flow of the main stream") and to enjoin California's right to permanently use any water in excess of approximately 3,800,000 acre-feet per annum (measured by "diversions less returns to the river"), that being the effect of (1) reducing 4,400,000 acre-feet of III(a) water by reservoir losses, and (2) denying California any permanent right to use excess or surplus waters.

California asserts a right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of the waters of the Colorado River System (measured by

"diversions less returns to the river") under contracts with the United States, comprising 4,400,000 acre-feet of the waters apportioned by Article III(a) of the Colorado River Compact and 962,000 acre-feet per annum of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact.

Nevada seeks to quiet title to 539,100 acre-feet per annum (measured in part by both methods) of the beneficial consumptive uses apportioned by Article III(a) of the Colorado River Compact, and to not less than a total of 900,000 acre-feet from all classes of water.

As the States differ in their definition of "beneficial consumptive use," their claims require restatement in terms of a common denominator in order to evaluate their effects. Thus:

The quantity to which Arizona seeks to quiet title, 3,800,000 acre-feet per annum, measured by the method she urges, "depletion of the virgin flow of the main stream occasioned by the activities of man," is equivalent to more than 5,000,000 acre-feet measured by consumption at the site of use, or "diversions less returns to the river," the standard established by the Boulder Canyon Project Act and asserted by California. The difference is due primarily to the fact that under Arizona's interpretation, the Compact deals with the virgin flow in the main stream only and that the use of water "salvaged by man" is not charged as a beneficial consumptive use, whereas under California's interpretation the Compact deals with the waters of the entire river system and such salvage is so charged.

Conversely, the aggregate of the California contracts, 5,362,000 acre-feet per annum, measured by "diversions less returns to the river," is equivalent to only about 4,500,000 acre-feet measured by "man-made depletion" (without charge for salvaged water). If Arizona's prayer should be granted, California's rights would be reduced to about 3,800,000 acre-feet per annum, measured by "diversions less returns to the river," or to about 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream."

The impact of Nevada's claims on those of the other states is not readily evaluated.

II. Ultimate Issues.

The ultimate issues, in the sense of the results sought by each party, may be grouped as follows:

The United States.

Does the United States have rights, "as against the parties to this cause, to the use of water in the Colorado River and its tributaries" in the following categories?

(1) for consumptive use of all projects in the Lower Basin, which it asserts independently of any rights claimed by the States in which such projects are located;

(2) to fulfill its obligations arising from international treaties and conventions; but this involves, with respect to the burden of the Mexican Water Treaty, the obligations as between the States of the Upper Division and the States of the Lower Division under Articles III(c) and III(d) of the Colorado River Compact, and involves also the effect of the so-

called "escape clause" of Article 10 of that Treaty, which allows reduction in the guaranteed deliveries to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty;

(3) to fulfill all its contracts for the delivery of water and electric power, *i.e.,* with or in Arizona, California, and Nevada; but it alleges that the water available is not sufficient to satisfy all these obligations;

(4) to fulfill the Government's obligations to Indians and Indian Tribes; but this involves not only the questions of the magnitude and priorities of these claims but the questions of whether or not they are chargeable under the Colorado River Compact to the Basin and State in which such uses are made, what the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and what rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins;

(5) to protect its interests in fish and wildlife, flood control and navigation; but such rights as it may have for these purposes may require the impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona and California, and again involves the question of accounting under the Compact; and

(6) for use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties to

this cause" for these functions, such claims apply to all the waters of the Colorado River System in both Basins.

The adjudication of these claims of the United States requires consideration and resolution of: questions of fact, referred to later; the power of the United States to impound and dispose of water independently of rights derived from the States; the extent of its obligations under treaties and contracts; the impact and effect of its treaties upon rights of domestic water users; how its claims to the use of water shall be measured; the location, magnitude and priorities of Indian claims, and claims for other alleged federal purposes; the extent to which its rights and obligations are controlled by the Colorado River Compact; and the extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

Arizona.

Is Arizona entitled to a decree:

(1) Quieting title to 2,800,000 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, substantially all to be taken from the main stream, and measured in terms of man-made depletion of the virgin flow of the main stream?

(2) Quieting title to all of the 1,000,000 acre-feet per annum by which the Lower Basin is permitted to "increase its use" by Article III(b) of the Colorado River Compact (notwithstanding the decision of this Court in *Arizona v. California et al.*, 292 U. S. 341 (1934)), to the exclusion of the other States of the Lower Basin, all to be taken from the waters flowing in the Gila River,

and to be measured in terms of man-made depletion of the virgin flow of the main stream?

(3) Reducing California's right to the uses apportioned by Article III(a) of the Colorado River Compact to approximately 3,800,000 acre-feet per annum, in consequence of reservoir losses?

(4) Enjoining California's right to receive and permanently use under its government contracts 962,000 acre-feet per annum, or any part thereof, in excess of 4,400,000 acre-feet per annum?

The determination of Arizona's claims involves: the questions of fact, later referred to; the standing of Arizona to seek a declaratory decree quieting title to a "block" of water for projects not yet constructed or authorized (about 1,600,000 acre-feet per annum of the 2,800,000 claimed from the main stream); the source of title to Arizona's claims to 2,800,000 acre-feet of III(a) water and 1,000,000 acre-feet of III(b) water; the status of the uses on the Gila; the measurement of uses thereof and of the main stream; whether Arizona's status is that of a party to the Colorado River Compact or that of a third party beneficiary of the Statutory Compact between the United States and California, and if so, whether Arizona is bound by the interpretations placed thereon by the principal parties thereto in its formulation and administration; and the validity and effect of Arizona's water delivery contract with the United States.

Most of the questions posed by Arizona's claims revolve around the issue of whether the Gila River shall be treated as a part of the Colorado River System for all purposes, or shall receive special treatment in respect of (1) the identification of uses thereon with the waters referred to

in Article III(b); (2) the corollary exemption of "rights which may now exist" on the Gila from any charge under Article III(a); and (3) the devaluation of the charge for beneficial consumptive uses from the quantity which is in fact consumed on the Gila (alleged by California to be about 2,000,000 acre-feet per annum) to the lesser quantity represented by the resulting depletion in the virgin flow of the main stream (alleged by Arizona to be about 1,000,000 acre-feet per annum).

California.

Are the contracts between the United States and the defendant public agencies of California for the storage and delivery of water valid and enforceable? Inasmuch as these contracts are, in terms, for permanent service but subject to the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, the issue is whether these enactments, considered together as a Statutory Compact established by reciprocal legislation, authorize and permit the Secretary of the Interior to presently contract for the storage and delivery for permanent beneficial consumptive use in California, of 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) of the Colorado River Compact plus one-half of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact. The aggregate of these contracted quantities, subject to physical availability of the amounts of excess or surplus waters, which vary from year to year, is 5,362,000 acre-feet per annum.

The determination of California's claims involves: the questions of fact, later referred to; the extent to which rights have vested in both the United States and California under the Statutory Compact; whether Arizona is estopped by her previous conduct from asserting her present position; whether the limitation is net of reservoir losses; how California's uses shall be measured; whether California is chargeable with the use of salvaged water; the effect of California's appropriations, in their relation to the expressions "rights which may now exist" and "present perfected rights" in the Compact and Project Act; the definition of the Project Act term, "excess or surplus waters unapportioned by" the Colorado River Compact; the availability of such waters for permanent service; the intent of Congress with respect to the waters referred to in Article III(b); and the relation between California's contracts and the later agreements which the Secretary of the Interior has entered into with others.

Nevada.

Is Nevada entitled to a decree:

(1) Quieting title to 539,100 acre feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact?

(2) Reserving for a future agreement the disposition of the use of the 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact, and preserving to Nevada an equitable share thereof?

(3) Assuring Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum, from all classes of water?

The determination of Nevada's claims requires the consideration and resolution of: the questions of fact later referred to; the questions of interpretation previously mentioned; the question of whether Nevada's share of III(a) waters has been determined or limited to 300,000 acre-feet per annum; whether, as to stored waters, Nevada may claim any quantity in excess of her contracts with the United States; and the source of title to her claims to 539,100 acre-feet per annum of III(a) water and not less than 900,000 acre-feet per annum from all sources.

Interests of Other States.

There remains the question whether the claims of the United States, Arizona, California, and Nevada can be effectively determined without concurrently determining the rights and obligations of Utah and New Mexico with respect to the waters of the Lower Basin, and the rights and obligations of those states and Colorado and Wyoming with respect to other waters of the Colorado River System, to the extent that they are affected by the issues in controversy here.

In more detail, these "ultimate issues" depend upon the resolution of the following questions of fact and of the interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Mexican Water Treaty.

III. Factual Issues.

There are substantial issues of fact, raised by the pleadings to date. These include, but are not limited to, determination of:

(1) the investments and obligations undertaken by the parties in the construction of works and in the performance of their contracts with the United States, and the investments and obligations undertaken by the United States in reliance upon such contracts;

(2) the location, magnitude and priorities of the water rights necessary to enable the United States to perform its obligations to Indians and Indian tribes pursuant to Article VII of the Compact;

(3) the requirements of the United States for (a) flood control, (b) navigation, (c) fish and wild life, and (d) the other claims which it makes;

(4) the quantities of water physically available for beneficial consumptive use in the Lower Basin, assuming full use by the Upper Basin of its Compact apportionment, full regulation of the supply available to the Lower Basin, and full performance of the Mexican Water Treaty;

(5) the uses, present and potential, on the main stream and on each tributary, determined as of the place of use, as California contends is the proper method, and the effect of those uses in terms of man-made depletion of the virgin flow of the main stream, as Arizona contends is the proper method;

(6) the quantities of water "salvaged" by the activities of man, on the main stream and on the tributaries;

(7) reservoir losses, present and potential, gross and net;

(8) appropriative rights, priorities, and uses thereunder, on the main stream and tributaries;

(9) the extent and place of use of "rights which may now exist" and which, under Article III(a) of the Compact, are to be charged as uses of water apportioned by Article III(a), and of "rights which may now exist" in California, within the meaning of Section 4(a) of the Project Act; and

(10) the extent and place of use of "present perfected rights" protected by Article VIII of the Compact and directed by the Boulder Canyon Project Act to be satisfied in the operation and management of the Project.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty.

Questions relating primarily to Article III(a) of the Colorado River Compact include the following: Whether the Colorado River Compact deals only with the main stream or treats with Colorado River System waters wherever they may be found; whether the uses apportioned by Article III(a) to the Lower Basin are to be taken only from "water present in the main stream and flowing at Lee Ferry," as Arizona contends, or from the tributaries as well, as California and Nevada contend; whether the 7,500,000 acre-feet referred to in Article III(a) is related to the 75,000,000 acre-feet referred to in Article III(d), as Arizona contends, or whether the latter figure includes excess or surplus waters unapportioned by the Compact, as California contends; by what

process Arizona claims to have acquired an apportionment of 2,800,000 acre-feet of III(a) water, to be taken from the main stream; whether the apportionment of 7,500,000 acre-feet "per annum" is a statement of a maximum, or of an average, and, if the latter, over what period of years; the definition and measurement of "beneficial consumptive use"; the accounting for water added to and withdrawn from storage on the main stream and tributaries; whether the use of water salvaged by man on the main stream and tributaries is to be charged under the Compact; the definition of "rights which may now exist," which are to be included in charges to water apportioned by Article III(a) and their magnitude on the main stream and tributaries; the date to which this last expression refers; whether, in the absence of a compact among the Lower Basin States, the division of water among them is to be affected by appropriative rights, *i. e.*, "rights which may now exist"; whether Indian rights, and other federal claims to consumptive use, are included within that expression and are to be charged under the Compact; whether reservoir losses are chargeable as beneficial consumptive uses, and if so, their classification under the Compact and their relation to other uses.

Questions relating primarily to Article III(b) of the Colorado River Compact include the following: The questions relating to the definition of "beneficial consumptive use" and "per annum" previously stated in connection with Article III(a); whether the "increase of use" permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as in Article III(a), as Arizona contends, or a license to acquire rights by appropriation and contracts under the Project Act in excess or surplus waters unapportioned by the Compact, as Cali-

fornia contends; whether this right to increased use is identified solely with the water found flowing in the Gila River, as Arizona contends, or is identified with the first 1,000,000 acre-feet of increased use (above 7,500,000) per annum throughout the Lower Basin, as California and Nevada contend; whether this right is available to all five States of the Lower Basin, or to Arizona alone, as she contends (notwithstanding the decision of this court in Arizona v. California *et al.*, 292 U. S. 341 (1934)); the status of uses in New Mexico on the Gila; the status of uses on other tributaries; and to what degree reservoir losses are chargeable to this increase of use. Reference to the relation of the Mexican Treaty burden to the uses under Article III(b) appears below in connection with Article III(c).

Questions relating primarily to Article III(c) of the Colorado River Compact include the following: Whether the waters to be supplied Mexico are "apportioned" thereby (this bears upon the determination of the meaning of the expression "excess or surplus waters unapportioned by" the Colorado River Compact, appearing in the Boulder Canyon Project Act, *infra*); whether, if the quantities in excess of those specified in Articles III(a) and III(b) are insufficient to supply the deliveries to Mexico, the burden, with respect to the Lower Basin, falls first upon the uses referred to in Article III(b), as California contends, or upon those referred to in Article III(a), as Arizona contends; and the relation of the "escape clause" in Article 10 of the Treaty, which permits reduction in deliveries to Mexico in case of extraordinary drought in proportion to the reduction in consumptive uses in the United States. The relation of Article III(c) to Articles III(d) and III(a), with respect to the obligations of

the Upper Division States, is referred to below in connection with Article III(d).

Questions relating primarily to Article III(d) of the Colorado River Compact include the following: As a corollary to one of the questions stated with reference to Article III(a), whether the 75,000,000 acre-feet referred to in Article III(d) is related to the 7,500,000 acre-feet apportioned by Article III(a) to the Lower Basin, or whether the 75,000,000 acre-feet include excess or surplus waters available for delivery to Mexico or use in the Lower Basin; the resulting effect on the obligation of the States of the Upper Division stated in Article III(c) to furnish additional water to meet the deficiency if surplus above the quantities specified in Articles III(a) and III(b) is insufficient to supply Mexico; and whether the Lower Basin is entitled to demand release of this 75,000,000 acre-feet notwithstanding the consequent inability of the Upper Basin to make beneficial consumptive use of 7,500,000 acre-feet per annum.

Questions relating primarily to Article III(e) of the Colorado River Compact include the following: whether, if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required; whether, if Indian uses are not subject to the Colorado River Compact, the United States may require release of water from reservoirs in the Upper Basin to satisfy them, in addition to the water which the States of the Upper Division are required to release in performance of Articles III(c) and III(d) of the Compact; so also with respect to the other federal claims asserted by the United States "as against the parties to this cause," for use of water in the Lower Basin.

Questions relating primarily to Articles III(f) and III(g) of the Colorado River Compact include the following: whether the provisions in these articles with reference to a compact to be made after October 1, 1963, are permissive or mandatory; whether, in the light of the Statutory Compact, these provisions preclude the acquisition of rights in excess or surplus waters by appropriation and by contract with the United States in the interim, subject only to further apportionment as between Basins by such a future compact; and whether, in the event of competing interstate claims to such excess or surplus waters, in the absence of a compact apportioning them, priority of appropriation, including contracts with the United States, controls.

Questions relating to Article VII of the Colorado River Compact include the following: Whether uses by Indians are subject to the Colorado River Compact; whether Indian uses are chargeable under the Compact to the Basin and the State in which they are situate; if not, whether they are prior and superior to the apportionments made by the Compact, or are in competition with appropriations of others which are subject to the Compact; the location, magnitude, and asserted priority of Indian claims; their effect upon the quantities available to non-Indian users under Articles III(a), III(b), etc.; their effect on the distribution of the Mexican Treaty burden; and their effect on the obligations of the States of the Upper Division under Articles III(c) and III(d).

Questions relating primarily to Article VIII of the Colorado River Compact include the following: The date to which the expression "present perfected rights" relates, *i.e.*, 1922, 1929, or some other date; the definition

of said term; whether such definition is to be determined under the law of the State under which the right arose; whether the assurance against impairment extends to quality as well as quantity; the extent of these rights in each State; their relation to the expression "rights which may now exist," as used in Article III(a) of the Compact and Section 4(a) of the Project Act; and the impact of reservoir losses when present "perfected rights" attach to, and are satisfied from stored waters, pursuant to the direction in Article VIII.

Questions relating primarily to the Boulder Canyon Project Act and the resulting Statutory Compact between the United States and California include the following: Whether the alternative consent given in the Project Act to a Seven-State or Six-State Compact became final on June 25, 1929, in establishing the latter; whether Arizona could, or did, effectively ratify a Seven-State Compact thereafter; if so, whether the Statutory Compact authorized by the Project Act as a corollary to a Six-State Compact remains in effect; if it does, whether Arizona can claim the benefits of both; whether the Statutory Compact authorized contracts to be made with the California defendants for the permanent service (in addition to 4,400,000 acre-feet of III(a) waters) of one-half of the excess or surplus waters unapportioned by the Compact for use in California; whether it included therein the waters referred to in Article III(b), or precluded California from use of such waters; whether the "excess

or surplus," of which California may use one-half, is to be reckoned before or after deduction of the quantity required to be delivered to Mexico; the effect on California's right to "excess or surplus" of a future compact apportioning such waters; whether the limitation "for use in California" is net of reservoir losses, or is subject to further reduction in consequence of such losses; whether the definition of consumptive uses applicable to California is applicable to Arizona, and vice versa; whether California is free to make use of salvaged waters without charge under the Compact or the Limitation Act; the effect of California's appropriations; the meaning and effect of the reference to "rights which may now exist" in Section 4(a) of the Project Act; the extent of California's "present perfected rights" as referred to in Section 6 of the Project Act; whether by the Project Act, or otherwise, the shares of Nevada or Arizona in the waters of the Colorado River System have been determined; and the construction and effect of the water delivery contracts held by those States.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

Response of California Defendants to the Motion on Behalf of the State of Nevada for Leave to Intervene

and

Answer of California Defendants to Petition of Intervention on Behalf of the State of Nevada.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

RESPONSE OF CALIFORNIA DEFENDANTS TO THE MOTION ON BEHALF OF THE STATE OF NEVADA FOR LEAVE TO INTERVENE.

The defendants above named have no objection to the granting of the motion on behalf of the State of Nevada for leave to intervene.

The defendants note that the motion and Petition refer to the "Colorado River" in some instances and to the "Colorado River System" in others. It is assumed, in this Response and in the accompanying Answer, that the Colorado River System is meant by the references to the Colorado River.

The signatures on behalf of the defendants appear at the close of their Answer.

IN THE

Supreme Court of the United States

October Term, 1953
No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

ANSWER OF CALIFORNIA DEFENDANTS TO PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA.

Defendants State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California, by their duly authorized attorneys, jointly Answer the Petition of Intervention on Behalf of the State of Nevada as follows:

Incorporation of Appendixes by Reference.

1.

Defendants refer to their "Appendixes to the Answer" to Arizona's Bill of Complaint, and incorporate those Appendixes by reference as a part of their present Answer to the Petition of Intervention on Behalf of the State of Nevada, as though the same were here set out at length.

FIRST AFFIRMATIVE DEFENSE.

Defendants Have the Right to the Beneficial Consumptive Use in California of 5,362,000 Acre-feet Per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto.

2.

The defendants incorporate by reference, as though here fully stated at length, as a part of this Answer to the Petition of Intervention of the State of Nevada, all of the allegations of the First Affirmative Defense of their Answer to the Petition for Intervention of the United States of America.

3.

The rights of Nevada as a third party beneficiary of the Statutory Compact between the United States and California are governed by that Compact as interpreted, construed and applied by the principal parties thereto, as alleged in Defendants' Answer to the Petition for Intervention of the United States, and said State cannot lawfully assert rights inconsistent therewith.

SECOND AFFIRMATIVE DEFENSE.

Defendants Have Appropriative Rights, Recognized by the Boulder Canyon Project Act and Protected by the Statutory Compact Between the United States and California, to the Beneficial Consumptive Use in California of Not Less Than 5,362,000 Acre-feet of Colorado River System Water Per Annum, Senior to the Claims Made by Nevada in that State's Petition of Intervention, With Certain Exceptions.

4.

Incorporation by Reference.

The defendants incorporate by reference, as though here fully stated at length, as a part of this Answer to the Petition of Intervention on Behalf of the State of Nevada, all of the allegations of the Second Affirmative Defense contained in the Answer of these defendants to the Petition for Intervention of the United States of America.

5.

California's Appropriations Are Senior to Nevada's.

All of the appropriations of defendants above alleged are senior in time and right to all claims of Nevada for the consumptive use of waters of the Colorado River System with the partial exception of certain beneficial consumptive uses which may have been initiated by users in Nevada prior to one or more of the dates of the initiation of defendants' appropriative rights. The exact quantities of such uses are unknown to the defendants, but, upon information and belief, defendants allege that the quantities thereof are not sufficient to interfere with the fulfillment of the appropriative rights of the defendants as such rights are recognized by the Boulder Canyon Project Act and the Statutory Compact between the United States and California.

TRAVERSE.

6.

Answering Paragraph I of said Petition, admit the allegations of said paragraph except that, with respect to the allegations contained in the last subparagraph thereof, allege that defendants have not sufficient information or belief to enable them to answer.

7.

The allegations of Paragraph II of said Petition do not appear to require answer by the defendants.

8.

Answering Paragraph III of said Petition, admit all the allegations thereof.

9.

Answering Paragraph IV of said Petition, admit that the State of Nevada is a signatory State of the Colorado River Compact and is one of the States of the Lower Basin thereunder. As to beneficial consumptive use of waters of the Colorado River System available to Nevada, reference is made to Paragraphs 12, 13 and 14 of this Answer. Admit that the Colorado River Compact, proclaimed by the President June 25, 1929, as a Six-State Compact among the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming as alleged in Paragraphs III and IV of Nevada's Motion for Leave to Intervene, was intended to be, and now is, binding and obligatory upon the said six States, and will be so until the said Compact is terminated by the unanimous

agreement of said six States. Except as specifically admitted herein, deny all allegations of Paragraph IV.

10.

Answering Paragraph V of said Petition, admit all the allegations thereof except that, with respect to the allegation that the State of Nevada has the right to the beneficial consumptive use of water under Article III(a) of the Colorado River Compact in the amount of 539,100 acre-feet per annum for present and future agricultural and domestic uses, allege that defendants are without information or belief sufficient to enable them to answer, and placing their denial upon that ground, deny said allegation. The defendants' position as to the rights of Nevada is stated in more detail in Paragraphs 12, 13 and 14 of this Answer.

11.

(a) Answering Paragraph VI(a) of said Petition, defendants admit the allegations contained in the first sentence thereof and allege that the facts therein stated are true of each Lower Basin State. Defendants are without information or belief as to the other allegations contained in said Paragraph VI(a), and placing their denial on that ground, deny said allegations.

(b) Answering Paragraph VI(b) of said Petition, defendants are without information or belief as to the allegations therein contained, and placing their denial on that ground, deny the allegations therein contained.

(c) Answering Paragraph VI(c) of said Petition, admit that the total present beneficial consumptive use (di-

versions less returns to the river) of water by the State of Nevada, measured at the place of use, does not exceed 63,730 acre-feet per annum as set forth in the table on page 12 of said Petition; except as expressly admitted, defendants are without information or belief as to the allegations contained in said Paragraph VI(c), including the tabulations appearing therein, and placing their denial on that ground, deny all other allegations of said paragraph.

12.

Answering Paragraph VII of said Petition:

(a) Deny, except as herein expressly admitted or alleged, all of the allegations of said paragraph.

(b) Allege that California has the right to make aggregate annual beneficial consumptive use in California, presently and permanently, of not to exceed 4,400,000 acre-feet of the waters apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, plus one-half of all excess or surplus waters unapportioned by Article III(a) of the Colorado River Compact, including in said excess or surplus the waters referred to in Article III(b) of said Compact. Allege that the quantities of excess or surplus waters unapportioned by Article III(a) of the Colorado River Compact are such that the portion thereof which is now available and will continue to be available to California under its Statutory Compact with the United States for beneficial consumptive use in California is not less than one million acre-feet per annum.

(c) Admit that Arizona claims the right to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters referred to in Paragraphs (a) and (b) of

Article III of the Colorado River Compact. Allege that the claim of Arizona to 3,800,000 acre-feet of beneficial consumptive use per annum of the waters of the Colorado River System, measured in terms of "main stream depletion," is equivalent to more than 5,000,000 acre-feet measured at the place of use in terms of diversions less returns to the river.

(d) Admit that the Colorado River Compact apportioned to no Lower Basin State any definite amount of water. Admit that nothing in said Compact denies Nevada the right to the beneficial consumptive use of more than 300,000 acre-feet of water, and allege that nothing in said Compact or in any agreement to which California is a party confirms or concedes to Nevada the right to the use of said quantity or any other specific quantity.

(e) Allege that there is available to Arizona, Nevada, Utah and New Mexico in the aggregate the beneficial consumptive use in the Lower Basin of 3,100,000 acre-feet per annum of the waters of the Colorado River System, apportioned by Article III(a) of the Colorado River Compact, including, among others, the waters of the Gila River and its tributaries, plus one-half of the excess or surplus waters unapportioned by Article III(a) of that Compact, including in such excess or surplus waters unapportioned by Article III(a) of said Compact the increase of use permitted to the Lower Basin by Article III(b) of the Compact, said aggregate being subject to an undetermined deduction on account of reservoir and other losses, and such deductions as may be required in consequence of the Mexican Water Treaty. Allege that, of the beneficial consumptive use of water available in the aggregate to said four States of Nevada, Arizona,

Utah, and New Mexico, the share of each class which may be available to Nevada and the shares of each class which may be severally available to the other said States, have not been determined.

13.

Answering the allegations of Paragraph VIII of said Petition:

(a) Deny, except as herein expressly admitted or alleged, all of the allegations of said paragraph.

(b) Admit the allegations contained in the first sentence thereof.

(c) Allege that when, as and if the aggregate rights to the annual beneficial consumptive use in the Lower Basin exceed 7,500,000 acre-feet of water of the Colorado River System in any year, the first million acre-feet per annum of additional rights to the beneficial consumptive use in the Lower Basin in said year, wherever they may occur or be applicable, constitute rights to such use of water accruing to the Lower Basin states under Article III(b) of the Colorado River Compact, without further agreement or concerted action among the States of the Lower Basin.

(d) Allege that the right of the defendants to the beneficial consumptive use of water under the provisions of Article III(b) of the Colorado River Compact is established by the provisions of the Statutory Compact between the United States and California and the contracts of the defendants executed in accordance therewith and the appropriations of the defendants, as being a present and permanent right to the use of part of the excess and surplus referred to therein, if physically available.

14.

Answering the allegations of Paragraph IX of said Petition:

(a) Admit the allegations in the first sentence of said paragraph. Deny every other allegation of said paragraph except as such allegations conform to the allegations of Paragraphs 12 and 13 of this Answer.

(b) Allege that the share of all waters which may be available to Nevada cannot lawfully impair the rights of California under its Statutory Compact with the United States and contracts with California agencies made thereunder, as set out in Paragraph 34 of Defendants' Answer to Arizona's Bill of Complaint herein.

15.

Answering Paragraph X of said Petition:

(a) Deny all of the allegations of said paragraph except insofar as herein expressly admitted. Allege that the text of the California Limitation Act is fully set forth in Appendix 3.

(b) Deny that Article III(b) of the Colorado River Compact constitutes an apportionment of water to the Lower Basin, and allege that the uses of the waters referred to in said Article III(b) are unapportioned by the Colorado River Compact.

(c) Allege that the intent of the Congress and of the legislature of California in the enactment of the Statutory Compact between the United States and California was to make the waters referred to in Article III(b) of the Colorado River Compact available for use by California as a part of the excess or surplus waters the use of which is unapportioned by the Colorado River Compact,

and that Nevada, as a third party beneficiary of the Statutory Compact, is bound by the meaning thereof as so construed and applied by the principal parties thereto, to-wit, the United States and California, as alleged in the First Affirmative Defense of the Answer of Defendants to the Petition for Intervention of the United States.

16.

Answering Paragraph XI of said Petition, admit and allege as follows:

(a) Admit and allege that Section 4(a), Paragraph 1, of the Boulder Canyon Project Act offered a Statutory Compact to California, which California accepted, as described in Paragraph 6 of Defendants' Answer to the Petition for Intervention on Behalf of the United States. Admit that no specific mention is made in said Paragraph 1 of the waters referred to in Article III(b) of the Colorado River Compact, but allege that they are encompassed in the expression therein used, "excess or surplus waters unapportioned by" the Colorado River Compact.

(b) Admit that Section 4(a), Paragraph 2, of the Boulder Canyon Project Act consented to a proposed compact among Arizona, California and Nevada, but allege that Section 8(b) of said Act provided that if such compact should be entered into subsequent to January 1, 1929, it should require the further approval and consent of the Congress and should be subject to all contracts into which the Secretary of the Interior might have entered pursuant to Section 5 of the Project Act prior to the date of such approval and consent. Admit and allege that the language of the compact proposed in said Paragraph 2 of Section 4(a) made no mention of water

for California, Utah, or New Mexico, and, like the first paragraph of that section, made no mention of the waters referred to in Article III(b) of the Colorado River Compact, except as the same are encompassed in the expression "excess or surplus waters unapportioned by the Colorado River compact," which appears in the second paragraph of Section 4(a) as in the first. Admit that the compact so conditionally authorized was directed to be subject to the Colorado River Compact.

(c) Admit that the compact proposed in the second paragraph of Section 4(a) was never entered into nor ratified by any State, and does not bind any State in any manner. Allege that in 1939 Arizona enacted a conditional ratification thereof which materially amended its language, to Arizona's advantage (see Defendants' Rejoinder to Arizona's Reply, Paragraph 2), and that no State has accepted Arizona's proposed amendment.

(d) Admit that any apportionment of water proposed in said Section 4(a), Paragraph 2, to be made to the States of Arizona and Nevada has never been consented to nor agreed to by the State of Nevada, and allege that no such apportionment to Arizona or Nevada had been agreed to by California.

17.

Answering the allegations of Paragraph XII of said Petition:

(a) Admit the allegations of Nevada contained in the first subparagraph thereof.

(b) Allege that the defendants have not sufficient information or belief to enable them to answer the second subparagraph thereof, and, basing their denial on that ground, deny the allegations therein.

18.

Answering Paragraph XIII of said Petition:

(a) Paragraph XIII(a) of said Petition does not appear to require answer by these defendants.

(b) Answering Paragraph XIII(b), deny the allegations therein contained except that defendants allege that the share of California in the waters referred to in Article III(b) of the Colorado River Compact has been determined by the Statutory Compact between the United States and California to which Arizona, Nevada, New Mexico and Utah have assented and that said waters are a portion of the excess or surplus waters the use of which is unapportioned by the Colorado River Compact.

19.

(a) Answering the allegations of Paragraph XIV of said Petition, deny, except as herein admitted or alleged, all the allegations of said paragraph.

(b) Admit that there is available to Arizona, Nevada, New Mexico and Utah the beneficial consumptive use of 3,100,000 acre-feet per annum of the uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact. As to the allegation that Nevada is entitled to the quantity of 539,100 acre-feet of water per annum apportioned to the Lower Basin by Article III(a) of the Compact, defendants allege that they have not sufficient information or belief to enable them to answer and, placing their denial on that ground, deny said allegation, and allege that the share which may be available for beneficial consumptive use in Nevada has not been determined. Such share is subject to the Statutory Compact between the United States and California and fur-

ther subject to all intervening rights since June 25, 1929, the effective date of the Statutory Compact and the Boulder Canyon Project Act.

(c) Admit that the beneficial consumptive uses of the waters of the Gila River and its tributaries in Arizona are to be charged to Arizona's uses in the Lower Basin under Article III(a) of the Colorado River Compact.

(d) Allege that California is entitled to the beneficial consumptive use of one-half of the excess or surplus waters unapportioned by Article III(a) of said Compact, including therein the uses referred to in Article III(b) of said Compact, and that there is available to the States of Arizona, Nevada, Utah and New Mexico, in the aggregate, the beneficial consumptive use of waters of the Colorado River System to the extent and in the manner described in Paragraphs 12 and 13 of this Answer, and not otherwise, and that the share thereof available to Nevada has not been determined except as affected by the provisions of the Statutory Compact between the United States and California.

20.

Answering the allegations contained in Paragraph XV of said Petition, admit all of said allegations.

21.

Answering the allegations contained in Paragraph XVI of said Petition, admit all of the allegations of said paragraph not herein denied. Deny the rights of Nevada in 3,800,000 acre-feet of water or any other quantity are as set forth in the Petition of Intervention of Nevada, and allege that the rights of Nevada are as set forth in Paragraphs 12, 13 and 14 of this Answer.

22.

Paragraph XVII of said Petition does not appear to require answer by these defendants.

23.

Answering Paragraph XVIII of said Petition, deny that the question in this controversy or their effect, measured in acre-feet per annum, are fully or accurately stated therein, and allege that the controversy, as developed in the pleadings to date, is summarized in Exhibit "A" annexed to Defendants' Answer to the Petition of Intervention on Behalf of the United States, and herein incorporated by reference as though fully stated.

24.

Paragraph XIX of said Petition does not appear to require answer by these defendants.

25.

(a) Paragraph XX(a) of said Petition does not appear to require answer by these defendants. The rights asserted by the defendants under the Statutory Compact between the United States and California are stated in Paragraph 27 of their Answer to Arizona's Bill of Complaint and Paragraph 6 of their Answer to the Petition for Intervention on Behalf of the United States.

(b) Paragraph XX(b) of said Petition does not appear to require answer by these defendants. Their position with respect to the status of the waters referred to in Article III(b) of the Colorado River Compact is stated in Paragraphs 12 and 13 of this Answer.

(c) Answering Paragraph XX(c) of said Petition, defendants allege that the right of Nevada to the waters of the Colorado River System not used by said State is

subject to intervening rights under the provisions of the Statutory Compact between the United States and California since June 25, 1929, the effective date thereof.

(d) Paragraph XX(d) of said Petition does not appear to require answer by these Defendants. Their rights to the use of waters in excess of or surplus to the uses apportioned by Article III(a) of the Colorado River Compact are stated in the First Affirmative Defense of their Answer to the Petition for Intervention of the United States, which is incorporated by reference in the First Affirmative Defense of this Answer.

26.

Answering the allegations of Paragraph XXI of said Petition, defendants admit that the economic interests of all the States of the Colorado River Basin are affected by this controversy.

27.

Paragraph XXII of said Petition does not appear to require answer by these defendants.

28.

Paragraph XXIII of said Petition does not appear to require answer by these defendants.

29.

Answering the allegations of Paragraph XXIV of said Petition:

(a) Admit the allegations contained in the first subparagraph thereof, and allege that the Compact referred to in Sections 8(a), 13(a), (b), (c) and (d) of the Boulder Canyon Project Act is the Six-State Compact proclaimed effective by the President June 25, 1929.

(b) Deny the allegations contained in the second subparagraph of Paragraph XXIV of said Petition, and allege that the rights of the defendants under their several contracts with the United States are as stated in the First Affirmative Defense of the Answer of these defendants to Arizona's Bill of Complaint and the First Affirmative Defense of their Answer to the Petition for Intervention of the United States.

(c) Admit the allegations, contained in the third subparagraph of Paragraph XXIV of said Petition, that Article III(a) of the Colorado River Compact makes no apportionment of any kind to any of the Lower Basin States and makes no apportionment whatever except as between the Upper and Lower Basin.

30.

Answering the allegations of Paragraph XXV of said Petition:

(a) Deny all of said allegations, and allege that the appropriative rights of each of the five States of the Lower Basin are material and relevant to the determination of their respective shares in the use of waters available to said five States in the aggregate.

(b) Allege that the rights of California to the use of the waters of the Colorado River System, to the extent that they constituted present perfected rights as of June 25, 1929, are within the protection of Article VIII of the Colorado River Compact, which provides that "present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact," and directs that such rights shall attach to and be satisfied from water that may be stored not in conflict with Article III; and within the protection of Section 6 of the

Boulder Canyon Project Act, which directs that the dam and reservoir provided for by Section 1 of said Act (Hoover Dam and reservoir) shall be used "first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power."

(c) Allege that the defendants as of June 25, 1929, were vested with valid appropriative rights as stated in the Third Affirmative Defense contained in the Answer of the defendants to the Bill of Complaint of Arizona and as summarized in Paragraph 46 of that Answer. Defendants incorporate by reference Paragraph 5 of the present Answer to Nevada's Petition of Intervention.

31.

Defendants deny all allegations contained in the Petition of Intervention of Nevada not specifically admitted in this Answer or which are at variance with the allegations contained in this Answer.

Prayer.

Wherefore, defendants pray:

1. That the rights and interests of defendants as against all parties to this cause be adjudged and decreed as alleged in their Answer to the Bill of Complaint of Arizona, in their Answer to the Petition of Intervention of the United States, and their Answer to the Petition of Intervention of the State of Nevada;

2. That the Court grant to the defendants such other and further relief as to the Court may seem meet and proper.

3. That in consequence of the disagreement of the parties on complex questions of fact and law, this Court appoint some suitable person as Special Master and refer this cause to such Special Master with authority to take evidence and to report the same to the Court with his findings of fact, conclusions of law and recommendations for decree, all to be subject to review and approval or other disposal by this Court.

The defendants also respectfully pray leave to amend this Answer if that should hereafter become appropriate or necessary in the course of the proceedings in this cause.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 10 Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS;

UNITED STATES OF AMERICA, INTERVENER

MEMORANDUM REQUESTING PRE-TRIAL CONFERENCE

I. PLEADINGS FILED AND PENDING PETITION FOR AUTHORIZATION TO FILE

On August 13, 1952, the State of Arizona filed its motion for leave to file its bill of complaint. Directly involved are the rights and interests of that State in the Colorado River System. Arizona's motion for leave to file was granted on January 19, 1953.[1] Likewise granted on that date was

[1] 344 U. S. 919 (1953).

the motion of the United States of America to intervene. Since January 19, 1953, the State of California and the other defendants have filed their answer to the bill of complaint; Arizona has replied to defendants' answer and a rejoinder to that reply has been filed by California and the other defendants. Arizona and those defendants have likewise answered the petition to intervene filed by the United States of America.

Presently pending before this Court is the motion of the State of Nevada for leave to intervene. To that motion the State of Arizona has filed its response, as has the State of California and the other named defendants.

Literally hundreds of pages of pleadings have now been filed together with a like number of pages of appendices to those pleadings.

II. BASIC ISSUES

Presented to this Court for resolution are far-reaching fundamental questions relating to the respective rights of the parties litigant in the Colorado River System. From the pleadings the broad scope of the long-standing controversy is manifest.

THE ISSUES PRESENTED BY THE STATE OF ARIZONA

In its bill of complaint the State of Arizona alludes to the controversy among the parties, "as to the interpretation, construction and application of the Colorado River Compact, the Boulder

Canyon Project Act, and the California Limitation Act,"[2] defining these three areas of conflict:

> (1) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?
>
> (2) How is beneficial consumptive use [as that term appears in the Colorado River Compact] to be measured?
>
> (3) How are evaporation losses from Lower Basin main stream storage reservoirs to be charged?

Having asserted its claimed rights to the use of water from the stream system in question, the "wrongful", adverse claims of the State of California and the other named defendants; its necessity to have its claimed rights defined and determined, the State of Arizona prays, among other things, that:

> Its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted * * *.

THE ISSUES PRESENTED BY THE STATE OF CALIFORNIA

To Arizona's bill of complaint the State of California and the other named defendants[3] made detailed answer, traversing the claims of Arizona and asserting affirmatively four defenses in which

[2] Arizona's Bill of Complaint.

[3] Hereafter referred to as the State of California or California.

are chronicled not only the historical background of the Colorado River Compact, but also the claimed rights to the use of water asserted by the several entities named defendants.

Transcendent over all other issues presented by the State of California are its contentions originally presented in its answer to the bill of complaint and reiterated in its answer to the petition of the United States of America, that:

> [1] The State of Arizona rejected the Seven-State Colorado River Compact; that the State of Arizona is not a party to the Colorado River Compact; that it is now precluded from urging the interpretations of that document as set forth in its bill of complaint.
>
> [2] The contracts between the United States of America and the named defendants are severally and collectively senior in time and right to any rights which may exist by virtue of contracts between the United States of America and any other parties for the delivery of water from Hoover Dam storage for use in the State of Arizona, subject to minor exceptions.[4]

In addition to the issues presented by and attendant upon the pleadings of California, gen-

[4] The United States of America has contracted for the delivery of water from the storage created by Hoover Dam, subject to specific terms and conditions, as follows: To certain named defendants 5,362,000 acre-feet each year; to the State of Arizona 2,800,000 acre-feet each year; to the State of Nevada 300,000 acre-feet each year.

erally alluded to above, it prays among other things in its response to the petition of the United States, that the rights and interests of defendants as against all parties to this cause, including the United States of America, be adjudged and decreed; for the appointment of a Special Master with authority to take evidence and to report to this Court findings of fact, conclusions of law and recommendations for a decree.

THE ISSUES PRESENTED BY THE UNITED STATES OF AMERICA

As an indispensable party to an adjudication by this Court of the controversy [5] between the State of Arizona and the State of California, the United States of America intervened. By that intervention the National Government seeks to have its rights determined and confirmed; its obligations and responsibilities ascertained and defined.

In connection with the vast Federal projects and developments in the Lower Basin of the Colorado River, the United States of America in its petition asserts rights to the use of the water in the Colorado River which will yield quantities of water sufficient to satisfy the maximum demands of those projects and developments which are described in its petition; it sets forth its international obligations arising from its Treaty with Mexico, its contractual obligations with the States and public corporations, its trusteeship in regard to the rights to the use of water

[5] *Arizona* v. *California*, 298 U. S. 558 (1936).

of the Indians and Indian tribes in the Lower Basin of the Colorado River.

Likewise asserted by the United States of America in its petition are the conflicts among the parties respecting the interpretation of the Colorado River Compact, the laws enacted in regard to it and the contracts entered into in contemplation of it. The United States of America then prays this Honorable Court to adjudge and declare the validity of the treaties, compacts, contracts and related laws; to interpret and construe those documents and to quiet its title to each and every right to the use of water claimed and exercised by it.

As there has been no disposition made of the motion of the State of Nevada for leave to file its petition in intervention, reference to the issues presented by that State will not be reviewed.

III. PRESENT NEED FOR CLARIFICATION OF ISSUES AND ISSUES WHICH SHOULD NOW BE RESOLVED

From the general statement set forth in the paragraphs which precede, the complexities of the litigation and the numerous issues presented are manifest. California in its answer to the petition of the United States of America has briefly outlined in its summary of the controversy the several aspects of the case as it perceives them. That summary does not purport, however, to be conclusive upon any of the parties, nor does it seek to encompass all of the issues.

Evidenced by that summarization is the present pressing need to delineate and to define the issues which are now presented with the end in view of proceeding at the earliest date possible to have this Court bring about a greatly needed resolution of this complex controversy for the benefit of all parties and the Nation as a whole.

Antecedent to any resolution of the many and varied issues in this action must be a determination of the two basic propositions advanced by the State of California. As shown above, California denies that the State of Arizona is a party to the Colorado River Compact. That issue transcends all others and should this Court accept California's position in regard to it, Arizona and all other parties to the cause would necessarily and drastically revise their pleadings and modify their claims. Eliminated by such a determination would be two of the principal questions concerning which the State of Arizona requests an adjudication. Similarly, the acceptance by this Court of California's contentions above set forth that its contracts severally and collectively are senior in time and right to any and all rights which may exist by virtue of contracts between the United States of America and other parties, would materially revise the course of the litigation changing the whole complexion of the position taken by the State of Arizona and the United States of America.

Attendant upon the two questions to which reference has been made are other issues which might well be resolved in advance of trial.

IV. REQUEST FOR PRE-TRIAL CONFERENCE

For these reasons, the United States of America respectfully requests the Court to order a pre-trial conference presided over by a member of this Court with counsel for all parties, for the purpose of securing simplification and clarification of the issues of law with the view of resolving in advance of any reference to the Special Master as has been prayed, those legal issues to which reference has been made, and such others as are susceptible of that disposition; of securing, if possible, agreement among the parties respecting facts concerning which there is no disagreement; considering the possibility of obtaining admissions respecting documentary evidence thus eliminating unnecessary proof, and otherwise to seek means to expedite a determination of the most appropriate course to pursue at this juncture of the proceding.

Respectfully submitted.

HERBERT BROWNELL, JR.
Attorney General.

MAY 1954.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10, Original

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

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RESPONSE OF ARIZONA TO MEMORANDUM OF UNITED STATES OF AMERICA REQUESTING PRE-TRIAL CONFERENCE.

IN THE

Supreme Court of the United States

October Term, 1953

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STATE OF ARIZONA

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Defendants

UNITED STATES OF AMERICA, INTERVENER.

RESPONSE OF ARIZONA TO MEMORANDUM OF UNITED STATES OF AMERICA REQUESTING PRE-TRIAL CONFERENCE.

In response to the memorandum requesting pre-trial conference, filed herein by the United States of America, Intervener, the State of Arizona, Complainant herein, submits the following:

I.

All the parties to this litigation have recognized that an early determination of the controversy involved is necessary before the full development of the Colorado River can be made and that such development is desirable and essential to the nation as a whole and particularly to the Southwest.

II.

All the parties to the controversy have for many years likewise recognized that there are certain fundamental legal questions relating to the rights of the respective parties which must be adjudicated. The parties, including the defendants, have also recognized at all times that if these basic legal questions were determined, all related questions would be greatly simplified. In many hearings held before congressional committees wherein these legal questions were discussed, the defendants on numerous occasions expressed the opinion that the adjudication of these legal questions would resolve the controversy, that such adjudication could be determined within a comparatively short space of time, and further pledged themselves to exert every effort to this end.[1]

III.

Careful control of the litigation from the outset by this Court for the purpose of simplifying, clarifying and appropriately resolving in advance the issues of law involved, and otherwise regulating the proceedings, will assure that the controversy will be handled in as orderly and expeditious a fashion as is possible and will eliminate unnecessary volume, delay, and expense. A pre-trial conference, or a series of pre-trial conferences, presided over by a member of this Court, with counsel for all parties, can best accomplish this end. Arizona is, therefore, in full accord with the request of the United States of America, Intervener, for a pre-trial conference and respectfully requests favorable consideration thereof by this Court.

---

[1]Typical of such statements are:

Hearings before Subcommittee of the Committee on Interior and Insular Affairs, U. S. Senate, 80th Congress, 2nd Session, on S. J. Res. 145, pp. 35, 69, 105, 120, 497, 498, and 499.

Hearings before Subcommittee No. 4 of the Committee on Judiciary, House of Representatives, 80th Congress, 2nd Session, on H. J. Res. 225, 226, 227, 236, and H. R. 4097, pp. 5, 32, 93, and 94.

Hearings before the Committee on Interior and Insular Affairs, United States Senate, 81st Congress, 1st Session, on S. 75 and S. J. Res. 4, p. 915.

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UNITED STATES OF AMERICA, *Intervener.*

Memorandum of the California Defendants In Reply to Memorandum of the United States Requesting a Pre-Trial Conference

(See List of Attorneys on Inside Cover)

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UNITED STATES OF AMERICA, *Intervener.*

Memorandum of the California Defendants In Reply to Memorandum of the United States Requesting a Pre-Trial Conference

I

The California defendants have no objection to a pre-trial conference whenever such a conference will expedite

the trial of the case. As now proposed, however, a pre-trial conference would delay, rather than expedite, the trial and final determination of this action.

II

A pre-trial conference would be premature until the Court has first determined what States shall be made parties to this cause.

(a) Nevada has moved for leave to file a Petition of Intervention. California has filed a response stating that it has no objection to Nevada's intervention, and has filed its answer. Nevada's motion, in our view, is a proper one, and its petition shows that Nevada is an indispensable party. If Nevada's motion is granted, Arizona will presumably be required to answer, and Nevada may desire to reply. A pre-trial conference in advance of the determination of Nevada's right to participate in this cause, and in advance of the completion of the pleadings as among Nevada, Arizona and the United States, would be premature.

(b) If Nevada is permitted to intervene, it appears, from the allegations in Nevada's petition, that Utah and New Mexico are also indispensable parties as two Lower Basin States participating in a common "fund" of water available to the five Lower Basin States of Arizona, California, Nevada, Utah, and New Mexico. If so, what has been said above with respect to Nevada would apply to those two States.

(c) The Petition of Intervention of the United States brought issues into this case which may require for their final adjudication the presence of all seven States of the Colorado River Basin (Colorado and Wyoming, in addition to those previously named). These are omitted from the inventory of issues requiring early determination,

presented in the Government's memorandum. They include the claims of the United States for water, independently of the right of any State, for the use of Indians; to serve the Mexican Water Treaty; to supply reclamation and power projects; for navigation and flood control; for the support of fish and wildlife; for use on lands administered by various Government bureaus, etc.; the denial by the United States that all of its rights are subject to the Colorado River compact. In particular, its Indian claims and its claims for water to serve the Mexican Water Treaty directly involve the obligations of the four Upper Division States to release water at Lee Ferry.

(d) The interest of the four Upper Division States in certain issues involved in this suit is evidenced by a letter dated April 28, 1954, from their Governors to the Attorney General of the United States. As reported in the press (no copy was served on these defendants), these States have proposed to the Attorney General that five issues be determined in advance of trial of the present litigation. Manifestly, these States are interested not only in the proposition that their issues be answered; they are concerned with *how* they are answered.

(e) As appears hereafter, the pleadings disclose a number of issues which affect all seven States, in addition to those raised by the Government's petition and by the letter of the Upper Basin Governors dated April 28, 1954.

III

The subject matter advanced by the United States for preliminary consideration at the requested pre-trial conference would be productive of further delay.

(a) The United States memorandum states that there are two "transcendent" issues which should be deter-

mined in advance of full consideration of the case. While the issues so stated are important, it is the view of the California defendants that such issues and other issues involved in the litigation cannot be determined on the basis of the pleadings and those matters of which this Court takes judicial notice. The review of much factual data and evidence must precede the determination of the law applicable thereto. This is illustrated by the issue relating to the status of Arizona as a party to the Colorado River Compact. Such an issue involves not only the legislative record, but (related to the question of unreasonable delay on Arizona's part in acting on the Compact), the manner in which the situation of the parties had changed during the period between 1929, when the Six-State Compact became effective, and 1944, when Arizona purported to ratify it, and other factual events.*

(b) The second issue referred to as "transcendent" by the United States, i.e., the status of the California water contracts, requires consideration not only of the respective dates of the contracts involved, but the investments made, work done, and uses established thereunder. The extent to which California water delivery contracts perpetuate "present perfected rights" and "rights which may now exist" as required by the Colorado River Compact and the Boulder Canyon Project Act, depends on facts evidentiary in character. Other factual evidence will no doubt be required. A trial of issues of fact involved in the questions described as "transcendent" prior to a full trial of all issues would unreasonably and unnecessarily delay final determination of this controversy.

---

* The Government's memorandum (p. 7) says that the determination of this issue would eliminate "two of the principal questions concerning which the State of Arizona requests an adjudication." These are not identified, and the statement appears erroneous.

IV

The "issues" suggested by the Government for determination prior to trial cannot be considered out of context with their relation to other issues of fact and of law of even more controlling effect on the case, some of them raised in the Government's own Petition of Intervention but ignored in its proposed agenda of issues to be determined in advance of trial.

The issues to date, as the California defendants see them, are stated in Exhibit A to their Answer to the Petition of Intervention of the United States. For convenient reference, this is reprinted as Exhibit A to this Memorandum, and is incorporated herein by reference.

V

It is respectfully suggested that the appointment of a Special Master precede the ordering of a pre-trial conference, and that such Special Master be present at such a conference, to be held after the necessary parties have been determined and after the pleadings occasioned by their participation have been completed.

Respectfully submitted,

(See next page for signatures)

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May 27, 1954

EXHIBIT A

Summary of the Controversy

The pleadings filed by Arizona, Nevada, the United States and California, to date, disclose complex questions of fact and law, many of which are interrelated. The summary of principal questions presented below is divided into four parts: (I) the quantities of water in controversy; (II) the ultimate issues, from the standpoint of the respective prayers; (III) a tabulation of factual issues; and (IV) the issues of interpretation of the basic documents involved. Under this division, certain questions reappear and to this extent reflect the interlocking nature of the problem.

I. The Quantities of Water in Controversy.

The United States seeks to quiet title to rights to the use of water, consumptive and otherwise, "as against the parties to this cause," for federal purposes, in unstated amounts.

Arizona seeks to quiet title to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters of the Colorado River System (measured by "man-made depletion of the virgin flow of the main stream") and to enjoin California's right to permanently use any water in excess of approximately 3,800,000 acre-feet per annum (measured by "diversions less returns to the river"), that being the effect of (1) reducing 4,400,000 acre-feet of III(a) water by reservoir losses, and (2) denying California any permanent right to use excess or surplus waters.

California asserts a right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of the waters of the Colorado River System (measured by "diversions less returns to the river") under contracts with the United States, comprising 4,400,000 acre-feet of the waters apportioned by Article III(a) of the Colorado

River Compact and 962,000 acre-feet per annum of the excess or surplus water unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact.

Nevada seeks to quiet title to 539,100 acre-feet per annum (measured in part by both methods) of the beneficial consumptive uses apportioned by Article III(a) of the Colorado River Compact, and to not less than a total of 900,000 acre-feet from all classes of water.

As the States differ in their definition of "beneficial consumptive use," their claims require restatement in terms of a common denominator in order to evaluate their effects. Thus:

The quantity to which Arizona seeks to quiet title, 3,800,000 acre-feet per annum, measured by the method she urges, "depletion of the virgin flow of the main stream occasioned by the activities of man," is equivalent to more than 5,000,000 acre-feet measured by consumption at the site of use, or "diversions less returns to the river," the standard established by the Boulder Canyon Project Act and asserted by California. The difference is due primarily to the fact that under Arizona's interpretation, the Compact deals with the virgin flow in the main stream only and that the use of water "salvaged by man" is not charged as a beneficial consumptive use, whereas under California's interpretation the Compact deals with the waters of the entire river system and such salvage is so charged.

Conversely, the aggregate of the California contracts, 5,362,000 acre-feet per annum, measured by "diversions less returns to the river," is equivalent to only about 4,500,000 acre-feet measured by "man-made depletion" (without charge for salvaged water). If Arizona's prayer should be granted, California's rights would be reduced to about 3,800,000 acre-feet per annum, measured by "diversions less returns to the river," or to about 3,000,000

acre-feet measured in terms of "depletion of the virgin flow of the main stream."

The impact of Nevada's claims on those of the other states is not readily evaluated.

II. Ultimate Issues.

The ultimate issues, in the sense of the results sought by each party, may be grouped as follows:

The United States.

Does the United States have rights, "as against the parties to this cause, to the use of water in the Colorado River and its tributaries" in the following categories?

(1) for consumptive use of all projects in the Lower Basin, which it asserts independently of any rights claimed by the States in which such projects are located;

(2) to fulfill its obligations arising from international treaties and conventions; but this involves, with respect to the burden of the Mexican Water Treaty, the obligations as between the States of the Upper Division and the States of the Lower Division under Articles III(c) and III(d) of the Colorado River Compact, and involves also the effect of the so-called "escape clause" of Article 10 of that Treaty, which allows reduction in the guaranteed deliveries to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty;

(3) to fulfill all its contracts for the delivery of water and electric power, *i.e.*, with or in Arizona, California, and Nevada; but it alleges that the water available is not sufficient to satisfy all these obligations;

(4) to fulfill the Government's obligations to Indians and Indian Tribes; but this involves not only the questions of the magnitude and priorities of these claims but the questions of whether or not they are chargeable under the Colorado River Compact to the Basin and State in which such uses are made, what the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and what rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins;

(5) to protect its interests in fish and wildlife; flood control and navigation; but such rights as it may have for these purposes may require the impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona and California, and again involves the question of accounting under the Compact; and

(6) for use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties to this cause" for these functions, such claims apply to all the waters of the Colorado River System in both Basins.

The adjudication of these claims of the United States requires consideration and resolution of: questions of fact, referred to later; the power of the United States to impound and dispose of water independently of rights derived from the States; the extent of its obligations under treaties and contracts; the impact and effect of its treaties upon rights of domestic water users; how its claims to the use of water shall be measured; the location, magnitude and priorities of Indian claims, and claims for other alleged federal purposes; the extent to which its rights and obligations are controlled by the Colorado River Com-

pact; and the extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

Arizona.

Is Arizona entitled to a decree:

(1) Quieting title to 2,800,000 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, substantially all to be taken from the main stream, and measured in terms of man-made depletion of the virgin flow of the main stream?

(2) Quieting title to all of the 1,000,000 acre-feet per annum by which the Lower Basin is permitted to "increase its use" by Article III(b) of the Colorado River Compact (notwithstanding the decision of this Court in *Arizona* v. *California et al.*, 292 U. S. 341 (1934)), to the exclusion of the other States of the Lower Basin, all to be taken from the waters flowing in the Gila River, and to be measured in terms of man-made depletion of the virgin flow of the main stream?

(3) Reducing California's right to the uses apportioned by Article III(a) of the Colorado River Compact to approximately 4,800,000 acre-feet per annum, in consequence of reservoir losses?

(4) Enjoining California's right to receive and permanently use under its government contracts 962,000 acre-feet per annum, or any part thereof, in excess of 4,400,000 acre-feet per annum?

The determination of Arizona's claims involves: the questions of fact, later referred to; the standing of Arizona to seek a declaratory decree quieting title to a "block" of water for projects not yet constructed or authorized (about 1,600,000 acre-feet per annum of the 2,800,000 claimed from the main stream); the source of title to Arizona's claims to 2,800,000 acre-feet of III(a) water

and 1,000,000 acre-feet of III(b) water; the status of the uses on the Gila; the measurement of uses thereof and of the main stream; whether Arizona's status is that of a party to the Colorado River Compact or that of a third party beneficiary of the Statutory Compact between the United States and California, and if so, whether Arizona is bound by the interpretations placed thereon by the principal parties thereto in its formulation and administration; and the validity and effect of Arizona's water delivery contract with the United States.

Most of the questions posed by Arizona's claims revolve around the issue of whether the Gila River shall be treated as a part of the Colorado River System for all purposes, or shall receive special treatment in respect of (1) the identification of uses thereon with the waters referred to in Article III(b); (2) the corollary exemption of "rights which may now exist" on the Gila from any charge under Article III(a); and (3) the devaluation of the charge for beneficial consumptive uses from the quantity which is in fact consumed on the Gila (alleged by California to be about 2,000,000 acre-feet per annum) to the lesser quantity represented by the resulting depletion in the virgin flow of the main stream (alleged by Arizona to be about 1,000,000 acre-feet per annum).

California.

Are the contracts between the United States and the defendant public agencies of California for the storage and delivery of water valid and enforceable? Inasmuch as these contracts are, in terms, for permanent service but subject to the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, the issue is whether these enactments, considered together as a Statutory Compact established by reciprocal legislation, authorize and permit the Secretary of the Interior to presently contract for the storage and delivery for permanent beneficial consumptive use in California, of

4,400,000 acre-feet per annum of the waters apportioned by Article III(a) of the Colorado River Compact plus one-half of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact. The aggregate of these contracted quantities, subject to physical availability of the amounts of excess or surplus waters, which vary from year to year, is 5,362,000 acre-feet per annum.

The determination of California's claims involves: the questions of fact, later referred to; the extent to which rights have vested in both the United States and California under the Statutory Compact; whether Arizona is estopped by her previous conduct from asserting her present position; whether the limitation is net of reservoir losses; how California's uses shall be measured; whether California is chargeable with the use of salvaged water; the effect of California's appropriations, in their relation to the expressions "rights which may now exist" and "present perfected rights" in the Compact and Project Act; the definition of the Project Act term, "excess or surplus waters unapportioned by" the Colorado River Compact; the availability of such waters for permanent service; the intent of Congress with respect to the waters referred to in Article III(b); and the relation between California's contracts and the later agreements which the Secretary of the Interior has entered into with others.

Nevada.

Is Nevada entitled to a decree:

(1) Quieting title to 539,100 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact?

(2) Reserving for a future agreement the disposition of the use of the 1,000,000 acre-feet referred to in Article

III(b) of the Colorado River Compact, and preserving to Nevada an equitable share thereof?

(3) Assuring Nevada the ultimate beneficial consumptive use of not less than 300,000 acre-feet per annum, from all classes of water?

The determination of Nevada's claims requires the consideration and resolution of: the questions of fact later referred to; the questions of interpretation previously mentioned; the question of whether Nevada's share of III(a) waters has been determined or limited to 300,000 acre-feet per annum; whether, as to stored waters, Nevada may claim any quantity in excess of her contracts with the United States; and the source of title to her claims to 539,100 acre-feet per annum of III(a) water and not less than 900,000 acre-feet per annum from all sources.

Interests of Other States.

There remains the question whether the claims of the United States, Arizona, California, and Nevada can be effectively determined without concurrently determining the rights and obligations of Utah and New Mexico with respect to the waters of the Lower Basin, and the rights and obligations of those states and Colorado and Wyoming with respect to other waters of the Colorado River System, to the extent that they are affected by the issues in controversy here.

In more detail, these "ultimate issues" depend upon the resolution of the following questions of fact and of the interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Mexican Water Treaty.

III. Factual Issues.

There are substantial issues of fact, raised by the pleadings to date. These include, but are not limited to, determination of:

(1) the investments and obligations undertaken by the parties in the construction of works and in the performance of their contracts with the United States, and the investments and obligations undertaken by the United States in reliance upon such contracts;

(2) the location, magnitude and priorities of the water rights necessary to enable the United States to perform its obligations to Indians and Indian tribes pursuant to Article VII of the Compact;

(3) the requirements of the United States for (a) flood control, (b) navigation, (c) fish and wild life, and (d) the other claims which it makes;

(4) The quantities of water physically available for beneficial consumptive use in the Lower Basin, assuming full use by the Upper Basin of its Compact apportionment, full regulation of the supply available to the Lower Basin, and full performance of the Mexican Water Treaty;

(5) the uses, present and potential, on the main stream and on each tributary, determined as of the place of use, as California contends is the proper method, and the effect of those uses in terms of man-made depletion of the virgin flow of the main stream, as Arizona contends is the proper method;

(6) the quantities of water "salvaged" by the activities of man, on the main stream and on the tributaries;

(7) reservoir losses, present and potential, gross and net;

(8) appropriative rights, priorities, and uses thereunder, on the main stream and tributaries;

(9) the extent and place of use of "rights which may now exist" and which, under Article III(a) of the Compact, are to be charged as uses of water apportioned by Article III(a), and of "rights which may now exist" in

California, within the meaning of Section 4(a) of the Project Act; and

(10) the extent and place of use of "present perfected rights" protected by Article VIII of the Compact and directed by the Boulder Canyon Project Act to be satisfied in the operation and management of the Project.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty.

Questions relating primarily to Article III(a) of the Colorado River Compact include the following: Whether the Colorado River Compact deals only with the main stream or treats with Colorado River System waters wherever they may be found; whether the uses apportioned by Article III(a) to the Lower Basin are to be taken only from "water present in the main stream and flowing at Lee Ferry," as Arizona contends, or from the tributaries as well, as California and Nevada contend; whether the 7,500,000 acre-feet referred to in Article III(a) is related to the 75,000,000 acre-feet referred to in Article III(d), as Arizona contends, or whether the latter figure includes excess or surplus waters unapportioned by the Compact, as California contends; by what process Arizona claims to have acquired an apportionment of 2,800,000 acre-feet of III(a) water, to be taken from the main stream; whether the apportionment of 7,500,000 acre-feet "per annum" is a statement of a maximum, or of an average, and, if the latter, over what period of years; the definition and measurement of "beneficial consumptive use"; the accounting for water added to and withdrawn from storage on the main stream and tributaries; whether the use of water salvaged by man on the main stream and tributaries is to be charged under the Compact; the definition of "rights which may now exist," which are to be included in charges to water apportioned by Article III(a) and their magnitude on the

main stream and tributaries; the date to which this last expression refers; whether, in the absence of a compact among the Lower Basin States, the division of water among them is to be affected by appropriative rights, *i.e.*, "rights which may now exist"; whether Indian rights, and other federal claims to consumptive use, are included within that expression and are to be charged under the Compact; whether reservoir losses are chargeable as beneficial consumptive uses, and if so, their classification under the Compact and their relation to other uses.

Questions relating primarily to Article III(b) of the Colorado River Compact include the following: The questions relating to the definition of "beneficial consumptive use" and "per annum" previously stated in connection with Article III(a); whether the "increase of use" permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as in Article III(a), as Arizona contends, or a license to acquire rights by appropriation and contracts under the Project Act in excess or surplus waters unapportioned by the Compact, as California contends; whether this right to increased use is identified solely with the water found flowing in the Gila River, as Arizona contends, or is identified with the first 1,000,000 acre-feet of increased use (above 7,500,000) per annum throughout the Lower Basin, as California and Nevada contend; whether this right is available to all five States of the Lower Basin, or to Arizona alone, as she contends (notwithstanding the decision of this court in Arizona v. California *et al.*, 292 U. S. 341 (1934)); the status of uses in New Mexico on the Gila; the status of uses on other tributaries; and to what degree reservoir losses are chargeable to this increase of use. Reference to the relation of the Mexican Treaty burden to the uses under Article III(b) appears below in connection with Article III(c).

Questions relating primarily to Article III(c) of the Colorado River Compact include the following: Whether

the waters to be supplied Mexico are "apportioned" thereby (this bears upon the determination of the meaning of the expression "excess or surplus waters unapportioned by" the Colorado River Compact, appearing in the Boulder Canyon Project Act, *infra*); whether, if the quantities in excess of those specified in Articles III(a) and III(b) are insufficient to supply the deliveries to Mexico, the burden, with respect to the Lower Basin, falls first upon the uses referred to in Article III(b), as California contends, or upon those referred to in Article III(a), as Arizona contends; and the relation of the "escape clause" in Article 10 of the Treaty, which permits reduction in deliveries to Mexico in case of extraordinary drought in proportion to the reduction in consumptive uses in the United States. The relation of Article III(c) to Articles III(d) and III(a), with respect to the obligations of the Upper Division States, is referred to below in connection with Article III(d).

Questions relating primarily to Article III(d) of the Colorado River Compact include the following: As a corollary to one of the questions stated with reference to Article III(a), whether the 75,000,000 acre-feet referred to in Article III(d) is related to the 7,500,000 acre-feet apportioned by Article III(a) to the Lower Basin, or whether the 75,000,000 acre-feet include excess or surplus waters available for delivery to Mexico or use in the Lower Basin; the resulting effect on the obligation of the States of the Upper Division stated in Article III(c) to furnish additional water to meet the deficiency if surplus above the quantities specified in Articles III(a) and III(b) is insufficient to supply Mexico; and whether the Lower Basin is entitled to demand release of this 75,000,000 acre-feet notwithstanding the consequent inability of the Upper Basin to make beneficial consumptive use of 7,500,000 acre-feet per annum.

Questions relating primarily to Article III(e) of the Colorado River Compact include the following: Whether,

if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required; whether, if Indian uses are not subject to the Colorado River Compact, the United States may require release of water from reservoirs in the Upper Basin to satisfy them, in addition to the water which the States of the Upper Division are required to release in performance of Articles III(c) and III(d) of the Compact; so also with respect to the other federal claims asserted by the United States "as against the parties to this cause," for use of water in the Lower Basin.

Questions relating primarily to Articles III(f) and III(g) of the Colorado River Compact include the following: Whether the provisions in these articles with reference to a compact to be made after October 1, 1963, are permissive or mandatory; whether, in the light of the Statutory Compact, these provisions preclude the acquisition of rights in excess or surplus waters by appropriation and by contract with the United States in the interim, subject only to further apportionment as between Basins by such a future compact; and whether, in the event of competing interstate claims to such excess or surplus waters, in the absence of a compact apportioning them, priority of appropriation, including contracts with the United States, controls.

Questions relating to Article VII of the Colorado River Compact include the following: Whether uses by Indians are subject to the Colorado River Compact; whether Indian uses are chargeable under the Compact to the Basin and the State in which they are situate; if not, whether they are prior and superior to the apportionments made by the Compact, or are in competition with appropriations of others which are subject to the Compact; the location, magnitude, and asserted priority of Indian claims; their effect upon the quantities available to non-Indian users

under Articles III(a), III(b), etc.; their effect on the distribution of the Mexican Treaty burden; and their effect on the obligations of the States of the Upper Division under Articles III(c) and III(d).

Questions relating primarily to Article VIII of the Colorado River Compact include the following: The date to which the expression "present perfected rights" relates, *i.e.*, 1922, 1929, or some other date; the definition of said term; whether such definition is to be determined under the law of the State under which the right arose; whether the assurance against impairment extends to quality as well as quantity; the extent of these rights in each State; their relation to the expression "rights which may now exist," as used in Article III(a) of the Compact and Section 4(a) of the Project Act; and the impact of reservoir losses when present "perfected rights" attach to, and are satisfied from stored waters, pursuant to the direction in Article VIII.

Questions relating primarily to the Boulder Canyon Project Act and the resulting Statutory Compact between the United States and California include the following: Whether the alternative consent given in the Project Act to a Seven-State or Six-State Compact became final on June 25, 1929, in establishing the latter; whether Arizona could, or did, effectively ratify a Seven-State Compact thereafter; if so, whether the Statutory Compact authorized by the Project Act as a corollary to a Six-State Compact remains in effect; if it does, whether Arizona can claim the benefits of both; whether the Statutory Compact authorized contracts to be made with the California defendants for the permanent service (in addition to 4,400,000 acre-feet of III(a) waters) of one-half of the excess or surplus waters unapportioned by the Compact for use in California; whether it included therein the waters referred to in Article III(b), or precluded California from use of such waters; whether the "excess or

surplus," of which California may use one-half, is to be reckoned before or after deduction of the quantity required to be delivered to Mexico; the effect on California's right to "excess or surplus" of a future compact apportioning such waters; whether the limitation "for use in California" is net of reservoir losses, or is subject to further reduction in consequence of such losses; whether the definition of consumptive uses applicable to California is applicable to Arizona, and vice versa; whether California is free to make use of salvaged waters without charge under the Compact or the Limitation Act; the effect of California's appropriations; the meaning and effect of the reference to "rights which may now exist" in Section 4(a) of the Project Act; the extent of California's "present perfected rights" as referred to in Section 6 of the Project Act; whether by the Project Act, or otherwise, the shares of Nevada or Arizona in the waters of the Colorado River System have been determined; and the construction and effect of the water delivery contracts held by those States.

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No. 18, ORIGINAL

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

STATE OF NEVADA, INTERVENER.

REPLY OF THE STATE OF NEVADA TO ANSWER OF CALIFORNIA DEFENDANTS TO PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 10, ORIGINAL

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

STATE OF NEVADA, INTERVENER.

REPLY OF THE STATE OF NEVADA TO ANSWER OF CALIFORNIA DEFENDANTS TO PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA

COMES NOW the State of Nevada and as and for its reply to the Answer of California Defendants, admits, denies and alleges as follows:

ANSWER TO FIRST AFFIRMATIVE DEFENSE

I

Answering the First Affirmative Defense of said defendants set forth on page 4 of said Answer, the State of Nevada denies that the defendants have the right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of waters of the Colorado River System under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Contracts of the Secretary of the

Interior, and, in this connection the State of Nevada realleges and reiterates the allegations set forth in the first two subparagraphs of Paragraph XXIV of its Petition of Intervention, and, in this connection the State of Nevada again denies that the excess and surplus waters referred to in Section 4 (a) of the Project Act and in Section 1 of the California Limitation Act includes water referred to and provided for in Article III (b) of the Colorado River Compact.

II

Answering Paragraph 2, page 4, of California's Answer, the State of Nevada admits that defendants have therein incorporated by reference as a part of its Answer hereto all of the allegations of their First Affirmative Defense of their Answer to Petition for Intervention of the United States of America, and in connection with said admission and in answer to the said First Affirmative Defense admits, denies and alleges, as follows:

(a) Answering Paragraphs 6 (a) and 6 (b) the State of Nevada states it has not sufficient knowledge or information upon which to base a belief, therefore denies all and singular the allegations therein contained, and in connection with such denial alleges the said "1,000,000 acre-feet of excess waters" per annum therein alleged did not nor do not constitute any of the water provided in and by Article III (b) of the Colorado River Compact. Said State further denies that the legislative history of the Project Act supports the positions taken with reference thereto by the defendants, save and except the said State admits that water in substantial quantities is essential to the economy of California and all the States in the Lower Basin.

(b) Answering Paragraph 6 (c) 1, the State of Nevada admits the allegations therein contained, save and except that it denies that the water provided in and by Article III (b) of the Colorado River Compact was included or can it legally be included in any excess or surplus waters unapportioned by Article III (a) of said Compact for use by defendants under contract with the United States or otherwise. Said State further denies that the quantities of water required

to serve the annual beneficial consumptive use in California, as alleged in Paragraph 6 (c) 2, includes in the excess or surplus waters the waters referred to in Article III (b) of said Compact.

(c) Answering Paragraph 6 (c) 3, the State of Nevada denies that the waters contracted to be delivered by the United States are available to serve all uses under contracts made under provisions of the Project Act for the supply of any rights which existed in California as of June 25, 1929, and alleges that such waters were and are available for said purpose only to rights in existence November 24, 1922.

(d) Answering Paragraph 7, the State of Nevada here refers to Paragraph III post, of this Reply.

(e) Answering Paragraph 8 (a), the State of Nevada admits all and singular the allegations therein contained, save and except said State denies that the Secretary of the Interior was possessed with the power to include in said regulation waters provided in Article III (b) of the Colorado River Compact.

(f) Answering Paragraph 8 (c), the State of Nevada alleges that the said 962,000 acre-feet per annum alleged to be excess and surplus within the meaning of the Statutory Compact do not and cannot legally include therein the waters provided in Article III (b) of the Colorado River Compact.

(g) Answering Paragraph 8 (d), the State of Nevada denies that there was and is inherent in said water delivery contracts the right to the present and permanent use of excess and surplus waters, if such waters are physically available.

(h) Answering Paragraph 9 (h), the State of Nevada here refers to Paragraph III post of this Reply.

(i) Answering Paragraph 10, the State of Nevada states it has not sufficient knowledge or information upon which to base a belief, therefore denies the allegations therein contained; further answering that part of said Paragraph 10 contained in footnote 4, page 25 of said Answer, the said State denies that any part of the revenues derived from power rates has been, is or will be paid to Nevada in lieu of taxes.

Further answering said Note 4 of said paragraph, Nevada alleges that it has contracted for, withdrawn and paid for all of the firm energy to which it is entitled under so-called Boulder Dam Contracts.

(j) Answering Paragraph 12 (c), the State of Nevada denies that there are available for storage by the United States for permanent service, and for receipt and beneficial consumptive use by defendants, without violating the Colorado River Compact or the Boulder Canyon Project Act or the said Statutory Compact, quantities of water equal to said alleged amount of 5,362,000 acre-feet.

(k) Answering Paragraph 12 (d), the State of Nevada denies all and singular the allegations contained therein.

III

Answering Paragraph 3, page 4, of California's Answer, the State of Nevada, as a signatory State to the Colorado River Compact, denies that its rights as a third-party beneficiary, or otherwise, of the alleged Statutory Compact between the United States and California are governed by said Compact as interpreted, construed and applied by the principal parties thereto, and in connection with said denial alleges that it is entitled to seek and have a judicial interpretation thereof; the State of Nevada further denies that it cannot lawfully assert rights inconsistent with the interpretation of the said principal parties.

ANSWER TO SECOND AFFIRMATIVE DEFENSE

IV

Answering the Second Affirmative Defense of said defendants set forth on page 5 of said Answer, the State of Nevada denies that the defendants have appropriative rights, recognized by the Boulder Canyon Project Act, and protected by the Statutory Compact between the United States and California, to the beneficial consumptive use in California of not less than 5,362,000 acre-feet of Colorado River System water per annum, senior to the claims made by Nevada in Nevada's Petition of Intervention.

V

Answering Paragraph 4 of California's Answer, the State of Nevada admits that defendants have therein incorporated by reference as a part of its Answer hereto all of the allegations of their Second Affirmative Defense of their Answer to Petition for Intervention of the United States of America, and in connection with said admission and in answer to said Second Affirmative Defense admits, denies and alleges, as follows:

(a) Answering Paragraphs 15 (a) (b) (c) the State of Nevada states it has not sufficient knowledge or information upon which to base a belief, therefore denies all and singular the allegations therein contained.

(b) Answering Paragraph 16, the State of Nevada states it has not sufficient knowledge or information upon which to base a belief, therefore denies all and singular the allegations therein contained.

(c) Answering Paragraphs 17 (a) (b), the State of Nevada admits all and singular the allegations therein contained; further answering Paragraphs 17 (c) (d), the State of Nevada denies all and singular the allegations therein contained.

(d) Answering Paragraph 18, the State of Nevada denies all and singular the allegations therein contained.

VI

Answering Paragraph 5, page 5, of California's Answer, the State of Nevada denies all and singular the allegations therein contained.

TRAVERSE

VII

Answering Paragraph 12 (b) of California's Answer, the State of Nevada denies that the quantities of excess or surplus waters unapportioned by Article III (a) of the Colorado River Compact alleged to be available and will continue to be available to California under its Statutory Compact with the United States or otherwise for beneficial consumptive use is and will be not less than one million acre-feet per annum.

(b) Answering Paragraph 12 (c) of California's Answer, the State of Nevada states it has not sufficient knowledge or information upon which to base a belief, therefore denies that the beneficial consumptive use per annum of the waters of said River Stream System, as alleged, measured in terms of "main stream depletion" is equivalent to more than 5,000,000 acre-feet measured at place of use in terms of diversion less returns to the river.

VIII

Answering Paragraph 13 (d) of California's Answer, the State of Nevada denies all and singular the allegations therein contained.

IX

Answering Paragraph 14 (b) of California's Answer, the State of Nevada denies all and singular the allegations therein contained.

X

Answering Paragraph 15 (c) of California's Answer, the State of Nevada denies all and singular the allegations therein contained.

XI

Answering Paragraphs 16 (a) (b) of California's Answer, the State of Nevada denies that the waters provided in and by Article III (b) of the Colorado River Compact is encompassed in "excess or surplus waters," as alleged.

XII

Answering Paragraph 18 (b) of California's Answer, the State of Nevada denies all and singular the allegations therein contained.

XIII

Answering Paragraphs 19 (b) (d) of California's Answer, the State of Nevada denies that Nevada's share of the waters of the Colorado River Stream System is and/or will be subject to the Statutory Compact between the United States and California and further subject to all intervening rights since June 25, 1929.

XIV

Answering Paragraph 25 (c) of California's Answer, the State of Nevada denies all and singular the allegations therein contained.

XV

Answering Paragraph 30 (b) of California's Answer, the State of Nevada denies that the right of California to the use of the waters of the Colorado River System, to the extent that they constituted present perfected rights as of June 25, 1929.

PRAYER

WHEREFORE, the State of Nevada reiterates its Prayer set forth in its Petition of Intervention heretofore filed in the cause.

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No. 10, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

STATE OF NEVADA, INTERVENER.

MOTION ON BEHALF OF THE STATE OF NEVADA FOR LEAVE TO INTERVENE

PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA

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In the Supreme Court of the United States

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STATE OF NEVADA, INTERVENER.

MOTION ON BEHALF OF THE STATE OF NEVADA FOR LEAVE TO INTERVENE

COMES NOW the Attorney General and the Special Assistant Attorneys General of the State of Nevada and for and in behalf of said State thereunto authorized and directed by the Act of the Legislature entitled, "An Act authorizing and directing the attorney general of the State of Nevada to intervene in the suit of the State of Arizona against the State of California relative to the rights to the waters of the Colorado river pending in the supreme court of the United States, providing additional legal counsel and assistance, and making an appropriation therefor," approved March 25, 1953, and thereunto directed by the Governor of Nevada, and respectfully move this Court for leave to intervene in the above-entitled cause, and for leave to file a petition for intervention therein.

I

The State of Nevada is one of the original signers of the Colorado River Compact formulated and signed by the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, November 24, 1922, and by reason thereof became entitled to and is now entitled to an allocation of a portion of the waters of the Colorado River agreed upon in said Compact to be allocated to the Lower Basin States.

II

The Complaint of Arizona, the Answer of California and the Reply of Arizona discloses that the paramount issue in the action is the right of each said State to the use of the waters of the Colorado River, in brief, that an adjudication of such rights is and will be necessary to the final determination thereof, in that each said State seeks to have the rights which it claims in the Colorado River quieted as against the other.

III

The State of Nevada being one of the signatory States in and to the Colorado River Compact, which the Legislature of Nevada ratified January 27, 1923, in that certain resolution entitled, "Assembly Joint Resolution, relative to approving Colorado river compact," Statutes 1923, page 393, as a Seven-State Compact, and thereafter on March 18, 1925, in and by Chapter 96, Statutes 1925, ratified said Compact as a Six-State Compact and by reason of said ratifications became entitled to and is now entitled to have and to use as a matter of right its just and equitable share of the waters of said river.

IV

The State of Nevada in and by that certain Act of its Legislature entitled, "An Act relating to the Colorado river compact; waiving certain provisions of article XI thereof; agreeing to and entering into said Colorado river compact as so modified, and providing for the ratification and going into effect of said compact as so modified," approved March 18, 1925, and being Chapter 96, Statutes of

Nevada, 1925, thereby waived the provisions of the first paragraph of Article XI of the Colorado River Compact making it effective where ratified by each of the signatory States, and then and there agreeing that said Compact shall become binding when ratified by six of the signatory States and the Congress of the United States shall have given its consent thereto. Thereafter the Congress of the United States enacted the Boulder Canyon Project Act, approved December 21, 1928, 45 U. S. Statutes, page 57, and therein included Section 13(a), providing as follows:

> The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

That thereafter on June 25, 1929, the President of the United States in Public Proclamation No. 1882, 46 U. S. Statutes 3000, declared that all conditions of the Boulder Canyon Project Act, including the conditions provided in Section 4(a) thereof, having been fulfilled, that said Act was then and there effective as of that date.

That from and after the 25th day of June, 1929, the State of

Nevada became entitled to its just and equitable portion and share of the waters of the Colorado River.

V

The State of Nevada is presently under a contract with the United States, dated January 3, 1944, amending a prior contract dated March 30, 1942, whereby the United States shall, from storage in Lake Mead, and pursuant to the provisions of the Colorado River Compact and the Boulder Canyon Project Act, deliver to the State each year not to exceed three hundred thousand (300,000) acre-feet of water, inclusive of all other waters diverted for use within the State from the Colorado River Stream System. That neither the said contract with the United States of June 30, 1942, nor the contract of January 3, 1944, contains any limitation whereby the right of the State of Nevada to contract for the delivery of additional water over and above three hundred thousand (300,000) acre-feet, and neither is said State by reason of said contracts prohibited from asserting claims to the right to use of the waters of the Colorado River Stream System over and above three hundred thousand (300,000) acre-feet of water.

Therefore, the State of Nevada, applicant for intervention herein, respectfully moves the Court for leave to intervene in the action and to file therein its petition of intervention hereunto annexed, upon the following grounds:

1. That the representation of the applicant's interest by the existing parties is or may be inadequate and that the applicant is or may be bound by the judgment entered in the suit.

2. That the applicant is so situated as to be adversely affected by the final distribution of the waters of the Colorado River Stream System.

3. That the applicant's interest and the main action have questions of law and fact in common, and that its inter-

vention will not to any extent delay or prejudice the rights of the original parties.

W. T. MATHEWS,
Attorney General of Nevada,

ALAN BIBLE,
Special Assistant Attorney General of Nevada,

WILLIAM J. KANE,
Special Assistant Attorney General of Nevada,

GEO. P. ANNAND,
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WILLIAM N. DUNSEATH,
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JOHN W. BARRETT,
Deputy Attorney General of Nevada,
Counsel for State of Nevada.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 10, ORIGINAL

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

STATE OF NEVADA, INTERVENER.

PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA

The State of Nevada, by W. T. MATHEWS, the ATTORNEY GENERAL of the STATE OF NEVADA, and by leave of Court first had and obtained, files this Petition of Intervention in the above-entitled cause, and alleges and states as follows:

PART ONE: INTRODUCTION

I

The State of Nevada refers to the several introductory statements of the States of Arizona and California and the United States of America covering the factual and historical background of the development of the Colorado River System and the basic causes of this controversy. This State deems it unnecessary to repeat the same except to state the rights and interests of Nevada in this cause. All

the parties agree that this is a controversy of considerable magnitude, affecting vast areas of land, many millions of dollars of investments growing out of the development of the Colorado River and the present and future interests of millions of people within the areas of the States concerned.

Under Article I of the Colorado River Compact the major purposes of the Compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Nevada is an arid State, particularly in that part of the State which lies within the limits of the Colorado River System or adjacent thereto. The economic life of Nevada depends upon the careful use of stored waters and controlled rivers or streams to sustain its agricultural and industrial development. In addition to the physical use of water there is an equally imperative need for a determination of the definite legal right to the use of water to secure present rights and insure future developments.

With the advent of World War II, the industrial growth of Southern Nevada began, and its future expansion is important to this State and the Nation as a whole. It is strategically located and with ample power and water available the progress of industrial expansion, particularly in the processing of minerals, should be continued. The City of Henderson, Nevada, is the site of vast industrial plants located eighteen miles from Hoover Dam and nine miles from Lake Mead, costing over one hundred and forty million dollars. These plants with waterways and waterworks and townsite have been carefully preserved by Nevada since World War II and

are now operated by private industry and are the center of a thriving community with extensive future possibilities as an industrial area. The increase in population of Las Vegas, Nevada, the county seat of Clark County, has been steady and substantial and during the past three years is conservatively estimated at thirty-five percent. There are many thousands of acres of irrigable land in the Colorado River Basin area to be developed into profitable agricultural communities.

Note. The State of Nevada, in this petition and future pleadings, refers to and includes all the defendants under the designation California.

Note. The State of Nevada refers to the various appendixes of the States of Arizona and California and the United States of America to their pleadings on file herein and respectfully submits that the same are adequate to apprise the Court of the contents of the basic documents upon which this case is predicated.

PART TWO: THE RIGHTS AND INTERESTS OF THE STATE OF NEVADA IN AND TO THE WATERS OF THE COLORADO RIVER SYSTEM

II

The State of Nevada acts by and through the Colorado River Commission of Nevada, an official State agency created by statute and charged with the duty to receive, protect and safeguard, and hold in trust for the State of Nevada all water and water rights, interests or benefits in and to the waters of the Colorado River, and by and through the Attorney General of the State of Nevada as authorized and directed by the Act of the Nevada Legislature entitled, "An Act authorizing and directing the attorney general of the State of Nevada to intervene in the suit of the State of Arizona against the State of California relative to the rights to the waters of the Colorado River pending in the supreme court of the United States, providing additional legal counsel and assistance, and making an appropriation therefor," approved March 25, 1953, the same being Chapter 214, page 267, Statutes of Nevada, 1953.

III

The State of Arizona, by leave of this Court, filed herein its Bill of Complaint against the State of California and certain entities of that State, wherein an adjudication of the rights of Arizona and California in and to the waters of the Colorado River System are drawn in question; thereafter California filed an Answer to said Complaint, and Arizona filed its Reply thereto, California then filing its Rejoinder to said Reply; and by leave of this Court the United States was granted leave to intervene in this suit. The State of Nevada being a signatory to the Colorado River Compact, and being one of the Lower Basin States defined in said Compact and being a user of and entitled to the right to the beneficial consumptive use of a portion of the Colorado River System water is, by reasons thereof, an indispensable party to this suit and herein sets forth its claims therefor.

IV

The State of Nevada is a signatory State to the Colorado River Compact dated November 24, 1922, and a member State of the Lower Basin thereunder, and is entitled to its equitable share of the waters provided in Article III of said Compact. The State of Nevada alleges that the said Colorado River Compact as so adopted by the signatory States was intended to be and is now binding and obligatory upon each of them for the then and now indefinite future and until said Compact is terminated by the unanimous agreement of the signatory States.

V

That under Article III(a) of said Compact there is apportioned in perpetuity to the Lower Basin the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum. There is no apportionment of water under said Article III(a) to each of the several States of the Lower Basin. The State of Nevada has the right to the beneficial consumptive use of water under said Article III(a) of 539,100 acre-feet for present and future agricultural and domestic uses.

VI

(a) The State of Nevada reiterates that it is an arid State and alleges that water is the life blood of its agricultural, domestic, industrial and municipal economy, and that this is particularly true in the Colorado River Basin within said State. That within said Basin and susceptible of being irrigated by the waters of said river and tributaries are many thousands of acres of land in addition to land presently irrigated that can and will be made productive thereby; that during World War II large industrial plants employing several thousand employees were created and established by the United States in said Basin, near and adjacent to the City of Las Vegas, and that said industrial plants, since the termination of the war, have been taken over by private enterprises and the activities thereof expanded; that by reason of the establishment of the industries and the expansion thereof, increased need and use of water has been and is now imperative for the domestic use of the large increase in population thereby required, which said population in said area has increased at least thirty-five percent during the last three years.

(b) That a recent extensive engineering examination and study of the Colorado River Basin within the State of Nevada has been made and completed in the month of November 1953, for the purpose of determining the potential use of water therein through the future development of the Basin with respect to its agricultural, domestic, industrial and municipal necessities. That said examination and study projects the development of the area and the necessary use of water therefor in future to the year 2000, and determines that the amount of water necessary to insure the development of said area for the aforesaid purposes will be in the amount of not less than 539,100 acre-feet.

(c) That the separate respective areas in said Basin and the amounts of water necessary for the future development thereof are as follows:

LISTING AREAS WITHIN COLORADO RIVER DRAINAGE DEPENDENT SOLELY ON WATER FROM COLORADO RIVER AND TRIBUTARIES FOR DEVELOPMENT, AND SHOWING PRESENT USES, ESTIMATED INCREASE AND TOTAL USE OF WATER BY YEAR 2000.

Area No.[1]	Designation of Area	Water Use in Acre-Feet[2] Present use	Estimated additional use-year 2000	Total estimated use-year 2000
	COLORADO RIVER DIRECT			
12	Las Vegas Valley	[3]12,340	220,060	232,400
14	Big Bend	0	2,700	2,700
15	Fort Mohave	0	20,300	20,300
16	Dry Lake	0	115,800	115,800
	Boulder City	[4]2,600	2,400	5,000
	Subtotal	14,940	361,260	376,200
	VIRGIN RIVER			
1 & 2	Mesquite and Bunkerville	12,020	3,080	15,100
3 & 4	Below Riverside Bridge	1,700	8,300	10,000
17	Mormon Mesa	0	46,400	46,400
18	Toquop Wash	0	15,700	15,700
	Subtotal	13,270	73,480	87,200
	MUDDY RIVER			
6	Upper Moapa Valley	9,480	9,320	18,800
7	Lower Moapa Valley	14,890	6,110	21,000
	Subtotal	24,370	15,430	39,800
	MEADOW VALLEY WASH			
5	Lower Meadow Valley Wash	0	15,500	15,500
19	Upper Meadow Valley Wash	10,700	9,700	20,400
	Subtotal	10,700	25,200	35,900
	TOTAL, NEVADA	63,730	475,370	539,100

[1]Area numbers correspond to similar numbers appearing on map in Appendix "A."

[2]Water uses calculated above are based upon diversion less return flow.

[3]Indicates water presently being pumped from Lake Mead for industrial and municipal purposes at Henderson.

[4]Indicates water presently being pumped from Lake Mead for industrial and municipal use in Boulder City.

VII

The State of Nevada, signatory to the Colorado River Compact, Article III(a) and III(b) of which allocates to the Lower Basin States 8,500,000 acre-feet of water of said river, alleges. That it is informed and believes that California is presently claiming the right to use 5,362,000 acre-feet of water and the State of Arizona is presently claiming the right to use 3,800,000 acre-feet of said water; that Nevada alleges the States of Arizona and California concede Nevada has the right to the use of 300,000 acre-feet of said III(a) water per annum in perpetuity; that the Colorado River Compact apportioned to no Lower Basin State any definite amount of water and that nothing in said Compact denies Nevada the right to the beneficial consumptive use of more than said 300,000 acre-feet of water, nor does said Compact deny Nevada the right to the beneficial consumptive use of sufficient water to beneficially irrigate its lands and extend its domestic uses requiring waters far in excess of said 300,000 acre-feet; to-wit, the right to the beneficial consumptive use of 900,000 acre-feet of water per annum. The State of Nevada alleges that said 900,000 acre-feet of water consists of 539,100 acre-feet of the water apportioned to the Lower Basin in and by Article III(a) of the Colorado River Compact plus an equitable share in the water to be apportioned under Article III(b) and III(f) of the said Compact, all of which is more particularly set forth in this petition.

VIII

Article III(b) of said Compact provides that in addition to the apportionment of water in Article III(a) "the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum." No joint action by the Lower Basin States by negotiated Compact, Agreement, or by any other method has ever been initiated or taken to increase the benficial consumptive use of said water within said basin by one million acre-feet or in any other amount whatsoever. The State of Nevada alleges that before any Lower Basin State can acquire the right to use said water, authoritative concerted action by the Lower Basin States must

first be had giving the right to increase the beneficial consumptive use of water within said lower basin to the extent of an additional one million acre-feet of water as provided in said Article III(b), and that an equitable apportionment thereof to each of said States, by compact or agreement between such States, or by such other equitable action as will apportion said water is a necessary condition precedent. The State of Nevada further alleges that it is entitled to its equitable share in said water in addition to its equitable share of the water apportioned to the Lower Basin in Paragraph III(a).

IX

Under Article III(f) of the Compact, provision is made for "further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) * * * at any time after October 1, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)." The State of Nevada has a right to its equitable share of this water if and when the Lower Basin shall have reached its total beneficial consumptive use of 8,500,000 acre-feet of water as set out in Article III(a) and III(b) of the Compact.

X

That the Legislature of the State of California, pursuant to the provisions and the express requirements of Section 4(a) of the Boulder Canyon Project Act, enacted legislation known as the California Limitation Act whereby California irrevocably and unconditionally agreed and agrees with the United States, and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, that the aggregate annual consumptive use of water of and from the Colorado River for use in California, including all uses in California under contract or otherwise, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin States by Article III(a) of said Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact. The State of Nevada alleges that Article III(b)

of said Compact constitutes an apportionment of water to the Lower Basin and nowhere in said Boulder Canyon Project Act has the Congress of the United States by such legislation changed or attempted to change either the language or the meaning of said Article III(b) of said Compact so as to constitute the water therein mentioned surplus or excess water.

XI

The Boulder Canyon Project Act failed to mention the waters under Article III(b) of the Compact. Said Act proposed an apportionment between three of the Lower Basin States, to wit, Nevada, Arizona and California, of the waters under Article III(a), plus the "excess or surplus waters unapportioned by the Colorado River Compact." The States of Utah and New Mexico, signatories to the Compact, were not mentioned in said proposed apportionment. The Project Act, in authorizing agreements between the States, made all such agreements subject in all particulars to the provisions of the Colorado River Compact. The State of Nevada alleges that the tri-state agreement authorized by the Congress of the United States in Paragraph 2 of Section 4(a) of the Project Act was never entered into or consummated and by reason thereof the proposed apportionment of water between the States of Nevada, Arizona and California has never become effective and that any apportionment of water therein proposed to be made to the States of Nevada and Arizona has never been consented to nor agreed to by the State of Nevada.

PART THREE: SPECIFIC RESPONSE OF THE STATE OF NEVADA TO THE PLEADINGS OF THE PARTIES

XII

Answering Paragraph XIV of Arizona's Bill of Complaint and Paragraph 60 of California's Answer thereto, and also answering Paragraph 60 of Arizona's Reply to California's Answer, the State of Nevada admits the allegations contained in Paragraph XIV of Arizona's Complaint, admits the allegations contained in Paragraph 60 of California's Answer. The State of Nevada answering Paragraph 60 of Arizona's said Reply, alleges that it has at no time

agreed or assented with any party or parties that it was not entitled to the right to the beneficial consumptive use of the waters of the Colorado River Stream System in excess of 300,000 acre-feet of said waters per annum.

Further answering Paragraph 60 of Arizona's Reply, the State of Nevada alleges that there has been introduced in the Congress of the United States and now pending in said Congress, legislation consisting of six bills wherein the Secretary of the Interior is authorized to construct, operate and maintain within the Colorado River Basin in the State of Nevada, diversion works on and in connection with the tributaries of said river, Lake Mead and the Colorado River below Lake Mead for the furnishing of the waters thereof for irrigation, domestic, industrial and municipal purposes, far in excess of 300,000 acre-feet per annum with an estimated potential beneficial consumptive use of 900,000 acre-feet per annum. The State of Nevada, in this connection, further alleges that the recent extensive engineering examination and study wherein this potential consumptive use of said waters was projected to the year 2000, determined the use and the amount thereof to be as alleged and set forth in Paragraph VI of this Petition.

XIII

(a) Answering Paragraph XV of Arizona's Bill of Complaint, Paragraph 61 of California's Answer and Paragraph 61 of Arizona's Reply, the State of Nevada admits that portions of New Mexico and Utah are located within the Lower Basin of the Colorado River System, as defined by Article II(g) of the Colorado River Compact, and admits that in Article 7(g) of Arizona's Contract with the United States of February 9, 1944, "Arizona recognizes the rights of New Mexico and Utah to equitable shares of water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such Compact, and nothing in this Contract shall prejudice such rights."

(b) The State of Nevada states that it has not sufficient knowledge or information upon which to base a belief, therefore denies that Arizona expects to negotiate with New Mexico and Utah a

compact defining the respective rights of said States of New Mexico and Utah to participate as Lower Basin States in the use of Colorado River water apportioned now or as may hereafter be apportioned to said Lower Basin, and in this connection the State of Nevada alleges there is not only a potential controversy between Arizona, New Mexico and Utah concerning the apportionment of Colorado River water in and to the Lower Basin, but that such controversy extends to and will extend to the States of California and Nevada, particularly with respect to the apportionment of the water provided for in Article III(b) of the Colorado River Compact; and further answering with respect to said potential controversy, the State of Nevada alleges that no compact or agreement between the Lower Basin States relating to the apportionment of Article III(b) water can be legally consummated and made effective unless and until all of the Lower Basin States are made parties thereto.

XIV

Answering Paragraphs XVII(a) and XVII(b) of Arizona's Bill of Complaint the State of Nevada denies each, every and all of said allegations save and except that the State of Nevada admits that Arizona is not now presently beneficially consumptively using 3,800,000 acre-feet of water per annum.

Answering Paragraph 63 of California's Answer, the State of Nevada denies each, every and all of said affirmative allegations save and except that the State of Nevada admits that the share of water to which Arizona may be entitled, and to which the States of Nevada, New Mexico, and Utah are entitled, has not been determined in any manner.

As to Paragraph 63 of Arizona's Reply, State of Nevada alleges that there is available to Arizona, Nevada, New Mexico and Utah, out of the waters of the Colorado River System apportioned to the Lower Basin by Article III(a) of the Compact, the beneficial consumptive use of 3,100,000 acre-feet of water per year with the right given to the States of Arizona, California, Nevada, New Mexico and Utah to increase their beneficial consumptive use an

additional 1,000,000 acre-feet in the manner set forth in Paragraph VIII of this petition. Allege that the use of the waters of the Gila River, chargeable to Arizona, are to be charged to Arizona's apportionment of Article III(a) water. Allege that in addition said States have a right to an undetermined quantity of surplus water not yet apportioned by the Compact. Alleges that the shares of beneficial consumptive use of Colorado River System water in the Lower Basin to which Arizona, California, Nevada, New Mexico and Utah are entitled have not been fully determined and the share to which Nevada is entitled is the quantity of 539,100 acre-feet of water per annum apportioned to the Lower Basin by Article III(a) of the Compact, plus an equitable apportionment of the water apportioned to the Lower Basin by III(b) of the Compact, plus an undetermined quantity of surplus water not apportioned by the Compact.

Denies all allegations of Paragraph 63 of Arizona's Reply not specifically admitted herein.

XV

Answering Paragraph XVIII of Arizona's Complaint, Paragraph 64 of California's Answer and Paragraph 64 of Arizona's Reply, the State of Nevada alleges that Article VII of the Compact provides that nothing herein shall be construed as affecting the obligations of the United States of America to Indian Tribes. The State of Nevada alleges all beneficial consumptive uses in Arizona, California, Nevada, New Mexico and Utah of Colorado River System water by Indians is chargeable to the share of Colorado River System water to which each of said States is legally entitled. Denies all the allegations of the above paragraphs not specifically admitted herein.

XVI

Answering Paragraph XX of Arizona's Complaint, Paragraph 66 of California's Answer, and Paragraph 66 of Arizona's Reply, the State of Nevada admits that at the request of Arizona the United States Bureau of Reclamation has investigated a project to

bring water to Central Arizona from the main stream of the Colorado River and that such project is known as the Central Arizona Project and further admits that bills were introduced into the 81st and 82d Congresses authorizing the Central Arizona Project and such bills were passed by the United States Senate, but failed to pass in the House of Representatives, admits that the House of Representatives Committee on Interior and Insular Affairs adopted resolutions as set forth on page 70 of California's Answer. The State of Nevada denies the claim of title of Arizona to the beneficial consumptive annually use of 3,800,000 acre-feet of water (subject to the rights of New Mexico and Utah) of the Colorado River System, as set forth in the last sentence of Paragraph XX of Arizona's Complaint. The State of Nevada alleges that the rights of Nevada in said 3,800,000 acre-feet of water are as set forth in this Petition of Intervention. The State of Nevada has not sufficient knowledge or information upon which to base a belief as to the other allegations in said Paragraphs XX of Arizona's Complaint and 66 of California's Answer and Arizona's Reply and therefore denies the same.

XVII

Answering Paragraphs XXI of Arizona's Complaint and 67 of California's Answer, the State of Nevada states it has not sufficient knowledge or information upon which to base a belief and therefore denies the allegations therein contained.

XVIII

Answering Paragraph XXII of Arizona's Bill of Complaint and Paragraph 68 of California's Answer thereto, the State of Nevada admits that there is a controversy between Arizona, California and Nevada relative to the construction and application of the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act as follows:

1. Is the water referred to and affected by Article III(b) of the Compact apportioned or unapportioned water? The State of Nevada admits all and singular the allegations contained in Subdivision No. 1

of said Paragraph XXII of said Complaint, save and except that when the States of the Lower Basin by authoritative, concerted action shall have increased their right to the beneficial consumptive use of the waters apportioned in and by Article III(a) by one million acre-feet of water as provided in Article III(b), that California would then be entitled to its equitable share thereof; the State of Nevada further alleges that Article III(b) water does not constitute surplus and excess water within the meaning of the Colorado River Compact, nor Section 4(a) of the Boulder Canyon Project Act.

2. How is beneficial consumptive use to be measured? The State of Nevada agrees that the Colorado River Compact does not apportion the water among the Lower Basin States, but that it serves to apportion the beneficial consumptive use thereof, and Nevada agrees that the Compact contains no definition of any method of measuring beneficial consumptive use. However, the State of Nevada alleges that the measure of beneficial consumptive use of the waters of the Colorado River Stream System is the commonly recognized measure in the Western States including Nevada, to wit: Beneficial consumptive use is the measured diversion from the source less the measured return flow thereof to said source, save and except, the State of Nevada alleges that there is an exception to the application of the rule of diversion less return flow, in that there are certain claimed tributaries to the Colorado River below Lee Ferry and in the Lower Basin of said river, wherein some of the waters thereof, in a state of nature and prior to the works of man, never reached the main stream of the Colorado River because of the fact that such tributaries were wasting streams due to channel losses occasioned by evaporation and transpiration, but which a portion of said losses were converted to beneficial purposes by the activities of man by impounding, pumping and diversion of said waters upstream from the area wherein the major losses by evaporation and transpiration took place, in which event the measure of beneficial consumptive use is by the main stream depletion theory, to wit, the tributaries to be charged only with the quantity of water which constitutes the

depletion of such tributaries at their confluence with the main stream, brought about by the activities of man.

The State of Nevada further alleges that in reference to losses by evaporation and transpiration under virgin conditions on the main stream of the Colorado River in the Lower Basin, that when such losses are salvaged by the activities of man and placed to beneficial use, the amount of such salvage is not a charge against the apportionment of Colorado River water to the State wherein such salvage is made, i. e., the amount of salvaged water is deductible from the total beneficial consumptive use as measured by the rule of diversions less return flow.

3. How are evaporation losses from Lower Basin stream storage reservoirs to be charged? The State of Nevada alleges that evaporation losses of water from storage reservoirs on the main stream of the Colorado River in the Lower Basin are first chargeable out of excess or surplus water and that such evaporation losses are not chargeable against Article III(a) or III(b) waters unless and until all such available excess or surplus water is exhausted in any given year.

XIX

Answering Paragraph XXV of Arizona's Bill of Complaint, the State of Nevada admits that the Congress of the United States stated in Section 4(a) of the Project Act what it deemed to be a fair apportionment among California, Arizona, and Nevada, of the beneficial consumptive use of water apportioned to the Lower Basin by the Compact, but, in connection with said admission, the State of Nevada states it has not sufficient knowledge, or information upon which to base a belief whether such apportionment was and is fair and equitable to the Lower Basin, therefore denies such allegation, and further the State of Nevada specifically denies said proposed apportionment was and is fair, equitable, or sufficient as therein made to the State of Nevada.

Further answering said Paragraph XXV, the State of Nevada states it has not sufficient knowledge, or information upon which to

base a belief, therefore denies all and singular the allegations contained in that portion of said paragraph beginning with the word "Arizona" in line 5 and ending with the word "Nevada" in line 19, page 28 of said Bill of Complaint.

XX

(a) Answering Paragraphs XXVI of Arizona's Complaint, 72 of California's Answer, and 72 of Arizona's Reply, the State of Nevada has not sufficient knowledge or information upon which to base a belief and therefore denies the same except that the State of Nevada admits that California intends to use water as therein set forth in its Answer, but denies that said State is entitled to or has the right to more than the beneficial consumptive use of 4,400,000 acre-feet of water under Article III(a) of the Compact plus an equitable share of water under Article III(b), when the right to the increased beneficial consumptive use of said water is authoritatively exercised by all the Lower Basin States, plus not more than one half of any excess or surplus water.

(b) The State of Nevada denies that such excess or surplus waters includes the water referred to in Article III(b) of the Compact.

(c) The State of Nevada further denies that California or any Lower Basin State has ever acquired any rights adverse to the rights of the State of Nevada in any water under the Compact by reason of nonuse of waters by the State of Nevada or may in the future acquire any rights adverse to the rights of the State of Nevada in such waters by reason of the nonuse by the State of Nevada.

(d) The State of Nevada further denies that California has any right to increase its diversions and beneficial consumptive use of water above 4,400,000 acre-feet of Article III(a) water, plus an equitable share of water under Article III(b), when the right to the increased beneficial consumptive use of said water is authoritatively exercised by all the Lower Basin States, plus one half of any excess or surplus waters, and by any additional diversion or use of such waters California cannot thereby acquire any rights in derogation of or adverse

to the rights of the State of Nevada without the express official agreement or assent of the State of Nevada.

XXI

Answering Paragraphs XXVII of Arizona's Complaint, 73 of California's Answer, the State of Nevada admits there is a serious controversy between Arizona and California, but denies the other allegations in said Paragraph XXVII of said Complaint. The State of Nevada alleges in this connection that the economic interests of Arizona, California, Nevada, Utah and New Mexico, as signatories to and beneficiaries under the Colorado River Compact, are vitally affected by this controversy.

XXII

Answering Paragraphs XXVIII of Arizona's Complaint and 74 of California's Answer, the State of Nevada admits the allegations in said paragraphs.

XXIII

Answering Paragraph XXIX of Arizona's Bill of Complaint, the State of Nevada admits all and singular the allegations therein contained, and alleges that any State in the Lower Basin is entitled to seek its remedy in this Court and therein pray for the adjudication of its right to the use of the waters of the Colorado River Stream System.

XXIV

Answering the first affirmative defense of California, the State of Nevada alleges that the use of the waters of the Colorado River Stream System by the State of California is subject to and limited by the Colorado River Compact, the Project Act, and the Limitation Act to the quantities of water therein set forth, and that contracts between the United States of America and the various defendant contracting agencies are upon the express condition and with the express understanding that all rights under such contracts are subject to and governed by the Colorado River Compact, which Compact

was approved in Section 13(c) of the Boulder Canyon Project Act.

The State of Nevada further alleges that such contracts do not create in California any right to use more than four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, plus an equitable share of water under Article III(b) when the right to the increased beneficial consumptive use of said water is authoritatively exercised by all the Lower Basin States, plus not more than one half of any excess or surplus water.

The State of Nevada denies the allegations of Paragraph 37(b) of Arizona's Reply alleging that Article III(a) of the Compact apportions certain amounts of water to the respective States of Arizona, California and Nevada and in this connection the State of Nevada alleges that Article III(a) of the Compact makes no apportionment of any kind to any of the Lower Basin States and makes no apportionment whatever except as between the Upper and Lower Basin.

XXV

Answering the Third Affirmative Defense of California, the State of Nevada alleges that all allegations therein as to the alleged appropriative rights of California are immaterial and irrelevant to a determination of the issues in this case for the following reasons:

1. Appropriative rights under California law are not binding upon the United States of America, the State of Nevada, or any other State of the Colorado River System, except the State of California.

2. The rights that California may have at any time to the use of waters of the Colorado River System are now and at all times since the effective date of the Colorado River Compact subject to the terms of said Compact, the Boulder Canyon Project Act and the California Limitation Act.

XXVI

The State of Nevada denies all the allegations, arguments, conclusions or averments in the respective pleadings of the parties which

are at variance with the facts and allegations of this petition of interpleader or in contravention of the rights of the State of Nevada as herein above set forth.

WHEREFORE, The State of Nevada respectfully prays:

1. That the rights of the States of Arizona, California, Nevada, New Mexico, Utah and the United States of America in and to the use of the waters of the Colorado River Stream System be adjudicated, determined and forever set at rest.

2. That the right of the State of Nevada in and to the beneficial consumptive use of 539,100 acre-feet of the water apportioned to the Lower Basin in and by Article III(a) of the Colorado River Compact be confirmed unto the State of Nevada in perpetuity.

3. That this Honorable Court enter its judgment and decree, that the additional one million acre-feet of water set forth and provided in Article III(b) of the Colorado River Compact is water apportioned to the Lower Basin, and be subject to use only when all the Lower Basin States shall have by authoritative Compact or Agreement increased the beneficial consumptive use in said Basin as provided in said Article III(b), at which time the State of Nevada shall be decreed the right to an equitable share thereof.

4. That the State of Nevada shall be decreed the right to its equitable share in and to the beneficial consumptive use of water to be apportioned under Article III(f) of the Colorado River Compact; provided, that the equitable share of the State of Nevada in Article III(b) water and the equitable share of the State of Nevada in Article III(f) water, together with its equitable share in the water apportioned pursuant to Article III(a) of said Compact in the amount of 539,100 acre-feet, shall not be less than 900,000 acre-feet per annum.

5. That the State of Nevada have such other and further relief as the Court may deem proper.

6. The State of Nevada further prays leave to amend this Petition

of Intervention if such amendments become necessary in the course of the pleadings or proceedings in this Cause.

DATED: December 1, 1953.

W. T. MATHEWS,
Attorney General of Nevada,

ALAN BIBLE,
Special Assistant Attorney General of Nevada,

WILLIAM J. KANE,
Special Assistant Attorney General of Nevada,

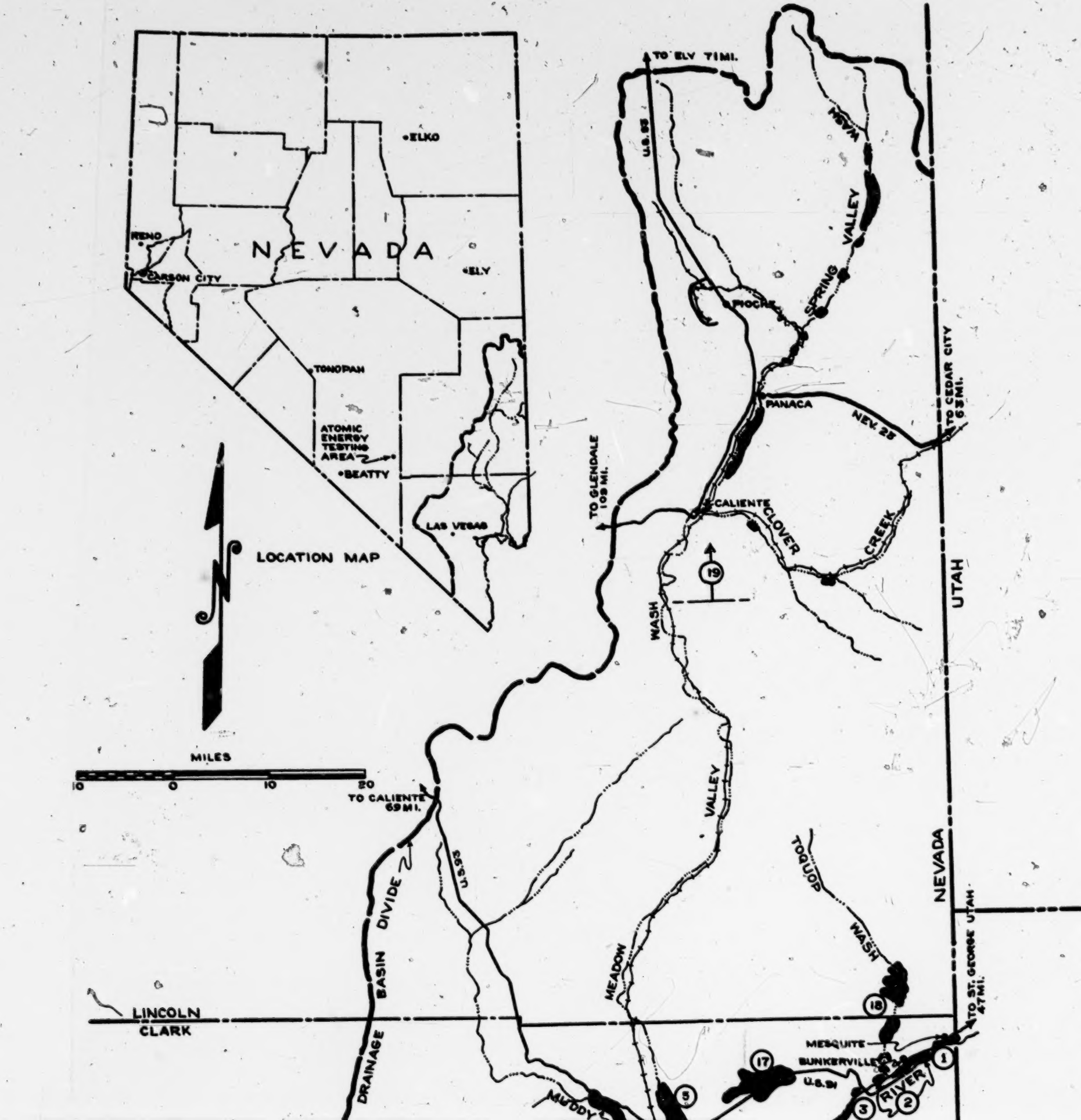
GEO. P. ANNAND,
Deputy Attorney General of Nevada,

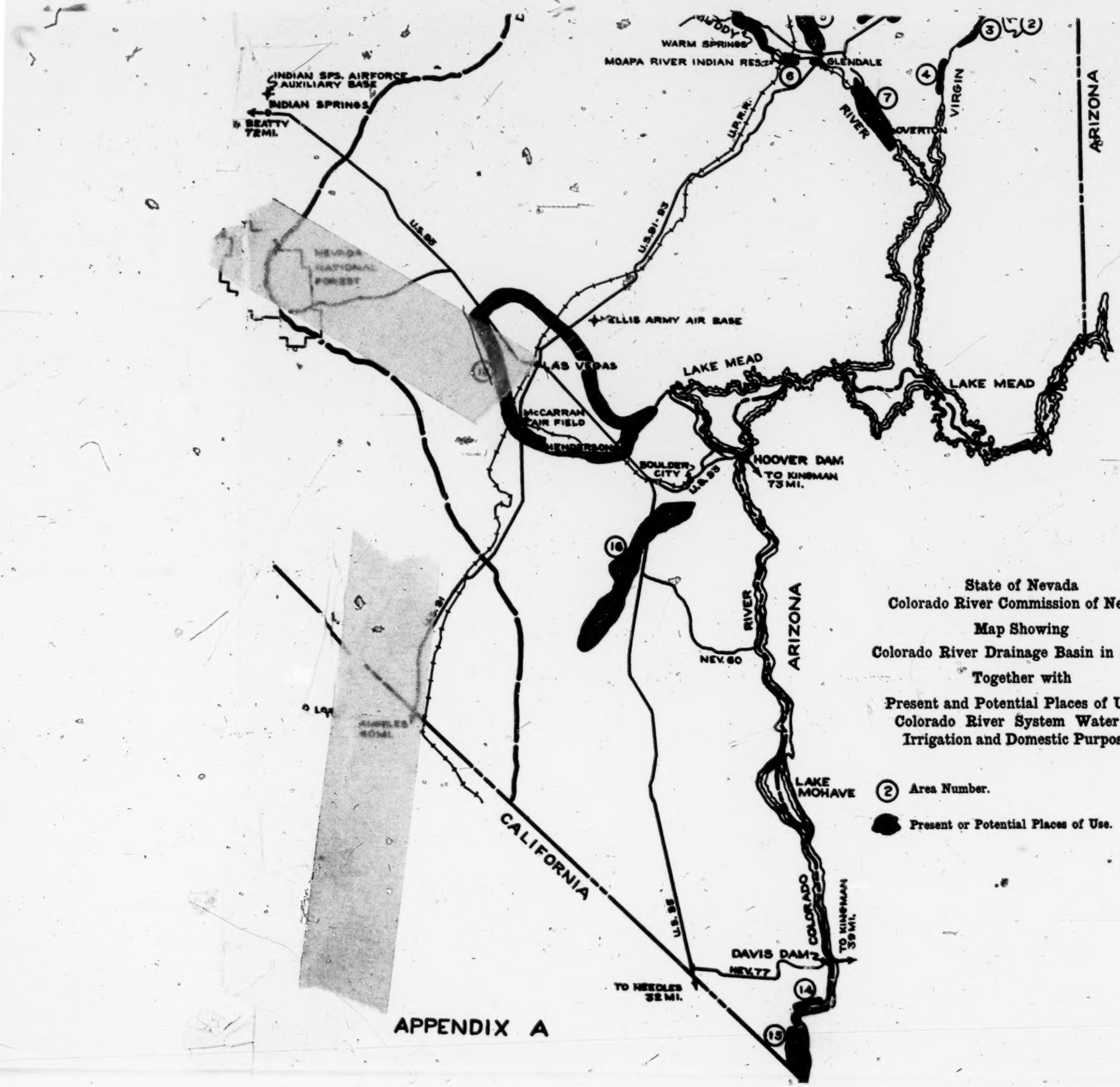
WILLIAM N. DUNSEATH,
Deputy Attorney General of Nevada,

JOHN W. BARRETT,
Deputy Attorney General of Nevada,
Counsel for State of Nevada.

DESCRIPTION OF AREAS DESIGNATED ON MAP IMMEDIATELY FOLLOWING:

Area No.	Name of area	Source of water
1	Mesquite	Virgin River
2	Bunkerville	Virgin River
3	Below Riverside Bridge	Virgin River
4	Below Riverside Bridge	Virgin River
5	Lower Meadow Valley Wash	Meadow Valley Wash and Muddy River
6	Upper Moapa Valley	Muddy River
7	Lower Moapa Valley	Muddy River
12	Las Vegas Valley	Lake Mead
14	Big Bend	Colorado River
15	Fort Mohave	Colorado River
16	Dry Lake	Lake Mead
17	Mormon Mesa	Virgin River
18	Toquop Wash	Virgin River
19	Upper Meadow Valley Wash	Meadow Valley Wash


NEVADA
ELKO
RENO
CARSON CITY
ELY
TONOPAH
ATOMIC ENERGY TESTING AREA
BEATTY
LAS VEGAS
LOCATION MAP
MILES
10 0 10 20
TO ELY 71MI.
U.S. 93
NEVA
SPRING VALLEY
PIOCHE
PANACA
NEV. 25
TO CEDAR CITY 63MI.
TO GLENDALE 108 MI.
CALIENTE
CLOVER CREEK
WASH
UTAH
NEVADA
TO CALIENTE 69MI.
U.S. 93
BASIN DIVIDE
DRAINAGE
VALLEY
MEADOW
TOQUOP WASH
TO ST. GEORGE UTAH 47MI.
LINCOLN
CLARK
MESQUITE
BUNKERVILLE
U.S. 91
RIVER
MUDDY



State of Nevada
Colorado River Commission of Nevada

Map Showing
Colorado River Drainage Basin in Nevada
Together with
Present and Potential Places of Use of
Colorado River System Water for
Irrigation and Domestic Purposes.

(2) Area Number.

Present or Potential Places of Use.

APPENDIX A

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JUN 17 1954

No. 10, Original

In the Supreme Court of the United States

October Term, [redacted] 1961

STATE OF ARIZONA, Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants,

UNITED STATES OF AMERICA, Intervener,

STATE OF NEVADA, Intervener.

MEMORANDUM OF NEVADA IN REPLY TO MEMORANDUM REQUESTING PRE-TRIAL CONFERENCE BY THE UNITED STATES OF AMERICA

W. T. MATHEWS,
Attorney General of Nevada,
ALAN BIBLE,
Special Assistant Attorney General of Nevada,
WILLIAM J. KANE,
Special Assistant Attorney General of Nevada,
GEO. P. ANNAND,
Deputy Attorney General of Nevada,
WILLIAM N. DUNSEATH,
Deputy Attorney General of Nevada,
JOHN W. BARRETT,
Deputy Attorney General of Nevada,
Counsel for State of Nevada.

No. 10, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1953

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

MEMORANDUM OF NEVADA IN REPLY TO MEMORANDUM REQUESTING PRE-TRIAL CONFERENCE BY THE UNITED STATES OF AMERICA

COMES Now the State of Nevada and for its Reply to the Memorandum Requesting Pre-Trial Conference by the United States of America, admits, denies and alleges as follows:

I

Answering Paragraph I of said Request, the State of Nevada states that its preceding motion for leave to intervene, as alleged on page 2 of said Request, was granted by the Court on June 1, 1954, but denies that the State of Arizona has filed an applicable response to Nevada's petition in Intervention in that the alleged

Response of Arizona constituted nothing more than a demurrer interposed in opposition to the granting of Nevada's motion.

Answering subparagraph three of Paragraph I, the State of Nevada admits that voluminous pleadings have been filed in this action together with numerous pages of appendices to such pleadings, and in this connection Nevada alleges that all of said pleadings and appendices so far filed were and are necessary and constitute indispensable allegations of fact to apprise the Court of each and every issue, the resolving of which is vitally necessary to enable the Court to determine and settle the respective rights of the parties to the action. However, Nevada alleges that notwithstanding the present status of the pleadings so far filed, insofar as Nevada is concerned none of the issues raised by it in its Petition of Intervention have been controverted or joined by any other party to the action save the State of California. The United States, at page 6 of its Request, states that no disposition having been made of the motion of Nevada for leave to intervene, reference to the issues presented by Nevada will not be reviewed. Nevada suggests that now, its motion to intervene being granted, material issues will be drawn between the United States and Nevada by most applicable pleadings on the part of Nevada. The same situation exists between Arizona and Nevada. Upon the granting of Nevada's motion to intervene, Arizona will of necessity be required to file an answer to Nevada's Petition of Intervention with Nevada's right to reply thereto, then only will the material issues be joined between Arizona and Nevada.

The State of Nevada further alleges that the States of New Mexico and Utah, signatories of the Colorado River Compact, are classed, in part, by and in the Compact as Lower Basin States. Article II, paragraphs (f) and (g) provide:

> (f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also

all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

Notwithstanding the fact that New Mexico and Utah unquestionably possess rights to the use of the waters of the Colorado River Stream System apportioned to the Lower Basin States and by reason thereof each said State is an indispensable party to this cause, neither of them has been made a party thereto nor has either petitioned the Court for leave to intervene. Nevada most respectfully suggests that unless and until New Mexico and Utah are made or become parties herein, vital issues pertaining to the apportionment of the waters to which all of the Lower Basin States are entitled under the Compact cannot be judicially fixed and determined. And Nevada has so alleged in Paragraphs XIII, XIV of the Petition of Intervention on Behalf of the State of Nevada filed herein December 21, 1953. Nevada suggests that all of the vitally necessary issues are not now sufficiently, or at all, joined to warrant a pre-trial conference.

II

Answering Paragraph II of the Request for Pre-Trial Conference of the United States, the State of Nevada denies that all the basic issues are as set forth therein and in this connection alleges that the basic issues are as set forth in Exhibit A of the Answer of California Defendants to Petition of Intervention on Behalf of the United States of America, designated Summary of the Controversy, and

the State of Nevada further alleges that said basic issues are interlocking and one or several issues cannot be decided independently of the other issues.

III

Answering subparagraph one of Paragraph III of the Request for Pre-Trial Conference of the United States, the State of Nevada alleges that the complexities of the litigation and numerous issues involved in this cause and the need for an early resolution of the controversy for the benefit of all parties and the Nation as a whole and the summary of the issues as set forth in California's Answer referred to in Paragraph II above, is accurate and concise based upon the pleadings of record at this time.

Answering subparagraph two of Paragraph III, the State of Nevada denies that "Antecedent to any resolution of the many and varied issues in this action must be a determination of the two basic propositions advanced by the State of California" and in this connection alleges that the matter is not at issue at the present time so as to warrant a pre-trial conference on any one or two issues and further, that the alleged one or two principal issues mentioned by the United States are so interrelated with other issues that it would not be judicious to attempt a determination of the said two basic issues.

IV

Answering Paragraph IV of the Request for Pre-Trial Conference of the United States, the State of Nevada denies that the reasons mentioned by the United States justify a pre-trial conference at this juncture of the proceeding and in this connection alleges that all the Lower Basin States are indispensable parties to this cause and until all such States are parties hereto and the issues fully joined between them and the United States, a pre-trial conference is premature.

Since the filing and service of the Memorandum Requesting Pre-Trial Conference by the United States, the Court, on June 1, 1954, appointed a Special Master to hear and report the future proceedings in the cause, including a resolving of the issues therein subject

to review by the Court. Nevada respectfully suggests that if a pre-trial conference before the Court, or a Justice thereof, is desirable or necessary, that it be not ordered until each, every and all the issues pertinent to the cause be drawn and that the Special Master participate therein.

W. T. MATHEWS,
Attorney General of Nevada,

ALAN BIBLE,
Special Assistant Attorney General of Nevada,

WILLIAM J. KANE,
Special Assistant Attorney General of Nevada,

GEO. P. ANNAND,
Deputy Attorney General of Nevada,

WILLIAM N. DUNSEATH,
Deputy Attorney General of Nevada,

JOHN W. BARRETT,
Deputy Attorney General of Nevada,
Counsel for State of Nevada.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUL 14 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 8, ORIGINAL

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

JOHN H. MOEUR
Chief Counsel,
Arizona Interstate Stream Commission
BURR SUTTER
Assistant Counsel,
Arizona Interstate Stream Commission
PERRY M. LING
Special Counsel,
Arizona Interstate Stream Commission
ROSS F. JONES
Attorney General of Arizona
HOWARD F. THOMPSON
Special Assistant Attorney General of Arizona

ANSWER OF COMPLAINANT STATE OF ARIZONA TO PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA.

IN THE

Supreme Court of the United States

October Term, 1953

No. 10, ORIGINAL

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

ANSWER OF COMPLAINANT STATE OF ARIZONA TO PETITION OF INTERVENTION ON BEHALF OF THE STATE OF NEVADA.

COMES now the State of Arizona, Complainant above named, and for its Answer to the Petition of Intervention on behalf of the State of Nevada says:

FIRST AFFIRMATIVE DEFENSE:

NEVADA IS ENTITLED TO THE ANNUAL DELIVERY OF NOT TO EXCEED 300,000 ACRE-FEET OF WATER FROM THE COLORADO RIVER SYSTEM IN ACCORDANCE WITH ITS CONTRACT OF JANUARY 3, 1944 WITH THE UNITED STATES.

1.

None of the parties to this cause has questioned the allocation to the State of Nevada of the beneficial consumptive use of 300,000 acre-feet of Colorado River System water as provided by the January 3, 1944 amendment of the March 30, 1942 contract between the United States of America and the State of Nevada.

2.

Section 5 of the Boulder Canyon Project Act (45 Stat. 1057) authorizes the Secretary of the Interior to contract for the storage of water in and delivery of water from the reservoir created by the dam authorized for construction by said Act and provides that:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

3.

Paragraph 4 of the January 3, 1944 contract between the United States of America and the State of Nevada provides:

> "Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River System, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power."

4.

The State of Nevada in its Motion for Leave to Intervene and in its tendered Petition of Intervention fails to allege that (a) it has or can obtain any contract from the United States of America for any greater quantity of water than that referred to in the aforementioned January 3, 1944 contract, and (b) that there is physically available for use within the State of Nevada any quantity of Colorado River System water, other than that possibly available from Lake Mead Storage, in excess of the 300,000 acre-feet referred to in said January 3, 1944 contract.

5.

The State of Nevada fails to allege that it has any fixed, definite plans for the use, within any reasonable time, of any greater quantity of Colorado River System water than that referred to in the said January 3, 1944 contract.

* * *

SECOND AFFIRMATIVE DEFENSE

COMPLAINANT HAS THE RIGHT TO THE BENFICIAL CONSUMPTIVE USE OF 2,800,000 ACRE-FEET PER ANNUM OF WATERS DELIVERED FROM STORAGE IN LAKE MEAD UNDER ITS CONTRACT WITH THE UNITED STATES DATED FEBRUARY 9, 1944.

1.

Paragraph 7 (a) of the February 9, 1944 contract between Arizona and the United States reads as follows:

"Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, or agencies or water users therein, will accept under this contract each calendar year from storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet."

Complainant refers to Exhibit "C" to the Bill of Complaint herein for the entire text of such contract.

2.

Prior to the execution of such contract Nevada approved and recommended the same and is now estopped to deny the validity or provisions thereof.

* * *

TRAVERSE

1.

Answering Paragraph I of said petition, Complainant admits the allegations of said paragraph except that with respect to the allegations of the last unnumbered sub-paragraph thereof, alleges that Complainant does not have sufficient knowledge or information to form a belief as to the truth thereof, and further alleges that such allegations are immaterial and irrelevant to any consideration or determination of the issues in this case.

2.

Complainant deems that the allegations contained in Paragraph II do not require any answer.

3.

Answering Paragraph III of said petition Complainant admits the allegations thereof except the allegation that Nevada is an indispensable party to this suit, which allegation Complainant expressly denies.

4.

Answering Paragraph IV Complainant admits that Nevada is a signatory state to the Colorado River Compact dated November 24, 1922 and a member state of the Lower Basin thereunder. Complainant alleges that the share of the waters to which Nevada is entitled is as set forth by the January 3, 1944 amendment of the March 30, 1942 contract between the United States and Nevada, and Complainant refers to and incorporates herein its First Affirmative Defense in this Answer. Complainant admits the allegations of the last sentence of Paragraph IV.

5.

Answering Paragraph V, Complainant admits the allegations thereof except the allegation that the State of Nevada has the right to the beneficial consumptive use of water under Article III (a) of the Compact of 539,100 acre-feet for present and future agricultural and domestic uses, which allegation Complainant denies and refers to and incorporates herein its First Affirmative Defense in this Answer.

6.

(a) Answering Paragraph VI (a) of said Petition, Complainant admits the allegations of the first sentence thereof. Complainant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said Paragraph VI (a), and therefore denies the same, and alleges that said

allegations are immaterial and irrelevant to any consideration or determination of the issues in this case.

(b) Answering Paragraph VI (b), Complainant alleges that it is without knowledge or information sufficient to form a belief as to either of the allegations thereof and therefore denies the same, and alleges that said allegations are immaterial and irrelevant to any consideration or determination of the issues in this case.

(c) Answering Paragraph VI (c) of said Petition, Complainant admits that the present uses set forth in the table therein contained are substantially correct. Complainant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said Paragraph VI (c), including the tabulations appearing therein, to form a belief as to the truth thereof, and therefore denies the same and alleges that said allegations are immaterial and irrelevant to any consideration or determination of the issues in this case.

7.

Answering Paragraph VII of said Petition, Complainant admits that the Defendants herein are presently claiming the right to the use of at least 5,362,000 acre-feet of water per annum, but denies the right of Defendants to use such quantity of water or any portion thereof except as set forth in the Bill of Complaint, Complainant's Reply to Defendants' Answer, Complainant's Answer to the United States Petition of Intervention, and this Answer; and admits that Complainant State of Arizona is presently claiming the right to the annual beneficial consumptive use of not less than 3,800,000 acre-feet of waters of the Colorado River System. Complainant concedes that Nevada has the right to the use of 300,000 acre-feet of said

waters per annum, but alleges that said right is as set forth in and limited by the contract between the United States and Nevada. Complainant refers to and incorporates herein its First Affirmative Defense in this Answer. Complainant denies all the allegations of Paragraph VII not heretofore expressly admitted.

8.

Answering Paragraph VIII of said Petition, Complainant admits the first sentence thereof, and alleges that the effect of Articles III (a) and III (b) of the Colorado River Compact are as set forth in the Bill of Complaint, Complainant's Reply to Defendants' Answer to the United States Petition of Intervention, and in this Answer. Complainant denies all of the allegations of Paragraph VIII not heretofore expressly admitted.

9.

Answering Paragraph IX of said Petition, Complainant admits the allegations thereof.

10.

Answering Paragraph X of said Petition, Complainant admits the allegations thereof, but alleges that the interpretation and construction of the documents referred to therein are as set forth in the Bill of Complaint, Complainant's Reply to Defendants' Answer, Complainant's Answer to the United States Petition of Intervention, and in this Answer.

11.

Answering Paragraph XI of said Petition, Complainant admits the allegations thereof, but alleges that the construction and interpretation of the documents referred to therein are as set forth in the Bill of Complaint, Complainant's Reply to Defendants' Answer,

Complainant's Answer to the United States Petition of Intervention, and in this Answer. Complainant further alleges that although no formal compact was ever entered into among the States of Arizona, California and Nevada, pursuant to provisions of Section 4 (a) of the Boulder Canyon Project Act, said States accepted and approved the apportionment suggested therein by entering into their various contracts with the United States of America for the use of waters of the Colorado River System, and said States are now estopped and precluded from denying the legal effect of such apportionment. Section 5 of the Boulder Canyon Project Act, among other things, provides:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to Paragraph (a) of Section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

12.

Answering Paragraph XII of said Petition, Complainant denies the allegations of the second sentence of the first unnumbered sub-paragraph thereof, and alleges that the rights of Nevada to the beneficial consumptive use of waters of the Colorado River System are as set forth in and limited by its contract with the United States, and Complainant refers to and incorporates herein its First Affirmative Defense in this Answer.

Complainant alleges that the allegations in the second unnumbered sub-paragraph of Paragraph XII are immaterial and irrelevant to any consideration or determination of the issues in this case.

13.

Answering Paragraph XIII of said Petition, Complainant denies all of the allegations thereof except as they conform to the allegations of the Bill of Complaint, Complainant's Reply to the Defendants' Answer, Complainant's Answer to the United States Petition of Intervention, and this Answer.

14.

Answering Paragraph XIV of said Petition, Complainant denies the allegations thereof except such as conform to the allegations of the Bill of Complaint, Complainant's Reply to Defendants' Answer, Complainant's Answer to the United States Petition of Intervention, and this Answer.

15.

Answering Paragraph XV of said Petition, Complainant alleges that the manner in which uses of Colorado River System water by Indians and Indian tribes is charged is immaterial and irrelevant to any consideration or determination of the issues in this case.

16.

Answering Paragraph XVI of said Petition, the Complainant denies the allegations thereof except such as conform to the allegations in the Bill of Complaint, Complainant's Reply to Defendants' Answer, Complainant's Answer to United States Petition of Intervention, and this Answer.

17.

Complainant deems that Paragraph XVII of said Petition does not require any answer.

18.

Answering Sub-paragraph 1 of Paragraph XVIII, of said Petition, Complainant admits that the waters apportioned by Article III (b) of the Colorado River Compact do not constitute surplus or excess water within the meaning of the Colorado River Compact or the Boulder Canyon Project Act. Complainant denies the remaining allegations of Sub-paragraph 1.

Answering Sub-paragraph 2 of Paragraph XVIII of said Petition, Complainant admits the allegations thereof.

Answering Sub-paragraph 3 of Paragraph XVIII of said Petition, Complainant alleges that evaporation losses from main-stream reservoirs in the Lower Basin are to be charged as set forth in the Bill of Complaint, Complainant's Reply to Defendants' Answer, and Complainant's answer to the United States Petition of Intervention.

19.

Answering Paragraph XIX of said Petition, Complainant alleges that the apportionment among Arizona, California and Nevada proposed by Congress in Section 4 (a) of the Boulder Canyon Project Act is fair, equitable and just as to each of said states.

20.

Answering Paragraph XX of said Petition, Complainant denies that California is entitled to an equitable share or any share of the waters apportioned by Article III (b) of the Colorado River Compact and alleges that the rights of California are as set forth in and limited by the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act.

21.

Answering Paragraph XXI of said Petition, Complainant denies that the economic interests of Nevada, Utah or New Mexico are vitally affected by the controversy between Arizona and California.

22.

Complainant deems that Paragraph XXII of said Petition does not require any answer.

23.

Answering Paragraph XXIII of said Petition, Complainant admits the allegations thereof, but alleges that there is no controversy involving Nevada, Utah or New Mexico which requires adjudication by this Court.

24.

Answering Paragraph XXIV of said Petition, Complainant denies that California is entitled to an equitable share or any share of the waters apportioned by Article III (b) of the Colorado River Compact, and alleges that the rights of California are as set forth and limited by the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act.

25.

Answering Paragraph XXV of said Petition, Complainant admits the allegations thereof.

26.

Complainant does not deem that Paragraph XXVI of said Petition requires any answer.

27.

Complainant denies each and every affirmative allegation of the Nevada Petition of Intervention not specifically admitted in this Answer.

WHEREFORE, Complainant prays as in its Complaint and Reply to the Answer of the Defendants.

JOHN H. MOEUR,
Chief Counsel,
Arizona Interstate Stream Commission

BURR SUTTER,
Assistant Counsel,
Arizona Interstate Stream Commission

PERRY M. LING,
Special Counsel,
Arizona Interstate Stream Commission

ROSS F. JONES,
Attorney General of Arizona

HOWARD F. THOMPSON,
Special Assistant to the Attorney General of Arizona

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JUL 15 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervenor.

STATE OF NEVADA,

Intervenor.

Motion to Join, as Parties, the States of Colorado, New Mexico, Utah and Wyoming.

(See List of Attorneys on Inside Cover)

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SUBJECT INDEX

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IN THE

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October Term, 1953

No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

Motion to Join, as Parties, the States of Colorado, New Mexico, Utah and Wyoming.

To the Honorable, The Chief Justice, and The Associate Justices of the Supreme Court of the United States:

Defendants State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, The City of Los Angeles, The City of San Diego and County of San Diego, by their

duly authorized attorneys, respectfully move this Court to order the joinder of the States of Colorado, New Mexico, Utah and Wyoming as additional parties to this action, and that, in furtherance of said order, a summons be issued to said states through their respective Governors and Attorneys General, directing them to appear as parties to this action at a time to be fixed in said summons, and that the Court direct that all pleadings filed herein be served on said officials.

This motion is made upon the grounds that each of said States is a necessary and indispensable party to this action, for the following reasons:

I.

The four absent States of Colorado, New Mexico, Utah and Wyoming are parties to the Colorado River Compact. Nevada sought leave to intervene in this case as a party to the Compact, and her motion was granted. The meaning and effect of the Colorado River Compact are in controversy in the present case. No decree determining the meaning and effect of that Compact, considered as a contract, can be fully effective in the absence of the other four parties to it. The principal issues of interpretation of the Colorado River Compact affecting the four absent States are stated in Defendants' Exhibit A, Summary of the Controversy, appended hereto and incorporated by reference as a part of this allegation as though here fully set out.

II.

Two of the absent States, New Mexico and Utah, have a dual interest with respect to the rights and obligations of parties to the Colorado River Compact, being States of the Upper Division (a status which they share with Colorado and Wyoming), as well as States which are in part within the Lower Basin (in common with Arizona, California and Nevada). Nevada sought leave to intervene not only as a party to the Compact but as an indispensable party to this action in her capacity as a Lower Basin State, and her motion was granted. The absent States of New Mexico and Utah, similarly to Nevada, are indispensable parties to the full resolution of the controversy among the States of the Lower Basin. As States lying in part within the Lower Basin, Utah and New Mexico participate in undetermined amounts in the right to beneficial consumptive use of a "common fund" of water available for use in the Lower Basin under the Colorado River Compact. No decree determining the rights of the present parties to this proceeding can be fully effective without the presence, as parties, of the other States having the right to participate in the use of said "common fund" of water.

III.

The four absent States, in like manner as Nevada and Arizona, are named as third party beneficiaries of the Statutory Compact between the United States and California evidenced by the Boulder Canyon Project Act and the California Limitation Act. The meaning and effect

of that Statutory Compact are in controversy in the present cause. No decree determining the rights and obligations of the United States and California as principals, and of Nevada and Arizona as two of the third-party beneficiaries of said Statutory Compact, can be fully effective in the absence of the other four beneficiaries. The principal issues of interpretation of that Statutory Compact which affect the four absent States are stated in Defendants' Exhibit A, Summary of the Controversy, appended hereto and incorporated by reference as a part of this allegation as though here fully set out.

IV.

The United States asserts claims "as against the parties to this cause," which are independent of, and adverse to, rights derived from or controlled by the Colorado River Compact. These claims of the United States affect all States in the Colorado River Basin, not merely the States of Arizona, California and Nevada. The absent States of Colorado, New Mexico, Utah and Wyoming are necessary and indispensable to the determination of these claims of the United States and of the effect thereof upon each of the seven States. The principal issues which arise from the claims of the United States and require the presence of all seven States are stated in Exhibit A, Summary of the Controversy, appended hereto and incorporated by reference as a part hereof as though here fully set out.

V.

This motion is based upon the records, files and pleadings herein.

Respectfully submitted,

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July 1954.

EXHIBIT A.

Summary of the Controversy

I. The Quantities of Water in Controversy.

The United States seeks to quiet title to rights to the use of water, consumptive and otherwise, "as against the parties to this cause," for federal purposes, in unstated amounts.

Arizona seeks to quiet title to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters of the Colorado River System (measured by "man-made depletion of the virgin flow of the main stream") and to enjoin California's right to permanently use any water in excess of approximately 3,800,000 acre-feet per annum (measured by "diversions less returns to the river"), that being the effect of (1) reducing 4,400,000 acre-feet of III(a) water by reservoir losses, and (2) denying California any permanent right to use excess or surplus waters.

California asserts a right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of the waters of the Colorado River System (measured by "diversions less returns to the river") under contracts with the United States, comprising 4,400,000 acre-feet of the waters apportioned by Article III(a) of the Colorado River Compact and 962,000 acre-feet per annum of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact.

Nevada seeks to quiet title to 539,100 acre-feet per annum (measured in part by both methods) of the beneficial consumptive uses apportioned by Article III(a) of

the Colorado River Compact, and to not less than a total of 900,000 acre-feet from all classes of water.

As the States differ in their definition of "beneficial consumptive use," their claims require restatement in terms of a common denominator in order to evaluate their effects. Thus:

The quantity to which Arizona seeks to quiet title, 3,800,000 acre-feet per annum, measured by the method she urges, "depletion of the virgin flow of the main stream occasioned by the activities of man," is equivalent to more than 5,000,000 acre-feet measured by consumption at the site of use, or "diversions less returns to the river," the standard established by the Boulder Canyon Project Act and asserted by California. The difference is due primarily to the fact that under Arizona's interpretation, the Compact deals with the virgin flow in the main stream only and that the use of water "salvaged by man" is not charged as a beneficial consumptive use, whereas under California's interpretation the Compact deals with the waters of the entire river system and such salvage is so charged.

Conversely, the aggregate of the California contracts, 5,362,000 acre-feet per annum, measured by "diversions less returns to the river," is equivalent to only about 4,500,000 acre-feet measured by "man-made depletion" (without charge for salvaged water). If Arizona's prayer should be granted, California's rights would be reduced to about 3,800,000 acre-feet per annum, measured by "diversions less returns to the river," or to about 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream."

The impact of Nevada's claims on those of the other states is not readily evaluated.

II. Ultimate Issues.

The ultimate issues, in the sense of the results sought by each party, may be grouped as follows:

The United States.

Does the United States have rights, "as against the parties to this cause, to the use of water in the Colorado River and its tributaries" in the following categories?

(1) for consumptive use of all projects in the Lower Basin, which it asserts independently of any rights claimed by the States in which such projects are located;

(2) to fulfill its obligations arising from international treaties and conventions; but this involves, with respect to the burden of the Mexican Water Treaty, the obligations as between the States of the Upper Division and the States of the Lower Division under Articles III(c) and III(d) of the Colorado River Compact, and involves also the effect of the so-called "escape clause" of Article 10 of that Treaty, which allows reduction in the guaranteed deliveries to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty;

(3) to fulfill all its contracts for the delivery of water and electric power, *i.e.*, with or in Arizona, California, and Nevada; but it alleges that the water available is not sufficient to satisfy all these obligations;

(4) to fulfill the Government's obligations to Indians and Indian Tribes; but this involves not only the questions of the magnitude and priorities of these claims but the questions of whether or not they are

chargeable under the Colorado River Compact to the Basin and State in which such uses are made, what the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and what rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins;

(5) to protect its interests in fish and wildlife, flood control and navigation; but such rights as it may have for these purposes may require the impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona and California, and again involves the question of accounting under the Compact; and

(6) for use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties to this cause" for these functions, such claims apply to all the waters of the Colorado River System in both Basins.

The adjudication of these claims of the United States requires consideration and resolution of: questions of fact, referred to later; the power of the United States to impound and dispose of water independently of rights derived from the States; the extent of its obligations under treaties and contracts; the impact and effect of its treaties upon rights of domestic water users; how its claims to the use of water shall be measured; the location, magnitude and priorities of Indian claims, and claims for other alleged federal purposes; the extent to which its rights and obligations are controlled by the Colorado River Compact; and the extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

Arizona.

Is Arizona entitled to a decree:

(1) Quieting title to 2,800,000 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, substantially all to be taken from the main stream, and measured in terms of man-made depletion of the virgin flow of the main stream?

(2) Quieting title to all of the 1,000,000 acre-feet per annum by which the Lower Basin is permitted to "increase its use" by Article III(b) of the Colorado River Compact (notwithstanding the decision of this Court in *Arizona v. California et al.*, 292 U. S. 341 (1934)), to the exclusion of the other States of the Lower Basin, all to be taken from the waters flowing in the Gila River, and to be measured in terms of man-made depletion of the virgin flow of the main stream?

(3) Reducing California's right to the uses apportioned by Article III(a) of the Colorado River Compact to approximately 3,800,000 acre-feet per annum, in consequence of reservoir losses?

(4) Enjoining California's right to receive and permanently use under its government contracts 962,000 acre-feet per annum, or any part thereof, in excess of 4,400,000 acre-feet per annum?

The determination of Arizona's claims involves: the questions of fact, later referred to; the standing of Arizona to seek a declaratory decree quieting title to a "block" of water for projects not yet constructed or authorized (about 1,600,000 acre-feet per annum of the 2,800,000 claimed from the main stream); the source of title to Arizona's claims to 2,800,000 acre-feet of III(a) water

and 1,000,000 acre-feet of III(b) water; the status of the uses on the Gila; the measurement of uses thereof and of the main stream; whether Arizona's status is that of a party to the Colorado River Compact or that of a third party beneficiary of the Statutory Compact between the United States and California, and if so, whether Arizona is bound by the interpretations placed thereon by the principal parties thereto in its formulation and administration; and the validity and effect of Arizona's water delivery contract with the United States.

Most of the questions posed by Arizona's claims revolve around the issue of whether the Gila River shall be treated as a part of the Colorado River System for all purposes, or shall receive special treatment in respect of (1) the identification of uses thereon with the waters referred to in Article III(b); (2) the corollary exemption of "rights which may now exist" on the Gila from any charge under Article III(a); and (3) the devaluation of the charge for beneficial consumptive uses from the quantity which is in fact consumed on the Gila (alleged by California to be about 2,000,000 acre-feet per annum) to the lesser quantity represented by the resulting depletion in the virgin flow of the main stream (alleged by Arizona to be about 1,000,000 acre-feet per annum).

California.

Are the contracts between the United States and the defendant public agencies of California for the storage and delivery of water valid and enforceable? Inasmuch as these contracts are, in terms, for permanent service but subject to the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, the issue is whether these enactments, considered together as a

Statutory Compact established by reciprocal legislation, authorize and permit the Secretary of the Interior to presently contract for the storage and delivery for permanent beneficial consumptive use in California, of 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) of the Colorado River Compact plus one-half of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact. The aggregate of these contracted quantities, subject to physical availability of the amounts of excess or surplus waters, which vary from year to year, is 5,362,000 acre-feet per annum.

The determination of California's claims involves: the questions of fact, later referred to; the extent to which rights have vested in both the United States and California under the Statutory Compact; whether Arizona is estopped by her previous conduct from asserting her present position; whether the limitation is net of reservoir losses; how California's uses shall be measured; whether California is chargeable with the use of salvaged water; the effect of California's appropriations, in their relation to the expressions "rights which may now exist" and "present perfected rights" in the Compact and Project Act; the definition of the Project Act term, "excess or surplus waters unapportioned by" the Colorado River Compact; the availability of such waters for permanent service; the intent of Congress with respect to the waters referred to in Article III(b); and the relation between California's contracts and the later agreements which the Secretary of the Interior has entered into with others.

Nevada.

Is Nevada entitled to a decree:

(1) Quieting title to 539,100 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact?

(2) Reserving for a future agreement the disposition of the use of the 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact, and preserving to Nevada an equitable share thereof?

(3) Assuring Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum, from all classes of water?

The determination of Nevada's claims requires the consideration and resolution of: the questions of fact later referred to; the questions of interpretation previously mentioned; the question of whether Nevada's share of III(a) waters has been determined or limited to 300,000 acre-feet per annum; whether, as to stored waters, Nevada may claim any quantity in excess of her contracts with the United States; and the source of title to her claims to 539,100 acre-feet per annum of III(a) water and not less than 900,000 acre-feet per annum from all sources.

Interests of Other States.

There remains the question whether the claims of the United States, Arizona, California, and Nevada can be effectively determined without concurrently determining the rights and obligations of Utah and New Mexico with respect to the waters of the Lower Basin, and the rights and obligations of those states and Colorado and Wyoming with respect to other waters of the Colorado

River System, to the extent that they are affected by the issues in controversy here.

In more detail, these "ultimate issues" depend upon the resolution of the following questions of fact and of the interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Mexican Water Treaty.

III. Factual Issues.

There are substantial issues of fact, raised by the pleadings to date. These include, but are not limited to, determination of:

(1) the investments and obligations undertaken by the parties in the construction of works and in the performance of their contracts with the United States, and the investments and obligations undertaken by the United States in reliance upon such contracts;

(2) the location, magnitude and priorities of the water rights necessary to enable the United States to perform its obligations to Indians and Indian Tribes pursuant to Article VII of the Compact;

(3) the requirements of the United States for (a) flood control, (b) navigation, (c) fish and wildlife, and (d) the other claims which it makes;

(4) the quantities of water physically available for beneficial consumptive use in the Lower Basin, assuming full use by the Upper Basin of its Compact apportionment, full regulation of the supply available to the Lower Basin, and full performance of the Mexican Water Treaty;

(5) the uses, present and potential, on the main stream and on each tributary, determined as of the place of use, as California contends is the proper method, and the effect of those uses in terms of man-made depletion of the virgin flow of the main stream, as Arizona contends is the proper method;

(6) the quantities of water "salvaged" by the activities of man, on the main stream and on the tributaries;

(7) reservoir losses, present and potential, gross and net;

(8) appropriative rights, priorities, and uses thereunder, on the main stream and tributaries;

(9) the extent and place of use of "rights which may now exist" and which, under Article III(a) of the Compact, are to be charged as uses of water apportioned by Article III(a), and of "rights which may now exist" in California, within the meaning of Section 4(a) of the Project Act; and

(10) the extent and place of use of "present perfected rights" protected by Article VIII of the Compact and directed by the Boulder Canyon Project Act to be satisfied in the operation and management of the Project.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty.

Questions relating primarily to Article III(a) of the Colorado River Compact include the following: Whether the Colorado River Compact deals only with the main stream or treats with Colorado River System waters wherever they may be found; whether the uses apportioned by Article III(a) to the Lower Basin are to be taken only from "water present in the main stream and

flowing at Lee Ferry," as Arizona contends, or from the tributaries as well, as California and Nevada contend; whether the 7,500,000 acre-feet referred to in Article III(a) is related to the 75,000,000 acre-feet referred to in Article III(d), as Arizona contends, or whether the latter figure includes excess or surplus waters unapportioned by the Compact, as California contends; by what process Arizona claims to have acquired an apportionment of 2,800,000 acre-feet of III(a) water, to be taken from the main stream; whether the apportionment of 7,500,000 acre-feet "per annum" is a statement of a maximum, or of an average, and, if the latter, over what period of years; the definition and measurement of "beneficial consumptive use"; the accounting for water added to and withdrawn from storage on the main stream and tributaries; whether the use of water salvaged by man on the main stream and tributaries is to be charged under the Compact; the definition of "rights which may now exist," which are to be included in charges to water apportioned by Article III(a) and their magnitude on the main stream and tributaries; the date to which this last expression refers; whether, in the absence of a compact among the Lower Basin States, the division of water among them is to be affected by appropriative rights, *i. e.*, "rights which may now exist"; whether Indian rights, and other federal claims to consumptive use, are included within that expression and are to be charged under the Compact; whether reservoir losses are chargeable as beneficial consumptive uses, and if so, their classification under the Compact and their relation to other uses.

Questions relating primarily to Article III(b) of the Colorado River Compact include the following: The questions relating to the definition of "beneficial consump-

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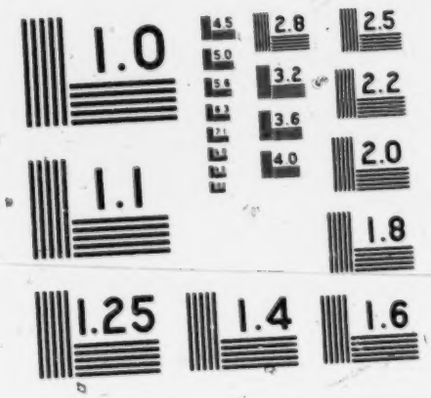

tive use" and "per annum" previously stated in connection with Article III(a); whether the "increase of use" permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as in Article III(a), as Arizona contends, or a license to acquire rights by appropriation and contracts under the Project Act in excess or surplus waters unapportioned by the Compact, as California contends; whether this right to increased use is identified solely with the water found flowing in the Gila River, as Arizona contends, or is identified with the first 1,000,000 acre-feet of increased use (above 7,500,000) per annum throughout the Lower Basin, as California and Nevada contend; whether this right is available to all five States of the Lower Basin, or to Arizona alone, as she contends (notwithstanding the decision of this Court in *Arizona v. California et al.*, 292 U. S. 341 (1934)); the status of uses in New Mexico on the Gila; the status of uses on other tributaries; and to what degree reservoir losses are chargeable to this increase of use. Reference to the relation of the Mexican Treaty burden to the uses under Article III(b) appears below in connection with Article III(c).

Questions relating primarily to Article III(c) of the Colorado River Compact include the following: Whether the waters to be supplied Mexico are "apportioned" thereby (this bears upon the determination of the meaning of the expression "excess or surplus waters unapportioned by" the Colorado River Compact, appearing in the Boulder Canyon Project Act, *infra*); whether, if the quantities in excess of those specified in Articles III(a) and III(b) are insufficient to supply the deliveries to Mexico, the burden, with respect to the Lower Basin, falls first upon the uses referred to in Article III(b), as California

contends, or upon those referred to in Article III(a), as Arizona contends; and the relation of the "escape clause" in Article 10 of the Treaty, which permits reduction in deliveries to Mexico in case of extraordinary drought in proportion to the reduction in consumptive uses in the United States. The relation of Article III(c) to Articles III(d) and III(a), with respect to the obligations of the Upper Division States, is referred to below in connection with Article III(d).

Questions relating primarily to Article III(d) of the Colorado River Compact include the following: As a corollary to one of the questions stated with reference to Article III(a), whether the 75,000,000 acre-feet referred to in Article III(d) is related to the 7,500,000 acre-feet apportioned by Article III(a) to the Lower Basin, or whether the 75,000,000 acre-feet include excess or surplus waters available for delivery to Mexico or use in the Lower Basin; the resulting effect on the obligation of the States of the Upper Division stated in Article III(c) to furnish additional water to meet the deficiency if surplus above the quantities specified in Articles III(a) and III(b) is insufficient to supply Mexico; and whether the Lower Basin is entitled to demand release of this 75,000,000 acre-feet notwithstanding the consequent inability of the Upper Basin to make beneficial consumptive use of 7,500,000 acre-feet per annum.

Questions relating primarily to Article III(e) of the Colorado River Compact include the following: Whether, if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required; whether, if Indian uses are not subject to the Colorado River Compact,

the United States may require release of water from reservoirs in the Upper Basin to satisfy them, in addition to the water which the States of the Upper Division are required to release in performance of Articles III(c) and III(d) of the Compact; so also with respect to the other federal claims asserted by the United States "as against the parties to this cause," for use of water in the Lower Basin.

Questions relating primarily to Articles III(f) and III(g) of the Colorado River Compact include the following: Whether the provisions in these articles with reference to a compact to be made after October 1, 1963, are permissive or mandatory; whether, in the light of the Statutory Compact, these provisions preclude the acquisition of rights in excess or surplus waters by appropriation and by contract with the United States in the interim, subject only to further apportionment as between Basins by such a future compact; and whether, in the event of competing interstate claims to such excess or surplus waters, in the absence of a compact apportioning them, priority of appropriation, including contracts with the United States, controls.

Questions relating to Article VII of the Colorado River Compact include the following: Whether uses by Indians are subject to the Colorado River Compact; whether Indian uses are chargeable under the Compact to the Basin and the State in which they are situate; if not, whether they are prior and superior to the apportionments made by the Compact, or are in competition with appropriations of others which are subject to the Compact; the location, magnitude, and asserted priority of Indian claims; their effect upon the quantities available to non-

Indian users under Articles III(a), III(b), etc.; their effect on the distribution of the Mexican Treaty burden; and their effect on the obligations of the States of the Upper Division under Articles III(c) and III(d).

Questions relating primarily to Article VIII of the Colorado River Compact include the following: The date to which the expression "present perfected rights" relates, *i.e.*, 1922, 1929, or some other date; the definition of said term; whether such definition is to be determined under the law of the State under which the right arose; whether the assurance against impairment extends to quality as well as quantity; the extent of these rights in each State; their relation to the expression "rights which may now exist," as used in Article III(a) of the Compact and Section 4(a) of the Project Act; and the impact of reservoir losses when present "perfected rights" attach to, and are satisfied from stored waters, pursuant to the direction in Article VIII.

Questions relating primarily to the Boulder Canyon Project Act and the resulting Statutory Compact between the United States and California include the following: Whether the alternative consent given in the Project Act to a Seven-State or Six-State Compact became final on June 25, 1929, in establishing the latter; whether Arizona could, or did, effectively ratify a Seven-State Compact thereafter; if so, whether the Statutory Compact authorized by the Project Act as a corollary to a Six-State Compact remains in effect; if it does, whether Arizona can claim the benefits of both; whether the Statutory Compact authorized contracts to be made with the California defendants for the permanent service (in addition to 4,400,000 acre-feet of III(a) waters) of one-half of

the excess or surplus waters unapportioned by the Compact for use in California; whether it included therein the waters referred to in Article III(b), or precluded California from use of such waters; whether the "excess or surplus," of which California may use one-half, is to be reckoned before or after deduction of the quantity required to be delivered to Mexico; the effect on California's right to "excess or surplus" of a future compact apportioning such waters; whether the limitation "for use in California" is net of reservoir losses, or is subject to further reduction in consequence of such losses; whether the definition of consumptive uses applicable to California is applicable to Arizona, and vice versa; whether California is free to make use of salvaged waters without charge under the Compact or the Limitation Act; the effect of California's appropriations; the meaning and effect of the reference to "rights which may now exist" in Section 4(a) of the Project Act; the extent of California's "present perfected rights" as referred to in Section 6 of the Project Act; whether by the Project Act, or otherwise, the shares of Nevada or Arizona in the waters of the Colorado River System have been determined; and the construction and effect of the water delivery contracts held by those States.

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No. 10, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

ANSWER OF THE STATE OF NEVADA TO PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

ANSWER OF THE STATE OF NEVADA TO PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES OF AMERICA

I

The State of Nevada admits the allegations contained in Paragraphs I to VIII, inclusive, of the Petition of Intervention of the United States.

II

Answering Paragraph IX of the petition of the United States, the State of Nevada admits the allegations contained therein; however, in connection with said admission, Nevada alleged in Paragraph VIII of its Petition of Intervention as follows: Article III(b) of said Compact provides that in addition to the apportionment of water in Article III(a) "the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one

million acre-feet per annum." No joint action by the Lower Basin States by negotiated Compact, Agreement, or by any other method has ever been initiated or taken to increase the beneficial consumptive use of said water within said basin by one million acre-feet or in any other amount whatsoever. The State of Nevada alleges that before any Lower Basin State can acquire the right to use said water, authoritative concerted action by the Lower Basin States must first be had giving the right to increase the beneficial consumptive use of water within said lower basin to the extent of an additional one million acre-feet of water as provided in said Article III(b), and that an equitable apportionment thereof to each of said States, by compact or agreement between such States, or by such other equitable action as will apportion said water is a necessary condition precedent. The State of Nevada further alleges that it is entitled to its equitable share in said water in addition to its equitable share of the water apportioned to the Lower Basin in Paragraph III(a). Nevada here reaffirms its position as alleged in said Paragraph.

III

The State of Nevada admits the allegations contained in Paragraphs X, XI, XII, XIII and XIV, of the Petition of the United States.

IV

Answering Paragraphs XV, XVI, and XVII of the Petition of the United States, the State of Nevada admits all and singular the allegations therein contained; however, in connection with said admission, Nevada alleges that the use of the waters of the Colorado River Stream System by the State of California is subject to and limited by the Colorado River Compact, the Project Act, and the Limitation Act to the quantities of water therein set forth, and that contracts between the United States of America and the various defendant contracting agencies are upon the express condition and with the express understanding that all rights under such contracts are subject to and governed by the Colorado River Compact, which Compact was approved in Section 13(c) of the Boulder Canyon Project Act.

V

Answering Paragraph XVIII of the Petition of the United States, the State of Nevada alleges that it is presently under a contract with the United States, dated January 3, 1944, amending a prior contract dated March 30, 1942, whereby the United States shall, from storage in Lake Mead, and pursuant to the provisions of the Colorado River Compact and the Boulder Canyon Project Act, deliver to the State each year not to exceed three hundred thousand (300,000) acre-feet of water, inclusive of all other waters diverted for use within the State from the Colorado River Stream System. That neither the said contract with the United States of June 30, 1942, nor the contract of January 3, 1944, contains any limitation whereby the right of the State of Nevada to contract for the delivery of additional water over and above three hundred thousand (300,000) acre-feet, and neither is said State by reason of said contracts prohibited from asserting claims to the right to use of the waters of the Colorado River Stream System over and above three hundred thousand (300,000) acre-feet of water.

VI

Answering Paragraph XIX of the Petition of the United States, the State of Nevada admits all and singular the allegations therein contained.

VII

Answering Paragraph XX of the Petition of the United States, the State of Nevada admits the allegations therein contained, but in connection with said admission, Nevada alleges that the Secretary of the Interior in the execution of said contracts providing annually eight million four hundred sixty-two thousand (8,462,000) acre-feet of water at Hoover Dam included therein the one million (1,000,000) acre-feet of water provided for in Article III(b) of the Colorado River Compact as and for an additional amount of water for beneficial consumptive use in the Lower Basin over and above the seven million five hundred thousand (7,500,000) acre-feet apportioned to the Lower Basin by Article III(a), without the necessity for such increase in the beneficial consumptive use of said III(b)

water being first shown and determined by all of the States in the Lower Basin by negotiated Compact, agreement or by any other method, whereby authoritative concerted action of said States increased such beneficial consumptive use in said Lower Basin and equitable apportionment thereof to each Lower Basin State being had in accordance with said Article III(b), and Nevada has so alleged in Paragraph VIII of its Petition of Intervention. Further, Nevada here refers to and adopts the allegations contained in Paragraph I, page 1, of its Reply to California's Answer to Nevada's Petition of Intervention.

VIII

Answering Paragraphs XXI, XXII, XXIII, XXIV, XXV, and XXVI, of the Petition of the United States, the State of Nevada admits all and singular the allegations therein contained.

IX

Answering Paragraph XXVII of the Petition of the United States, the State of Nevada admits the allegations therein contained, and in connection with said admission Nevada alleges that all the beneficial consumptive uses of the waters of the Colorado River Stream System by the Indians and Indian tribes under the United States as trustee or otherwise, is and shall be chargeable to the share thereof to which each State signatory of the Colorado River Compact is entitled; and Nevada further alleges that the appropriation and apportionment of said waters shall be had in strict accordance with the water law of appropriation of water for beneficial consumptive use in the particular State in which said use is had or contemplated, therefore, Nevada denies that the United States as trustee or otherwise is entitled to or obligated to annually divert as its water the acre-feet of water set forth in Appendix II, pages 56 and 57 of its Petition.

X

Answering Paragraph XXVIII of the Petition of the United States, the State of Nevada:

(a) Denies that any treaty to which the United States is a party authorizes it to make consumptive use of the water of the Colorado

River System for the support of fish or wildlife, and alleges that no treaty or federal statute has undertaken to authorize any officer of the United States so to do.

(b) Alleges that the United States, in Sections 8(a) and 13(b), (c), and (d) of the Boulder Canyon Project Act, subjected its rights and the rights of those claiming under it to the Colorado River Compact, and that these statutory provisions are applicable to uses for the benefit of fish and wildlife.

(c) Alleges that, pursuant to the provisions of Article IV of the Colorado River Compact, if any right exists to the consumptive use of water for the support of fish and wildlife, such right is subservient to the use and consumption of water for agricultural and domestic purposes and for the generation of electric energy, and that the rights of the State of Nevada are of these dominant categories.

(d) Alleges that if the United States has rights to the consumptive uses of water for the support of fish and wildlife, such uses are chargeable under the Colorado River Compact to the Basin and to the State in which such uses are situate, and, at least, to the extent that such rights existed on November 24, 1922, are chargeable under Article III(a) of the Compact.

XI

Answering Paragraph XXIX of the Petition of the United States, the State of Nevada admits all and singular the allegations therein contained.

XII

Answering Paragraph XXX of the Petition of the United States, the State of Nevada admits, denies and alleges with respect thereto as follows: Nevada admits that the United States alleges that it asserts claims against the parties to the Cause to the use of the waters of the Colorado River Stream System for the purposes of securing for its use, quantities of water to satisfy the maximum legal demands it is allegedly charged with and accountable for, but in connection with this said admission Nevada states that it has not sufficient knowledge or information upon which to base a belief and therefore denies all and singular the allegations therein contained, save and except,

(1) as its duty may arise in fulfilling its obligation to deliver to Mexico, water of said Stream System in accordance with the treaty provisions now existing between the United States and Mexico; (2) to fulfill its obligations in the delivery of water and power pursuant to valid contracts therefor; (3) as its obligations as trustee for the Indians and Indian Tribes with respect to the use of waters of the said Stream System may arise; however, such obligations as trustee for the use of such waters is to be exercised as set forth in Paragraph IX, ante this Answer; and (4) to exercise its lawful power with respect to flood control and navigation.

XIII

Answering Paragraph XXXI(a) of the Petition of the United States, the State of Nevada admits that the United States is a party to the treaties and international conventions alluded to in said paragraph, admits that the Colorado River Compact is a valid and binding covenant among all the States in the Colorado River Basin and alleges that its terms are also binding upon the United States and the Congress thereof. Nevada further admits that the Federal and State legislation mentioned in said paragraph are presumed to be valid enactments and enforceable, but that all of said acts are subject to interpretation and judicial determination. The State of Nevada states it has not sufficient knowledge or information upon which to base a belief, therefore denies that each and every contract entered into by the United States of America involving the use and delivery of water or electric power pursuant to its aforesaid compacts and legislation, are valid, binding covenants constituting the measure of the rights of the parties thereto.

It appears that Paragraph XXXI(b) does not require an answer on the part of the State of Nevada.

XIV

Answering Paragraph XXXII-(1)-(2)-(3) of the Petition of the United States, the State of Nevada here refers to and adopts as if here set forth verbatim, each and every allegation therein contained

as set forth in Paragraph XVIII, pages 19 and 20, of Petition of Intervention of the State of Nevada relating to (1) Article III(b) water, (2) the measure of beneficial use of water, and (3) the measure and the charge of evaporation losses.

XV

Answering Paragraph XXXIII of the Petition of the United States, the State of Nevada admits that the questions propounded by the State of Arizona and the correlative inquiries presented by the California defendants in their respective pleadings heretofore filed in this Cause and as now presented by the State of Nevada in its Petition of Intervention and in its Reply to the Answer of California defendants filed in this Cause, contain allegations and contentions of said parties and require the determination thereof by the Court. Nevada further alleges that the right to the use of the waters of the Colorado River Stream System sought by Nevada will not injure any right of the United States.

XVI

Answering Paragraph XXXIV of the Petition of the United States, the State of Nevada alleges that all of the rights of the United States involved in instant Cause, are subject to and controlled by the Colorado River Compact as particularly provided in Section 8 of the Boulder Canyon Project Act.

XVII

Answering Paragraph XXXV of the Petition of the United States, the State of Nevada admits that there is a conflict between the States of Arizona and California with respect to the validity and interpretation of the contracts therein mentioned with respect to the delivery of Colorado River water to the respective States, and in this connection Nevada alleges that in and by its Petition of Intervention and its Reply to the Answer of California filed herein, it makes claim to additional water of said river, which said claim is also in conflict with the claims of Arizona and California, all of which will

require interpretation by the Court. Nevada further alleges that it is and will be necessary for the Court to resolve the conflicts between the parties, including the United States, and determine the meaning and effect of the Colorado River Compact thereon.

XVIII

Answering Paragraph XXXVI of the Petition of the United States, the State of Nevada admits that there is a controversy between the States of Arizona and California with respect to the Colorado River Compact and the validity of the contract for the delivery of water between the United States and Arizona, the resolving of which will require the determination by the Court.

XIX

Answering Paragraph XXXVII of the Petition of the United States, the State of Nevada here refers to the allegations relating to the right to the use of the waters of the Colorado River Stream System by Indians and Indian tribes under the United States as trustee or otherwise, all as set forth in Paragraph IX, ante, this Answer.

WHEREFORE, The State of Nevada respectfully prays:

That the rights of the States of Arizona, California, Nevada, New Mexico, Utah and the United States of America in and to the use of the waters of the Colorado River Stream System be adjudicated, determined and forever set at rest.

W. T. MATHEWS,
Attorney General of Nevada,

ALAN BIBLE,
Special Assistant Attorney General of Nevada,

WILLIAM J. KANE,
Special Assistant Attorney General of Nevada,

GEO. P. ANNAND,
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. ~~8~~ 68, ORIGINAL ~~8~~ 59

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

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Arizona Interstate Stream Commission
BURR SUTTER
Assistant Counsel,
Arizona Interstate Stream Commission
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Attorney General of Arizona
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Special Assistant Attorney General of Arizona

RESPONSE OF COMPLAINANT STATE OF ARIZONA TO DEFENDANTS' MOTION TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH, AND WYOMING.

IN THE

Supreme Court of the United States

October Term, 1954

No. 10, ORIGINAL

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

RESPONSE OF COMPLAINANT STATE OF ARIZONA TO DEFENDANTS' MOTION TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH, AND WYOMING.

The Complainant, State of Arizona, by its duly authorized Attorneys, respectfully submits its response to the motion by Defendants to join as parties the States of Colorado, New Mexico, Utah and Wyoming.

1.

Responding to Paragraph I of said motion, Complainant admits that the four States of Colorado, New Mexico, Utah, and Wyoming are parties to the Colorado

River Compact, and admits that the State of Nevada sought leave to intervene in this case as a party, which motion was granted.

Complainant admits that the construction and interpretation of portions of the Colorado River Compact affecting the Lower Basin only are in controversy in the present case, but denies that any decree determining the meaning and effect of that Compact considered as a contract cannot be fully effective in the absence of the other States who are not presently parties to this litigation.

Complainant denies that the principal issues and interpretation of the Colorado River Compact are as stated in Defendants' Exhibit A, Summary of the Controversy, appended to said motion, which Exhibit is incorporated as a part of said motion. Complainant alleges that the true issues involved in the controversy are as hereinafter set forth, and in the other pleadings filed by Complainant.

2.

Complainant admits that the States of New Mexico and Utah are States of the Upper Division, as well as States which are, in part, within the Lower Basin, as those terms are defined by the Colorado River Compact. Complainant admits that Nevada sought leave to intervene, which motion was granted.

Complainant denies that the States of New Mexico and Utah are indispensable parties to a full resolution of a controversy between Complainant and Defendants.

Further responding to Paragraph II of said motion, Complainant denies all of the allegations thereof, except as admitted in this response, or in the other pleadings filed herein by Complainant.

3.

Responding to Paragraph III of said motion, Complainant denies all of the allegations thereof, except as admitted in this response or in the other pleadings filed herein by Complainant.

Complainant specifically denies the existence of a "Statutory Compact" between the United States and California or any compact precluding the State of Arizona from ratifying the Colorado River Compact, as alleged in Paragraph 13 of the Bill of Complaint.

4.

Responding to Paragraph IV of said motion, Complainant denies the allegations thereof, except as admitted in this response, or in other pleadings filed by Complainant.

5.

Responding to Paragraph V of said Motion, Complainant denies the joinder of the States of Colorado, New Mexico, Utah, and Wyoming is justified by the records, files and pleadings herein, and denies that such States are indispensable parties to a decree in this case. Complainant further denies that the States of Colorado, New Mexico, Utah and Wyoming, as States of the Upper Division, or as States of the Upper Basin, as defined by the Colorado River Compact, are proper, necessary or indispensable parties to this action. Further answering Paragraph V of said Motion Complainant alleges that the States of New Mexico and Utah, as States of the Lower Basin, have not made any application to intervene in this action and further alleges that they are not necessary or indispensable parties to any decree that may be entered herein. (See Nebraska vs. Wyoming, 295 U.S. 40 at Page 43) Com-

plainant further alleges that the only interests which the States of New Mexico or Utah, as States of the Lower Basin, might have in this litigation are as set forth in this Response, the Analysis of the Summary of the Controversy appended hereto and marked Exhibit 1, and the other pleadings filed by Complainant herein.

Complainant, as heretofore admitted, alleges that the State of Nevada, as a Lower Basin State, filed a motion for leave to intervene in this action, which motion has been granted by the Court, and Complainant further alleges that neither the States of New Mexico nor Utah, as States of the Lower Basin nor the States of Colorado, New Mexico, Utah or Wyoming, as States of the Upper Basin, or as States of the Upper Division, have moved to intervene in this action, and such States do not desire to become parties to this action and have indicated that they will resist this motion, as hereinafter alleged in Paragraph 13 hereof.

6.

Complainant alleges that this litigation involves only the right to the use of the waters of the Colorado River System after the same have passed Lee Ferry, Arizona, or which originate on tributaries in the Lower Basin. None of the parties to the action has questioned the right of the Upper Basin States to the beneficial consumptive use of 7,500,000 acre-feet of the waters of such system per annum as apportioned to the Upper Basin by the Colorado River Compact, subject to the obligations and burdens imposed by Article III (c) and Article III (d) of said Compact.

Complainant further alleges that although a majority of the waters of the Colorado River System are developed in the Upper Basin States, and the system drains a considerable area therein, this fact does not make

such States indispensable parties in an action to determine rights to use of waters below Lee Ferry, Arizona, the dividing point between the Upper and the Lower Basins.

7.

Complainant alleges that the principal uses by the State of New Mexico of Lower Basin waters are from the Gila River and its tributaries in New Mexico. Complainant further alleges that such uses are governed and controlled by a decree of the United States District Court for the District of Arizona, and such uses cannot be extended or increased without a modification of said decree.

8.

Complainant alleges that the only uses of waters from the Colorado River System by the State of Utah in the Lower Basin are on the Virgin River within that State, and the Complainant is presently engaged in negotiating a compact with that State respecting such uses, and that there is no dispute existing between Complainant and the State of Utah.

9.

Complainant alleges that in Section 7 (g) of the contract between Arizona and the United States, dated February 9, 1944, the full text of which appears as Exhibit C in the Bill of Complaint, Complainant expressly recognizes the rights of New Mexico and Utah to an equitable share of the waters apportioned by the Colorado River Compact to the Lower Basin, and also waters unapportioned by such Compact.

The Complainant further alleges that in its Bill of Complaint it recognizes the rights of the States of Utah and New Mexico to waters of the Lower Basin.

10.

In its Bill of Complaint Complainant set forth three basic issues which must be determined as follows:

(a) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?

(b) How is the beneficial consumptive use of water in the Lower Basin to be measured?

(c) How are evaporative losses from Lower Basin main-stream reservoirs to be charged?

Defendants have raised three additional questions; namely,

(a) Is Arizona a party to, and bound by, the Colorado River Compact?

(b) May Arizona place reliance upon and receive benefits under the California Limitation Act?

(c) The relative priorities of contracts between the United States and water users in the Lower Basin.

A determination of these questions can have no effect upon the States of Colorado, New Mexico, Utah, and Wyoming.

11.

As of October 11, 1948 the five Upper Basin States as defined by the Colorado River Compact, executed the Upper Colorado River Basin Compact. By said Compact the States of the Upper Basin:

(a) Apportioned the waters available to that Basin under the Colorado River Compact.

(b) Defined beneficial consumptive use in terms of man-made depletions as contended for by Complainant.

(c) Recognized the obligations imposed upon the States of the Upper Division by Article III of the Colorado River Compact, including the obligation to refrain from depleting the flow of the river at Lee Ferry below an aggregate of 75 million acre-feet for any period of ten consecutive years.

(d) Determined how reservoir losses should be charged in the Upper Basin.

(e) Agreed that the consumptive use of water by the United States of America or any of its agencies, instrumentalities, or wards shall be charged as a use by the State in which the use is made.

12.

The Upper Colorado River Basin Compact has been duly approved by the Legislatures of each of the Upper Basin States, and by the Congress of the United States. By the execution of such Compact the States of the Upper Basin have resolved and settled any differences or disputes which may, at any time, have existed among them, and any decision by this Court dealing solely with waters of the Colorado River System below Lee Ferry cannot, in any manner, affect the States of Colorado, New Mexico, Utah, and Wyoming.

13.

This action was commenced on August 13, 1952, when Complainant filed its Motion For Leave To File Bill of Complaint and Bill of Complaint, which motion was granted on January 19, 1953. Since that date Defendants have filed numerous and voluminous pleadings in this cause, and the present motion to join as parties the States of Colorado, New Mexico, Utah, and Wyoming is only dilatory in nature, and designed to prolong this controversy.

Any delay in determination of the issues in this case can benefit only the State of California and water users therein, since facilities for the diversion of water of the Colorado River System for use in California have already been constructed with a capacity far in excess of the 4,400,000 acre-feet per annum authorized by Boulder Canyon Project Act and California Limitation Act. Defendants are admittedly increasing their uses annually, and will thereby attempt to establish rights to the use of the Colorado River System water to the detriment of the other States within that river basin, and particularly, Complainant State of Arizona.

If the aforementioned States are made parties to this litigation such action will seriously interfere with, and perhaps prevent, the enactment of S. 1555, a measure now pending before the Congress of the United States to authorize the Upper Basin Storage Project.

The Upper Colorado River Commission, an Interstate Administrative Agency, duly created by Article VIII of the Upper Colorado River Basin Compact, has adopted a resolution finding that the Upper Division States are not indispensable parties in this action, and recommending that none of them seek leave to intervene herein, and that each resist any effort to be joined in this case.

On numerous occasions representatives of the State of California, and various other defendants herein, have stated that the only three points of dispute between Arizona and the Defendants are those set forth in the Bill of Complaint; some of such statements are as follows:

Excerpt from letter of Governor Earl Warren to Hon. Joseph C. O'Mahoney, Chairman, Senate Committee on Interior and Insular Affairs, in the Hearings before the Committee on Interior and Insular Affairs

of the United States Senate on S.75 and S.J.Res.4 in March, April and May, 1949, at Page 915 thereof:

"... The future economic development of the lower-basin States is dependent upon a solution of the existing controversy. The Secretary of the Interior has recognized the necessity of a determination of the controversy in order to permit further development of the water resources of the Colorado River by the Federal Government.

Since the major issues of the controversy are matters of law and not of fact, it is probable that within a comparatively short time the Court could hear legal arguments, without the necessity of taking extended evidence regarding facts, and adjudicate the rights of the affected States promptly. I believe the case could be presented to the Court on an agreed statement of facts. Each year that the settlement of the controversy is delayed means additional years of delay in the development of the areas affected by the use of Colorado River water."

Of similar import are:

A letter dated May 8, 1948 written by Governor Warren to Hon. Clifford P. Case, Chairman of the House Judiciary Sub-Committee, as contained in Hearings before Sub-Committee No. 4 of the Committee of the Judiciary House of Representatives on H.J. Res. 225, 226, 227, 236 and H.R. 4097 in May of 1948 at Page 5 thereof:

"... I am convinced that the litigation can be conducted and concluded within a brief time, because the essential issues between the States are legal in character, and do not involve interminable examination of factual evidence. I believe the case could be presented to the Court on an agreed statement of facts. To the end that there may be a speedy determination of the case, I am willing to undertake that in the event the Congress authorizes the suit, the proceedings on

California's part will be carried on with all possible promptness."

On the same page of the above hearings immediately following the letter to the Hon. Clifford P. Case, is another letter written by Governor Warren to Governor Sidney P. Osborn, Governor of Arizona, dated March 3, 1947. In this latter letter Governor Warren first urges that the controversy be arbitrated, and if arbitration is not possible or feasible, that:

"... I propose that we join in requesting Congress to authorize a suit to determine our rights in the Supreme Court of the United States, which suit could, if agreeable to the States, be submitted on an agreed statement of facts."

Mr. Northcutt Ely, Assistant Attorney General, appearing for Defendant State of California, in testifying in Hearings before Sub-Committee No. 4 of the Committee on the Judiciary of the House of Representatives on H.J. Res. 225, 226, 236 and H.R. 4097 in May of 1948, at Page 32 thereof said:

"... We believe the questions required to be presented to the Supreme Court in this matter are all questions of law, interpretation of statutes, compacts, and documents of which the Court would take judicial notice, and that no protracted case or hearing shall be involved, of the character of which the committee has probably heard or may be familiar, with respect to Kansas v. California, (sic), or Wyoming v. Colorado, and the other long-drawn-out adjudication cases."

Again, Mr. Ely testifying before the same Committee in the same report, on Page 93 thereof said:

"We feel that the decision can be obtained within a reasonable time, within 1 or 2 years at the most; that the taking of protracted testimony will not be required and that the submission of this case to the Court will advance the cause of the development of the Colorado River. We see no advantage in delay.

Nothing is gained by risking these great works without a decision. The decision is inevitable. The day of shortage must come; let the decision be made before new works are built, not after."

Again, Mr. Ely, testifying at the same hearing (testimony appearing on Page 94) in answer to a question propounded by Mr. Case, Chairman of the Committee, said:

"Mr. Chairman, if the Court should resolve the questions of interpretation involved in these three points, the engineers may very readily calculate the quantities of water available for each State under them if the rules are once laid down by the Supreme Court. The engineers can apply them without particular difficulty."

Also note Mr. Ely's testimony, appearing on Page 35 of Hearings before a Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate, 80th Congress on S.J. Res. 145, May 10-14 inclusive, 1948:

"As far as California is concerned, the issues which must necessarily be litigated are the three which are directly translatable into large quantities of water: The issue of consumptive use versus depletion, the status of the waters referred to in Article III (b) of the compact, and the issue of the accountability for reservoir losses. All of these are matters of statutory construction or of contract law insofar as the California Limitation Act constitutes a contract between the Congress and the Legislature of California. None of them present issues of fact or require the taking of testimony. California pledges her energies to an expeditious conclusion of the case."

Of like import there is testimony of Mr. Ely given before various Committees of Congress on Hearings on the Central Arizona Project Bill, S.75, and the so-called Suit Resolutions. Again and again Mr. Ely has

taken this same position, to wit: The only questions involved in this controversy are questions of law that can be determined by the Court without the necessity of the taking of any testimony whatsoever and that they are susceptible of an early determination.

The same position was taken by Mr. Arvin B. Shaw, Jr., Assistant Attorney General of California, in a brief filed by Mr. Shaw, Fred M. Hauser, Attorney General of California, and Allen Bible, Attorney General of Nevada, in Hearings on S.J. Res. 145 before a Sub-Committee of the Committee on Interior and Insular Affairs of the United States Senate, 80th Congress, May, 1948 at Page 69. Quoting from that brief:

> "From the foregoing review of major issues, it is plain that the matters in controversy between Arizona and California are characteristically legal issues, being matters of interpretation of statutes and other documents. The ordinary factual elements, relating to quantities and time of flow and use, which characterize most water litigation are not to any substantial extent critical factors.
>
> It is true that some of the classic interstate water cases, such as Kansas v. Colorado (206 U.S.46); Wyoming v. Colorado (259 U.S.419), and Nebraska v. Wyoming and Colorado (325 U.S.589), have required 10 years or more to reach adjudication. This has occurred because in each of these cases it was necessary for the court to appoint a master to take voluminous testimony relative to factual issues. In the case at bar it is not considered that a master need be appointed, nor that factual testimony be taken. The issues which are significant as between California and Arizona can be adjudicated, upon briefs and oral argument, within a reasonable time, not to exceed 2 to 3 years."

Mr. James H. Howard, Chief Counsel for Defendant Metropolitan Water District of Southern California, testifying before the Sub-Committee of the Committee

on Interior and Insular Affairs of the United States Senate, 80th Congress, on S.J. Res. 145, Page 105, said:

> "... It will not be necessary, in the proposed litigation, to determine any factual issues. Both Arizona and California use the same basic water-supply figures as determined by the United States Bureau of Reclamation and the United States Geological Survey. The differences between the States arise out of the application of the contract documents referred to, as they affect the distribution between the States, of water available for use in the lower basin."

Again, Mr. Howard, testifying before the Sub-Committee of the Committee on Interior and Insular Affairs of the United States Senate, 80th Congress, on S.J. Res. 145, on page 120, in answer to a question by Senator O'Mahoney as to whether any of the other basin states would be involved, stated:

> "So far as California is concerned, I think the answer is 'No'. We have no controversy with any of the upper basin States that requires any judicial examination. Both Arizona and California concede that Nevada should have 300,000 acre-feet, and a fraction of excess or surplus, whatever it is, set up in their contract. So that the real battle is between Arizona and California."

And again, on the same page, in reply to another question by Senator O'Mahoney, Mr. Howard stated:

> "As Mr. Ely said a few minutes ago, so far as California is concerned, we would be willing to submit the case to the court on a stipulation just calling for the interpretation of those three issues."

These are but a few of the many instances in which officials and representatives of Defendants, particularly Defendant State of California, have urged a submission of this controversy to the Supreme Court in order that it might be determined and have stated that such controversy could be acted on by the Court without

the necessity of taking any factual evidence and that such controversy involved only the three questions of law that Complainant in its Complaint asked the Court to resolve, to wit:

1. Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?
2. How is the beneficial consumptive use of water apportioned by the Compact to be measured?
3. How are evaporation losses from Lower Basin main-stream reservoirs to be charged?

WHEREFORE, Complainant prays that the Motion of Defendants to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming, be denied.

Respectfully submitted,

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Arizona Interstate Stream Commission

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EXHIBIT 1.

ANALYSIS OF SUMMARY OF CONTROVERSY SET FORTH AS EXHIBIT A TO DEFENDANTS' MOTION TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH, AND WYOMING.

As Exhibit A to the foregoing motion Defendants have appended a so-called "Summary of the Controversy"; an analysis of this summary discloses the questions raised by the Defendants are primarily questions of law, immaterial to the determination of the issues presented in the pleadings, and can have no effect whatsoever upon the States of Colorado, New Mexico, Utah, and Wyoming. Complainant will analyze the various questions raised under the same headings as presented in the "Exhibit A" to the motion.

I. The Quantities of Water in Controversy

Under this heading Defendants have set forth what they claim to be the quantity of water sought by the various parties to this action. The sole question involved is a definition of "beneficial consumptive use". This is purely a legal question affecting only the States of the Lower Basin, since the Upper Basin States have, by the Upper Colorado River Compact, agreed that this phrase should be defined in terms of man-made depletions.

II. Ultimate Issues

Under this heading Defendants have attempted to set forth what they consider to be ultimate issues involved in this action. None of the statements made, or the questions propounded, can have any effect whatsoever upon the States of Colorado, New Mexico, Utah, and Wyoming.

The United States

As far as the Upper Basin States are concerned, all of the matters raised by Defendants under this subheading have been settled and resolved by Article VII of the Upper Colorado River Basin Compact, wherein it was agreed that the consumptive use of water by the United States of America, or any of its agencies, instrumentalities, or wards, shall be charged as a use by the State in which the use is made.

Arizona

The question of Arizona's right to quiet title to 3,800,000 acre-feet per annum of the beneficial consumptive use of waters of the Colorado River Water System, subject to the availability thereof under the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act, cannot, in any manner, affect the States of Colorado, New Mexico, Utah, and Wyoming, since Arizona's claims are based solely on waters of the River System below Lee Ferry, Arizona. Any dispute between Arizona, California, and Nevada as to waters below Lee Ferry cannot, in any manner, involve the States of Colorado, New Mexico, Utah, and Wyoming.

California

The validity and enforceability of the contracts between the United States and the Defendants' public agencies of California for the storage and delivery of water requires only an interpretation of those contracts and related documents. Such contracts are for the delivery of water from storage in Lake Mead below Lee Ferry, Arizona, and cannot involve any of the States of the Upper Division.

Nevada

The claims of the State of Nevada relate only to waters of the Colorado River Water System apportioned to the Lower Basin, and a determination of such claims cannot, in any way, affect the States of the Upper Division.

Interests of Other States

The principal issues presented by the pleadings heretofore filed herein are as follows:

(a) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?

(b) How is the beneficial consumptive use of water in the Lower Basin to be measured?

(c) How are evaporative losses from Lower Basin main-stream reservoirs to be charged?

(d) Is Arizona a party to, and bound by, the Colorado River Compact?

(e) May Arizona place reliance upon and receive benefits under the California Limitation Act?

(f) The relative priorities of contracts between the United States and water users in the Lower Basin.

As heretofore pointed out, none of these issues can affect the States of Colorado, New Mexico, Utah, and Wyoming. Certainly these states have no interest in the waters apportioned by Article III (b) of the Colorado River Compact since that apportionment was expressly made to the Lower Basin. By the Upper Colorado River Compact the aforementioned States have agreed that the term "beneficial consumptive use" is to be measured by man-made depletions, and they have also agreed how reservoir losses are to be charged in the Upper Basin.

Whether Arizona is a party to, and bound by, the Colorado River Compact does not concern the aforementioned States since they have all ratifed such Compacts and are bound thereby. Whether Arizona may rely upon the California Limitation Act is immaterial in respect to Defendants' motion since the States of Colorado, New Mexico, Utah, and Wyoming are expressly named as beneficiaries in such Act. The relative priority of the various contracts between the United States and water users in the Lower Basin do not concern the States in question since such contracts deal solely with waters in the River System below Lee Ferry, Arizona.

III. Factual Issues

None of the issues raised under this sub-heading concern the States of Colorado, New Mexico, Utah, and Wyoming, since they relate to waters of the Lower Basin, or to questions which have been resolved and agreed upon in the Upper Colorado River Basin Compact.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty

All of the questions raised by Defendants under this sub-heading are purely legal in character. This is obvious from the very language used in the sub-heading itself. These questions can be resolved and determined by an interpretation and construction of the various documents mentioned, and such interpretation can, in no way, involve the States of Colorado, New Mexico, Utah, and Wyoming.

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No. 10, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

REPLY OF THE STATE OF NEVADA TO ANSWER OF THE STATE OF ARIZONA TO PETITION OF INTERVENTION OF THE STATE OF NEVADA

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Attorney General of Nevada,
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Deputy Attorney General of Nevada,
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Deputy Attorney General of Nevada,
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COMES NOW the State of Nevada and for its Reply to the Answer of the State of Arizona, admits, denies and alleges as follows:

ANSWER TO FIRST AFFIRMATIVE DEFENSE.

I

Answering the First Affirmative Defense of the Complainant as set forth on Page 1 of its Answer, the State of Nevada admits that pursuant to its Contract with the United States, dated January 3, 1944, it is entitled to the delivery of water not to exceed 300,000 acre-feet of water from the Colorado River Stream System. However, in connection with said admission, Nevada alleges there is no

provision in said contract nor any statute pertaining thereto that prohibits Nevada from making claim for additional quantities of the waters of the Colorado River Stream System.

II

Answering Paragraphs Nos. 1, 2, 3, 4 and 5 of Complainant's First Affirmative Defense, the State of Nevada alleges that on or about the 15th day of February, 1954, the Complainant filed in this Cause and interposed the Response of Complainant to Motion of State of Nevada for Leave to Intervene, and was directed against Nevada's Motion for Leave to Intervene and Nevada's Petition of Intervention filed therewith; that said Response in its entirety was and is in words and figures verbatim with the words and figures of said Paragraphs 1, 2, 3, 4 and 5; that said Response was submitted to and before this Court on and before June 1, 1954; that on said June 1, 1954, this Court entered its Order permitting the State of Nevada to intervene in said Cause upon the grounds and basis theretofore set forth in its said Petition to Intervene; that the said Paragraphs Nos. 1, 2, 3, 4 and 5 of Complainant's Answer have been overruled and therefore the said allegations do not now constitute a valid pleading of an affirmative defense.

ANSWER TO SECOND AFFIRMATIVE DEFENSE

III

Answering Paragraph 1 of Complainant's Second Affirmative Defense, the State of Nevada admits all and singular the allegations therein contained.

IV

Answering Paragraph 2 of Complainant's Second Affirmative Defense, the State of Nevada denies all and singular the allegations therein contained.

TRAVERSE

I

Answering Paragraph 3 of Complainant's Traverse, the State of

Nevada alleges that this Court in its Order of June 1, 1954, permitting Nevada to intervene in this Cause thereby ruled that Nevada was and is an indispensable party herein.

II

Answering Paragraph 4 of Complainant's Traverse, the State of Nevada alleges that it is entitled to the share of water set forth in its contracts with the United States of June 30, 1942, as amended by its contract of January 3, 1944, but in this connection it further alleges that there is nothing in said contracts limiting the right of the State of Nevada to contract for the delivery of additional water over and above the 300,000 acre-feet, and neither is said State by reason of said contracts prohibited from asserting claims to the right to use of the waters of the Colorado River System over and above 300,000 acre-feet of water.

III

Answering Paragraph 8 of Complainant's Traverse, the State of Nevada denies that the effect of Articles III(a) and III(b) of the Colorado River Compact are as set forth in Arizona's pleadings.

IV

Answering Paragraph 10 of Complainant's Traverse, the State of Nevada denies that the interpretation and construction of the documents referred to in Nevada's Petition are as set forth in Arizona's pleadings.

V

Answering Paragraph 11 of Complainant's Traverse, the State of Nevada denies that the construction and interpretation of the documents referred to in Nevada's Petition are as set forth in Arizona's pleadings.

The State of Nevada admits that no formal Compact was ever entered into among the States of Arizona, California and Nevada pursuant to the provisions of Section 4(a) of the Boulder Canyon Project Act, but denies that the State of Nevada accepted and approved the apportionment suggested therein by entering into its contract with the United States.

VI

Answering Paragraph 12 of Complainant's Tarverse, the State of Nevada denies that its rights to the beneficial consumptive use of the waters of the Colorado River System are as set forth in and limited by its contract with the United States.

VII

Referring to Paragraphs Nos. 13, 14, 15, 16, 18, 19, 20, 21, 22, 23 and 24 of Complainant's Traverse, the State of Nevada states that the matters and things therein alleged are drawn in issue by its Petition in Intervention and by reason thereof said paragraphs require no reply herein.

WHEREFORE, the State of Nevada reiterates its Prayer set forth in its Petition of Intervention heretofore filed in this Cause.

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Counsel for State of Nevada.

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October Term, 1961

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Defendants.

UNITED STATES OF AMERICA,

Intervenor.

STATE OF NEVADA,

Intervenor.

APPENDIXES TO THE ANSWER.
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APPENDIX No. 29.

Treaty Series 994

UTILIZATION OF WATERS OF THE COLORADO AND TIJUANA RIVERS AND OF THE RIO GRANDE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND MEXICO

Signed at Washington February 3, 1944.

AND PROTOCOL

Signed at Washington November 14, 1944.

Ratification advised by the Senate of the United States of America April 18, 1945, subject to certain understandings.

Ratified by the President of the United States of America November 1, 1945, subject to said understandings.

Ratified by Mexico October 16, 1945.

Ratifications exchanged at Washington November 8, 1945.

Proclaimed by the President of the United States of America November 27, 1945, subject to said understandings.

Effective November 8, 1945.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a treaty between the United States of America and the United Mexican States relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, was signed by their respective Plenipotentiaries in Washington on February 3, 1944, and a protocol supplementary to the said treaty was signed by their respective Plenipotentiaries in Washington on November 14, 1944, the originals of which treaty and protocol, in English and Spanish languages, are word for word as follows:

[The Spanish is omitted.]

The Government of the United States of America and the Government of the United Mexican States: animated by the sincere spirit of cordiality and friendly cooperation which happily governs the relations between them; taking into account the fact that Articles VI and VII of the Treaty of Peace, Friendship and Limits between the United States of America and the United Mexican States signed at Guadalupe Hidalgo on February 2, 1848,[1] and Article IV of the boundary treaty between the two countries signed at the City of Mexico December 30, 1853[2] regulate the use of the waters of the Rio

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[1] [Treaty Series 207; 9 Stat. 922; 18 Stat. (pt. 2, Public Treaties) 492.]

[2] [Treaty Series 208; 10 Stat. 1031; 18 Stat. (pt. 2, Public Treaties) 503.]

Grande (Rio Bravo) and the Colorado River for purposes of navigation only; considering that the utilization of these waters for other purposes is desirable in the interest of both countries, and desiring, moreover, to fix and delimit the rights of the two countries with respect to the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof, have resolved to conclude a treaty and for this purpose have named as their plenipotentiaries:

The President of the United States of America:

Cordell Hull, Secretary of State of the United States of America, George S. Messersmith, Ambassador Extraordinary and Plenipotentiary of the United States of America in Mexico, and Lawrence M. Lawson, United States Commissioner, International Boundary Commission, United States and Mexico; and.

The President of the United Mexican States:

Francisco Castillo Nájera, Ambassador Extrordinary and Plenipotentiary of the United Mexican States in Washington, and Rafael Fernández MacGregor, Mexican Commissioner, International Boundary Commission, United States and Mexico; who, having communicated to each other their respective Full Powers and having found them in good and due form, have agreed upon the following:

I—Preliminary Provisions.

ARTICLE 1.

For the purposes of this Treaty it shall be understood that:

(a) "The United States" means the United States of America.

(b) "Mexico" means the United Mexican States.

(c) "The Commission" means the International Boundary and Water Commission, United States and Mexico, as described in Article 2 of this Treaty.

(d) "To divert" means the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stock-raising or industrial purposes whether this be done by means of dams across the channel, partition weirs, lateral intakes, pumps or any other methods.

(e) "Point of diversion" means the place where the act of diverting the water is effected.

(f) "Conservation capacity of storage reservoirs" means that part of their total capacity devoted to holding and conserving the water for disposal thereof as and when required, that is, capacity additional to that provided for silt retention and flood control.

(g) "Flood discharges and spills" means the voluntary or involuntary discharge of water for flood control as distinguished from releases for other purposes.

(h) "Return flow" means that portion of diverted water that eventually finds it way back to the source from which it was diverted.

(i) "Release" means the deliberate discharge of stored water for conveyance elsewhere or for direct utilization.

(j) "Consumptive use" means the use of water by evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream.

(k) "Lowest major international dam or reservoir" means the major international dam or reservoir situated farthest downstream.

(l) "Highest major international dam or reservoir" means the major international dam or reservoir situated farthest upstream.

ARTICLE 2.

The International Boundary Commission established pursuant to the provisions of the Convention between the United States and Mexico signed in Washington March 1, 1889[1] to facilitate the carrying out of the principles contained in the Treaty of November 12, 1884[2] and to avoid difficulties occasioned by reason of the changes which take place in the beds of the Rio Grande (Rio Bravo) and the Colorado River shall hereafter be known as the International Boundary and Water Commission, United States and Mexico, which shall continue to function for the entire period during which the present Treaty shall continue in force. Accordingly, the term of the Convention of March 1, 1889 shall be considered to be indefinitely extended, and the Convention of November

[1][Treaty Series 232; 26 Stat. 1512.]

[2][Treaty Series 226; 24 Stat. 1011.]

21, 1900[3] between the United States and Mexico regarding that Convention shall be considered completely terminated.

The application of the present Treaty, the regulation and exercise of the rights and obligations which the two Governments assume thereunder, and the settlement of all disputes to which its observance and execution may give rise are hereby entrusted to the International Boundary and Water Commission, which shall function in conformity with the powers and limitations set forth in this Treaty.

The Commission shall in all respects have the status of an international body, and shall consist of a United States Section and a Mexican Section. The head of each Section shall be an Engineer Commissioner. Wherever there are provisions in this Treaty for joint action or joint agreement by the two Governments, or for the furnishing of reports, studies or plans to the two Governments, or similar provisions, it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Relations of Mexico.

The Commission or either of its two Sections may employ such assistants and engineering and legal advisers as it may deem necessary. Each Government shall accord diplomatic status to the Commissioner, designated by

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[3][Treaty Series 244; 31 Stat. 1936.]

the other Government. The Commissioner, two principal engineers, a legal adviser, and a secretary, designated by each Government as members of its Section of the Commission, shall be entitled in the territory of the other country to the privileges and immunities appertaining to diplomatic officers. The Commission and its personnel may freely carry out their observations, studies and field work in the territory of either country.

The jurisdiction of the Commission shall extend to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary, each Section of the Commission retaining jurisdiction over that part of the works located within the limits of its own country. Neither Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent of the Government of the latter. The works constructed, acquired or used in fulfillment of the provisions of this Treaty and located wholly within the territorial limits of either country, although these works may be international in character, shall remain, except as herein otherwise specifically provided, under the exclusive jurisdiction and control of the Section of the Commission in whose country the works may be situated.

The duties and powers vested in the Commission by this Treaty shall be in addition to those vested in the International Boundary Commission by the Convention of March 1, 1889 and other pertinent treaties and agree-

ments in force between the two countries except as the provisions of any of them may be modified by the present Treaty.

Each Government shall bear the expenses incurred in the maintenance of its Section of the Commission. The joint expenses, which may be incurred as agreed upon by the Commission, shall be borne equally by the two Governments.

ARTICLE 3.

In matters in which the Commission may be called upon to make provision for the joint use of international waters, the following order of preferences shall serve as a guide:

1. Domestic and municipal uses.
2. Agriculture and stock-raising.
3. Electric power.
4. Other industrial uses.
5. Navigation.
6. Fishing and hunting.
7. Any other beneficial uses which may be determined by the Commission.

All of the foregoing uses shall be subject to any sanitary measures or works which may be mutually agreed upon by the two Governments, which hereby agree to give preferential attention to the solution of all border sanitation problems.

II—Rio Grande (Rio Bravo).

ARTICLE 4.

The waters of the Rio Grande (Rio Bravo) between Fort Quitman, Texas and the Gulf of Mexico are hereby allotted to the two countries in the following manner:

A. To Mexico:

(a) All of the waters reaching the main channel of the Rio Grande (Rio Bravo) from the San Juan and Alamo Rivers, including the return flow from the lands irrigated from the latter two rivers.

(b) One-half of the flow in the main channel of the Rio Grande (Rio Bravo) below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.

(c) Two-thirds of the flow reaching the main channel of the Rio Grande (Rio Bravo) from the Conchos, San Diego San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, subject to the provisions of subparagraph (c) of paragraph B of this Article.

(d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam.

B. To the United States:

(a) All of the waters reaching the main channel of the Rio Grande (Rio Bravo) from the Pecos and Devils Rivers, Goodenough Spring, and Alamito, Terlingua, San Felipe and Pinto Creeks.

(b) One-half of the flow in the main channel of the Rio Grande (Rio Bravo) below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.

(c) One-third of the flow reaching the main channel of the Rio Grande (Rio Bravo) from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, provided that this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet (431,721,000 cubic meters) annually. The United States shall not acquire any right by the use of the waters of the tributaries named in this subparagraph, in excess of the said 350,000 acre-feet (431,721,000 cubic meters) annually, except the right to use one-third of the flow reaching the Rio Grande (Rio Bravo) from said tributaries, although such one-third may be in excess of that amount.

(d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam.

In the event of extraordinary drought or serious accident to the hydraulic systems on the measured Mexican tributaries, making it difficult for Mexico to make available the run-off of 350,000 acre-feet (431,721,000 cubic meters) annually, allotted in subparagraph (c) of paragraph B of this Article to the United States as the minimum contribution from the aforesaid Mexican tributaries, any deficiencies existing at the end of the aforesaid five-year cycle shall be made up in the following five-year cycle with water from the said measured tributaries.

Whenever the conservation capacities assigned to the United States in at least two of the major international reservoirs, including the highest major reservoir, are filled with waters belonging to the United States, a cycle of five years shall be considered as terminated and all debits fully paid, whereupon a new five-year cycle shall commence.

ARTICLE 5.

The two Governments agree to construct jointly, through their respective Sections of the Commission, the following works in the main channel of the Rio Grande (Rio Bravo):

I. The dams required for the conservation, storage and regulation of the greatest quantity of the annual flow of the river in a way to ensure the continuance of existing uses and the development of the greatest number of feasible projects, within the limits imposed by the water allotments specified.

II. The dams and other joint works required for the diversion of the flow of the Rio Grande (Rio Bravo).

One of the storage dams shall be constructed in the section between Santa Helena Canyon and the mouth of the Pecos River; one in the section between Eagle Pass and Laredo, Texas (Piedras Negras and Nuevo Laredo in Mexico); and a third in the section between Laredo and Roma, Texas (Nuevo Laredo and San Pedro de Roma in Mexico). One or more of the stipulated dams may be omitted, and others than those enumerated may be built, in either case as may be determined by the Commission, subject to the approval of the two Governments.

In planning the construction of such dams the Commission shall determine:

(a) The most feasible sites;

(b) The maximum feasible reservoir capacity at each site;

(c) The conservation capacity required by each country at each site, taking into consideration the amount and regiment of its allotment of water and its contemplated uses;

(d) The capacity required for retention of silt;

(e) The capacity required for flood control.

The conservation and silt capacities of each reservoir shall be assigned to each country in the same proportion as the capacities required by each country in such reservoir for conservation purposes. Each country shall have an undivided interest in the flood control capacity of each reservoir.

The construction of the international storage dams shall start within two years following the approval of the respective plans by the two Governments. The works

shall begin with the construction of the lowest major international storage dam, but works in the upper reaches of the river may be constructed simultaneously. The lowest major international storage dam shall be completed within a period of eight years from the date of the entry into force of this Treaty.

The construction of the dams and other joint works required for the diversion of the flows of the river shall be initiated on the dates recommended by the Commission and approved by the two Governments.

The cost of construction, operation and maintenance of each of the international storage dams shall be prorated between the two Governments in proportion to the capacity allotted to each country for conservation purposes in the reservoir at such dam.

The cost of construction, operation and maintenance of each of the dams and other joint works required for the diversion of the flows of the river shall be prorated between the two Governments in proportion to the benefits which the respective countries receive therefrom, as determined by the Commission and approved by the two Governments.

ARTICLE 6.

The Commission shall study, investigate, and prepare plans for flood control works, where and when necessary, other than those referred to in Article 5 of this Treaty, on the Rio Grande (Rio Bravo) from Fort Quitman, Texas to the Gulf of Mexico. These works may include levees along the river, floodways and grade-control structures, and works for the canalization, rectification and artificial channeling of reaches of the river. The Commission shall report to the two Governments the works

which should be built, the estimated cost thereof, the part of the works to be constructed by each Government, and the part of the works to be operated and maintained by each Section of the Commission. Each Government agrees to construct, through its Section of the Commission, such works as may be recommended by the Commission and approved by the two Governments. Each Government shall pay the costs of the works constructed by it and the costs of operation and maintenance of the part of the works assigned to it for such purpose.

ARTICLE 7.

The Commission shall study, investigate and prepare plans for plants for generating hydro-electric energy which it may be feasible to construct at the international storage dams on the Rio Grande (Rio Bravo). The Commission shall report to the two Governments in a Minute the works which should be built, the estimated cost thereof, and the part of the works to be constructed by each Government. Each Government agrees to construct, through its Section of the Commission, such works as may be recommended by the Commission and approved by the two Governments. Both Governments, through their respective Sections of the Commission, shall operate and maintain jointly such hydro-electric plants. Each Government shall pay half the cost of the construction, operation and maintenance of such plants, and the energy generated shall be assigned to each country in like proportion.

ARTICLE 8.

The two Governments recognize that both countries have a common interest in the conservation and storage of waters in the international reservoirs and in the maxi-

mum use of these structures for the purpose of obtaining the most beneficial, regular and constant use of the waters belonging to them. Accordingly, within the year following the placing in operation of the first of the major international storage dams which is constructed, the Commission shall submit to each Government for its approval, regulations for the storage, conveyance and delivery of the waters of the Rio Grande (Rio Bravo) from Fort Quitman, Texas to the Gulf of Mexico. Such regulations may be modified, amended or supplemented when necessary by the Commission, subject to the approval of the two Governments. The following general rules shall severally govern until modified or amended by agreement of the Commission, with the approval of the two Governments:

(a) Storage in all major international reservoirs above the lowest shall be maintained at the maximum possible water level, consistent with flood control, irrigation use and power requirements.

(b) Inflows to each reservoir shall be credited to each country in accordance with the ownership of such inflows.

(c) In any reservoir the ownership of water belonging to the country whose conservation capacity therein is filled, and in excess of that needed to keep it filled, shall pass to the other country to the extent that such country may have unfilled conservation capacity, except that one country may at its option temporarily use the conservation capacity of the other country not currently being used in any of the upper reservoirs; provided that in the event of flood discharge or spill occurring while one country is using the conservation capacity of the other,

all of such flood discharge or spill shall be charged to the country using the other's capacity, and all inflow shall be credited to the other country until the flood discharge or spill ceases or until the capacity of the other country becomes filled with its own water.

(d) Reservoir losses shall be charged in proportion to the ownership of water in storage. Releases from any reservoir shall be charged to the country requesting them, except that releases for the generation of electrical energy, or other common purpose, shall be charged in proportion to the ownership of water in storage.

(e) Flood discharges and spills from the upper reservoirs shall be divided in the same proportion as the ownership of the inflows occurring at the time of such flood discharges and spills, except as provided in subparagraph (c) of this Article. Flood discharges and spills from the lowest reservoir shall be divided equally, except that one country, with the consent of the Commission, may use such part of the share of the other country as is not used by the latter country.

(f) Either of the two countries may avail itself, whenever it so desires, of any water belonging to it and stored in the international reservoirs, provided that the water so taken is for direct beneficial use or for storage in other reservoirs. For this purpose the Commissioner of the respective country shall give appropriate notice to the Commission, which shall prescribe the proper measures for the opportune furnishing of the water.

ARTICLE 9.

(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.

(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information.

(c) Consumptive uses from the main stream and from the unmeasured tributaries below Fort Quitman shall be charged against the share of the country making them.

(d) The Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.

(e) The Commission shall have the power to authorize temporary diversion and use by one country of water belonging to the other, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.

(f) In case of the occurrence of an extraordinary drought in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought.

(g) Each country shall have the right to divert from the main channel of the river any amount of water, including the water belonging to the other country, for the purpose of generating hydro-electric power, provided that such diversion causes no injury to the other country and does not interfere with the international generation of power and that the quantities not returning directly to the river are charged against the share of the country making the diversion. The feasibility of such diversions not existing on the date this Treaty enters into force shall be determined by the Commission, which shall also determine the amount of water consumed, such water to be charged against the country making the diversion.

(h) In case either of the two countries shall construct works for diverting into the main channel of the Rio Grande (Rio Bravo) or its tributaries waters that do not

at the time this Treaty enters into force contribute to the flow of the Rio Grande (Rio Bravo) such water shall belong to the country making such diversion.

(i) Main stream channel losses shall be charged in proportion to the ownership of water being conveyed in the channel at the times and places of the losses.

(j) The Commission shall keep a record of the waters belonging to each country and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions, and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gaging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record. The information with respect to the diversions and consumptive uses on the unmeasured tributaries shall be furnished to the Commission by the appropriate Section. The cost of construction of any new gaging stations located on the main channel of the Rio Grande (Rio Bravo) shall be borne equally by the two Governments. The operation and maintenance of all gaging stations or the cost of such operation and maintenance shall be apportioned between the two Sections in accordance with determinations to be made by the Commission.

III—Colorado River.

ARTICLE 10.

Of the waters of the Colorado River, from any and all sources, there are allotted to Mexico:

(a) A guaranteed annual quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) to be delivered in accordance with the provisions of Article 15 of this Treaty.

(b) Any other quantities arriving at the Mexican points of diversion, with the understanding that in any year in which, as determined by the United States Section, there exists a surplus of waters of the Colorado River in excess of the amount necessary to supply uses in the United States and the guaranteed quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) annually to Mexico, the United States undertakes to deliver to Mexico, in the manner set out in Article 15 of this Treaty, additional waters of the Colorado River system to provide a total quantity not to exceed 1,700,000 acre-feet (2,096,931,000 cubic meters) a year. Mexico shall acquire no right beyond that provided by this subparagraph by the use of the waters of the Colorado River system, for any purpose whatsoever, in excess of 1,500,000 acre-feet (1,850,234,000 cubic meters) annually.

In the event of extraordinary drought or serious accident to the irrigation system in the United States, thereby making it difficult for the United States to deliver the guaranteed quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) a year, the water allotted to Mexico under subparagraph (a) of this Article will be reduced in the same proportion as consumptive uses in the United States are reduced.

ARTICLE 11.

(a) The United States shall deliver all waters allotted to Mexico wherever these waters may arrive in the bed of the limitrophe section of the Colorado River, with the exceptions hereinafter provided. Such waters shall be made up of the waters of the said river, whatever their origin, subject to the provisions of the following paragraphs of this Article.

(b) Of the waters of the Colorado River allotted to Mexico by subparagraph (a) of Article 10 of this Treaty, the United States shall deliver, wherever such waters may arrive in the limitrophe section of the river, 1,000,000 acre-feet (1,233,489,000 cubic meters) annually from the time the Davis dam and reservoir are placed in operation until January 1, 1980 and thereafter 1,125,000 acre-feet (1,387,675,000 cubic meters) annually, except that, should the main diversion structure referred to in subparagraph (a) of Article 12 of this Treaty be located entirely in Mexico and should Mexico so request, the United States shall deliver a quantity of water not exceeding 25,000 acre-feet (30,837,000 cubic meters) annually, unless a larger quantity may be mutually agreed upon, at a point, to be likewise mutually agreed upon, on the international land boundary near San Luis, Sonora, in which event the quantities of 1,000,000 acre-feet (1,233,489,000 cubic meters) and 1,125,000 acre-feet (1,387,675,000 cubic meters) provided hereinabove as deliverable in the limitrophe section of the river shall be reduced by the quantities to be delivered in the year concerned near San Luis, Sonora.

(c) During the period from the time Davis dam and reservoir are placed in operation until January 1, 1980,

the United States shall also deliver to Mexico annually, of the water allotted to it, 500,000 acre-feet (616,745,000 cubic meters), and thereafter the United States shall deliver annually 375,000 acre-feet (462,558,000 cubic meters), at the international boundary line, by means of the All-American Canal and a canal connecting the lower end of the Pilot Knob Wasteway with the Alamo Canal or with any other Mexican canal which may be substituted for the Alamo Canal. In either event the deliveries shall be made at an operating water surface elevation not higher than that of the Alamo Canal at the point where it crossed the international boundary line in the year 1943.

(d) All the deliveries of water specified above shall be made subject to the provisions of Article 15 of this Treaty.

ARTICLE 12.

The two Governments agree to construct the following works:

(a) Mexico shall construct at its expense, within a period of five years from the date of the entry into force of this Treaty, a main diversion structure below the point where the northernmost part of the international land boundary line intersects the Colorado River. If such diversion structure is located in the limitrophe section of the river, its location, design and construction shall be subject to the approval of the Commission. The Commission shall thereafter maintain and operate the structure at the expense of Mexico. Regardless of where such diversion structure is located, there shall simultaneously be constructed such levees, interior drainage facilities and other works, or improvements to existing works, as in the opinion of the Commission shall be necessary to

protect lands within the United States against damage from such floods and seepage as might result from the construction, operation and maintenance of this diversion structure. These protective works shall be constructed, operated and maintained at the expense of Mexico by the respective Sections of the Commission, or under their supervision, each within the territory of its own country.

(b) The United States, within a period of five years from the date of the entry into force of this Treaty, shall construct in its own territory and at its expense, and thereafter operate and maintain at its expense, the Davis storage dam and reservoir, a part of the capacity of which shall be used to make possible the regulation at the boundary of the waters to be delivered to Mexico in accordance with the provisions of Article 15 of this Treaty.

(c) The United States shall construct or acquire in its own territory the works that may be necessary to convey a part of the waters of the Colorado River allotted to Mexico to the Mexican diversion points on the international land boundary line referred to in this Treaty. Among these works shall be included: the canal and other works necessary to convey water from the lower end of the Pilot Knob Wasteway to the international boundary, and, should Mexico request it, a canal to connect the main diversion structure referred to in subparagraph (a) of this Article, if this diversion structure should be built in the limitrophe section of the river, with the Mexican system of canals at a point to be agreed upon by the Commission on the international land boundary near San Luis, Sonora. Such works shall be constructed or acquired and operated and maintained by the United States Section at the expense of Mexico. Mexico shall also pay the costs of any sites or rights of way required for such works.

(d) The Commission shall construct, operate and maintain in the limitrophe section of the Colorado River, and each Section shall construct, operate and maintain in the territory of its own country on the Colorado River below Imperial Dam and on all other carrying facilities used for the delivery of water to Mexico, all necessary gaging stations and other measuring devices for the purpose of keeping a complete record of the waters delivered to Mexico and of the flows of the river. All data obtained as to such deliveries and flows shall be periodically compiled and exchanged between the two Sections.

ARTICLE 13.

The Commission shall study, investigate and prepare plans for flood control on the Lower Colorado River between Imperial Dam and the Gulf of California, in both the United States and Mexico, and shall, in a Minute, report to the two Governments the works which should be built, the estimated cost thereof, and the part of the works to be constructed by each Government. The two Governments agree to construct, through their respective Sections of the Commission, such works as may be recommended by the Commission and approved by the two Governments, each Government to pay the costs of the works constructed by it. The Commission shall likewise recommend the parts of the works to be operated and maintained jointly by the Commission and the parts to be operated and maintained by each Section. The two Governments agree to pay in equal shares the cost of joint operation and maintenance, and each Government agrees to pay the cost of operation and maintenance of the works assigned to it for such purpose.

ARTICLE 14.

In consideration of the use of the All-American Canal for the delivery to Mexico, in the manner provided in Articles 11 and 15 of this Treaty, of a part of its allotment of the waters of the Colorado River, Mexico shall pay to the United States:

(a) A proportion of the costs actually incurred in the construction of Imperial Dam and the Imperial Dam-Pilot Knob section of the All-American Canal, this proportion and the method and terms of repayment to be determined by the two Governments, which, for this purpose, shall take into consideration the proportionate uses of these facilities by the two countries, these determinations to be made as soon as Davis dam and reservoir are placed in operation.

(b) Annually, a proportionate part of the total costs of maintenance and operation of such facilities, these costs to be prorated between the two countries in proportion to the amount of water delivered annually through such facilities for use in each of the two countries.

In the event that revenues from the sale of hydro-electric power which may be generated at Pilot Knob become available for the amortization of part or all of the costs of the facilities named in subparagraph (a) of this Article, the part that Mexico should pay of the costs of said facilities shall be reduced or repaid in the same proportion as the balance of the total costs are reduced or repaid. It is understood that any such revenue shall not become available until the cost of any works which may be constructed for the generation of hydro-electric power at said location has been fully amortized from the revenues derived therefrom.

ARTICLE 15.

A. The water allotted in subparagraph (a) of Article 10 of this Treaty shall be delivered to Mexico at the points of delivery specified in Article 11, in accordance with the following two annual schedules of deliveries by months, which the Mexican Section shall formulate and present to the Commission before the beginning of each calendar year:

Schedule I.

Schedule I shall cover the delivery, in the limitrophe section of the Colorado River, of 1,000,000 acre-feet (1,233,489,000 cubic meters) of water each year from the date Davis dam and reservoir are placed in operation until January 1, 1980 and the delivery of 1,125,000 acre-feet (1,387,675,000 cubic meters) of water each year thereafter. This schedule shall be formulated subject to the following limitations:

With reference to the 1,000,000 acre-feet (1,233,489,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 600 cubic feet (17.0 cubic meters) nor more than 3,500 cubic feet (99.1 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 1,000 cubic feet (28.3 cubic meters) nor more than 3,500 cubic feet (99.1 cubic meters) per second.

With reference to the 1,125,000 acre-foot (1,387,675,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 675 cubic feet (19.1 cubic meters) nor more than 4,000 cubic feet (113.3 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 1,125 cubic feet (31.9 cubic meters) nor more than 4,000 cubic feet (113.3 cubic meters) per second.

Should deliveries of water be made at a point on the land boundary near San Luis, Sonora, as provided for in Article 11, such deliveries shall be made under a sub-schedule to be formulated and furnished by the Mexican Section. The quantities and monthly rates of deliveries under such sub-schedule shall be in proportion to those specified for Schedule I, unless otherwise agreed upon by the Commission.

Schedule II.

Schedule II shall cover the delivery at the boundary line by means of the All-American Canal of 500,000 acre-feet (616,745,000 cubic meters) of water each year from the date Davis dam and reservoir are placed in operation until January 1, 1980 and the delivery of 375,000 acre-feet (462,558,000 cubic meters) of water each year thereafter. This schedule shall be formulated subject to the following limitations:

With reference to the 500,000 acre-foot (616,745,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 300 cubic feet (8.5 cubic meters) nor more than 2,000 cubic feet (56.6 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 500 cubic feet (14.2 cubic meters) nor more than 2,000 cubic feet (56.6 cubic meters) per second.

With reference to the 375,000 acre-foot (462,558,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 225 cubic feet (6.4 cubic meters) nor more than 1,500 cubic feet (42.5 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 375 cubic feet (10.6 cubic meters) nor more than 1,500 cubic feet (42.5 cubic meters) per second.

B. The United States shall be under no obligation to deliver, through the All-American Canal, more than 500,000 acre-feet (616,745,000 cubic meters) annually from the date Davis dam and reservoir are placed in operation until January 1, 1980 or more than 375,000 acre-feet (462,558,000 cubic meters) annually thereafter. If, by mutual agreement, any part of the quantities of water specified in this paragraph are delivered to Mexico

at points on the land boundary otherwise than through the All-American Canal, the above quantities of water and the rates of deliveries set out under Schedule II of this Article shall be correspondingly diminished.

C. The United States shall have the option of delivering, at the point on the land boundary mentioned in subparagraph (c) of Article 11, any part or all of the water to be delivered at that point under Schedule II of this Article during the months of January, February, October, November and December of each year, from any source whatsoever, with the understanding that the total specified annual quantities to be delivered through the All-American Canal shall not be reduced because of the exercise of this option, unless such reduction be requested by the Mexican Section, provided that the exercise of this option shall not have the effect of increasing the total amount of scheduled water to be delivered to Mexico.

D. In any year in which there shall exist in the river water in excess of that necessary to satisfy the requirements in the United States and the guaranteed quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) allotted to Mexico, the United States hereby declares its intention to cooperate with Mexico in attempting to supply additional quantities of water through the All-American Canal as such additional quantities are desired by Mexico, if such use of the Canal and facilities will not be detrimental to the United States, provided that the delivery of any additional quantities through the All-American Canal shall not have the effect of increasing the total scheduled deliveries to Mexico. Mexico hereby declares its intention to cooperate with the United States by attempting to curtail deliveries of water through the All-American

Canal in years of limited supply, if such curtailment can be accomplished without detriment to Mexico and is necessary to allow full use of all available water supplies, provided that such curtailment shall not have the effect of reducing the total scheduled deliveries of water to Mexico.

E. In any year in which there shall exist in the river water in excess of that necessary to satisfy the requirements in the United States and the guaranteed quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) allotted to Mexico, the United States Section shall so inform the Mexican Section in order that the latter may schedule such surplus water to complete a quantity up to a maximum of 1,700,000 acre-feet (2,096,931,000 cubic meters). In this circumstance the total quantities to be delivered under Schedules I and II shall be increased in proportion to their respective total quantities and the two schedules thus increased shall be subject to the same limitations as those established for each under paragraph A of this Article.

F. Subject to the limitations as to rates of deliveries and total quantities set out in Schedules I and II, Mexico shall have the right upon thirty days notice in advance to the United States Section, to increase or decrease each monthly quantity prescribed by those schedules by not more than 20% of the monthly quantity.

G. The total quantity of water to be delivered under Schedule I of paragraph A of this Article may be increased in any year if the amount to be delivered under Schedule II is correspondingly reduced and if the limitations as to rates of delivery under each schedule are correspondingly increased and reduced.

IV—Tijuana Rver.

ARTICLE 16.

In order to improve existing uses and to assure any feasible further development, the Commission shall study and investigate and shall submit to the two Governments for their approval:

(1) Recommendations for the equitable distribution between the two countries of the waters of the Tijuana River system;

(2) Plans for storage and flood control to promote and develop domestic, irrigation and other feasible uses of the waters of this system;

(3) An estimate of the cost of the proposed works and the manner in which the construction of such works or the cost thereof should be divided between the two Governments;

(4) Recommendations regarding the parts of the works to be operated and maintained by the Commission and the parts to be operated and maintained by each Section.

The two Governments through their respective Sections of the Commission shall construct such of the proposed works as are approved by both Governments, shall divide the work to be done or the cost thereof, and shall distribute between the two countries the waters of the Tijuana River system in the proportions approved by the two Governments. The two Governments agree to pay in equal shares the costs of joint operation and maintenance of the works involved, and each Government agrees to pay the cost of operation and maintenance of the works assigned to it for such purpose.

V—General Provisions.

Article 17.

The use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either country, and neither country shall have any claim against the other in respect of any damage caused by such use. Each Government agrees to furnish the other Government, as far in advance as practicable, any information it may have in regard to such extraordinary discharges of water from reservoirs and flood flows on its own territory as may produce floods on the territory of the other.

Each Government declares its intention to operate its storage dams in such manner, consistent with the normal operations of its hydraulic systems, as to avoid, as far as feasible, material damage in the territory of the other.

Article 18.

Public use of the water surface of lakes formed by international dams shall, when not harmful to the services rendered by such dams, be free and common to both countries, subject to the police regulations of each country in its territory, to such general regulations as may appropriately be prescribed and enforced by the Commission with the approval of the two Governments for the purpose of the application of the provisions of this Treaty, and to such regulations as may appropriately be prescribed and enforced for the same purpose by each Section of the Commission with respect to the areas and borders of such parts of those lakes as lie within its territory. Neither Government shall use for military purposes such water surface situated within the territory of the other country except by express agreement between the two Governments.

ARTICLE 19.

The two Governments shall conclude such special agreements as may be necessary to regulate the generation, development and disposition of electric power at international plants, including the necessary provisions for the export of electric current.

ARTICLE 20.

The two Governments shall, through their respective Sections of the Commission, carry out the construction of works allotted to them. For this purpose the respective Sections of the Commission may make use of any competent public or private agencies in accordance with the laws of the respective countries. With respect to such works as either Section of the Commission may have to execute on the territory of the other, it shall, in the execution of such works, observe the laws of the place where such works are located or carried out, with the exceptions hereinafter stated.

All materials, implements, equipment and repair parts intended for the construction, operation and maintenance of such works shall be exempt from import and export customs duties. The whole of the personnel employed either directly or indirectly on the construction, operation or maintenance of the works may pass freely from one country to the other for the purpose of going to and from the place of location of the works, without any immigration restrictions, passports or labor requirements. Each Government shall furnish, through its own Section of the Commission, convenient means of identification to the personnel employed by it on the aforesaid works and verification certificates covering all materials, implements, equipment and repair parts intended for the works.

Each Government shall assume responsibility for and shall adjust exclusively in accordance with its own laws all claims arising within its territory in connection with the construction, operation or maintenance of the whole or of any part of the works herein agreed upon, or of any works which may, in the execution of this Treaty, be agreed upon in the future.

ARTICLE 21.

The construction of the international dams and the formation of artificial lakes shall produce no change in the fluvial international boundary, which shall continue to be governed by existing treaties and conventions in force between the two countries.

The Commission shall, with the approval of the two Governments, establish in the artificial lakes, by buoys or by other suitable markers, a practicable and convenient line to provide for the exercise of the jurisdiction and control vested by this Treaty in the Commission and its respective Sections. Such line shall also mark the boundary for the application of the customs and police regulations of each country.

ARTICLE 22.

The provisions of the Convention between the United States and Mexico for the rectification of the Rio Grande (Rio Bravo) in the El Paso-Juárez Valley signed on February 1, 1933,[1] shall govern, so far as delimitation of the boundary, distribution of jurisdiction and sovereignty, and relations with private owners are concerned, in any places where works for the artficial channeling, canalization or rectification of the Rio Grande (Rio Bravo) and the Colorado River are carried out.

[1] [Treaty Series 864; 48 Stat. 1621.]

ARTICLE 23.

The two Governments recognize the public interest attached to the works required for the execution and performance of this Treaty and agree to acquire in accordance with their respective domestic laws, any private property that may be required for the construction of the said works, including the main structures and their appurtenances and the construction materials therefor, and for the operation and maintenance thereof, at the cost of the country within which the property is situated, except as may be otherwise specifically provided in this Treaty.

Each Section of the Commission shall determine the extent and location of any private property to be acquired within its own country and shall make the necessary requests upon its Government for the acquisition of such property.

The Commission shall determine the cases in which it shall become necessary to locate works for the conveyance of water or electrical energy and for the servicing of any such works, for the benefit of either of the two countries, in the territory of the other country, in order that such works can be built pursuant to agreement between the two Governments. Such works shall be subject to the jurisdiction and supervision of the Section of the Commission within whose country they are located.

Construction of the works built in pursuance of the provisions of this Treaty shall not confer upon either of the two countries any rights either of property or of jurisdiction over any part whatsoever of the territory of the other. These works shall be part of the territory and be the property of the country wherein they are situated. However, in the case of any incidents occurring on works constructed across the limitrophe part of a river and with

supports on both banks, the jurisdiction of each country shall be limited by the center line of such works, which shall be marked by the Commission, without thereby changing the international boundary.

Each Government shall retain, through its own Section of the Commission and within the limits and to the extent necessary to effectuate the provisions of this Treaty, direct ownership, control and jurisdiction within its own territory and in accordance with its own laws, over all real property—including that within the channel of any river—rights of way and right *in rem*, that it may be necessary to enter upon and occupy for the construction, operation or maintenance of all the works constructed, acquired or used pursuant to this Treaty. Furthermore, each Government shall similarly acquire and retain in its own possession the titles, control and jurisdiction over such works.

ARTICLE 24.

The International Boundary and Water Commission shall have, in addition to the powers and duties otherwise specifically provided in this Treaty, the following powers and duties:

(a) To initiate and carry on investigations and develop plans for the works which are to be constructed or established in accordance with the provisions of this and other treaties or agreements in force between the two Governments dealing with boundaries and international waters; to determine, as to such works, their location, size, kind and characteristic specifications; to estimate the cost of

such works; and to recommend the division of such costs between the two Governments, the arrangements for the furnishing of the necessary funds, and the dates for the beginning of the works, to the extent that the matters mentioned in this subparagraph are not otherwise covered by specific provisions of this or any other Treaty.

(b) To construct the works agreed upon or to supervise their construction and to operate and maintain such works or to supervise their operation and maintenance, in accordance with the respective domestic laws of each country. Each Section shall have, to the extent necessary to give effect to the provisions of this Treaty, jurisdiction over the works constructed exclusively in the territory of its country whenever such works shall be connected with or shall directly affect the execution of the provisions of this Treaty.

(c) In general to exercise and discharge the specific powers and duties entrusted to the Commission by this and other treaties and agreements in force between the two countries, and to carry into execution and prevent the violation of the provisions of those treaties and agreements. The authorities of each country shall aid and support the exercise and discharge of these powers and duties, and each Commissioner shall invoke when necessary the jurisdiction of the courts or other appropriate agencies of his country to aid in the execution and enforcement of these powers and duties.

(d) To settle all differences that may arise between the two Governments with respect to the interpretation or ap-

plication of this Treaty, subject to the approval of the two Governments. In any case in which the Commissioners do not reach an agreement, they shall so inform their respective governments reporting their respective opinions and the grounds therefor and the points upon which they differ, for discussion and adjustment of the difference through diplomatic channels and for application where proper of the general or special agreements which the two Governments have concluded for the settlement of controversies.

(e) To furnish the information requested of the Commissioners jointly by the two Governments on matters within their jurisdiction. In the event that the request is made by one Government alone, the Commissioner of the other Government must have the express authorization of his Government in order to comply with such request.

(f) The Commission shall construct, operate and maintain upon the limitrophe parts of the international streams, and each Section shall severally construct, operate and maintain upon the parts of the international streams and their tributaries within the boundaries of its own country, such stream gaging stations as may be needed to provide the hydrographic data necessary or convenient for the proper functioning of this Treaty. The data so obtained shall be compiled and periodically exchanged between the two Sections.

(g) The Commission shall submit annually a joint report to the two Governments on the matters in its charge. The Commission shall also submit to the two Governments joint reports on general or any particular matters at such other times as it may deem necessary or as may be requested by the two Governments.

ARTICLE 25.

Except as otherwise specifically provided in this Treaty, Articles III and VII of the Convention of March 1, 1889 shall govern the proceedings of the Commission in carrying out the provisions of this Treaty. Supplementary thereto the Commission shall establish a body of rules and regulations to govern its procedure, consistent with the provisions of this Treaty and of Articles III and VII of the Convention of March 1, 1889 and subject to the approval of both Governments.

Decisions of the Commission shall be recorded in the form of Minutes done in duplicate in the English and Spanish languages, signed by each Commissioner and attested by the Secretaries, and copies thereof forwarded to each Government within three days after being signed. Except where the specific approval of the two Governments is required by any provision of this Treaty, if one of the Governments fails to communicate to the Commission its approval or disapproval of a decision of the Commission within thirty days reckoned from the date of the Minute in which it shall have been pronounced, the Minute in question and the decisions which it contains shall be considered to be approved by that Government. The Commissioners, within the limits of their respective jurisdictions, shall execute the decisions of the Commission that are approved by both Governments.

If either Government disapproves a decision of the Commission the two Governments shall take cognizance of the matter, and if an agreement regarding such matter is reached between the two Governments, the agreement shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

VI—Transitory Provisions.

ARTICLE 26.

During a period of eight years from the date of the entry into force of this Treaty, or until the beginning of operation of the lowest major international reservoir on the Rio Grande (Rio Bravo), should it be placed in operation prior to the expiration of said period, Mexico will cooperate with the United States to relieve, in times of drought, any lack of water needed to irrigate the lands now under irrigation in the Lower Rio Grande Valley in the United States, and for this purpose Mexico will release water from El Azúcar reservoir on the San Juan River and allow that water to run through its system of canals back into the San Juan River in order that the United States may divert such water from the Rio Grande (Rio Bravo). Such releases shall be made on condition that they do not affect the Mexican irrigation system, provided that Mexico shall, in any event, except in cases of extraordinary drought or serious accident to its hydraulic works, release and make available to the United States for its use the quantities requested, under the following conditions: that during the said eight years there shall be made available total of 160,000 acre-feet (197,358,000 cubic meters) and up to 40,000 acre-feet (49,340,000 cubic meters) in any one year; that the water shall be made available as requested at rates not exceeding 750 cubic feet (21.2 cubic meters) per second; that when the rates of flow requested and made available have been more than 500 cubic feet (14.2 cubic meters) per second the period of release shall not extend beyond fifteen consecutive days; and that at least thirty days must elapse between any two periods of release during which rates of flow in excess of

500 cubic feet (14.2 cubic meters) per second have been requested and made available. In addition to the guaranteed flow, Mexico shall release from El Azúcar reservoir and conduct through its canal system and the San Juan River, for use in the United States during periods of drought and after satisfying the needs of Mexican users, any excess water that does not in the opinion of the Mexican Section have to be stored and that may be needed for the irrigation of lands which were under irrigation during the year 1943 in the Lower Rio Grande Valley in the United States.

ARTICLE 27.

The provisions of Article 10, 11, and 15 of this Treaty shall not be applied during a period of five years from the date of the entry into force of this Treaty, or until the Davis dam and the major Mexican diversion structure on the Colorado River are placed in operation, should these works be placed in operation prior to the expiration of said period. In the meantime Mexico may construct and operate at its expense a temporary diversion structure in the bed of the Colorado River in territory of the United States for the purpose of diverting water into the Alamo Canal, provided that the plans for such structure and the construction and operation thereof shall be subject to the approval of the United States Section. During this period of time the United States will make available in the river at such diversion structure river flow not currently required in the United States, and the United States will cooperate with Mexico to the end that the latter may satisfy its irrigation requirements within the limits of those requirements for lands irrigated in Mexico from the Colorado River during the year 1943.

VII—Final Provisions.

ARTICLE 28.

This Treaty shall be ratified and the ratifications thereof shall be exchanged in Washington. It shall enter into force on the day of the exchange of ratifications and shall continue in force until terminated by another Treaty concluded for that purpose between the two Governments.

In witness whereof the respective Plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in the English and Spanish languages, in Washington on this third day of February, 1944.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

CORDELL HULL [Seal]

GEORGE S. MESSERSMITH [Seal]

LAWRENCE M. LAWSON. [Seal]

FOR THE GOVERNMENT OF THE UNITED MEXICAN STATES:

F. CASTILLO NAJERA [Seal]

RAFAEL FERNANDEZ MACGREGOR [Seal]

Protocol.

The Government of the United States of America and the Government of the United Mexican States agree and understand that:

Wherever, by virtue of the provisions of the Treaty between the United States of America and the United Mexican States, signed in Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, specific functions are imposed on, or exclusive jurisdiction is vested in, either of the Sections of the International Boundary and Water Commission, which involve the construction or use of works for storage or conveyance of water, flood control, stream gaging, or for any other purpose, which are situated wholly within the territory of the country of that Section, and which are to be used only partly for the performance of treaty provisions, such jurisdiction shall be exercised, and such functions, including the construction, operation and maintenance of the said works, shall be performed and carried out by the Federal agencies of that country which now or hereafter may be authorized by domestic law to construct, or to operate and maintain, such works. Such functions or jurisdictions shall be exercised in conformity with the provisions of the Treaty and in cooperation with the respective Section of the Commission, to the end that all international obligations and functions may be coordinated and fulfilled.

The works to be constructed or used on or along the boundary, and those to be constructed or used exclusively for the discharge of treaty stipulations, shall be under the jurisdiction of the Commission or of the respective

Section, in accordance with the provisions of the Treaty. In carrying out the construction of such works the Sections of the Commission may utilize the services of public or private organizations in accordance with the laws of their respective countries.

This Protocol, which shall be regarded as an integral part of the aforementioned Treaty signed in Washington on February 3, 1944, shall be ratified and the ratifications thereof shall be exchanged in Washington. This Protocol shall be effective beginning with the day of the entry into force of the Treaty and shall continue effective so long as the Treaty remains in force.

In witness whereof the respective Plenipotentiaries have signed this Protocol and have hereunto affixed their seals.

Done in duplicate, in the English and Spanish languages, in Washington, this fourteenth day of November, 1944.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

E. R. STETTINIUS, JR. [Seal]
Acting Secretary of State of the United States of America.

FOR THE GOVERNMENT OF THE UNITED MEXICAN STATES:

F. CASTILLO NAJERA [Seal]
Ambassador Extraordinary and Plenipotentiary of the United Mexican States in Washington.

AND WHEREAS the Senate of the United States of America by their Resolution of April 18, 1945, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said treaty and protocol, subject to certain understandings, the text of which Resolution is word for word as follows:

"*Resolved* (*two-thirds of the Senators present concurring therein*), That the Senate advise and consent to the ratification of Executive A, Seventy-eighth Congress, second session, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, second session, a protocol, signed at Washington on November 14, 1944, supplementary to the treaty, subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty:

"(a) That no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States. It is understood that the works to be built by the United States, in whole or in part at its ex-

pense, and the expenditures by the United States, which are specifically provided for in the treaty, are as follows:

"1. The joint construction of the three storage and flood-control dams on the Rio Grande below Fort Quitman, Texas, mentioned in article 5 of the treaty.

"2. The dams and other joint works required for the diversion of the flow of the Rio Grande mentioned in subparagraph II of article 5 of the treaty, it being understood that the commitment of the United States to make expenditures under this subparagraph is limited to its share of the cost of one dam and works appurtenant thereto.

"3. Stream-gaging stations which may be required under the provisions of section (j) of article 9 of the treaty and of subparagraph (d) of article 12 of the treaty.

"4. The Davis Dam and Reservoir mentioned in subparagraph (b) of article 12 of the treaty.

"5. The joint flood-control investigations, preparation of plans, and reports on the Rio Grande below Fort Quitman required by the provisions of article 6 of the treaty.

"6. The joint flood-control investigations, preparations of plans, and reports on the lower Colorado River between the Imperial Dam and the Gulf of California required by article 13 of the treaty.

"7. The joint investigations, preparation of plans, and reports on the establishment of hydroelectric plants at the international dams on the Rio Grande below Fort Quitman provided for by article 7 of the treaty.

"8. The studies, investigations, preparation of plans, recommendations, reports, and other matters dealing with the Tijuana River system provided for by the first para-

graph (including the numbered subparagraphs) of article 16 of the treaty.

"(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States.

"(d) That 'international dam or reservoir' means a dam or reservoir built across the common boundary between the two countries.

"(e) That the words 'international plants', appearing in article 19, mean only hydroelectric generating plants in connection with dams built across the common boundary between the two countries.

"(f) That the words 'electric current', appearing in article 19, mean hydroelectric power generated at an international plant.

"(g) That by the use of the words 'The jurisdiction of the Commission shall extend to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary * * *' in the first sentence of the fifth paragraph of article 2, is meant: 'The jurisdiction of the Commission shall extend and be limited to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary * * *.'

"(h) The word 'agreements' whenever used in subparagraphs (a), (c), and (d) of article 24 of the treaty shall refer only to agreements entered into pursuant to and subject to the provisions and limitations of treaties in force between the United States of America and the United Mexican States.

"(i) The word 'disputes' in the second paragraph of article 2 shall have reference only to disputes between the Governments of the United States of America and the United Mexican States.

"(j) First, that the one million seven hundred thousand acre-feet specified in subparagraph (b) of article 10 includes and is not in addition to the one million five hundred thousand acre-feet, the delivery of which to Mexico is guaranteed in subparagraph (a) of article 10; second, that the one mililon five hundred thousand acre-feet specified in three places in said subparagraph (b) is identical with the one million five hundred thousand

acre-feet specified in said subparagraph (a); third, that any use by Mexico under said subparagraph (b) of quantities of water arriving at the Mexican points of diversion in excess of said one million five hundred thousand acre-feet shall not give rise to any future claim of right by Mexico in excess of said guaranteed quantity of one million five hundred thousand acre-feet of water.

"(k) The United States recognizes a duty to require that the protective structures to be constructed under article 12, paragraph (a), of this treaty, are so constructed, operated, and maintained as to adequately prevent damage to property and lands within the United States from the construction and operation of the diversion structure referred to in said paragraph."

AND WHEREAS the said treaty and protocol were duly ratified by the President of the United States of America on November 1, 1945, in pursuance of the aforesaid advice and consent of the Senate and subject to the aforesaid understandings on the part of the United States of America;

AND WHEREAS the said treaty and protocol were duly ratified by the President of the United Mexican States on October 16, 1945, in pursuance and according to the terms of a Decree of September 27, 1945 of the Senate of the United Mexican States approving the said treaty and protocol and approving the said understandings on the part of the United States of America in all that refers to the rights and obligations between the parties;

AND WHEREAS it is provided in Article 28 of the said treaty that the treaty shall enter into force on the day of the exchange of ratifications;

AND WHEREAS it is provided in the said protocol that the protocol shall be regarded as an integral part of the said treaty and shall be effective beginning with the day of the entry into force of the said treaty;

AND WHEREAS the respective instruments of ratification of the said treaty and protocol were duly exchanged, and a protocol of exchange of instruments of ratification was signed in the English and Spanish languages, by the respective Plenipotentiaries of the United States of America and the United Mexican States on November 8, 1945, the English text of which protocol of exchange of instruments of ratification reads in part as follows:

"The ratification by the Government of the United States of America of the treaty and protocol aforesaid recites in their entirety the understandings contained in the resolution of April 18, 1945 of the Senate of the United States of America advising and consenting to ratification, the text of which resolution was communicated by the Government of the United States of America to the Government of the United Mexican States. The ratification by the Government of the United Mexican States of the treaty and protocol aforesaid is effected, in the terms of its instrument of ratification, in conformity to the Decree of September 27, 1945 of the Senate of the United Mexican States approving the treaty and protocol aforesaid and approving also the aforesaid understandings on the part of the United States of America in all that refers to the rights and obligations between both parties, and in which the Mexican Senate refrains from considering, because it is not competent to pass judgment upon them, the provisions which relate exclusively to the internal application of the treaty within the United States of

America and by its own authorities, and which are included in the understandings set forth under the letter (a) in its first part to the period preceding the words 'It is understood' and under the letters (b) and (c)."

NOW, THEREFORE, be it known that I, Harry S. Truman, President of the United States of America, do hereby proclaim and make public the said treaty and the said protocol supplementary thereto, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith, on and from the eighth day of November, one thousand nine hundred forty-five, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-seventh day of November in the year of our Lord one thousand
[Seal] nine hundred forty-five and of the Independence of the United States of America the one hundred seventieth.

HARRY S. TRUMAN

By the President:
James F. Byrnes
Secretary of State

APPENDIX No. 30.

Upper Colorado River Basin Compact.

Act of April 7, 1949
63 Stat. 31

(TEXT)
Approved by Congress

ENTERED INTO BY THE STATES OF ARIZONA, COLORADO, NEW MEXICO, UTAH, WYOMING.

Santa Fe, New Mexico, October 11, 1948.

UPPER COLORADO RIVER BASIN COMPACT.

The State of Arizona, the State of Colorado, the State of New Mexico, the State of Utah and the State of Wyoming, acting through their Commissioners,

Charles A. Carson for the State of Arizona,
Clifford H. Stone for the State of Colorado,
Fred E. Wilson for the State of New Mexico,
Edward H. Watson for the State of Utah and
L. C. Bishop for the State of Wyoming,

after negotiations participated in by Harry W. Bashore, appointed by the President as the representative of the United States of America, have agreed, subject to the provisions of the Colorado River Compact, to determine the rights and obligations of each signatory State respecting the uses and deliveries of the water of the Upper Basin of the Colorado River, as follows:

ARTICLE I.

(a) The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System, the use of which was apportioned in perpetuity to the Upper Basin by the Colorado River Compact; to establish the obligations of each State of the Upper Division with respect to the deliveries of water required to be made at Lee Ferry by the Colorado River Compact; to promote interstate comity; to remove causes of present and future controversies; to secure the expeditious agricultural and industrial development of the Upper Basin, the storage of water and to protect life and property from floods.

(b) It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto.

ARTICLE II.

As used in this Compact:

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the Colorado River System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the Colorado River System below Lee Ferry.

(h) The term "Colorado River Compact" means the agreement concerning the apportionment of the use of the waters of the Colorado River System dated November 24, 1922, executed by Commissioners for the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, approved by Herbert Hoover, representative of the United States of America, and proclaimed effective by the President of the United States of America, June 25, 1929.

(i) The term "Upper Colorado River System" means that portion of the Colorado River System above Lee Ferry.

(j) The term "Commission" means the administrative agency created by Article VIII of this Compact.

(k) The term "water year" means that period of twelve months ending September 30 of each year.

(l) The term "acre-foot" means the quantity of water required to cover an acre to the depth of one foot and is equivalent to 43,560 cubic feet.

(m) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

(n) The term "virgin flow" means the flow of any stream undepleted by the activities of man.

ARTICLE III.

(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

(1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.

(2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin under the Colorado River Compact and remaining after the deduction of the use, not to

exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado ..... 51.75 per cent,
State of New Mexico ..... 11.25 per cent,
State of Utah ..... 23.00 per cent,
State of Wyoming ..... 14.00 per cent.

(b) The apportionment made to the respective States by paragraph (a) of this Article is based upon, and shall be applied in conformity with, the following principles and each of them:

(1) The apportionment is of any and all man-made depletions;

(2) Beneficial use is the basis, the measure and the limit of the right to use;

(3) No State shall exceed its apportioned use in any water year when the effect of such excess use, as determined by the Commission, is to deprive another signatory State of its apportioned use during that water year; provided, that this subparagraph (b)(3) shall not be construed as:

(i) Altering the apportionment of use, or obligations to make deliveries as provided in Article XI, XII, XIII or XIV of this Compact;

(ii) Purporting to apportion among the signatory States such uses of water as the Upper Basin may be entitled to under paragraphs (f) and (g) of Article III of the Colorado River Compact; or

(iii) Countenancing average uses by any signatory State in excess of its apportionment.

(4) The apportionment to each State includes all water necessary for the supply of any rights which now exist.

(c) No apportionment is hereby made, or intended to be made, of such uses of water as the Upper Basin may be entitled to under paragraphs (f) and (g) of Article III of the Colorado River Compact.

(d) The apportionment made by this Article shall not be taken as any basis for the allocation among the signatory States of any benefits resulting from the generation of power.

ARTICLE IV.

In the event curtailment of use of water by the States of the Upper Division at any time shall become necessary in order that the flow at Lee Ferry shall not be depleted below that required by Article III of the Colorado River Compact, the extent of curtailment by each State of the consumptive use of water apportioned to it by Article III of this Compact shall be in such quantities and at such times as shall be determined by the Commission upon the application of the following principles:

(a) The extent and times of curtailment shall be such as to assure full compliance with Article III of the Colorado River Compact;

(b) If any State or States of the Upper Division, in the ten years immediately preceding the water year in which curtailment is necessary, shall have consumptively used more water than it was or they were, as the case may be, entitled to use under the apportionment made by Article III of this Compact, such State or States shall be required to supply at Lee Ferry a quantity of water equal

to its, or the aggregate of their, overdraft or the proportionate part of such overdraft, as may be necessary to assure compliance with Article III of the Colorado River Compact, before demand is made on any other State of the Upper Division;

(c) Except as provided in subparagraph (b) of this Article, the extent of curtailment by each State of the Upper Division of the consumptive use of water apportioned to it by Article III of this Compact shall be such as to result in the delivery at Lee Ferry of a quantity of water which bears the same relation to the total required curtailment of use by the States of the Upper Division as the consumptive use of Upper Colorado River System water which was made by each such State during the water year immediately preceding the year in which the curtailment becomes necessary bears to the total consumptive use of such water in the States of the Upper Division during the same water year; provided, that in determining such relation the uses of water under rights perfected prior to November 24, 1922, shall be excluded.

ARTICLE V.

(a) All losses of water occurring from or as the result of the storage of water in reservoirs constructed prior to the signing of this Compact shall be charged to the State in which such reservoir or reservoirs are located. Water stored in reservoirs covered by this paragraph (a) shall be for the exclusive use of and shall be charged to the State in which the reservoir or reservoirs are located.

(b) All losses of water occurring from or as the result of the storage of water in reservoirs constructed after the signing of this Compact shall be charged as follows:

(1) If the Commission finds that the reservoir is used, in whole or in part, to assist the States of the Upper Division in meeting their obligations to deliver water at Lee Ferry imposed by Article III of the Colorado River Compact, the Commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir capacity allocated for that purpose. The whole or that proportion, as the case may be, of reservoir losses as found by the Commission to be reasonably and properly chargeable to the reservoir or reservoir capacity utilized to assure deliveries at Lee Ferry shall be charged to the States of the Upper Division in the proportion which the consumptive use of water in each State of the Upper Division during the water year in which the charge is made bears to the total consumptive use of water in all States of the Upper Division during the same water year. Water stored in reservoirs or in reservoir capacity covered by this subparagraph (b)(1) shall be for the common benefit of all of the States of the Upper Division.

(2) If the Commission finds that the reservoir is used, in whole or in part, to supply water for use in a State of the Upper Division, the Commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir or reservoir capacity utilized to supply water for use and the State in which such water will be used. The whole or that proportion, as the case

may be, of reservoir losses as found by the Commission to be reasonably and properly chargeable to the State in which such water will be used shall be borne by that State. As determined by the Commission, water stored in reservoirs covered by this subparagraph (b)(2) shall be earmarked for and charged to the State in which the water will be used.

(c) In the event the Commission finds that a reservoir site is available both to assure deliveries at Lee Ferry and to store water for consumptive use in a State of the Upper Division, the storage of water for consumptive use shall be given preference. Any reservoir or reservoir capacity hereafter used to assure deliveries at Lee Ferry shall by order of the Commission be used to store water for consumptive use in a State, provided the Commission finds that such storage is reasonably necessary to permit such State to make the use of the water apportioned to it by this Compact.

ARTICLE VI.

The Commission shall determine the quantity of the consumptive use of water, which use is apportioned by Article III hereof, for the Upper Basin and for each State of the Upper Basin by the inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry, unless the Commission, by unanimous action, shall adopt a different method of determination.

ARTICLE VII.

The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use

is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII.

(a) There is hereby created an interstate administrative agency to be known as the "Upper Colorado River Commission." The Commission shall be composed of one Commissioner representing each of the States of the Upper Division, namely, the States of Colorado, New Mexico, Utah and Wyoming, designated or appointed in accordance with the laws of each such State and, if designated by the President, one Commissioner representing the United States of America. The President is hereby requested to designate a Commissioner. If so designated the Commissioner representing the United States of America shall be the presiding officer of the Commission and shall be entitled to the same powers and rights as the Commissioner of any State. Any four members of the Commission shall constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the Government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact, and which are not paid by the United States of America, shall be borne by the four States according to the percentage of consumptive use apportioned to each. On or before December 1 of each year, the Commission shall adopt and transmit to the Governors of the four States and to the President a budget covering an estimate of its expenses for the following year, and of the amount payable by each State. Each State shall pay the amount due by

it to the Commission on or before April 1 of the year following. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of any of the four States; however, all receipts and disbursement of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission shall appoint a Secretary, who shall not be a member of the Commission, or an employee of any signatory State or of the United States of America while so acting. He shall serve for such term and receive such salary and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical and other personnel as, in its judgment, may be necessary for the performance of its functions under this Compact. In the hiring of employees, the Commission shall not be bound by the civil service laws of any State.

(d) The Commission, so far as consistent with this Compact, shall have to power to:

(1) Adopt rules and regulations;

(2) Locate, establish, construct, abandon, operate and maintain water gaging stations;

(3) Make estimates to forecast water run-off on the Colorado River and any of its tributaries;

(4) Engage in cooperative studies of water supplies of the Colorado River and its tributaries;

(5) Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions

and use of the waters of the Colorado River, and any of its tributaries;

(6) Make findings as to the quantity of water of the Upper Colorado River System used each year in the Upper Colorado River Basin and in each State thereof;

(7) Make findings as to the quantity of water deliveries at Lee Ferry during each water year;

(8) Make findings as to the necessity for and the extent of the curtailment of use, required, if any, pursuant to Article IV hereof;

(9) Make findings as to the quantity of reservoir losses and as to the share thereof chargeable under Article V hereof to each of the States;

(10) Make findings of fact in the event of the occurrence of extraordinary drought or serious accident to the irrigation system in the Upper Basin, whereby deliveries by the Upper Basin of water which it may be required to deliver in order to aid in fulfilling obligations of the United States of America to the United Mexican States arising under the Treaty between the United States of America and the United Mexican States, dated February 3, 1944 (Treaty Series 994) become difficult, and report such findings to the Governors of the Upper Basin States, the President of the United States of America, the United States Section of the International Boundary and Water Commission, and such other Federal officials and agencies as it may deem appropriate to the end that the water allotted to Mexico under Division

III of such treaty may be reduced in accordance with the terms of such Treaty;

(11) Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

(12) Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, either independently or in cooperation with any state or federal agency;

(13) Make and transmit annually to the Governors of the signatory States and the President of the United States of America, with the estimated budget, a report covering the activities of the Commission for the preceding water year.

(e) Except as otherwise provided in this Compact the concurrence of four members of the Commission shall be required in any action taken by it.

(f) The Commission and its Secretary shall make available to the Governor of each of the signatory States any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the States, or their representatives, or authorized representatives of the United States of America.

(g) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute *prima facie* evidence of the facts found.

(h) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE IX.

(a) No State shall deny the right of the United States of America and, subject to the conditions hereinafter contained, no State shall deny the right of another signatory State, any person, or entity of any signatory State to acquire rights to the use of water, or to construct or participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one State for the purpose of diverting, conveying, storing, regulating and releasing water to satisfy the provisions of the Colorado River Compact relating to the obligation of the States of the Upper Division to make deliveries of water at Lee Ferry, or for the purpose of diverting, conveying, storing or regulating water in an upper signatory State for consumptive use in a lower signatory State, when such use is within the apportionment to such lower State made by this Compact. Such rights shall be subject to the rights of water users, in a State in which such reservoir or works are located, to receive and use water, the use of which is within the apportionment to such State by this Compact.

(b) Any signatory State, any person or any entity of any signatory State shall have the right to acquire such property rights as are necessary to the use of water in conformity with this Compact in any other signatory State by donation, purchase or through the exercise of the power of eminent domain. Any signatory State, upon the written request of the Governor of any other signatory State, for the benefit of whose water users property is to be acquired in the State to which such written request is made, shall proceed expeditiously to acquire the desired property either by purchase at a price satisfactory to the requesting State,

or, if such purchase cannot be made, then through the exercise of its power of eminent domain and shall convey such property to the requesting State or such entity as may be designated by the requesting State; provided, that all costs of acquisition and expenses of every kind and nature whatsoever incurred in obtaining the requested property shall be paid by the requesting State at the time and in the manner prescribed by the State requested to acquire the property.

(c) Should any facility be constructed in a signatory State by and for the benefit of another signatory State or States or the water users thereof, as above provided, the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the State in which the facility is located, except that, in the case of a reservoir constructed in one State for the benefit of another State or States, the water administration officials of the State in which the facility is located shall permit the storage and release of any water which, as determined by findings of the Commission, falls within the apportionment of the State or States for whose benefit the facility is constructed. In the case of a regulating reservoir for the joint benefit of all States in making Lee Ferry deliveries, the water administration officials of the State in which the facility is located, in permitting the storage and release of water, shall comply with the findings and orders of the Commission.

(d) In the event property is acquired by a signatory State in another signatory State for the use and benefit of the former, the users of water made available by such facilities, as a condition precedent to the use thereof, shall pay to the political subdivisions of the State in which

such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes levied and assessed against the land and improvements thereon during the ten years preceding the acquisition of such land. Said payments shall be in full reimbursement for the loss of taxes in such political subdivisions of the State, and in lieu of any and all taxes on said property, improvements and rights. The signatory States recommend to the President and the Congress that, in the event the United States of America shall acquire property in one of the signatory States for the benefit of another signatory State, or its water users, provision be made for like payment in reimbursement of loss of taxes.

ARTICLE X.

(a) The signatory States recognize La Plata River Compact entered into between the States of Colorado and New Mexico, dated November 27, 1922, approved by the Congress on January 29, 1925 (43 Stat. 796), and this Compact shall not affect the apportionment therein made.

(b) All consumptive use of water of La Plata River and its tributaries shall be charged under the apportionment of Article III hereof to the State in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one State for use in the other shall be charged to the latter State.

ARTICLE XI.

Subject to the provisions of this Compact, the consumptive use of the water of the Little Snake River and its tributaries is hereby apportioned between the States of Colorado and Wyoming in such quantities as shall

result from the application of the following principles and procedures:

(a) *Water used under rights existing prior to the signing of this Compact.*

(1) Water diverted from any tributary of the Little Snake River or from the main stem of the Little Snake River above a point one hundred feet below the confluence of Savery Creek and the Little Snake River shall be administered without regard to rights covering the diversion of water from any downstream points.

(2) Water diverted from the main stem of the Little Snake River below a point one hundred feet below the confluence of Savery Creek and the Little Snake River shall be administered on the basis of an interstate priority schedule prepared by the Commission in conformity with priority dates established by the laws of the respective States.

(b) *Water used under rights initiated subsequent to the signing of this Compact.*

(1) Direct flow diversions shall be so administered that, in time of shortage, the curtailment of use on each acre of land irrigated thereunder shall be as nearly equal as may be possible in both of the States.

(2) The storage of water by projects located in either State, whether of supplemental supply or of water used to irrigate land not irrigated at the date of the signing of this Compact, shall be so administered that in times of water shortage the curtailment of storage of water available for each acre of land irrigated thereunder shall be as nearly equal as may be possible in both States.

(c) Water uses under the apportionment made by this Article shall be in accordance with the principle that beneficial use shall be the basis, measure and limit of the right to use.

(d) The States of Colorado and Wyoming each assent to diversions and storage of water in one State for use in the other State, subject to compliance with Article IX of this Compact.

(e) In the event of the importation of water to the Little Snake River Basin from any other river basin, the State making the importation shall have the exclusive use of such imported water unless by written agreement, made by the representatives of the States of Colorado and Wyoming on the Commission, it is otherwise provided.

(f) Water use projects initiated after the signing of this Compact, to the greatest extent possible, shall permit the full use within the Basin in the most feasible manner of the waters of the Little Snake River and its tributaries, without regard to the state line; and, so far as is practicable, shall result in an equal division between the States of the use of water not used under rights existing prior to the signing of this Compact.

(g) All consumptive use of the waters of the Little Snake River and its tributaries shall be charged under the apportionment of Article III hereof to the State in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one State for use in the other shall be charged to the latter State.

ARTICLE XII.

Subject to the provisions of this Compact, the consumptive use of the waters of Henry's Fork, a tributary of Green River originating in the State of Utah and flowing into the State of Wyoming and thence into the Green River in the State of Utah; Beaver Creek, originating in the State of Utah and flowing into Henry's Fork in the State of Wyoming; Burnt Fork, a tributary of Henry's Fork, originating in the State of Utah and flowing into Henry's Fork in the State of Wyoming; Birch Creek, a tributary of Henry's Fork originating in the State of Utah and flowing into Henry's Fork in the State of Wyoming; and Sheep Creek, a tributary of Green River in the State of Utah, and their tributaries, are hereby apportioned between the States of Utah and Wyoming in such quantities as will result from the application of the following principles and procedures:

(a) *Waters used under rights existing prior to the signing of this Compact.*

Waters diverted from Henry's Fork, Beaver Creek, Burnt Fork, Birch Creek and their tributaries, shall be administered without regard to the state line on the basis of an interstate priority schedule to be prepared by the States affected and approved by the Commission in conformity with the actual priority of right of use, the water requirements of the land irrigated and the acreage irrigated in connection therewith.

(b) Waters used under rights from Henry's Fork, Beaver Creek, Burnt Fork, Birch Creek and their tributaries, initiated after the signing of this Compact shall be divided fifty percent to the State of Wyoming and

fifty percent to the State of Utah and each State may use said waters as and where it deems advisable.

(c) The State of Wyoming assents to the exclusive use by the State of Utah of the water of Sheep Creek, except that the lands, if any, presently irrigated in the State of Wyoming from the water of Sheep Creek shall be supplied with water from Sheep Creek in order of priority and in such quantities as are in conformity with the laws of the State of Utah.

(d) In the event of the importation of water to Henry's Fork, or any of its tributaries, from any other river basin, the State making the importation shall have the exclusive use of such imported water unless by written agreement made by the representatives of the States of Utah and Wyoming on the Commission, it is otherwise provided.

(e) All consumptive use of waters of Henry's Fork, Beaver Creek, Burnt Fork, Birch Creek, Sheep Creek, and their tributaries shall be charged under the apportionment of Article III hereof to the State in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one State for use in the other shall be charged to the latter State.

(f) The States of Utah and Wyoming each assent to the diversion and storage of water in one State for use in the other State, subject to compliance with Article IX of this Compact. It shall be the duty of the water administrative officials of the State where the water is stored to release said stored water to the other State upon demand. If either the State of Utah or the State of Wyoming shall construct a reservoir in the other State for use in its own State, the water users of the State in which said facilities are constructed may purchase at cost a portion of the

capacity of said reservoir sufficient for the irrigation of their lands thereunder.

(g) In order to measure the flow of water diverted, each State shall cause suitable measuring devices to be constructed, maintained and operated at or near the point of diversion into each ditch.

(h) The State Engineers of the two States jointly shall appoint a Special Water Commissioner who shall have authority to administer the water in both States in accordance with the terms of this Article. The salary and expenses of such Special Water Commissioner shall be paid, thirty percent by the State of Utah and seventy percent by the State of Wyoming.

Article XIII.

Subject to the provisions of this Compact, the rights to the consumptive use of the water of the Yampa River, a tributary entering the Green River in the State of Colorado, are hereby apportioned between the States of Colorado and Utah in accordance with the following principles:

(a) The State of Colorado will not cause the flow of the Yampa River at the Maybell Gaging Station to be depleted below an aggregate of 5,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification and approval of this Compact. In the event any diversion is made from the Yampa River or from tributaries entering the Yampa River above the Maybell Gaging Station for the benefit of any water use project in the State of Utah, then the gross amount of all such diversions for use in the State of Utah, less any returns from such diversions to the River above

Maybell, shall be added to the actual flow at the Maybell Gaging Station to determine the total flow at the Maybell Gaging Station.

(b) All consumptive use of the waters of the Yampa River and its tributaries shall be charged under the apportionment of Article III hereof to the State in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one State for use in the other shall be charged to the latter State.

ARTICLE XIV.

Subject to the provisions of this Compact, the consumptive use of the waters of the San Juan River and its tributaries is hereby apportioned between the States of Colorado and New Mexico as follows:

The State of Colorado agrees to deliver to the State of New Mexico from the San Juan River and its tributaries which rise in the State of Colorado a quantity of water which shall be sufficient, together with water originating in the San Juan Basin in the State of New Mexico, to enable the State of New Mexico to make full use of the water apportioned to the State of New Mexico by Article III of this Compact, subject, however, to the following:

(a) A first and prior right shall be recognized as to:

(1) All uses of water made in either State at the time of the signing of this Compact; and

(2) All uses of water contemplated by projects authorized, at the time of the signing of this Compact, under the laws of the United States of America whether or not such projects are eventually constructed by the United States of America or by some other entity.

(b) The State of Colorado assents to diversions and storage of water in the State of Colorado for use in the State of New Mexico, subject to compliance with Article IX of this Compact.

(c) The uses of the waters of the San Juan River and any of its tributaries within either State which are dependent upon a common source of water and which are not covered by (a) hereof, shall in times of water shortages be reduced in such quantity that the resulting consumptive use in each State will bear the same proportionate relation to the consumptive use made in each State during times of average water supply as determined by the Commission; provided, that any preferential uses of water to which Indians are entitled under Article XIX shall be excluded in determining the amount of curtailment to be made under this paragraph.

(d) The curtailment of water use by either State in order to make deliveries at Lee Ferry as required by Article IV of this Compact shall be independent of any and all conditions imposed by this Article and shall be made by each State, as and when required, without regard to any provision of this Article.

(e) All consumptive use of the waters of the San Juan River and its tributaries shall be charged under the apportionment of Article III hereof to the State in which the use is made; provided, that consumptive use incident to the diversion, impounding or conveyance of water in one State for use in the other shall be charged to the latter State.

ARTICLE XV.

(a) Subject to the provisions of the Colorado River Compact and of this Compact, water of the Upper Colo-

rado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(b) The provisions of this Compact shall not apply to or interfere with the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such State by this Compact.

ARTICLE XVI.

The failure of any State to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use to the Lower Basin or to any other State, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XVII.

The use of any water now or hereafter imported into the natural drainage basin of the Upper Colorado River System shall not be charged to any State under the apportionment of consumptive use made by this Compact.

ARTICLE XVIII.

(a) The State of Arizona reserves its rights and interests under the Colorado River Compact as a State of the Lower Division and as a State of the Lower Basin.

(b) The State of New Mexico and the State of Utah reserve their respective rights and interests under the Colorado River Compact as States of the Lower Basin.

ARTICLE XIX.

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States of America to Indian tribes;

(b) Affecting the obligations of the United States of America under the Treaty with the United Mexican States (Treaty Series 994);

(c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System, or its capacity to acquire rights in and to the use of said waters;

(d) Subjecting any property of the United States of America, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States of America, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, State agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(e) Subjecting any property of the United States of America, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XX.

This Compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination, all rights established under it shall continue unimpaired.

Article XXI.

This Compact shall become binding and obligatory when it shall have been ratified by the legislatures of each of the signatory States and approved by the Congress of the United States of America. Notice of ratification by the legislatures of the signatory States shall be given by the Governor of each signatory State to the Governor of each of the other signatory States and to the President of the United States of America, and the President is hereby requested to give notice to the Governor of each of the signatory States of approval by the Congress of the United States of America.

IN WITNESS WHEREOF, the Commissioners have executed six counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States of America, and one of which shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, State of New Mexico, this 11th day of October, 1948.

(Signed) CHARLES A. CARSON
Charles A. Carson
Commissioner for the State of Arizona

(Signed) CLIFFORD H. STONE
Clifford H. Stone
Commissioner for the State of Colorado

(Signed) FRED E. WILSON
Fred E. Wilson
Commissioner for the State of New Mexico

(Signed) EDWARD H. WATSON
Edward H. Watson
Commissioner for the State of Utah

(Signed) L. C. BISHOP
L. C. Bishop
Commissioner for the State of Wyoming

(Signed) GROVER A. GILES
Grover A. Giles, Secretary

Approved:

(Signed) HARRY W. BASHORE
Harry W. Bashore
Representative of the United States of America

APPENDIX No. 31.

THE UPPER COLORADO RIVER BASIN COMPACT:

Joint Statement of the Negotiators.

Reprinted in Hearings, Subcommittee on Irrigation Reclamation of the Committee on Public Lands, House of Representatives (81st Cong., 1st Sess., p. 56) on H. R. 2325, etc. The Upper Colorado River Basin Compact.

(Signatures appearing on original letter are included.)

March 16, 1949

Hon. Clair Engle,
House of Representatives.

My dear Mr. Engle:

Your letter of March 12, 1949, addressed to Honorable Harry W. Bashore, Representative of the United States, Upper Colorado River Basin Compact Negotiations, has been given consideration by Mr. Bashore and by the representatives of the Upper Basin States now assembled in Washington. The answers herein given to your specific question are the answers of the representatives of the compacting States and of Mr. Bashore.

In this letter the statements made by you in connection with each question and the questions themselves will be underlined.* The answer will follow each question.

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*Underscoring in italics.

QUESTION No. 1.

Article I of the proposed Compact refers to the apportionment of the "use" of the water of the Colorado River System, the use of which was apportioned in perpetuity to the Upper Basin by the Colorado River Compact.

(a) *Is the word "use" to be taken as synonymous with the phrase "beneficial consumptive use" as it occurs in the Colorado River Compact?*

ANSWER: The word "use" as it occurs in Article I of the Upper Colorado River Basin Compact is synonymous with the phrase "beneficial consumptive use" as it appears in Article III(a) and Article III(b) of the Colorado River Compact.

(b) *In this connection, note that the phrase "consumptive use" occurs frequently in the pending Compact. Is there any difference in meaning between the phrase "consumptive use" as used in the pending Compact, and "beneficial consumptive use" as the phrase is used in the Colorado River Compact?*

ANSWER: In all instances where the phrase "consumptive use" occurs with reference to the apportionment made to the Upper Basin by the Colorado River Compact, such phrase is synonymous with the phrase "beneficial consumptive use" as it occurs in Article III(a) and Article III(b) of the Colorado River Compact. This is because of the paramountcy of the Colorado River Compact. When such phrase is employed in connection with internal matters relating to the rights of the Upper Basin States as among themselves to the water available to them under the Colorado River Compact, the phrase "consumptive

use" is not necessarily synonymous with the phrase "beneficial consumptive use" as used in the Colorado River Compact. In this connection it should be pointed out that in each of the compacting States a "beneficial use" is essential to the acquisition of a firm water right. Also attention is directed to Article III(b)(2) of the Upper Basin Compact which provides that "beneficial use is the basis, the measure and the limit of the right to use."

QUESTION No. 2.

In Article II, the term "virgin flow" is defined to mean "the flow of any stream undepleted by the activities of man."

(a) *Is it proposed to determine "virgin flow" with respect to each year, or to use averages?*

ANSWER: "Virgin flow" will be determined with respect to each water year. In the actual administration of the Upper Colorado River Basin Compact, the Upper Colorado River Commission may make use of averages and necessarily will do so when hold-over reservoirs are constructed and placed in operation.

(b) *If on an annual basis, how will "virgin flow" for any particular future water year be determined?*

ANSWER: An index of the virgin inflow will be determined by the summation of the discharge measured at a series of key gaging stations located around the rim of the Basin above the major development, the recorded discharge past each station to be corrected for man-made depletions, if any, above that station. The virgin outflow at Lee Ferry will be

determined by a correlation curve developed by the historic relationship between recorded inflow at such key gaging stations, corrected for upstream man-made depletions, if any, and recorded Lee Ferry flows, together with the historic man-made depletions above Lee Ferry.

QUESTION No. 3.

(a) *Will consumptive uses in each of the States, under Article III, be determined with reference to each water year?*

ANSWER: Consumptive uses in each of the Upper Basin States will be determined with reference to each water year. In making an administrative determination of such consumptive uses the Upper Colorado River Commission will necessarily make use of averages when holdover reservoirs are constructed and placed in operation. While the Compact leaves such determination to the Commission, it is considered that the Commission may make use of 10-year progressive averages.

(b) *Or, are these quantities to be determined on long or short term averages?*

ANSWER: See answer to Question No. 3(a) above.

QUESTION No. 4.

Article IV speaks of curtailment of use of water in order that flow at Lee Ferry shall not be depleted below that required by Article III of the Colorado River Compact.

Does the word "use" mean the same thing as the phrase "consumptive use" as determined pursuant to Article VI of the Compact?

ANSWER: The word "use" as it so occurs includes "consumptive use" as such use is determined pursuant to Article VI. "Use" is a broader term than "consumptive use." It is employed in Article IV in order that there may be no argument as to the power and obligation of an Upper Division State to curtail any "use" which it determines should be curtailed in order to assure full compliance with Article III(d) of the Colorado River Compact.

QUESTION No. 5.

Article V, subsection (c), provides that: "In the event the Commission finds that a reservoir site is available both to assure deliveries at Lee Ferry and to store water for consumptive use in a State of the Upper Division, the storage of water for consumptive use shall be given preference."

Does this mean that the Commission may exonerate any reservoir or reservoir capacity from the obligation of Article III(d) of the Colorado River Compact: If not, what is meant by the "preference" for consumptive use?

ANSWER: The answer to the first part of this double question is: No. The States and not the Commission determine what uses must be curtailed in order to comply with the obligation of Article III (d) of the Colorado River Compact. By "preference" is meant that each Upper Division State has a superior right to use a storage site for consumptive uses within that State and it may not be deprived of that right by the desire of other Upper Division States to utilize the same site for the impoundment of water which will be released to meet the Lee Ferry delivery obligations of the Upper Division States. The exer-

cise of such a preference right must not violate or have the effect of violating the delivery obligation imposed by Article III(d) of the Colorado River Compact.

QUESTION No. 6.

Article VI provides that the Commission shall determine the quantity of the consumptive use of water for the Upper Basin and for each State of the Upper Basin, by the inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry, unless the Commission, by unanimous action, shall adopt a different method of determination.

(a) *Outflow from the Upper Basin apparently would be measured at Lee Ferry. Where and how would inflow to the Upper Basin be measured?*

ANSWER: Inflow to the Upper Basin will be determined by a series of key gaging stations located at strategic points and designed to be an index of the inflow to the Upper Basin. The recorded discharge past these key gaging stations will be corrected for all man-made depletions, if any, occurring above each station.

(b) *It is my understanding that a large part of the use of water in the Upper Basin will be made possible by over-year and cyclic storage. The impounding of water in storage reservoirs would be reflected by depletion at Lee Ferry during the water year in which water is impounded. Does Article VI mean that consumptive use will be measured by water stored, as distinguished from the withdrawals from storage and application to use on land?*

ANSWER: The measurement of use by the inflow-outflow method prescribed by Article VI automatically takes into account the storage and release of water from reservoirs. Hence the measurement, in terms of stream depletion at Lee Ferry is by water stored as distinguished from withdrawals from storage and applications to use on land.

(c) *How is it proposed to account for water stored in one year and applied to use in another and later year? Specifically, would consumptive use be considered as occurring in the year in which water is impounded, or in some later year when it is withdrawn from storage and applied to use?*

ANSWER: The necessity for hold-over storage to enable the Upper Basin to utilize the apportionment made to it by the Colorado River Compact and at the same time to comply with the obligation for Lee Ferry deliveries imposed by Article III(d) of the Colorado River Compact requires that consumptive use resulting from the storage of water in reservoirs be determined on the basis of progressive averages. While the Compact leaves such determination to the Commission, it is considered that the Commission may make use of progressive averages.

QUESTION No. 7.

Article VIII provides for an "Upper Colorado River Commission." Among other things, the Commission is authorized to (Article VIII(d)):

"(6) *Make findings as to the quantity of water of the Upper Colorado River System used each year in the Upper Colorado River Basin and each State thereof:*

"(7) Make findings as to the quantity of water deliveries at Lee Ferry during each water year:

"(8) Make findings as to the necessity for and the extent of the curtailment of use, required, if any, pursuant to Article IV hereof."

Subdivision (g) of the same article provides that:

"Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal but shall constitute prima facie evidence of the facts found."

It has been held that, in addition to its contractual character, under some circumstances a compact approved by the Congress is a public law (Missouri v. Illinois, 200 U. S. 496-519: Pennsylvania v. Wheeling, etc., 54 U. S. 518-566). Is it intended that subdivision (g) above shall be binding on any State not a party to the Upper Colorado River Basin Compact, or on the United States?

ANSWER: Article VIII(g) of the Upper Colorado River Basin Compact does not bind any State which is not signatory to that Compact and does not bind the United States.

QUESTION No. 8.

Will the ratification by the several States and the approval by the Congress, of the Upper Colorado River Basin Compact in any way amend or affect the meaning of the Colorado River Compact, whatever that document may mean?

ANSWER: The Upper Colorado River Basin Compact is an inter-state compact between the States of Arizona, Colorado, New Mexico, Utah, and Wyoming. Article I, section 10, of the Constitution of

the United States requires that before a compact or agreement between states is effective the Congress of the United States must consent thereto. The purpose of H. R. 2325 is to give such Congressional consent to the Upper Colorado River Basin Compact. H. R. 2325 does not, nor does the Upper Colorado River Basin Compact, alter, amend, modify, or repeal the Boulder Canyon Project Act (45 Stat. 1057) or the Colorado River Compact signed at Santa Fe, New Mexico, on November 24, 1922. It is recognized that the Upper Colorado River Basin Compact is binding only upon the states which are signatory thereto and does not impair any rights of any State not signatory thereto, and that the Upper Colorado River Basin Compact is subject, in all respects, to the provisions and limitations contained in the Colorado River Compact.

QUESTION No. 9.

I note that in Article XVIII the States of Arizona, New Mexico and Utah have reserved their respective rights and interests under the Colorado River Compact, as States of the Lower Basin. Will the ratification and approval by the Congress of the Upper Colorado River Basin Compact impair or in any way affect the rights of States of the Lower Basin not signatory thereto?

ANSWER: All that is sought by H. R. 2325 is the consent of the Congress to the Upper Colorado River Basin Compact so that the limitation imposed by Article I, Section 10, of the United States Constitution upon the power of any state to "enter into any Agreement or Compact with another state" may be

removed. The Lower Basin rights of Arizona, New Mexico, and Utah were reserved in order to avoid any questions that might arise if they were not specifically reserved. No implication can be drawn from this reservation with respect to the rights of states not parties to the Compact. They are not bound and their legal rights are not and cannot be impaired by a document to which they are not parties.

Sincerely yours,

(Sgd) CHARLES A. CARSON
Charles A. Carson
Commissioner for the State of Ariz.

(Sgd) CLIFFORD H. STONE
Clifford H. Stone
Commissioner for the State of Colo.

(Sgd) FRED E. WILSON
Fred E. Wilson
Commissioner for the State of New Mexico

(Sgd) L. C. BISHOP
L. C. Bishop
Commissioner for the State of Wyom.

(Sgd) CLINTON D. VERNON
Clinton D. Vernon
Attorney General of Utah

(Sgd) J. A. HOWELL
J. A. Howell
Special Asst. Atty. Genl of Utah

(Sgd) HARRY W. BASHORE
Harry W. Bashore
Representative of the U. S.,
Upper Colo. R. Basin Comp. Negotiations

APPENDIX No. 32.

EXTRACT FROM REPORT OF COMMITTEE ON PUBLIC LANDS, HOUSE OF REPRESENTATIVES.

(81st Cong., 1st Sess.) Report No. 270 on H. R. 2325 an Act Granting the Consent of the United States to the Upper Colorado River Basin Compact, Act of April 7, 1949, 63 Stat. 31.

The purpose of H. R. 2325 (S. 790) is to give such congressional consent to the Upper Colorado River Basin Compact. H. R. 2325 (S. 790) does not, nor does the Upper Colorado River Basin Compact, alter, amend, modify, or repeal the Boulder Canyon Project Act (45 Stat. 1057) or the Colorado River Compact signed at Santa Fe, N. Mex., on November 24, 1922. It is recognized that the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto and does not impair any rights of any State not signatory thereto, and that the Upper Colorado River Basin Compact is subject, in all respects, to the provisions and limitations contained in the Colorado River Compact. It is further recognized that Congress, by giving its consent to the Upper Colorado River Basin Compact, does not commit the United States to any interpretation of the Colorado River Compact expressed in, or implied from, the Upper Colorado River Basin Compact, and expresses neither agreement nor disagreement with any such interpretation.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

(See List of Attorneys on Inside Cover)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

STATEMENT OF JURISDICTION

The four States of Colorado, New Mexico, Utah and Wyoming, which this motion seeks to join as necessary parties, are subject to the jurisdiction of this Court both as to service of process and venue, and the joinder of such States will not deprive the Court of original jurisdiction

over the parties under Article III, Section 2, Clause 2, of the Constitution of the United States.

RULES, TREATIES, INTERSTATE COMPACTS AND STATUTES INVOLVED

Rules

Rule 9 of the Revised Rules of the Supreme Court provides in part:

> "2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 21 of the Federal Rules of Civil Procedure provides:

> "*Misjoinder and nonjoinder of parties.*—Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Rule 19 of the Federal Rules of Civil Procedure provides:

> "*Necessary joinder of parties.*—(a) *Necessary joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) *Effect of failure to join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without

depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"(c) *Same—Names of omitted persons and reasons for non-joinder to be pleaded.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

Compact, Statutes, Treaty

The Colorado River Compact (H. Doc. 717, 80th Cong., 2d Sess., p. A17 (1948)). The full text appears in Appendix No. 1 to the Answer of the California Defendants to Arizona's Bill of Complaint. The provisions of that Compact primarily involved are quoted in the Statement of the Case.

The Boulder Canyon Project Act (Act of Dec. 21, 1928, 45 Stat. 1057). The full text of this statute appears in Appendix No. 2 to the Answer of the California Defendants to Arizona's Bill of Complaint. The provisions of that statute primarily involved are quoted in the Statement of the Case.

The California Limitation Act (Calif. Stats. 1929, Ch. 16, p. 38). The full text of that statute appears in Appendix No. 3 to the Answer of the California Defendants to Arizona's Bill of Complaint.

The Presidential Proclamation of June 25, 1929 (46 Stat. 3000). The full text of this proclamation appears in Ap-

pendix No. 4 to the Answer of the California Defendants to Arizona's Bill of Complaint.

The Mexican Water Treaty (U. S. Treaty Ser. No. 994, 59 Stat. 1219 (1945); H. Doc. 717, 80th Cong., 2d Sess. p. A831 (1948)). The full text of this Treaty appears as Appendix No. 29 of the Answer (in Volume II of the Appendixes).

The Upper Colorado River Basin Compact (Act of April 6, 1949, 63 Stat. 31) among the States of Arizona, Colorado, New Mexico, Utah and Wyoming. The full text of that Compact is printed as Appendix No. 30 of the Answer (Volume II of the Appendixes).

STATEMENT OF THE QUESTION PRESENTED

The question presented by this motion is:

Are the States of Colorado, New Mexico, Utah and Wyoming necessary parties to this action?

STATEMENT OF THE CASE

1. The Record to Date

The State of Arizona, invoking the original jurisdiction of this Court pursuant to the provisions of Article III, Section 2, Clause 2 of the Constitution of the United States, filed a motion for leave to file a bill of complaint in August, 1952, seeking certain equitable relief against the State of California and seven public agencies of California. Arizona's motion for leave to file was granted on January 19, 1953. The California Defendants answered the bill of complaint averring, among other things, four affirmative defenses (filed May 19, 1953). Arizona replied (filed August 28, 1953) and California made rejoinder (filed October 7, 1953).

On December 31, 1952, the United States of America filed a motion to intervene, which was granted (344 U.S. 919, Jan. 19, 1953). Subsequently the United States filed

a petition in intervention (December 8, 1953) which was answered by Arizona (February 11, 1954) and the California Defendants (April 5, 1954).

On December 14, 1953, the State of Nevada filed a motion to intervene and a petition in intervention. Arizona in effect demurred (filed February 5, 1954), and the California Defendants made answer (filed April 5, 1954). Following the granting of Nevada's motion to intervene by this Court on June 1, 1954, (*Arizona* v. *California,* 98 L. ed. (Advance p. 720), 1954), Arizona made answer (filed July 14, 1954).

By Order entered June 1, 1954 (*Arizona* v. *California,* 98 L. ed. (Advance p. 720), 1954), this Court appointed George I. Haight, Esquire, of Chicago, Illinois, as Special Master in this cause.

On July 15, 1954, the California Defendants filed the present motion to join as necessary parties the States of Colorado, New Mexico, Utah and Wyoming. On the same date the California Defendants filed a motion for leave to file an amended answer to Arizona's bill of complaint and also filed an amendatory answer. On August 13, 1954, Arizona filed its response to the motion of the California Defendants to join the four named States.

2. The Relief Prayed by the Parties

ARIZONA

In its bill of complaint the State of Arizona prays, among other things, that its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the waters of the Colorado River System (alleged to have been apportioned to the Lower Basin by the Colorado River Compact, and to consist of 2,800,000 acre-feet of the 7,500,000 acre-feet the use of which was apportioned by Article III(a), and all of the additional 1,000,000 acre-feet of uses referred to in Article III(b) of the Compact), be forever confirmed and quieted as against the Defendants, subject to certain rights in New Mexico and Utah, and that the Defendants be enjoined from asserting any claim to the contrary;

that the title of California to the annual beneficial consumptive use of waters of the Colorado River System apportioned by the Colorado River Compact to the Lower Basin be forever fixed and limited at 4,400,000 acre-feet; that, as to surplus waters unapportioned by the Colorado River Compact, the Court decree that when and if there is a further apportionment of such waters to the Lower Basin the State of California be entitled to one-half and the State of Arizona to the remainder less one-twenty-fifth to Nevada and less the undefined rights of Utah and New Mexico; that a decree be entered establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of man-made depletion of the virgin flow of the main stream; and that losses of water from reservoirs located on the main stream in the Lower Basin be charged against Arizona and California in proportion to their use of water stored in such reservoirs. To further these claims, Arizona seeks certain interpretations of the Colorado River Compact and the Boulder Canyon Project Act, related laws, contracts and documents.

California

In their answer the California Defendants deny the major allegations of the State of Arizona, and assert, among other things, the affirmative defenses that the Defendants have the right to the beneficial consumptive use of 5,362,000 acre-feet per annum of water of the Colorado River System under the Colorado River Compact, the Boulder Canyon Project Act, a Statutory Compact between the United States and California, and the water storage and delivery contracts of the United States executed pursuant thereto; that Arizona is estopped and precluded from asserting the interpretations of the laws and documents asserted in her bill of complaint; and that the Defendants have appropriative rights to the beneficial consumptive use of not less than 5,362,000 acre-feet of

Colorado River System water per annum as against all other parties.

Nevada

The State of Nevada, in its petition of intervention, seeks to quiet title to 539,100 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact; to reserve for future agreement the disposition of the use of 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact and to assure to Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum, from all classes of water.

The United States

The United States of America, in its petition of intervention, asserts claims "as against the parties to this cause" of rights to the use of water in the Colorado River and its tributaries for the maximum legal demands of all projects in the Lower Basin to their full capacity for diversion, carrying and storage; to fulfill its obligations arising from its international treaties or conventions; to fulfill all of its contracts to deliver water and electric power; to fulfill the obligations emanating from its status as trustee for the Indians and Indian tribes; to protect its interests in fish and wildlife, flood control and navigation; and for use of the National Park Service, Bureau of Land Management, and Forest Service. The United States further alleges that these claims of Arizona and California far exceed the quantity of water apportioned to the Lower Basin of the Colorado River by the Colorado River Compact, and a resolution of the controversy between the parties "may therefore infringe upon the interests of the United States to its detriment". The United States claims rights to "annual diversions" in the Lower Basin for Indian uses in the amount of 1,747,250 acre-feet, and 76,000 acre-feet for fish and wildlife projects. The amounts of the other Federal claims are not stated.

The issues which involve the States of Colorado, New Mexico, Utah and Wyoming in this controversy arise primarily from the Colorado River Compact, which their representatives and those of Arizona, California, and Nevada signed on November 24, 1922, subject to ratification by the legislatures of all seven States and the consent of Congress, and from the Boulder Canyon Project Act, which granted the consent of Congress thereto upon certain conditions, which have themselves become the subject of controversy.

3. The Colorado River Compact

The agreement signed at Santa Fe in November 1922 was the resultant of two forces. One was the Lower Basin's imperative necessity for the construction of a great storage dam, a drive rooted in the need for flood and silt protection for the Palo Verde Valley and Imperial Valley, (the latter lying 300 feet below sea level) and projects in Arizona along the lower river; the need for stored water to replace natural flow which was being taken away from senior appropriators in California by junior appropriators in other parts of the Basin; and the need for an All-American Canal to replace the canal then serving the Imperial Valley via a route through Mexican territory. The counter-force was the demand of Colorado, New Mexico, Utah and Wyoming for protection against the law of appropriation. The Compact was negotiated in the light of the then recent decision of *Wyoming* v. *Colorado,* 259 U. S. 419 (1922), which applied the doctrine of "first in time, first in right" regardless of State lines. The four upper States knew that irrigators in Arizona and California, in the period 1877-1910, had already appropriated and were now using all the natural flow of the river, and that the junior appropriations in the Upper Basin were dependent upon the construction of storage works, either in their basin or below. (California's answer to Arizona's complaint, par. 3)

The Compact, in short, was the price paid by the Lower Basin to the Upper for acquiescence in the construction of Hoover Dam.

Pertinent Provisions of the Compact

The Colorado River Compact deals, not merely with the main stream of the Colorado River, but with the "Colorado River System", which it defines in Article II(a):

> "The Colorado River System means that portion of the Colorado River and its tributaries within the United States of America."

This definition includes the Gila River System in Arizona as well as the eight other major tributary systems which, all together, constitute the Colorado River System.

As Arizona's Complaint correctly states (par. VII), "The Compact did not apportion water of the Colorado River System among the signatory States. Instead, it apportioned the beneficial consumptive use of stated quantities of water to the Upper Basin and the Lower Basin respectively."

It did more, however.

The Compact recognizes *rights* to the beneficial consumptive *use* of water in terms of "Basins"; *obligations,* with respect to the *delivery* of water, in terms of "Divisions". "Divisions" and "Basins" are defined as follows in Article II:

> "(c) The term 'States of the Upper Division' means the States of Colorado, New Mexico, Utah and Wyoming.
>
> "(d) The term 'States of the Lower Division' means the States of Arizona, California and Nevada.
>
> * * *
>
> "(f) The term 'Upper Basin' means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee

Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

"(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

The four States named in the present motion thus constitute the "States of the Upper Division". But the "Upper Basin" includes portions of these States and a part of Arizona.

Two of the absent States, Utah and New Mexico, have areas (and rights) within the Lower Basin, together with Arizona, California, and Nevada; but only the three last named are "States of the Lower Division".

The *rights* of both Upper and Lower *Basins* are stated in Articles III(a) and III(b):

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum."

These rights are stated in terms of "use", not in terms of flow of the stream; in terms of demand, not in terms of supply. They apply to the waters of the Colorado River System, including the waters of all of its tributaries, not merely the waters of the main stream.

The term "beneficial consumptive use" is not defined. The *obligations* of the two *Divisions* are stated in Articles III(c), III(d) and III(e):

> "(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).
>
> "(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this Compact.
>
> "(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

Unlike the statement of rights in Article III(a) and III(b), these obligations are stated in terms of water, not use of water; in terms of supply, not in terms of demand. They relate to the flow at one place, Lee Ferry on the main stream, unlike Articles III(a) and III(b), which deal with uses throughout the Colorado River System, on the tributaries as well as on the main stream.

The Compact does not purport to deal with the use of all of the waters available in the System, but provides in Articles III(f) and III(g):

"(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

"(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America."

These provisions are permissive, not mandatory. There may or may not be another Compact in the future, and if one is negotiated, the parties may or may not conform to this pattern.

Throughout the Colorado River System certain protective provisions apply, stated in Articles VII and VIII:

"ARTICLE VII

"Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the

Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Article XI provides that the Compact shall be binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States.

4. Arizona's Rejection of the Compact

The equilibrium supposedly established in November 1922 between the Lower States and the Upper, between the present parties to this suit and the four absent States, collapsed in less than three months. The legislature of Arizona rejected the Compact. (Answer to Arizona's complaint, par. 18) The legislatures of the other six States ratified it.

The needs for flood protection, water and electric power in the Lower Basin continued to increase. In 1923 Los Angeles commenced surveys on the Colorado River aqueduct and in 1924 filed appropriations on the waters of the Colorado River. (Answer to Arizona's complaint, par. 45, and Exhibit A thereto)

Ratification by the Other States of a Six-State Compact: 1925-1929

Between 1925 and 1929, the Legislatures of California, Colorado, Nevada, New Mexico, Utah and Wyoming, abandoning hope of Arizona's ratification, enacted legislation, proposed by Colorado, reciprocally waiving the provisions of Article XI of the proposed Colorado River Compact (which made the Compact effective when ap-

proved by the Legislatures of seven states), and enacting that the Compact should become effective when six states should have ratified it and the Congress should have given its consent. It was submitted for the consent of Congress in that form. (Answer to Arizona's complaint, par. 19)

5. The Boulder Canyon Project Act

(Act of Dec. 21, 1928, 45 Stat. 1057)

On December 21, 1928, the President approved the Boulder Canyon Project Act. (Appendix No. 2) This statute, insofar as the present controversy is concerned, (1) authorized construction of a dam (now known as Hoover Dam) and power plant in Black Canyon or Boulder Canyon in the Colorado River, on the Arizona-Nevada boundary, and the All-American Canal to carry water into the Imperial and Coachella Valleys in California, adjacent to the Mexican border, (2) granted the consent of Congress to the Colorado River Compact on certain conditions, more particularly described below, (3) subjected the rights and operations of the United States to the Compact, (4) directed that no person should have the use of stored waters except pursuant to contracts with the Secretary of the Interior, and authorized him to make such contracts, and (5) specified the purposes for which the dam and its reservoirs should be used.

Alternative Consent to Seven-state or Six-state Compact by Congress

The Project Act superimposed new features in granting the consent of Congress to the Compact. It granted that consent to the Compact either as a seven-state agreement, or, in the alternative, as a six-state compact, conditioned, in the latter event only, upon the enactment by California of a statute in specified terms. Power was designated to the President to proclaim, after the expiration of six months, the effectuation and existence of either the seven-

state compact or the alternative six-state compact, but not both. The language of the statute in this respect reads:

> Sec. 4(a). (Par. 1): "This Act shall not take effect * * * unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

(Paragraph 2 of this section authorized a compact among Arizona, California and Nevada, but it was not consummated.)

> Sec. 13 (a). "The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, * * * is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided."

Sections 13 (b, c, d) of the Act subjected the United States and all those claiming under it to the Colorado River Compact.

6. The Statutory Compact Between the United States and California

The Quantities Involved

The further restriction with which the California legislature was thus confronted was a serious one. California, in the present action, alleges that as of the date of signing the Compact (Nov. 24, 1922) her valid appropriations exceeded 6,000,000 acre-feet per annum, and that "present perfected rights" of projects then constructed and in operation in California required the beneficial consumptive use of more than 4,500,000 acre-feet per annum (Answer to Arizona's Complaint, par. 4), which had increased to 4,950,000 acre-feet at the effective date of the Project Act (June 25, 1929; Answer to Arizona's Complaint, par. 28). The limitation proposed by Congress was 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) plus not to exceed "one-half of the excess or surplus waters unapportioned by the Colorado River Compact". It omitted reference to the 1,000,000 acre-feet referred to in Article III(b), and the legislative history of the Project Act made it clear that Congress did not intend to exclude

California from participation in that "increase of use", but considered this quantity as part of the "excess or surplus waters unapportioned by the Compact", available "for use in California". The term "consumptive use" was defined as "diversions less returns to the river." The minimum requirements for beneficial consumptive use of the Palo Verde Valley, in which irrigation had been carried on since 1877, of the All-American Canal areas whose appropriative rights dated from 1893, and of the proposed Colorado River Aqueduct to the coastal plain, were known to aggregate about 5,400,000 acre-feet per annum. The limitation, if accepted, would require the abandonment of plans for California's other meritorious projects. (Answer to Arizona's Complaint, par. 28, 37.) Such a limitation had to be agreed to as the additional price for authorization of the dam and canal if Arizona continued to refuse to ratify the Seven-State Compact, but not if Arizona ratified. California's legislature provided for both contingencies.

California's Acceptance

The Legislature of California ratified the proposed Colorado River Compact both as a seven-state compact and as a six-state compact. (Calif. Stats. 1929, Ch. 1, p. 1; Stats. 1929, Ch. 15, p. 37; see Stats. 1929, Ch. 16, p. 38.) In a separate statute the California Legislature, in response to the first paragraph of Section 4(a) of the Boulder Canyon Project Act, on March 4, 1929, enacted a statute (Stats. 1929, Ch. 16, p. 38; sometimes referred to as the California Limitation Act, Appendix 3) to become effective only upon the ratification of the Colorado River Compact by six States, and its non-ratification by the seventh State (Arizona) within six months from December 21, 1928, and proclamation of the latter event by the President.

Proclamation of The Six-State Compact and Limitation Act by the President

On June 25, 1929 the President of the United States proclaimed that (a) seven States had not ratified the Colorado River Compact within six months from the date of the approval of the Boulder Canyon Project Act, but that (b) six states (including California) had ratified the compact and consented to waive the provisions of Article XI thereof requiring seven-state approval, as prescribed in Section 13 (a) of the Boulder Canyon Project Act; (c) that California had met the requirements set out in the first paragraph of Section 4 (a) of the Boulder Canyon Project Act necessary to render that act effective on six-state approval of the compact, and (d) all prescribed conditions having been fulfilled, the Boulder Canyon Project Act was effective June 25, 1929. (Appendix 4; 46 Stat. 3000.)

The Terms of the Resulting Statutory Compact

California alleges (Answer to Arizona's Complaint, par. 27) and Arizona denies (Reply to California's Answer, par. 27, 59); that upon the President's proclamation on June 25, 1929, the Boulder Canyon Project Act and the California Limitation Act thus established, by reciprocal legislation, a Statutory Compact between the United States and California which, on the one hand, restricted California's uses to the limits therein stated, but on the other hand authorized the United States to contract to presently deliver, and the defendants to receive, water from storage sufficient to make possible the beneficial consumptive use of the full quantities stated in the Statutory Compact. California says that these comprise the aggregate annual beneficial consumptive use of not to exceed:

(1) Four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin by Article III (a) of the Colorado River Compact, plus

(2) One-half of all excess or surplus waters not apportioned by Article III(a) of the Colorado River Compact, including in said excess or surplus the waters referred to in Article III(b) of said Compact.

As previously noted, the absent States, together with Arizona and Nevada, are named as beneficiaries of this Statutory Compact.

7. The Boulder Canyon Project Contracts: Statutory Provisions

Section 4(b) of the Boulder Canyon Project Act required the Secretary of the Interior, before constructing Hoover Dam and the All American Canal, to obtain contracts which would assure revenues to repay their cost.

Section 5 of the Project Act authorized the Secretary of the Interior to contract for the storage and delivery of water, and for the disposition of electric energy, in the following terms:

> "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, and generation of electrical energy * * * upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of Section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of Section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Section 6, Paragraph 1, governing the use of Hoover Dam and reservoir, provided in part as follows:

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power * * * "

California's "present perfected rights", as previously stated, are alleged to be 4,950,000 acre feet as of June 25, 1929. (Answer to Arizona's Complaint, par. 28)

The Seven Party Agreement

In 1931, at the instance of the Secretary of the Interior, the State of California recommended an apportionment among California public agencies of such waters as might be available under the Colorado River Compact and the Statutory Compact (Answer, par. 32; Appendix 10). The total was held within 5,400,000 acre-feet (5,362,000) per annum, which represented the minimum requirements of the Palo Verde Valley, All American Canal and Metropolitan areas on the coastal plain. A number of meritorious California projects were thereby excluded, in consequence of the Limitation Act. The Secretary of the Interior approved the allocation and promulgated it in regulations (Appendix 8). The seven public agencies recognized therein are the seven co-defendants of the State of California in this action.

The Contracts

Contracts were made in 1930 and 1931 between the United States and the California defendants (tabulated in paragraphs 34 and 35 of their Answer to Arizona's Complaint, and printed as appendixes to that Answer), assuring the United States the revenues required by Section 4 of the

Project Act, and providing for the delivery, from storage to be provided by Hoover Dam, pursuant to Sections 5 and 6 of the Project Act, of the quantities required to make possible the beneficial consumptive use in California of not to exceed 5,362,000 acre-feet per annum. Hoover Dam and the All-American Canal were constructed by the United States. The Colorado River Aqueduct was built by the Metropolitan Water District. (See Petition of Intervention of the United States, Appendix I-A) The California defendants allege that altogether they have undertaken firm obligations to the United States or have themselves built works to utilize the water covered by their contracts, at a cost exceeding five hundred million dollars. (Answer to Arizona's Complaint, par. 1) These projects are summarized in paragraph 2 of California's Answer to Arizona's Complaint, and in Exhibits A, B, and C to that Answer. It is through these projects that the seven co-defendants, signatories to the Seven Party Agreement, are served.

The United States subsequently entered into contracts in 1942 and 1944 with Nevada (Appendix VIA, VIB, to the Petition of Intervention of the United States) for the delivery of not to exceed 300,000 acre-feet per annum, and in 1944 with Arizona (Exhibit C to Arizona's Bill of Complaint) for the delivery of the quantities required to make possible the beneficial consumptive use of not to exceed 2,800,000 acre-feet per annum of Colorado River System water.

8. Litigation

The equilibrium between the present parties and the four absent States—established in 1922 by signature of the seven-state compact, destroyed by Arizona's rejection of that compact in 1923, reestablished in 1929 by the Six-State Compact and the California Limitation Act—wavered again in 1930. Arizona was no better satisfied with the new compact than with the old, and brought three successive actions in this Court to upset it, in 1930, 1934, and 1935. In all of them she joined all of the other six States as defendants.

On October 13, 1930, Arizona instituted an action (*Arizona* v. *California, et al.*, 283 U.S. 423 (1931)), to enjoin the construction of the Hoover Dam and All-American Canal, to declare the Boulder Canyon Project Act unconstitutional, and to invalidate the Colorado River Compact. On motion of the defendants the bill of complaint was dismissed.

On February 14, 1934, Arizona moved for leave to file a bill to perpetuate the testimony of the negotiators of the Colorado River Compact. (*Arizona* v. *California, et al.*, 292 U.S. 341 (1934).) The Court denied the motion for leave to file.

In October, 1935, Arizona filed a motion for leave to file a Bill of Complaint against the States parties to the Six-State Colorado River Compact praying an equitable apportionment, which motion was denied. (*Arizona* v. *California, et al.*, 298 U.S. 558 (1936).)

The present action, consequently, is the fourth in which the Court has been asked by Arizona to pass upon the meaning of the Colorado River Compact and the Boulder Canyon Project Act. It is the first in which Arizona has seen fit not to join the States other than California.

9. Arizona's Ratification of the Seven-State Compact; 1944

Fifteen years after enactment of the Project Act and the California Limitation Act, on February 24, 1944, the Legislature of Arizona enacted a statute entitled "An Act ratifying the Colorado River Compact; and declaring an emergency." (Sess. L. Ariz. 1944, pp. 427-428.)

That legislation was accompanied and followed by assertions by Arizona of interpretations of the Colorado River Compact, reversing those which she had stated to this Court in the preceding cases. It is these new interpretations that she seeks to enforce in this suit.

In brief, they have the effect of transforming Article III(a) of the Colorado River Compact from an apportionment of the uses of the waters of the entire Colorado River

System to an apportionment of the virgin flow of the main stream only. This would be accomplished primarily by (1) excluding the uses on the Gila River System from the operation of Article III(a) and physically identifying them as an apportionment of the waters specified in Article III(b);[1] (2) identifying the uses apportioned to the Lower Basin by Article III(a) with the waters delivered under Article III(d) at Lee Ferry by the States of the Upper Division, and (3) reducing the debit for Arizona's uses by more than 1,000,000 acre-feet through the technique of measuring the consumptive uses, particularly on the Gila, not at the places where the water is consumed, but by the estimated depletion which such uses would cause in the virgin flow of the main stream.[1] There are a number of other important issues, but Arizona's case insofar as the Upper Basin States are concerned, is essentially based upon this conversion of the Colorado River Compact from a System-wide agreement to a main-stream agreement, coupled with a denial by Arizona of the right of any State to acquire appropriative rights in unapportioned water, except as the result of a new compact, to be made after October 1, 1963; that is to say, with Arizona's consent. (The decree Arizona seeks here would presumably control the negotiators of that compact: complaint, prayer, par. 4, p. 30)

10. The Mexican Water Treaty

On February 3, 1944 the United States executed a treaty with Mexico relating to the waters of the Rio Grande, Colorado, and Tijuana Rivers. On April 18, 1945, the Senate of the United States consented thereto, with reservations, and the same was ratified, effective as of November 8, 1945 (Treaty Series 994; Appendix 29 to California's Answer). The performance of this treaty, as to the Colo-

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[1] Compare with the contemporary interpretation of the Colorado River Compact asserted by Arizona in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931); Appendix 28 to California's Answer to the present case.

rado River System, will require the guaranteed delivery, "from any and all sources," of 1,500,000 acre-feet of water per annum at the Mexican boundary, subject to reduction in the event of "extraordinary drought or serious accident to the irrigation system in the United States", in the "same proportion as consumptive uses in the United States are reduced." (Art. 10) The treaty (Art. 1(j)) defined "consumptive use" in terms consistent with the Project Act (Sec. 4a).

11. Upper Colorado River Basin Compact

By the Act of April 6, 1949, (63 Stat. 31) the Congress granted its consent to a compact (Appendix 30) among Arizona, Colorado, New Mexico, Utah and Wyoming apportioning the water available to the Upper Basin under the Colorado River Compact, defined as the compact proclaimed effective by the President June 25, 1929. The legislative report accompanying that legislation stipulates that the United States, by giving such consent, does not thereby commit itself to any interpretation therein expressed or implied with respect to the Colorado River Compact (H. Rep. 270, on HR 2325, 81st Cong., 1st Sess.)

12. Issues in the Present Case

The issues in the present case, as California sees them, are stated in a "Summary of the Controversy", which is annexed as Exhibit A to the present motion.

The issues are serious. If Arizona's prayers were granted, California's rights would be reduced to the beneficial consumptive use of 3,800,000 acre-feet per annum, measured by consumption at place of use, or 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream" (present Motion, Exhibit A, p. 8). This is a great deal less than the rights which California owned and could supply from natural flow prior to the construction of Hoover Dam.

The respects in which these issues involve the absent States and necessitate their presence in this action are stated in the following argument.

SUMMARY OF ARGUMENT

The presence in this case of the four absent parties to the Colorado River Compact is necessary to an effective conclusion of the Colorado River controversy.

No effective decree determining the rights to the use of water in the Lower Basin can be made unless it be first ascertained what quantities are legally available to the Lower Basin. This requires a determination of the obligations of the States of the Upper Division to deliver water at Lee Ferry, as well as their rights to use water as areas within the Upper Basin, since the waters upon which the decree will operate in the Lower Basin have, as their principal source, the waters arriving at Lee Ferry.

The same language of the Colorado River Compact which controls rights and obligations in the Lower Basin controls those in the Upper Basin, and the Upper Basin States are consequently affected by a decree construing that disputed language.

New Mexico and Utah have a dual interest, on the one hand as States of the Upper Division and Upper Basin, and on the other hand as States entitled to a portion, as yet undetermined, of the waters available to the Lower Basin as a whole. An effective division of the waters available *en bloc* to five States cannot be made in the absence of two of them.

Arizona claims rights as a third-party beneficiary of the Statutory Compact between the United States and California evidenced by the Boulder Canyon Project Act and the California Limitation Act. Colorado, Nevada, New Mexico, Utah and Wyoming are co-beneficiaries. This Statutory Compact came into existence only as an accompaniment, required by Congress, to a Six-State Compact, in consequence of Arizona's refusal to ratify a Seven-State

Compact. The six states ratified the Compact (1925-1929) under certain well understood interpretations. Arizona purported to ratify the Seven-State Compact fifteen years thereafter, upon new interpretations. The six parties to the Six-State Compact are all necessary parties to a determination of whether their agreement has thus been supplanted by a Seven-State agreement, and, if so, what its interpretation shall be, and whether the Statutory Compact between the United States and California remains in force. If it does remain in force, all of the co-beneficiaries are necessary parties to a decree construing their rights thereunder.

The United States asserts claims to the waters of the Colorado River System which are independent of, and adverse to, not only the rights of the present parties, but of all of the States of the Colorado River Basin. Most prominent of these is a large claim to the use of water made on behalf of Indians. All of the parties to the Colorado River Compact are necessary parties to a determination of whether this Indian claim and other federal claims to the beneficial consumptive use of water are outside of the Colorado River Compact and superior to the rights governed by that Compact, or whether the federal uses are chargeable to the Basin, and to the State, in which they occur, and a determination of the effect of these claims on the rights of the States to which they are adverse.

ARGUMENT

I

ALL ABSENT PARTIES MUST BE JOINED WHERE THEIR PRESENCE IS NECESSARY FOR A FULL AND EFFECTIVE SETTLEMENT OF THE CONTROVERSY.

A. The Rules of Court and the Federal Rules of Civil Procedure.

Under Rule 9 of the new Revised Rules of the Supreme Court, effective July 1, 1954, the form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and "in other respects those rules, where their application is ap-

propriate, may be taken as a guide to procedure in original actions in this Court."

On July 15, 1954, the California Defendants filed a motion to join, as parties to the present controversy, the States of Colorado, New Mexico, Utah and Wyoming pursuant to the procedure set forth in Rule 21 of the Federal Rules of Civil Procedure, which provides:

> "*Misjoinder and nonjoinder of parties.*— . . . Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just . . . ."

The requirements for compulsory joinder of parties under the Federal Rules of Civil Procedure are stated in Rule 19, which provides:

> "*Necessary joinder of parties.*—(a) *Necessary joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) *Effect of failure to join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

Rule 19 has been construed merely to codify the existing federal law of necessary and/or indispensable parties under federal practice prior to the adoption of the Federal Rules of Civil Procedure. *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. 2d 481, 485 (7th Cir. 1948), *cert. denied,* 336 U. S. 945 (1949); *Young* v. *Garrett,* 149 F. 2d 223, 228 (8th Cir. 1945); *United States* v. *Washington Institute of Technology,* 138 F. 2d 25, 26 (3d Cir. 1943); *Cather* v. *Ocean Accident & Guaranty Corp.,* 94 F. Supp. 511, 514 (D. Neb. 1950); *Field* v. *True Comics,* 89 F. Supp. 611, 613 (S.D.N.Y. 1950); 3 MOORE, FEDERAL PRACTICE, Par. 19.05 (2d ed. 1948).

This court in cases of original jurisdiction under Article 3, Section 2, Clause 2 of the Constitution has framed its proceedings on the question of parties in accordance with a developing body of federal precedents and held these precedents binding even where their application defeated the original jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902); *New Mexico* v. *Lane,* 243 U. S. 52 (1917).

B. The test of "necessary" parties.

Cited by the court in *California* v. *Southern Pacific Co., supra,* as authority for cases of original jurisdiction, was the leading case of *Shields* v. *Barrow,* 17 How. 130 (U. S. 1855). It defined "necessary parties" as:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the Court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties . . . ." (p. 139)

This rule as to necessary parties has been followed in subsequent decisions by the court, *Railroad Company* v. *Orr,* 18 Wall. 471 (U. S. 1873), *McArthur* v. *Scott,* 113 U. S.

340 (1885), *Gregory* v. *Stetson,* 133 U. S. 579 (1890), *Commonwealth Trust of Pittsburgh* v. *Smith,* 266 U. S. 152 (1924), and appears to have been incorporated in the definition of necessary parties found in subdivision (b) of Rule 19 of the Federal Rules of Civil Procedure as those:

> "who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties . . . ."

Where absent parties are found to be necessary, they must be joined to the suit when they are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it. Federal Rules of Civil Procedure, Rule 19(b); See *Williams* v. *Bankhead,* 19 Wall. 563, (U. S. 1874); *Barney* v. *Baltimore,* 6 Wall. 280 (U. S. 1868).

C. The further test of "indispensability".

If jurisdiction over those qualifying as necessary parties cannot be obtained, or if the joinder of such parties would destroy the court's jurisdiction over the parties before it, the court must then make the further determination of whether they are so "indispensable" as to require dismissal of the suit. The *Shields* case defined an indispensable party as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." (p. 139)

This rule as to indispensable parties has been uniformly followed as the guiding test. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77 (1920); *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902); *Barney* v. *Baltimore,* 6 Wall. 280 (U. S. 1868); *Northern Indiana*

R.R. v. *Michigan Central R.R.*, 15 How. 233 (U. S. 1854); *Mallow* v. *Hinde*, 12 Wheat. 193 (U. S. 1827). Where absent parties are found to be indispensable this Court has uniformly held that no adjudication can be made and the action must be dismissed. *Shields* v. *Barrow*, 17 How. 130 (U. S. 1855); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895); *Arizona* v. *California*, 298 U. S. 558 (1936).

D. Since the absent parties are within the court's jurisdiction, the question is whether they are "necessary", not whether they are "indispensable".

The four absent States of Colorado, New Mexico, Utah and Wyoming will be affected so directly and materially by a resolution of the issues raised in the pleadings among the present parties to the controversy, for the reasons hereafter shown, that they would qualify as indispensable parties if such a determination were required. However, since the four States are subject to the jurisdiction of this court both as to service of process and venue, and their joinder will not deprive the court of its original jurisdiction over the parties, a determination of indispensability is not required under the federal law of compulsory joinder. The absent States must be joined as long as they qualify as "necessary" parties. Accordingly, the only question that need be decided on this motion is whether the States of Colorado, New Mexico, Utah and Wyoming are necessary parties to this litigation.

E. The absent States are necessary parties.

Colorado, New Mexico, Utah and Wyoming must be joined as necessary parties if "complete relief" is to be accorded between those presently parties to the controversy. They must also be joined as necessary parties because their rights are at issue in this suit and should not be determined in their absence. The issues which materially and directly affect the absent States so as to require

their joinder are identified and summarized in the following pages.

II

THE FOUR STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING ARE NECESSARY PARTIES TO THIS ACTION BECAUSE THEY ARE PARTIES TO THE COLORADO RIVER COMPACT, THE MEANING AND EFFECT OF WHICH ARE IN CONTROVERSY IN THIS CASE, AND NO DECREE CONSTRUING THAT AGREEMENT CAN BE FULLY EFFECTIVE WHICH DOES NOT DETERMINE THEIR RIGHTS AND OBLIGATIONS AS WELL AS THOSE OF THE PRESENT PARTIES.

A. Both the rights of the absent States, as areas in part within the Upper Basin, and the obligations of those States, as the four "States of the Upper Division," are controlled by the language of the Colorado River Compact which determines the rights and obligations of the present parties.

The obligations of the States of the Upper Division are stated in Articles III(c), III(d) and III(e). The greater portion of the waters in controversy in the Lower Basin reach that Basin through the operation of those Articles.

The rights of the Upper Basin, like those of the Lower Basin, are stated in Articles III(a), III(e), III(f) and III(g). The quantities reaching the Lower Basin are directly affected by the quantities which the Upper Basin may have a right to use.

The obligations and the rights of all the States are affected by Articles VII and VIII.

The rights and obligations of the absent States are defined in the same terms, and in some cases in the same sentence, as the rights and obligations which are in dispute among the present parties, as is developed below.

B. The States of the Upper Division are affected by the question of whether the apportionment made to the Lower Basin by Article III(a) is identified with the covenant of the States of the Upper Division in Article III(d) not to deplete the flow at Lee Ferry below a total of 75,000,000 acre-feet in each period of ten consecutive years, or whether the "rights which may now exist" to uses on the Gila River and other Lower Basin tributaries shall be charged against the Lower Basin's apportionment under Article III(a).

This question depends upon the resolution of two others:

(a) Are the uses of the waters of the Gila River System and other Lower Basin tributaries chargeable at all to the apportionment made by Article III(a) to the Lower Basin?

(b) If uses on the tributaries are chargeable under Article III(a), what is their magnitude?

These two questions were primarily responsible for Arizona's refusal to ratify the Compact for twenty-two years, and they go to the heart of the present controversy.

The contending views are as follows:

California asserts that the waters of the Gila River System are part of the Colorado River System as defined by Article II(a) and of the Lower Basin as defined by Article II(g), (California's Answer to Arizona's Complaint, par. 7, p. 9); that uses under "rights which may now exist" to the waters of the Gila River System are chargeable under Article III(a) of the Compact to the Lower Basin and to Arizona, (*id.*, par. 8, pp. 11, 12); and that such uses amount to not less than 2,000,000 acre-feet per annum (*id.*, par. 8, p. 12).

Arizona asserts that the apportionment made by Article III(a) to the Lower Basin is of the use of waters present in the main stream and measured at Lee Ferry (Reply to California's Answer, par. 8, p. 16), and "that the 75,000,000 acre-feet specified in Article III(d) bears a direct quantitative relationship to the 7,500,000 acre-feet per year apportioned to the Lower Basin by Article III(a)"

(Reply to California's Answer, par. 11, p. 18)[1]. She alleges that the first million acre-feet of uses on the Gila (measured by her depletion method) are chargeable under Article III(b), not III(a) (*id.*, par. 8, p. 17), and that only the excess, which she now says is 170,000 acre-feet, is chargeable under III(a). (*Id*).

The net effect of Arizona's contentions is to read the Gila River System out of the Compact insofar as Article III(a) is concerned. (Arizona also reads the Gila out of the Colorado River System insofar as the Mexican burden is concerned: Reply to California's Answer, par. 10, p. 17.)

The effect of this issue upon the obligations of the four

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[1] Arizona's present position on this point reverses that which she presented to this Court in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931), in which her counsel said (Brief of Complainant in Opposition to Motions to Dismiss the Bill of Complaint, p. 32; Appendix 28 to California's Answer to Arizona's Complaint in the instant suit, pp. 397, 398):

"The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten-year periods, has, as the Colorado brief, page 41, correctly states, no bearing on the amount of the apportionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt."

absent States under Articles III(c) and III(d), as States of the Upper Division, is as follows:

If the uses of Arizona on the tributaries are chargeable at all to the Lower Basin's apportionment under Article III(a), it follows that, even if they are measured under Arizona's theory at only approximately 1,000,000 acre-feet, the 75,000,000 acre-feet received by the Lower Basin in a ten-year period at Lee Ferry must include at least 10,000,000 acre-feet of waters other than those the use of which is apportioned to the Lower Basin by Article III(a), because manifestly the Lower Basin cannot claim this ten million acre-feet twice under Article III(a), once on the tributaries and a second time at Lee Ferry. The States of the Upper Division, in the calculation of their obligation under Article III(c), are thus directly affected by the question of whether or not the uses on the Gila River and other Lower Basin tributaries are accountable under Article III(a), quite aside from the question of how such uses are measured.

That being so, the States of the Upper Division are affected by the magnitude assigned to the uses on the Lower Basin tributaries. California asserts that such uses amount to at least two million acre-feet per annum on the Gila River System; Arizona says they are less than 1,200,000.[2] This represents a difference of another 8,000,000 to 10,000,000 acre-feet in 10 years in the classification of the uses of the waters arriving at Lee Ferry.

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[2] Compare this contention, also, with Arizona's assertions in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931), particularly par. XIV of the bill of complaint (reprinted in Appendix 28 to California's answer, p. 389):

> "(3) Said compact defines the term 'Colorado River System' so as to include therein the Gila River and its tributaries, of which the total flow, aggregating 3,000,000 acre-feet of water annually, was appropriated and put to beneficial use prior to June 25, 1929."

The dispute over the magnitude of the uses on the Gila is part of the more general dispute as to how beneficial consumptive uses shall be measured, (II-D, *infra*).

C. The States of the Upper Division are affected by the question of whether the provision of Article VIII that "present perfected rights are unimpaired by this Compact" means unimpaired as to quality as well as quantity.

The parties' contentions are as follows:

California alleges (Answer to Arizona's Complaint, par. 15, p. 17), that the protection of this language extends to quality as well as quantity; Arizona says that the provision relates only to quantity (Reply to California's Answer, par. 15, p. 20).

Each State alleges the existence of large "present perfected rights." California alleges that, as of June 25, 1929, her rights of that category exceeded 4,950,000 acre-feet per annum (Answer to Arizona's Complaint, par. 28, p. 29), measured by diversions less return flow. Arizona admits that California had constructed projects as of June 25, 1929 which required a "net main stream depletion of about 2,902,000 acre-feet of water per annum" (Reply to California's Answer, par. 28, p. 26). Arizona alleges that in 1922, 73,000 acres were irrigated in that State from the main stream of the Colorado River. (*Id.*, par. 4, p. 14).

That there were large "present perfected rights" to the use of main stream water in the Lower Basin is attested by Article VIII of the Compact and Section 6 of the Boulder Canyon Project Act, directing that the dam and reservoir be used, among other purposes, for the protection of such rights.

The effect of this issue upon the absent States is as follows:

It is a question of fact, to be developed at the trial, what effect the increased utilization of water in the Upper Basin will have upon the concentration of salts in the

residue reaching Lee Ferry. The present concentration equals somewhat less than one ton of salts per acre-foot of water. What the effect will be, due to increased uses of water in the Upper Basin, and whether transmountain diversions will have a greater effect on the quality at Lee Ferry than in-basin consumptive uses, are matters to be determined. How much increase in salinity the projects in the Lower Basin with "perfected rights" can stand without affecting the yield and types of crops which have been grown are other factors to be considered.

The absent States are thus affected by the questions of whether Article VIII protects "present perfected rights" with respect to quality as well as quantity, what the magnitude of such rights in the Lower Basin may be, and the effect that the covenant that such "present perfected rights shall remain unimpaired by the Colorado River Compact" may have upon the rights and obligations of the absent States.

D. The rights of the Upper Basin are affected by the controversy over the interpretation of the expression "beneficial consumptive use".

The expression "beneficial consumptive use" occurs in Articles III(a) and III(b). Its meaning affects both basins.

Four definitions of this expression have been advanced:

California says (par. 8 of Answer to Arizona's Complaint) that the meaning of this term in the Compact is the same as that defined in section 4(a) of the Boulder Canyon Project Act:

> ". . . aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River . . . ."

which, California says, is amplified in the Mexican Water Treaty Article 1(j) as follows:

> " 'Consumptive use' means the use of water by evaporation, plant transpiration or other manner whereby

> the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream." (See Appendix 29.)

California says that this was the meaning of that term as used throughout the Compact (Answer to Arizona's Complaint, par. 8, p. 12.)

Arizona says (Complaint, par. XXII) that:

> ". . . beneficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man."

Nevada says (Petition of Intervention, par. XVIII) in substance, that the rule of "diversion less return flow" applies generally subject to an exception in favor of the "main stream depletion theory" on certain tributaries.

The four absent States of Colorado, New Mexico, Utah and Wyoming, together with Arizona, have provisionally agreed in the Upper Colorado River Basin Compact (63 Stat. 31; Appendix 30):

"ARTICLE VI

> "The Commission shall determine the quantity of the consumptive use of water, which use is apportioned by Article III hereof, for the Upper Basin and for each State of the Upper Basin by the inflow-outflow method in terms of the man-made depletion of the virgin flow at Lee Ferry, unless the Commission, by unanimous action, shall adopt a different method of determination."[1]

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[1] See Report of the House Committee on Public Lands, No. 270, on H.R. 2325, 81st Cong., 1st Sess. (1949), an act granting the consent of Congress to the Upper Colorado River Basin Compact (63 Stat. 31): "It is recognized that the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto and does not impair any rights of any State not signatory thereto, and that the Upper Colorado River Basin Com-

The "spread" of figures produced by these various methods is of the order of two million acre-feet per annum, as to the entire Basin, and three to five hundred thousand acre-feet as to the Upper Basin.[2]

The four absent States are affected by this issue in the calculation of their own rights to use water under Article III(a). The formula which they have provisionally adopted in Article VI of the Upper Colorado River Basin Compact does not bind the States of the Lower Basin or the United States. They are also affected by this issue in the calculation of their obligations as "States of the Upper Division" under Articles III(c) and III(d), *supra,* because these obligations are affected by the quantities of use of "surplus" waters above the quantities specified in Articles III(a) and III(b), both in the Lower Basin and the Upper Basin, which must be yielded before the added obligation of the States of the Upper Division under Article III(c) comes into force. The quantities in fact beneficially consumed, measured at the place of use, are greater than the resulting depletion of the virgin flow of the main stream. This is particularly true in the Lower Basin. The magnitude of the uses chargeable to the Lower Basin is consequently greater, if calculated in terms of actual consumption at the places of use, than if calculated in terms of resulting depletion of the virgin flow of the main stream.

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pact is subject, in all respects, to the provisions and limitations contained in the Colorado River Compact. It is further recognized that Congress, by giving its consent to the Upper Colorado River Basin Compact, does not commit the United States to any interpretation of the Colorado River Compact expressed in, or implied from, the Upper Colorado River Basin Compact, and expresses neither agreement nor disagreement with any such interpretation."

[2] As to the figures applicable to the Lower Basin, see "Summary of the Controversy": Exhibit A to the Answer of the California Defendants to the Petition of Intervention of the United States, and to the present motion. As to the figures respecting the Upper Basin, see Record, UPPER COLORADO RIVER BASIN COMPACT; Proceedings of July 8, 1948, p. 58.

We do not think that four sets of books should be kept on uses in the Colorado River Basin, one under the Colorado River compact, one under the Boulder Canyon Project Act, one under the Upper Basin compact, and one under the Treaty. We think one rule applies, and that the treaty, in Article 1, fairly states it.

There are other serious questions involved in the interpretation of the expression "beneficial consumptive use." For example, if water is stored in a reservoir and later released and used, shall the charge for that use be made in the year in which the water was stored (on the theory that the use, in the sense of "depletion" of the river's flow, took place in that year), or made in the year of release and actual consumption? The four absent States maintain the former interpretation (Hearings, House Committee on Public Lands, H.R. 2325, 81st Cong., 1st Sess., (1949), pp. 57-58, question 6(b); Appendix 31 to California's Answer, Vol. II). California asserts the latter construction. The difference is important, because water is added to storage in plentiful years and is withdrawn in years of short supply, and the identification of the "use" with the one year or the other seriously affects the determination of the quantities of "surplus" waters used.

The term "beneficial consumptive use," applied by the Compact in common to both Basins, must be given a uniform interpretation and application in both.

E. The Upper Basin is affected by the question of whether beneficial consumptive uses of "salvaged water", i.e., water salvaged by the activities of man, which would be lost in a state of nature, shall be charged under the Colorado River Compact.

This question is not necessarily controlled by the question of whether consumptive use shall be calculated in terms of actual use at place of use or calculated in terms of main stream depletion of virgin flow. The question here is whether any charge at all shall be made, under either theory, for the use of water salvaged by man which

would have been lost to the Colorado River System in a state of nature. Arizona cites, as an example, the Gila River, which she says was a "losing stream" in a state of nature. (Complaint, par. XXII, p. 26.) Other examples occur on the main stream, on which there were large evaporation losses from such areas as the Palo Verde Valley, Parker Valley and Yuma Valley in a state of nature, but where such water is now conserved and used; so also with respect to the flood waters on the tributaries and the main stream which escaped in a state of nature but were salvaged by the construction of storage dams, such as Roosevelt Dam on the Gila System and Hoover Dam on the main stream.

The present parties have advanced three contentions; the absent States may advance others.

Arizona contends that "water salvaged by man is not chargeable as a beneficial consumptive use" (Complaint, par. XXII, p. 26), although she charges California with the use of flood waters salvaged by storage behind Hoover Dam, which otherwise wasted to the Gulf of California.

California contends that "no beneficial consumptive uses at places of use are excepted or exempt from said method of measurement, whether of natural flow or of water salvaged by storage or otherwise in any part of the basin." (Answer to Arizona's Complaint, par. 8, p. 12).

Nevada contends that the use of waters salvaged on certain tributaries is not chargeable (Petition of Intervention of Nevada, par. XVIII, p. 20), either under the depletion theory (p. 20) or the diversion-less-return-flow theory.

This issue involves the absent States in two ways:

As this question involves the interpretation of "beneficial consumptive use," an expression common to both basins, the determination of the accounting for the use of waters salvaged by man must apply uniformly to both basins.

The question of whether the use of salvaged water shall be charged under the Compact, in either basin, affects the total of the uses chargeable in the entire Colorado River

Basin under paragraphs (a) and (b) of Article III, and therefore affects the amount of "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, available to support the Mexican Treaty burden before the States of the Upper Division are required to increase their deliveries under Article III (c) at Lee Ferry.

F. The Upper Basin is affected by the question of whether the Compact term "per annum" means "each year", or an average over some unstated period of years.

Both Articles III(a) and III(b) refer to quantities in terms of uses "per annum." The problem is whether the apportionment made by Article III(a) to the Upper Basin reserves to that Basin, against appropriations in the Lower Basin, the right to a maximum of 7,500,000 acre-feet in any given year, or a right to an annual average of that quantity over some long period of time. The latter is more advantageous to the Upper Basin and disadvantageous to the Lower. Very large amounts of water are affected by this question.

The contentions of the States are as follows:

The four absent States have asserted a right to use, as water apportioned by Article III(a), aggregate quantities which, averaged over a 32-year period, would equal 7,500,000 acre-feet per annum, notwithstanding that the annual uses which make up this 32-year total would exceed 7,500,000 acre-feet per annum in 17 of the 32 years, and that such excess use would amount to as much as 2 million acre-feet in individual years.[1]

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[1](i) The right to calculate the apportionment on an average basis was asserted by the negotiators of the Upper Colorado River Basin Compact, without translating their assertion into figures, in the hearings of the House Committee on Public Lands on H.R. 2325 *et al.*, 81st Cong., 1st Sess., (1949), p. 57. (Answer to question No. 3.)

(ii) The result of this contention, in figures, appears in "Colorado River Storage Project and Participating Projects, Upper

California's contention is that the quantities specified in Articles III(a) and III(b) relate to the aggregate annual uses in each calendar year, considering each year separately. The result is that if the Upper Basin uses more than 7,500,000 acre-feet in a given year, it is using water above that apportioned to it by Article III(a), and if the Lower Basin uses more than 8,500,000 acre-feet in any given year it is using water in excess of that apportioned by Article III(a) and surplus to that permitted by Article III(b). The right to use that excess or surplus is not founded on the apportionment made by Article III(a), but upon appropriation of such excess or surplus waters (using the word "appropriation" here, as elsewhere in this brief, to include the acquisition of rights by contract with the United States to the use of waters stored by the United States). California construes "per annum" like "per hour" in a speed limit, and denies the right of either Basin to use, as "apportioned" in perpetuity, a quantity in excess of 7,500,000 acre-feet in a given year merely because that Basin, in some other year, used less than that quantity.[2]

Colorado River Basin"; U.S. Bureau of Reclamation, December 1950; H. Doc. 364, 83d Cong., 2d Sess., (1954), p. 152: (Table captioned "Determination of active storage requirement to permit full utilization of apportioned consumptive use"). Column 2 of that Table, captioned "Ultimate use of upper basin apportionment", shows uses by proposed Upper Basin projects of more than 7,500,000 acre-feet in each of the 17 years corresponding to the historical years 1914, 1916, 1917, 1918, 1920, 1921, 1922, 1923, 1926, 1927, 1928, 1929, 1930, 1932, 1938, 1941, and 1942, ranging from an excess of 90,000 acre-feet in a year like 1930 to an excess of 2,030,000 acre-feet in a year like 1917. The aggregate use in these 17 years, in excess of 7,500,000 acre-feet per annum, is 15,680,000 acre-feet, and the average excess for each of the 17 years is 920,000 acre-feet. The average excess for the whole 32-year period is 490,000 acre-feet per annum.

[2] The expression used in Section 4(a) of the Boulder Canyon Project Act is "aggregate annual consumptive use". The water delivery contracts made under that Act refer to delivery of specified quantities "each year". This is true with respect to the Government's water delivery contracts in California (Ap-

Arizona apparently agrees with this in principle, but contends that, as a parctical matter, measurement of uses must be "averaged," and that the issue has not yet arisen. (Reply to California's Answer, par. 8, p. 17.)

If California is correct, the absent States are relying, in the planning of their projects, on a misinterpretation of the Compact which, with respect to this point alone, would unlawfully add several hundred thousand acre-feet per annum to their supply, and correspondingly diminish the supply to which the Lower Basin is lawfully entitled.

The expression "per annum" must be given a uniform interpretation in both of the Basins to which the one expression refers.

G. The Upper Basin is affected by the question of whether, and how, rights may be acquired in either Basin to the use of waters surplus to those specified in Articles III(a) and III(b) of the Compact.

Two widely conflicting views on this question have been stated.

California asserts that pursuant to its Statutory Compact with the United States rights may be presently acquired in such surplus waters by appropriation, including contracts with the United States where such waters have been stored by the United States, and that this right likewise exists under the Compact and applies in the Upper Basin States, subject to the priority of earlier appropriations and earlier contracts in the Lower Basin. (Answer to Arizona's Complaint, par. 27, p. 28; par. 13, p. 16.)

Arizona (Complaint, par. XI, p. 17; Prayer, par. 4, p. 30; Reply to California's Answer, par. 13, pp. 18-19) as-

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pendixes 11, 13, 16, 19, 21, 23 to the Answer of the California Defendants to Arizona's Bill of Complaint), Arizona (Exhibit C to Arizona's Bill of Complaint), and Nevada (Appendixes VI(A), VI(B) to Petition of Intervention of the United States). The guaranteed delivery to Mexico is 1,500,000 acre-feet "annually", "a year", (Mexican Water Treaty, Art. 10; Appendix 29, Vol. II).

serts that no rights may be acquired in such surplus waters except as the result of a new compact to be made after October 1, 1963.

The issue affects the absent States in several ways:

If the Compact should be held, as California contends, to apportion to the Upper Basin the beneficial consumptive use of only 7,500,000 acre-feet in each calendar year, and not a long-term average of that amount, the right of the Upper Basin to the beneficial consumptive use of more than 7,500,000 acre-feet in any one calendar year is dependent upon the establishment of a right thereto by appropriation and use, not by apportionment under Article III(a). But Arizona (Complaint, par. XI; Reply to California's Answer, par. 57) and Nevada (Petition of Intervention, par. XX) deny the existence of any present right to acquire rights in unapportioned waters. A question of fact exists as to whether all such surplus waters which the Upper Basin might attempt to use have already been appropriated or contracted for in the Lower Basin or dedicated to Mexico by treaty. (See California's Answer to Arizona's Complaint, par. 46, p. 52; par. 47, p. 53; Answer to Nevada's Petition of Intervention, par. 5, p. 5; Answer to Petition of Intervention of the United States, par. 15-17, pp. 29-31.)

California contends that the Compact was intended when written in 1922 to insulate the Upper Basin against the law of appropriation, applied regardless of State lines (*Wyoming* v. *Colorado*, 259 U. S. 419 (1922)) only to the extent of a permanent right to make beneficial consumptive use of 7,500,000 acre-feet per annum. All other waters must come down the river, unless appropriated for beneficial consumptive use in the Upper Basin in competition with the Lower, for they are either subject to the apportionment made to the Lower Basin by Article III(a), or to the Lower Basin's right to increase its use by 1,000,000 acre-feet per annum, or to the dedication of 1,500,000 acre-feet a year made by the Mexican Water Treaty to Mexico,

or to appropriations long since made in the Lower Basin of all other waters in excess of those apportioned by Article III(a).

H. The Upper Basin is affected by the question of whether the increase of use permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as against the Upper Basin, or whether the Lower Basin's right to that million acre-feet, as against the Upper Basin, is dependent upon appropriation and use.

The contentions advanced to date are as follows:

California alleges that the language of Article III(b) does not constitute an apportionment to the Lower Basin, which remains good in pereptuity against the Upper Basin regardless of non-use, as does the apportionment made in Article III(a), but that the "right to increase its use" given the Lower Basin becomes effective only to the extent that appropriations, including contracts with the United States for the use of water stored by the United States, are made; that only upon making such appropriations, and not until then, does the right become vested in users in the Lower Basin (Answer to Arizona's Complaint, par. 9, p. 13); and that the first million acre-feet so committed in excess of 7,500,000 in any year, throughout the Lower Basin, is covered by this permission. It follows that if such rights have not been exercised by the time the Upper Basin becomes entitled under Articles III(f) and III(g) to demand a further apportionment, the uncommitted portion of this million acre-feet becomes available for further apportionment upon demand of the Upper Basin, as a part of the waters unapportioned by the Colorado River Compact (Cf. Sec. 4(a) of the Boulder Canyon Project Act).

Arizona now alleges that the use of the acre-feet referred to in Article III(b) is apportioned by the Compact in perpetuity to the Lower Basin, but is identified with the waters of the Gila River, which are physically avail-

able only to Arizona and New Mexico[1] (Reply to California's Answer, par. 9, p. 17).

Nevada asserts that increases of use throughout the Lower Basin are accountable under Article III(b) and are available to all five States in that Basin upon an agreement among such States (Petition of Intervention, par. VIII, p. 13), but that Article III(b) constitutes an apportionment by the Compact to the Lower Basin (*id.*, par. X, pp. 14-15).

The issue affects the Upper Basin with respect to the quantities of water which will be available for reapportionment under Article III(f). If the uses referred to in Article III(b) are "apportioned," that million acre-feet will not be subject to reapportionment in favor of the Upper Basin, even if unused. But if the Lower Basin's right thereto is dependent upon appropriation, not apportionment, the portion unappropriated will be subject to reapportionment, like other surplus waters unapportioned by the Compact.

I. The absent States are affected by the issue of the accounting for reservoir evaporation losses.

There are a number of contentions on this issue.

Arizona contends (Reply to California's Answer, p. 50):

> "Losses of water in and from reservoirs located in the Lower Basin on the main stream of the Colorado River shall be charged against the apportionment to Arizona and California respectively in the same proportion as the consumptive use of water delivered from storage in such Reservoirs in the State against which the charge is made currently bears to the total consumptive use in the Lower Basin of water delivered from storage in such Reservoir."

This would exclude Nevada from any charge for reservoir losses on Lake Mead.

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[1] Compare with Arizona's contentions in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931); Appendix 28 to California's Answer, p. 398, 399.

California contends that the limitation imposed by the Statutory Compact is stated in quantities "for use in California," and

> "Said Statutory Compact does not provide for the reduction of said quantities in consequence of reservoir, evaporation or other losses occurring prior to delivery of said waters at the points of diversion in California." (Answer to Arizona's Bill of Complaint, par. 27(f), pp. 27-28.)

Nevada contends that

> "evaportion losses of water from storage reservoirs on the main stream of the Colorado River in the Lower Basin are first chargeable out of excess or surplus water and that such evaporation losses are not chargeable against Article III(a) or III(b) waters unless and until all such available excess or surplus water is exhausted in any given year." (Petition of Intervention, par. XVIII, p. 21.)

The four absent States apparently contend that all reservoir losses in the Upper Basin, whether on the main stream or tributaries, are chargeable against the uses apportioned by Article III(a) of the Colorado River Compact. (Upper Colorado River Basin Compact, Art. V; Appendix 30.)

It is not known what position the United States will take as to the accounting for reservoir evaporation losses attributable to federal claims to water, *e.g.*, for the service of Indian rights, performance of the Mexican Water Treaty, navigation, flood control, power generation, etc.

The quantities of reservoir evaporation losses involved are of the order of two million acre-feet per annum, somewhat more than one-half being in the Lower Basin. As this question arises in connection with the definition of "beneficial consumptive use" in Article III(a) and III(b), and affects obligations under Articles III(c) and III(d), it is an issue common to both Basins.

J. The Upper Basin is affected by the question of whether rights of Indians, and uses under these and other federal claims of rights, are chargeable against the apportionments made by the Colorado River Compact, or are excluded therefrom by Article VII.

This question, which concerns the absent States as much as the States now parties to this suit, is discussed, *infra*, in connection with the necessity of the presence of these States as parties to the adjudication of the federal claims to the waters of the Colorado River System.

K. Language in the Colorado River Compact applicable to both Basins must be given the same interpretation as to both, and the decree in this case interpreting such language as to the Lower Basin must, to be effective, operate throughout the Upper Basin as well as the Lower. This requires that the four absent parties to the Compact be made parties to this action.

The Colorado River Compact, like other interstate compacts, is a contract between states. *Green* v. *Biddle*, 8 Wheat. 1 (U. S. 1823). Parties to the compact are bound by joint obligations, and have rights as joint obligees.

The settlement of the controversy between the present parties to the suit, Arizona, California, Nevada and the United States, can only be made by a decree determining provisions of the Colorado River Compact definitive of Lower Basin rights and obligations which by the same language must conversely be definitive of rights in the Upper Basin and obligations of the Upper Division States. If the Upper Basin States of Colorado, New Mexico, Utah and Wyoming, as parties to the Colorado River Compact, are not made parties to the suit, no settlement of Lower Basin rights can be final and effective. Under the applicable law they must be joined.

(1) Signatories to the Compact must be joined.

The absent States are necessary parties merely as signatories to the Colorado River Compact now in controversy.

Following the general tests for necessary or indispens-

able parties set forth in the leading case of *Shields* v. *Barrow,* 17 How. 130 (U. S. 1855) the courts have given them specific application to situations where contract rights of absent parties are involved in the controversy before the court. The *Shields* case itself determined that in a suit to rescind a contract, all parties to the contract are indispensable to the suit, as the rights of an absent party to the instrument could not be adjudicated in his absence.

Similarly, a general rule that all parties to the contract in issue must be joined as necessary or indispensable parties has been followed where the question was not one of the very existence of the Contract, as in the *Shields* rescission case, but one of interpretation of respective rights and obligations under the contract in issue. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77 (1920); *Gregory* v. *Stetson,* 133 U. S. 579 (1890); Cf. *Mallow* v. *Hinde,* 12 Wheat. 193 (U. S. 1827).

In *National Licorice Co.* v. *N.L.R.B.,* 309 U. S. 350 (1940) the court stated the rule and its reason:

> "Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. . . . Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present." (p. 363).

Accord see *Gauss* v. *Kirk,* 198 F. 2d 83, 84 (D. C. Cir. 1952).

(2) PARTIES HAVING INTERDEPENDENT RIGHTS AND OBLIGATIONS UNDER THE COMPACT MUST BE JOINED.

The States of Colorado, New Mexico, Utah and Wyoming are more than mere parties to a contract in dispute, as their rights under the Colorado River Compact are jointly stated with the rights of the Lower Basin States and controlled by the same language so that any determination of Lower Basin rights pursuant to the Compact would con-

versely determine rights in the Upper Basin. Moreover, the obligations of the absent States as States of the Upper Division, are so interdependent with the rights of the Lower Basin States that the interests of one group cannot be defined and adjudicated without affecting the interests of the other.

In *Commonwealth Trust of Pittsburgh* v. *Smith,* 266 U. S. 152 (1924) the State of Idaho entered into a contract with an irrigation company whereby the company was to build irrigation works and provide the requisite water supply to settlers, selling to each settler water rights all on the same plane of equal priority, not in excess of the available water supply. The company in turn entered into contract with settlers of reclaimed land to sell water rights to a common water supply. All contracts between the company and the settlers were of the same tenor, but each was separate and distinct. In an action by the holder of the company contracts against only two of the settlers for nonpayment under their contracts, the Court held that all were necessary parties, saying:

> "The bill sets forth the controversy respecting the water supply and does so for the purpose of having it determined. The controversy is not peculiar to the contracts sued on but reaches and affects all that are outstanding. The contracts, while several in form, are interdependent in substance and operation. All are effectively tied together by the contract between the State and the company, in virtue of which they were made ,and by what they purport to do, which is to entitle their holders to participate on equal terms in the use of a common supply of water and to invest them with proportionate interests in the works by which the water is collected and conducted to the places of use." (p. 159).

Then the lower court judge was quoted with approval as follows:

> "In a very substantial sense all the settlers are parties to one general contract, in the subject matter of which

> all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined and adjudicated without affecting the interests of the other."

The courts have uniformly required the joinder of absent persons subject to the courts' jurisdiction having a community of interest with the litigation at bar. *Independent Wireless Telegraph Co.* v. *Radio Corp. of America,* 269 U. S. 459 (1926); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. 2d 481 (7th Cir. 1948), *cert. denied,* 336 U. S. 945 (1949); *Franz* v. *Buder,* 11 F. 2d 854 (8th Cir. 1926), *cert. denied* 273 U. S. 756 (1927); *West* v. *Randall,* 29 Fed. Cas. 718, No. 17,424. (C.C.R.I. 1820).

(3) All parties having interests in Colorado River System waters must be joined.

The subject matter of the controversy—*i.e.,* the use of the water of the Colorado River System—would make all of the States of the Colorado River Basin necessary parties to the suit, even if the rights asserted bore no relationship to a Compact in which the rights of the States are interdependently stated. Arizona recognized this fact in her previous suits in this Court in which she named all of the other Colorado River Basin States as defendants. *Arizona* v. *California, Colorado, Nevada, New Mexico, Utah, Wyoming, and Wilbur, Secretary of the Interior,* 283 U. S. 423 (1931); *Arizona* v. *California, Colorado, Nevada, New Mexico, Utah, Wyoming and Ickes, Secretary of the Interior,* 292 U. S. 341 (1934); *Arizona* v. *California, Colorado, Nevada, New Mexico, Utah and Wyoming,* 298 U. S. 558 (1936). The legal principles are well recognized.

In *California* v. *Southern Pacific Co.,* 157 U. S. 229 (1895) the Court held absent parties to be indispensable (and consequently ousted the court of original jurisdiction) even though they were involved in real estate transactions distinctly separate from the litigated transactions. How-

ever, because the validity of all the transactions turned on common questions of law, the Court felt that any decree issued would be hollow in the absence of all the parties to the other transactions. After conceding that the decree technically would not be binding on the absent parties as *res judicata,* the Court said:

> ". . . it is impossible to ignore the inquiry whether the interests of parties not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience." (p. 255).

Similarly in *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902) the Court held that in order to judge the rights of the Northern Securities Company to exercise control over two parallel and competing railroads in Minnesota, the rights of the two absent railroads were necessarily involved, making them indispensable parties. In the present suit an adjudication of rights of the Lower Basin States to Colorado River System water would necessarily control the remaining rights of the Upper Basin States to System waters.

In *Railroad Company* v. *Orr, 18 Wall.* 471 (U. S. 1873) certain bondholders brought suit for an accounting and foreclosure of the mortgaged property. All of the bondholders named in the indenture agreement were not joined as parties. The court noted from the bill that the mortgaged property was probably inadequate to pay all of the bond claims purporting to be secured by it, and held the absent bondholders necessary parties to the suit, stating:

> ". . . all persons who have any material interest in the subject of the litigation should be joined as parties . . . "It is the interest of every bondholder to diminish the debt of every other bondholder. Insofar as he succeeds in doing that, he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it." (pp. 474, 475).

These principles concerning parties have been applied to the Colorado River. In *Arizona* v. *California et al.*, 298 U. S. 558 (1936) Arizona joined all of the States of the Colorado River Basin, but not the United States, in a suit seeking to quiet title to rights to the permanent use of a certain portion of the waters of the Colorado River. It was argued by Arizona that under the applicable law, the rights of the United States were not involved as they were subject, and secondary, to the right of Arizona to an equitable share in the unappropriated waters. The Court held, however, that this contention could not be judicially determined in a proceeding to which the United States was not a party, and in which it could not be heard. The Court went further to state:

> "Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 245-247; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 163". (pp. 571-572).

Upon the same principles the absent States of Colorado, New Mexico, Utah and Wyoming are necessary parties to the present suit.

III

NEW MEXICO AND UTAH ARE NECESSARY PARTIES TO THIS ACTION BECAUSE THEY ARE STATES WHICH ARE IN PART WITHIN THE LOWER BASIN, IN ADDITION TO THE REASONS WHICH MAKE THEM NECESSARY PARTIES AS STATES OF THE UPPER DIVISION AND OF THE UPPER BASIN.

A. New Mexico, Utah, Arizona, California and Nevada have undivided interests under the Colorado River Compact in the "common fund" of water available to the Lower Basin.

The Colorado River Compact defines the Lower Basin in terms which include portions of New Mexico and Utah, as well as portions of Arizona, California and Nevada. (Article II(g).)

The Colorado River Compact makes no allocation among the five States of the uses of water available to the Lower Basin as a whole, and they have not agreed upon an allocation. (The relation of the Statutory Compact between the United States and California to this question is discussed later in this brief.)

The rights of Arizona, California and Nevada cannot be determined without concurrently determining the rights of New Mexico and Utah in the "common fund" of water available under the Colorado River Compact to five States of the Lower Basin. (California's Answer to Arizona's Complaint, par. 61, p. 64; par. 63, p. 66.)

B. The meaning and effect of the Colorado River Compact and the Boulder Canyon Project Act are in controversy in respects which specifically affect New Mexico and Utah as States which are in part within the Lower Basin.

(1) There is controversy as to whether the "rights which may now exist" to the use of the waters of the Virgin River in Nevada and Utah, and the Little Colorado River in New Mexico and Arizona (streams which enter the main stream below Lee Ferry) are accountable under, and protected by, Article III(a) of the Compact. California as-

serts the affirmative. (Answer to Arizona's Complaint, par. 8, p. 12.) Arizona says that all uses under Article III(a) are to be taken from water flowing at Lee Ferry. (Reply to California's Answer, par. 8, p. 16.)

(2) There is controversy as to whether the "rights which may now exist" to the use of the waters of the Gila River System in New Mexico are accountable under, and protected by, Article III(a) of the Compact. California asserts that they are. Arizona says they are not, but are covered by Article III(b). (Reply to California's Answer, par. 8, 9, pp. 16, 17.)

(3) There is controversy as to whether Nevada's share in any class of water has been determined. Nevada asserts that they have not (Petition, par. XII), Arizona that they have (Answer to Nevada's Petition, par. 12).

(4) There is controversy as to whether rights to the "increase of use" under Article III(b) may be acquired by appropriation (including contracts with the United States with respect to water stored by it), as California contends (Answer to Arizona's Complaint, par. 9, p. 13), or only by agreement among the five States in the Lower Basin, as Nevada contends (Petition of Intervention, par. VIII, pp. 13, 14; par. XVIII, p. 19).

(5) There is controversy as to whether the burden of the Mexican Water Treaty on the Lower Basin, in case "surplus" above the aggregate of the quantities specified in Articles III(a) and III(b) is not sufficient to meet it, falls first on the uses covered by Article III(b) as California contends (Answer to Arizona's Complaint, par. 10, p. 14), or on the uses covered by Article III(a), as Arizona contends (Reply to California's Answer, par. 10, p. 18).

(6) There is controversy as to whether the term "beneficial consumptive use" shall be given a different meaning on the tributary systems, including the Virgin and Gila Rivers, than on the main stream. The affirmative is as-

serted by Arizona (Complaint, par. XXII, p. 26) and Nevada (Petition of Intervention, par. XVIII, p. 20), the negative by California (Answer to Arizona's Complaint, par. 8, p. 12).

C. The meaning and effect of the Statutory Compact between the United States and California, evidenced by the Boulder Canyon Project Act and the California Limitation Act, are in controversy in respects which specifically affect New Mexico and Utah as States which are in part within the Lower Basin.

(1) There is controversy as to whether California is excluded by the terms of the Statutory Compact from participation in the increase of use permitted to the Lower Basin by Article III(b) of the Compact. Arizona asserts the affirmative (Complaint, par. XXII, p. 25). The negative is asserted by California (Answer to Arizona's Complaint, par. 27, p. 27), and Nevada (Petition of Intervention, par. XVIII, p. 20).

(2) There is controversy as to whether the right of the Lower Basin to the increase of use permitted by Article III(b) relates to all water of the Colorado River System in the Lower Basin as is asserted by California (Answer to Arizona's Complaint, par. 9, p. 13; par. 63, p. 66) and Nevada (Petition of Intervention, par. XIV, p. 18; par. XVIII, p. 20), or whether this right is limited to the waters of the Gila River and is available only to Arizona and New Mexico, as Arizona contends, excluding not only California but Nevada and Utah. (Reply to California's Answer, par. 9, p. 17).

(3) There is controversy as to the availability of "surplus" waters for use in the Lower Basin under the Statutory Compact, and the rights of the five States to make use of it.

D. Arizona is not authorized to speak for or commit New Mexico or Utah.

Arizona's purported recognition of the rights of New Mexico and Utah (Complaint, Prayer, p. 30), based upon Arizona's interpretation of the Compact, does not bind those States, (see also Nevada's Petition of Intervention, par. XIII(b), p. 16). New Mexico and Utah may or may not agree with Arizona's interpreations of the Compact and of their rights thereunder, and in any event those rights must be determined either by decree of this Court or interstate compact. Arizona's asserted willingness to negotiate an agreement with these two States has not materialized in any compact with them in the past 32 years.

E. The controversy as to the rights and obligations of the Lower Basin cannot be effectively resolved in the presence of only three, and the absence of two, of the five States sharing those rights and obligations.

The States of New Mexico and Utah, as States lying in part within the Lower Basin, participate in undetermined amounts in the right to beneficial consumptive use of a "common fund" of water available for use in the Lower Basin under under the Colorado River Compact. As such their interests require their joinder as necessary parties for an effective settlement of the presnt controversy.

A case in point is *Williams* v. *Bankhead*, 19 Wall. 563 (U. S. 1874). There a specific fund of money was in dispute. An absent party who claimed an interest in the fund was held indispensable to the action by the court on the basis that any decree disposing of the fund would directly affect her interest therein. Similarly in *United States* v. *Bank of New York & Trust Company*, 296 U. S. 463 (1936), involving specific funds, the court stated:

> " . . . there are numerous persons whose claims in relation to these funds are in the course of adjudication. . . . they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved." (p. 480)

The absent States of New Mexico and Utah are entitled to be heard on their undefined rights to the common fund of Lower Basin water, and conversely if they are not joined, a determination among the present parties of Lower Basin rights would be subject to later disruption in any subsequent litigation by them. As stated by the court in *Barney* v. *Baltimore,* 6 Wall. 280 (U. S. 1868) in holding absent co-heirs indispensable to an action for partition brought by one of the heirs:

> "If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties." (p. 285)

See also *Russell* v. *Clark's Executors,* 7 Cranch 69 (U. S. 1812); *Franz* v. *Buder,* 11 F. 2d 854 (8th Cir. 1926), *cert. denied* 273 U. S. 756 (1927); *Young* v. *Powell,* 179 F. 2d 147 (5th Cir. 1950), *cert. denied* 339 U. S. 948.

Accordingly, the States of Utah and New Mexico must be joined as parties to the suit to give complete relief to the present parties with respect to the water available to the Lower Basin.

IV

THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THIS ACTION IN THEIR CAPACITY AS THIRD PARTY BENEFICIARIES OF THE STATUTORY COMPACT BETWEEN THE UNITED STATES AND CALIFORNIA EVIDENCED BY THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT.

A. The continued existence of the Statutory Compact as a necessary accompaniment to a Six-State Colorado River Compact may not be determined in the absence of all parties to the contract.

The allegation by Arizona that she ratified the Colorado River Compact in 1944, thus creating a Seven-State Compact, is in issue. This raises the question of whether the

Statutory Compact between the United States and California, wherein California agreed to certain limitations upon her uses for the benefit of Colorado, New Mexico, Utah and Wyoming (as well as the present parties of Nevada and Arizona), remained in effect if Arizona should be held to have effectively ratified the Compact. This question can only be decided if all the parties to the Six-State Compact are joined to the suit. *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855); *Northern Indiana R.R.* v. *Michigan Central R.R.,* 15 How. 233 (U.S. 1854); *Ward* v. *Deavers,* 203 F. 2d 72 (D.C. Cir. 1953); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. 2d 481 (7th Cir. 1948), *cert. denied,* 336 U.S. 945 (1949); *Lawrence* v. *Sun Oil Co.,* 166 F. 2d 466 (5th Cir. 1948); *Vincent Oil Co.* v. *Gulf Refining Co.,* 195 Fed. 434 (5th Cir. 1912); *Kleinschmidt* v. *Kleinschmidt Laboratories, Inc.,* 89 F. Supp. 869 (N.D. Ill. 1950); *see Roos* v. *Texas Co.,* 23 F. 2d 171, 172 (2d Cir. 1927), *cert. denied,* 277 U. S. 587 (1928). In *Shields* v. *Barrow,* the case in which this Court formulated the classic definitions of necessary and indispensable parties, it was held that all parties to a contract are indispensable in an action for the rescission of that contract.

B. The four absent States are necessary parties to Arizona's suit because all joint beneficiaries of a contract must be joined in an action by any one of them to determine the obligations of the promisor.

California made a single promise in the California Limitation Act, pursuant to the Boulder Canyon Project Act, for the joint benefit of all six of the other States in the Colorado River Basin. The United States is the other principal to that agreement. The present controversy among Arizona, California, Nevada and the United States raises issues of interpretation affecting the rights of the four absent beneficiaries—Colorado, New Mexico, Utah and Wyoming. All six joint beneficiaries must be parties to the action if these issues are to be resolved.

It is well established that in an action by a joint obligee against the obligor, all joint obligees are necessary parties and also are indispensable when indispensability is in issue. *Farni* v. *Tesson,* 1 Black 309 (U. S. 1862); *Fremon* v. *W. A. Sheaffer Pen Co.,* 209 F. 2d 627 (8th Cir. 1954); *National City Bank* v. *Harbin Electric Joint-Stock Co.,* 28 F. 2d 468 (9th Cir. 1928); *Roos* v. *Texas Co.,* 23 F. 2d 171 (2d Cir. 1927), *cert. denied,* 277 U. S. 587 (1928); *Himes* v. *Schmehl,* 257 Fed. 69 (3d Cir. 1919); *Edgell* v. *Felder,* 84 Fed. 69 (5th Cir. 1897); *McAulay* v. *Moody,* 185 Fed. 144 (C. C. Ore. 1911). The rule is designed to protect the obligor from possible harassment and multiplicity of suits upon his single promise or duty. Any determination of California's rights and obligations under the Statutory Compact in the present suit would be open to later disruption in a subsequent suit by any one of the absent beneficiaries — Colorado, New Mexico, Utah or Wyoming.

While third party beneficiaries technically are not promisees, where they hold joint rights they must be treated like joint obligees for the purpose of compulsory joinder. 4 CORBIN, CONTRACTS, Sec. 940 (1951); RESTATEMENT, CONTRACTS, Sec. 129, Comment *a* (1932).

The absent States of Colorado, New Mexico, Utah and Wyoming are necessary parties to any action to interpret or enforce the Statutory Compact between the United States and California.

V

THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THE ADJUDICATION OF THE CLAIMS OF THE UNITED STATES TO THE WATERS OF THE COLORADO RIVER SYSTEM.

A. The claims which the United States asserts "as against the parties to this cause, to the use of waters of the Colorado River and its tributaries" are equally claims as against all the States of the Colorado River Basin.

The following claims asserted by the United States "as against the parties to this cause" affect the four absent States:

(1) To supply all projects in the Lower Basin (Petition of Intervention of the United States, par. XXX, p. 25); but it is admitted that the requirements of these projects exceed the quantity of water available to that Basin under Articles III(a) and III(b) of the Compact (Petition, par. XXXIII, p. 33). This involves, therefore, an adjudication of the right of the United States in the Lower Basin, as against the Upper, to store and contract for the delivery of quantities of water surplus to the quantities specified in those articles. The Government's contracts require, for their performance, nearly 8,500,000 acre-feet per annum from the main stream alone (Petition, par. XV, p. 14; par. XVIII, p. 17; par. XIX, p. 17), beside the uses on the Gila (par. XXIV, p. 22) and the "diversion rights" of 1,747,250 acre-feet per annum for Indians (par. XXVII, Appendix IIA). The Government asserts that all its contracts are valid (Petition, par. XXXI(a), p. 27).

(2) To fulfill obligations arising from international treaties and conventions. (Petition of Intervention par. XXX, p. 25). This involves:

(a) The obligations of the States of the Upper Division under Article III(c) and III(d) of the Colorado River Compact, and

(b) The effect on Compact rights and obligations of the so-called "escape clause" of Article 10 of the Mexican Water Treaty, which allows reduction in the annual guaranteed delivery to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty.

(3) To fulfill the Government's obligations to Indians and Indian tribes (Petition, Par. XXX, p. 25). This involves:

(a) The magnitude and priority of these claims. The United States is understood to reserve the right under paragraphs XXVII (p. 23) and XXXVII (p. 39) of its Petition of Intervention to assert that Indian rights are prior and superior to those of all other claimants to the waters of the Colorado River System.

(b) The question of whether or not uses under Indian rights are chargeable to the Basin and the State in which they occur. The United States is understood to reserve the right, under the language of paragraphs XVII (p. 23) and XXXVII (p. 38) of its Petition of Intervention, to assert that Indian uses and rights are not covered at all by the Colorado River Compact, but constitute uses outside of (as well as superior to) the quantities of uses referred to in the Compact. Arizona's position upon this point is ambiguous (Reply to California's Answer, par. 14, p. 19). All other States in the Basin assert, in effect, that Indian uses and other federal uses are chargeable under the Compact to the Basin and State in which they occur. (California, Answer to Arizona's Complaint, par. 14, p. 16; Nevada, Petition of Intervention, par. XV, p. 18; Upper Colorado River Basin Compact (63 Stat. 31, Appendix 30, Art. VII.)

(c) What the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and

(d) What rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins.

(4) To protect its interests in fish and wildlife, flood control and navigation. (Petition, par. XXX, p. 25.) This involves:

(a) The impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona, Nevada and California, and

(b) The question of accounting under the Compact.

(5) For use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties of this cause" for these functions, it has similar claims to all the waters of the Colorado River System.

B. The claims which the United States asserts involve questions of law common to all the States of the Colorado River Basin.

These include:

(1) The power of the United States to impound and dispose of water independently of rights derived from the States;

(2) The extent of its obligations under treaties and contracts, and the impact thereof upon rights of domestic water users;

(3) How its claims to the use of water shall be measured;

(4) The extent to which its rights and obligations are controlled by the Colorado River Compact;

(5) The extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

C. Certain of the claims of the United States, if sustained, and held to be outside of the Compact, may render the Colorado River Compact incapable of operation.

(1) If the uses of Indians throughout the Colorado River Basin are not chargeable against beneficial consumptive uses under the Colorado River Compact, and are held to be prior and superior in right to the uses which are chargeable, there may not be sufficient water in the entire Colorado River System to service those claims and the Mexican Water Treaty, and to sustain the uses contemplated by the Compact;

(2) So also with the undefined claims for use by the Bureau of Land Management and the Forest Service, which, together, administer substantially all of the public lands in the Colorado River Basin.

D. The claims of the United States to the waters of the Colorado River System cannot be effectively adjudicated in the absence of four States which have rights and obligations with respect to the waters of that System.

The claims of the United States are asserted independently of the Colorado River Compact. If they are sustained to the use of Colorado River System waters, the interests of the absent States in the System waters will be materially affected, for rights would be decreed not only to the Lower Basin's Compact share of water, but to the additional amounts requested by the Federal Government, which could come only from the whole River System. Under the doctrine of the *Shields* case (17 How. 130 (U. S. 1854)) the absent States would hence qualify as indispensable parties.

The fact that when claims to Colorado River System water are asserted independently of the Colorado River Compact, all parties having an interest in the System waters must be joined, was recognized by Arizona in the first three cases of *Arizona* v. *California* where the States of Colorado, New Mexico, Nevada, Utah and Wyoming were joined as defendants with California. 283 U. S. 423 (1931); 292 U. S. 341 (1934); 298 U. S. 558 (1936).

In *Nebraska* v. *Wyoming*, 295 U. S. 40 (1935), Wyoming moved to dismiss Nebraska's Bill of Complaint on the ground, among others, that the State of Colorado was an indispensable party to Nebraska's suit for an equitable apportionment against Wyoming of the North Platte River. No interstate compact or statutory compact existed on the North Platte River and the only allegation in the Bill of Complaint touching Colorado was that the river in question had its source in Colorado. The court, looking to the Bill of Complaint, held that Colorado was not an indispensable party merely because of the allegation that the North Platte River arises in that State and drains a considerable area therein; more than that allegation of fact would be necessary. The court said further, however:

> "We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit."

A Master was appointed. 296 U. S. 542 (1935). Subsequently Wyoming filed an Amended and Supplemental Answer alleging the State of Colorado to be a necessary and indispensable party. The allegations were that thirty per cent of the waters in controversy originated in Colorado, that Colorado and its citizens threatened the diversion of a large quantity of water, that defendant would be subject to further litigation if Colorado were not made a party, and that a fair allocation of water could not be made upon any basis without at the same time determining the rights of Colorado. (Amended and Supplemental Answer, paragraph Twentieth, filed Nov. 30,

1935.) This Court, on the basis of these allegations, ordered that Colorado be made a party. 296 U.S. 553 (1935). The final decree adjudicated the rights of all three States and the United States, which had intervened, even though Colorado had taken the position she should be dismissed. *Nebraska* v. *Wyoming and Colorado,* 325 U. S. 589 (1945).

The claims of the United States in the present case, like the claims of *Nebraska* in *Nebraska* v. *Wyoming and Colorado,* asserted in both cases independently of any Compact, cannot be adjudicated piecemeal against the lower States in the absence of the upper States.

VI

CONCLUSION.

The States of Colorado, New Mexico, Utah and Wyoming are necessary parties in the pending case of *Arizona* v. *California et al.,* and must be joined as such for a full and effective settlement of the controversy in that case. They are necessary because they are parties to the Colorado River Compact, because they, together with Arizona and Nevada, are beneficiaries of the Statutory Compact between the United States and California evidenced by the Boulder Canyon Project Act and the California Limitation Act, and because the claims of the United States affect all of the waters of the Colorado River System. New Mexico and Utah are necessary parties for the additional reason that they have interests in the Lower Basin in common with Arizona, California and Nevada.

For all these reasons the motion to join these four States as parties should be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, [redacted] 1961

No. [redacted] Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER, DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

BRIEF OF THE STATE OF UTAH OPPOSING THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN THE STATE OF UTAH AS A PARTY TO THIS ACTION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 10 Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER, DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener.

BRIEF OF THE STATE OF UTAH OPPOSING THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN THE STATE OF UTAH AS A PARTY TO THIS ACTION.

INTRODUCTORY STATEMENT

On July 15, 1954, the present motion was filed by the California defendants, asking the joinder of the States of

Utah, New Mexico, Colorado, and Wyoming. On October 26, 1954, this court granted those four states leave to file briefs responsive to that motion.

While the motion is unanimously opposed by those states respondent to it, their respective briefs must deal with slightly divergent considerations since their positions differ, to a limited extent, under the Colorado River Compact, (Exhibit A, Arizona's Bill of Complaint) hereinafter referred to as "Compact." While all four respondents are "States of the Upper Division" (Article II (c), Compact) the states of Utah and New Mexico lie partially within the Lower Basin (Article II (9) Compact) and are, to the extent that parts of those states lie in areas naturally draining into the main stream of the River below Lee Ferry[1], states of the Lower Basin.

Since Utah denies that they are either necessary or indispensable parties by virtue of interests either as a state of the Upper Division or as a state lying in part in the Lower Basin, it is her election to file a separate brief and to traverse, separately and affirmatively, the contentions that Utah is a necessary party under either characterization; however, Utah does join in and subscribe to all the factual statements and references, and all the legal arguments and conclusions contained in the briefs of the other respondent states, Colorado, New Mexico and Wyoming.

STATEMENT OF THE ISSUES RAISED

On January 19, 1953, the State of Arizona was granted her Motion for Leave to File a Bill of Complaint against the several California defendants. In the Bill filed pursuant

---

[1]Although Utah will show that this interest in terms of percentage of flow is infinitesimal, Infra page 16.

to that Order Arizona asked this court to determine three issues:

> (1) Is the State of California limited to the annual beneficial consumptive use of 4,400,000 acre feet of the waters of the Colorado River System *apportioned to the Lower Basin by the Compact?*
>
> (2) In what manner is "beneficial consumptive use" of the waters of the Colorado system *in the Lower Basin* to be measured?
>
> (3) How are evaporative reservoir losses from *Lower Basin* main stream impounding facilities to be charged?

(See Arizona's Motion for Leave to File Bill of Complaint and Bill of Complaint, Par. XXII, page 25.)

In response to this Motion and to the Bill of Complaint, California raised three additional questions:

> (a) Is Arizona a party to and bound by the Colorado River Compact?
>
> (b) May Arizona be a beneficiary under the California Limitation Act?
>
> (c) What are the priorities of contract between the United States and water users *in the Lower Basin?*

It may clearly be seen from the issues thus drawn that the only purpose of the action was the determination, as between the two states in the Lower Basin, Arizona and California, of the water use to which each respective state is entitled under the Colorado River Compact, the California Limitation Act, and the various other enactments constituting the Law of the River.

Pending before the 83rd Congress were two measures, S-1555 and HR-4449, which were companion bills to

authorize the Upper Basin Storage Project consisting of a reclamation program for storage of waters in the Upper Basin of the Colorado River. On January 26, 1954, in a hearing before the Irrigation Subcommittee of the House Committee on Interior and Insular Affairs, Mr. Northcutt Ely, counsel for the defendant State of California, appeared before the Subcommittee asking it to defer any action upon the bill then being considered until after a determination of the issues raised by the present controversy. (See Hearings on H.R. 4449, page 697, Serial No. 11 before Irrigation and Reclamation Subcommittee of the House Committee on Interior and Insular Affairs, 83rd Cong.) This Subcommittee rejected Mr. Ely's arguments favoring deferral of the measure and the bill came dangerously, insofar as defendants were concerned, close to passage but failed of enactment due to early adjournment of the Congress.

On April 5, 1954, in answer to a petition of the United States to intervene in the within action, the State of California had summarized the controversy (see Answer of California defendants to Petition in Intervention on behalf of the United States of America, page 67) which summary we paraphrase as follows:

> (I) The quantities of water in controversy; Arizona seeks to quiet title to the consumptive beneficial use of 3,800,000 acre feet per annum of the waters of the Colorado River System—California asserts a right to the beneficial consumptive use in California of 5,362,000 acre feet per annum; Nevada seeks to quiet title in herself to 539,100 acre feet per annum. The states differ in their definition of "beneficial consumptive use."
>
> (II) The ultimate issues; does the United States have rights "as against the parties to this cause," (meaning those parties at the time California re-

sponded to the United States' Petition). Is Arizona entitled to a decree quieting title to 3,800,000 acre feet per annum? Is California entitled to a decree permitting the beneficial consumptive use of 4,400,000 acre feet per annum plus one-half of the surplus waters unapportioned by the Compact and the rights awarded California by contracts between the United States and the defendant public agencies of and including California?

While California *now* contends, in her analysis of the issues raised, that these questions may not be effectively determined without concurrently determining the rights and obligations of the Upper Division states, nevertheless, the actual analysis by California of the issues in the lawsuit on April 5, 1954, in no way extended to any of those states not then parties to the action. California's only reservation on that question was a general statement that decisions on those points would affect absent states. (p. 75, California's Answer to United States' Petition).

On July 15, 1954, however, California filed the present motion to make the states of the Upper Basin and of the Upper Division parties to this action, attempting materially to broaden the scope of this suit beyond their previous analysis of the necessary issues.

SUMMARY OF ARGUMENT

The State of Utah is neither a necessary nor an indispensable party for the reason that they are a party to the Compact.

The State of Utah contends that this is not an action to determine any rights of Upper Basin States; that this is *not* an action in which the rule, requiring all parties to a litigated

contract to be present in the action, is applicable for the reasons that:

(1) That rule is not available against a sovereign state in the absence of present or imminently threatened injury, of which there is none alleged or in fact in existence; and

(2) This is not an action based primarily upon the Compact.

The State of Utah is neither a necessary nor an indispensable party by reason of its interest in the Lower Basin.

For their share of the waters of the Lower Basin the State of Utah looks to, and is satisfied with the recognition of their rights by, the State of Arizona, with whom they are presently negotiating for a compact. The inclusion of Utah as a party to this action would effectively and absolutely preclude consummation of any such apportionment by agreement, the medium through which *all* inter-state matters or disputes should be resolved.

The State of Utah is neither a necessary nor an indispensable party as a beneficiary of California's Self-Limitation Act.

The only dispute in this action is the question whether or not Arizona is a beneficiary, or entitled to rely upon, that Act.

Utah is neither a necessary nor an indispensable party by reason of the claims of the United States.

The State of Utah is a party to the Upper Colorado River Basin Compact by which it has been agreed that uses by the United States in the State of Utah — as in all other

Upper Basin states — will be charged as a use *by* the State of Utah.

The purpose and motive of the present motion by the California defendants are improper and ought not to be entertained.

ARGUMENT

The State of Utah will seek to answer the contentions of the State of California in the order of their appearance in California's Motion:

POINT 1

A DECREE DETERMINING THE PRESENT CONTROVERSY CAN BE EFFECTIVE IN THE ABSENCE OF THE STATE OF UTAH ALTHOUGH A PARTY TO THE COMPACT.

In California's brief supporting her motion to join, numerous decisions are collected which hold, admittedly, that in actions upon contracts, decrees construing the terms thereof cannot be entered unless all parties thereto are present in the action. These decisions are all applicable in their own peculiar set of facts but California cites no cases—and there are none—holding that the indispensable or even the necessary party rule is applicable with respect to compacts between states as quasi-sovereigns. It is respectfully submitted that in this case neither the issues nor the facts even closely approximate the burden required of the state which asks relief against another state. The extent of that burden is announced in *Colorado v. Kansas,* 320 U. S. 383, 88 L. Ed. 116 at p. 124:

"Not every matter which would warrant resort to equity by one citizen against another would just-

> ify our interference with the action of the state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using or threatening to use more than its equitable share of the benefits of a stream, all the facts which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

In that case an attempt was made by Kansas to show injury resulting from a material increase in the river depletion by Colorado of the Arkansas River since the adjudication of *Kansas* v. *Colorado* (206 U. S. 46, 51 L. Ed. 956, 27 S. Ct. 655) in which a bill brought by the state of Kansas was dismissed because Kansas was not entitled to "present relief;" it being expressly reserved, however, that the dismissal was without prejudice to the right of Kansas to initiate new proceedings "whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas River by the defendants, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states" (206 U. S. at page 117-118). That case was decided in 1907 and Kansas claimed in 1943 that the condition of the 1907 decree had been fulfilled, i.e., injury to the substantial interests of Kansas by Colorado uses in excess of those occurring in 1907.

It might be said that those two states, since the 1907 decision, were operating under a "decree of the court" subject to a reopening at a future time when present injury existed. An attempt to reopen that decree was denied Kansas upon the lack of sustaining the burden that Kansas was presently injured by Colorado depletion of the Arkansas

River. It might be contended that the two states, operating under a decree of the court which indicated a formula for equitably apportioning the benefits of the stream, were operating under a governing instrument similar to the Compact under which signatory states of the Colorado River Compact are presently operating, and that although injury was threatened the court would still refuse to make a definite apportionment of the river in either second feet or acre feet in the absence of a showing that a state was presently injured by excess depletion of the waters of the river.

California cites at the conclusion of her motion the case of *Nebraska* v. *Wyoming and Colorado,* 325 U. S. 589, 89 L. Ed. 1815. Colorado, in that case, made a motion that they be dismissed and California cites, as favorable to their position, the refusal of the court to grant that motion. However, the decision expressly says, 325 U. S. at 609:

> "Out-of-priority diversions by Colorado have had an adverse effect downstream. * * * *This alone negatives the absence of present injury*" (Emphasis added).

Further, on page 1827 (325 U. S. at 610):

> "Colorado v. Kansas, 30 U. S. 353, 88 L. Ed. 116, 64 S. Ct. 176, is not opposed to this view. That case turned on its special facts. It is true that an apportionment of the waters of an interstate river was denied in that case. But the downstream state (Kansas) did not sustain the burden of showing that since the earlier litigation between the states there had been a material increase in the depletion of the river by Colorado. * * * We held that in those circumstances a plain showing was necessary of increased depletion and substantial injury that would warrant a decree * * *."

California at page 51 of her brief further contends that "all parties having interests in the Colorado River System waters must be joined." This statement is not in accord with previous rulings of the United States Supreme Court. In *Nebraska* v. *Wyoming*, 295 U. S. 40, 55 S. Ct. 568, an action by Nebraska seeking equitable apportionment of the waters of the North Platte River, the defendant Wyoming moved to dismiss under her contention that the State of Colorado was an indispensable party having an interest in the North Platte River System, and in whose absence the controversy could not be effectively settled. This court at 295 U. S. page 43, stated:

> "The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party or whether at a later stage of the cause pleadings or proof may disclose a necessity to bring her into the suit."

By a subsequent amendment Nebraska alleged that Colorado "by diversions of water from the river for irrigation purposes * * * [are] depriving Nebraska of water to which she is equitably entitled" (*Nebraska* v. *Wyoming*, 325 U. S. 589, 591-2, 65 S. Ct. 1332, 1338). Upon the basis of the amended complaint the court joined Colorado as a party. *Nebraska* v. *Wyoming*, 296 U. S. 553, 56 S. Ct. 369.

A thorough analysis of the voluminous pleadings filed herein discloses absolutely no allegation that injury is threatened either by or to the State of Utah either as a state of the Upper Division or as a state of the Upper Basin entitled to limited participation in the "common-fund" of waters allocated by the Colorado River Compact to the Lower Basin. No such allegation—under the actual facts—could in good faith *be* made.

In numerous decisions this court has held that declaratory decrees, determining rights to interstate or local waters which have not yet been and which may never be appropriated, are not available to any state. *New Jersey* v. *Sargent*, 269 U. S. 328, 338, 46 S. Ct. 122, 70 L. Ed. 289; *Arizona* v. *California, et al.*, 283 U. S. 423, 463, 464, 51 S. Ct. 522, 529; *Colorado* v. *Kansas*, 320 U. S. 383, 393, 394, 64 S. Ct. 176, 181, 88 L. Ed. 116, 120; that adjudication of rights to interstate waters must be founded on an existing justiciable controversy. *Arizona* v. *California, et al.*, 283 U. S. 423, 463, 464, 51 S. Ct. 522, 529; that alleged injury must be presently threatened and of serious magnitude and not merely something feared to occur at some future time. *Missouri* v. *Illinois*, 200 U. S. 496, 521, 26 S. Ct. 268, 270; *New York* v. *New Jersey*, 256 U. S. 296, 309, 26 S. Ct. 268, 270; *North Dakota* v. *Minnesota*, 263 U. S. 365, 374, 44 S. Ct. 138, 139; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669, 51 S. Ct. 286, 289; *Alabama* v. *Arizona*, 291 U. S. 286, 291, 54 S. Ct. 399, 401; *Washington* v. *Oregon*, 297 U. S. 517, 522, 56 S. Ct. 540, 542; and that to pre-determine the rights of different sovereignties pregnant with future controversies is beyond the judicial function; that the court's jurisdiction is limited to concrete legal issues presented in actual cases and not abstractions. *U. S.* v. *Appalachian Power Company*, 311 U. S. 377, 423, 61 S. Ct. 299, 306.

It must be emphasized that the Colorado River Compact, the Compact now sought to be construed by the states of Arizona and California, and which Compact, it is alleged by California, cannot be effectively construed without the presence of all states signatory thereto, *was never intended to divide the water use among either the states of the Upper Basin, the states of the Lower Basin, the states of the Upper Division, or the states of the Lower Division.* It is, on the contrary, a compact *dividing only the water as between one*

entity, the Upper Basin, and a second entity, the Lower Basin.

The division of the waters apportioned to either basin as between the states of that basin is a matter entirely outside the scope of the Compact.

This litigation involves only the right to the use of the waters of the Colorado River System after the same have passed Lee Ferry, Arizona, or which originate on tributaries in the Lower Basin. (And Utah, as will be shown in the Argument under Point 2 herein, is not involved in *any* dispute—much less a justiciable controversy—over her share of those waters characterized as "Lower Basin" waters.) None of the parties to the action (Arizona the plaintiff, the California defendants, nor the intervenors Nevada and the United States) has questioned the right of the Upper Basin states to the beneficial consumptive use of 7,500,000 acre feet of the water of the Colorado River System.

An examination of the issues as analyzed by either the State of California or the State of Arizona and a study of the contentions of the State of Nevada and the United States fail to disclose any allegation or even any inference that the Upper Basin states separately or collectively threaten any injury to the Lower Basin states. None of the states presently parties to the action seeks the enforcement of the Compact against any states of the Upper Basin. There is no injury of which they could complain. As has been said heretofore, the Compact apportions 7,500,000 acre feet per annum to each Basin. The present beneficial consumptive use in the Upper Basin is but approximately one-third of that apportionment under Article III(a) or about 2,500,000 acre feet. It is not in keeping with the practice of this Court to entertain an action against a state even where a contract is involved when any breach can occur only in the remote

future, if at all. The time when the Lower Basin may have its day in Court will be the time when, if ever, the Upper Basin states' use exceeds that figure some three times greater than their present use. To determine those questions involving hypothetical situations which may arise in the future would be palpably unfair to the states of the Upper Basin who are entitled to a decision on none other than actual controversies in fact in existence.

On pages 31 to 53, inclusive, California's brief sets forth various questions of interpretation of the Compact which, it is contended, the respondent states ought now to be required to litigate. We concur with and join in the seriatim treatment of these points by the States of Colorado and Wyoming, who have ably disposed of each. We wish to add, however, that irrespective of the final determination by this Court of any of those interpretation questions, there still is no violation by the State of Utah or the Upper Basin of any of the terms of the Compact; no diversions in excess of those granted the respondents under the Compact; and therefore, no justiciable issue either upon the pleadings or upon the facts. *Nebraska* v. *Wyoming,* 295 U. S. 40, 55 S. Ct. 568, *Colorado* v. *Kansas,* 320 U. S. 383, 88 L. Ed. 116.

Since it was never intended that the Compact divide the waters of the Colorado River between states, but only between basins, this action can only be a Lower Basin dispute since they have failed to negotiate by Compact for a division of their apportionment. This the Upper Basin has done, and their apportionment among themselves of water use, and their resolution of many of the questions California now would require them to litigate, were approved by Congress (63 Stat. 31). The full text of this Compact appears as Appendix 30, Vol. II Appendixes to California's Answer.

In Summary under California's Paragraph I, the State of Utah denies that no decree determining the meaning and

effect of the Colorado River Compact can be effective in the absence of all parties to that Compact and contends that Utah is neither indispensable nor necessary; that Utah on the contrary cannot be made a party to this action for the reason that injury is neither threatened to nor by the State of Utah.

POINT 2

UTAH IS NEITHER A NECESSARY NOR AN INDISPENSABLE PARTY FOR THE REASON THAT THEY SHARE INTERESTS IN THE LOWER BASIN.

The State of Utah concurs in Arizona's Bill of Complaint, page 19, para. XIII, line 18, and page 21, para. XVII (a). Utah also expresses concurrence in the allegation of Arizona in response to California's motion to join the states of Colorado, New Mexico, Utah and Wyoming found on page 7, para. XII. These references to which Utah subscribes and by which Utah is satisfied that their interests in the Lower Basin are recognized, read as follows:

Arizona's bill of complaint:

Para. XIII, line 15 (page 19):

> "The United States also agrees to deliver to Arizona from Lake Mead storage one-half of the unappropriated surplus, subject to the availability thereof to Arizona under the Compact and *subject to whatever rights Nevada, New Mexico and Utah may be determined to have therein*" (Emphasis added).

Para. XVII (a) (page 21):

> "(a) Subject to the availability of water under the Compact and the project act and *subject to the rights of the states of New Mexico and Utah,*

> Arizona has the right to take and divert from the Colorado River System annually so much water as may be necessary for the beneficial consumptive use in Arizona of 3,800,000 acre feet * * *" (Emphasis added).

Response of Arizona to California's motion to join Colorado, New Mexico, Utah, and Wyoming:

Para. 8 (page 5):

> "Complainant alleges that the only uses of water from the Colorado River System by the State of Utah in the lower basin are on the Virgin River within that state and the *complainant is presently engaged in negotiating a Compact with that State respecting such uses, and that there is no dispute existing between complainant and the state of Utah*" (Emphasis added).

Certainly Arizona seeks no relief as against the Upper Basin generally or against the State of Utah specifically. California seeks no relief against the State of Utah either as a state of the Upper Basin having an interest in the "common fund" of water in the Lower Basin or as a state both of the Upper Division and of the Lower Basin. In neither California's affirmative defenses to Arizona's complaint nor in their traverse to the allegations of Arizona or to any other party may be found any contention seeking or demanding relief to the State of California against the State of Utah as either a state of the Upper Basin or as a state of the Lower Basin. Without such an allegation—and no such allegation could in good faith be made—there is nothing in the pleadings nor in the provable facts to be determined which can possibly disclose a necessity to bring Utah into the suit. *Nebraska* v. *Wyoming*, 295 U. S. 40, 55 S. Ct. 568.

The interests of the State of Utah in the waters of the Lower Basin are certainly *de minimus*. Their maximum

rights and claims to the waters of the Lower Basin do not equal in magnitude even 2½ percent of the water allocated by the Compact to the Lower Basin exclusive of surplus or unappropriated water. Clearly applicable here is the statement of this court in *Colorado* v. *Kansas*, 320 U. S. 383, 88 L. Ed. 116 at page 124:

> "Before the court will intervene the case must be of serious magnitude and fully and clearly proved."

Unquestionably there is no alleged wrongful act of the State of Utah and no prayer for relief against that state such as is required by the doctrine of *Nebraska* v. *Wyoming*, 295 U. S. 40, 55 S. Ct. 568. Certainly this is the precise situation of which this court was speaking in *Colorado* v. *Kansas* (320 U. S. 383, 88 L. Ed. 116), when it held that the Supreme Court would not intervene in actions between sovereign states in matters best settled by compact. Decisively should they refuse to intervene where it appeared that the matter might be amicably settled by mutual agreement or diplomatic relations between the states. (See also *Washington* v. *Oregon*, 214 U. S. 205, 218, 53 L. Ed. 969, 971, 29 S. Ct. 631.) To draw the State of Utah into this dispute upon the ground that they are presently interested but neither injured nor threatening injury in a controversy between the States of California and Arizona with respect to waters by the great preponderance in magnitude owned and vested in those other states would be absolutely to preclude the possibility of an amicable settlement of Utah's rights by compact and by negotiations. This contention fits squarely within the rule announced in *Colorado* v. *Kansas* (320 U. S. 383, 88 L. Ed. 116), where this court said, 320 U. S. at page 392:

> "The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve

the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, *that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power*" (Emphasis added).

POINT 3

ABSENCE OF UTAH AND THE STATES OF THE UPPER DIVISION DOES NOT PRECLUDE AN EFFECTIVE INTERPRETATION OF THE ENACTMENTS AND COMPACTS KNOWN AS THE LAW OF THE RIVER UPON THE GROUND THAT THOSE ABSENT STATES ARE THIRD PARTY BENEFICIARIES TO THOSE STATUTORY ENACTMENTS OR STATUTORY COMPACTS.

The statutory compacts to which reference is made by California in their motion are the Boulder Canyon Project Act (45 Stat. 1057) and the California Self Limitation Act (Ch. 16, Calif. Statutes, 1929, p. 38). These acts are set out at length at pages 9 to 31 in Appendixes to California's Answer to Arizona's Bill of Complaint on file herein. The State of Utah adopts the argument of the States of Colorado and Wyoming in their brief concurrent hereto, without reiterating their arguments to this point.

It may be said, for purposes of continuity and integration of this brief, that the crux of this particular dispute is

whether or not Arizona is entitled to place reliance upon the California Self Limitation Act adopted as a condition to fulfillment of the Boulder Canyon Project Act (which authorized the construction of Hoover Dam,) for the reason that Arizona delayed ratification of the Colorado River Compact. This is purely an intra-basin problem between *California* and *Arizona* and does not involve either an obligation of the Upper Basin or of any other states. It does not involve Utah as a Lower Basin participant because the question is solely whether *Arizona* may place reliance on the Limitation Act.

California does not allege that the Upper Basin states or the State of Utah, New Mexico or Nevada are no longer beneficiaries to the Act or that any duties are imposed upon any of those states or that Basin by reason of their characterization as such beneficiaries.

POINT 4

THERE IS NO JUSTICIABLE CONTROVERSY EXISTING BETWEEN RESPONDENTS AND THE UNITED STATES REQUIRING THE PRESENCE OF RESPONDENTS AS PARTIES TO THIS ACTION.

The State of Utah concurs in the more amplified treatment given this point in Colorado's brief.

We only add that the United States intervened, as we comprehend their Motion and Petition in Intervention, to secure the water use rights of its agencies, instrumentalities, or wards; at least insofar as the Upper Basin States are concerned. To this point in California's Motion, the complete answer is that by Article VII of the Upper Colorado River Basin Compact, (63 Stat. 31, Vol. 2, Appendix 30, Cal. Appendixes to the Answer) it has been agreed that those uses

by the United States shall be, as to the Upper Basin, charged as a use by the state in which such use is made .

Here again, California is attempting to inspire determination by litigation of a problem already settled by negotiations and Compact. This again illustrates California's ostensible purpose to defeat the doctrine that this Court will not permit invocation of its jurisdiction over a state when the matter should and can be [and indeed this particular problem has been] settled through the medium of accommodation and agreement. *Colorado* v. *Kansas* (320 U. S. 383, 88 L. Ed. 116).

CONCLUSION

After Arizona had been granted leave to file a Bill of Complaint in this action, after the issues had been joined by an Answer, a Reply, and a Rejoinder, after two petitions to intervene had, after response by the parties, been granted, and after a Special Master had been appointed, this motion by the California defendants was filed.

It was also filed after counsel for the movant had urged deferral of Congressional authorization of the Upper Colorado Project until issues in the pending action between California and Arizona could be settled[2]. The body before whom this argument was developed apparently rejected the logic presented, by a recommendation approving the project. The granting of the present motion would be a tangible encouragement for the re-assertion of that same argument. We respectfully submit that this motion is calculated to delay both the pending litigation and the proposed project.

Whatever the movants' purpose might be, we further contend that they have not and cannot assert a ground upon which any relief against the State of Utah may be granted.

---

[2]See Hearings before Subcommittee on Irrigation and Reclamation, House Committee on Interior and Insular Affairs on H. R. 4449, p. 697.

THE STATE OF UTAH AS AN UPPER BASIN STATE

As this and the concurrent briefs of respondents to this motion have demonstrated, this is a dispute involving waters apportioned to the Lower Basin. The Compact under which California seeks to join the absent states as "parties to a contract" never has had as any of its purposes, the distribution of waters between states within a Basin; therefore the numerous questions isolated by the California defendants which pertain to such a distribution between them and the other present parties cannot come under the aegis of the Compact. In other words, this is not a suit upon the Compact.

The only suit which could be brought under the Compact would be for the determination of inter-basin rights and obligations. No allegations charge any violation of the Compact by the Upper Basin. No such allegation could in good faith be made. Present injury must be alleged[3].

UTAH AS A STATE ENTITLED TO PARTICIPATE IN THE LOWER BASIN.

The State of Utah has a limited right of participation in the Lower Basin waters. They are now negotiating with Arizona for a distribution of their share by Compact. For this court to assume jurisdiction over Utah under that situation would be contrary to this court's holdings that matters between states should be settled by negotiation and Compact[4]; that a justiciable disputed issue must be in existence[5];

---

[3] *Nebraska* v. *Wyoming*, 325 U. S. 589, 89 L. Ed. 1815.

[4] *Washington* v. *Oregon*, 214 U. S. 205, 218, 53 L. Ed. 969, 971, 29 S. Ct. 631.

[5] *Missouri* v. *Illinois*, 200 U. S. 496, 521, 26 S. Ct. 268, 270.

or imminently threatened[6]; of serious magnitude[7]; and fully and clearly proved[8].

We respectfully contend that the State of Utah should not be joined as a state of the Upper Basin or as a state entitled to participate in the waters of the Lower Basin, and that the motion of the California defendants should be denied.

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[6]*Connecticut* v. *Massachusetts*, 282 U. S. 660, 669, 51 S. Ct. 286, 289.

[7]*Colorado* v. *Kansas*, 320 U. S. 383, 88 L. Ed. 116, 124.

[8]Ibid.

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BRIEF OPPOSING MOTION OF CALIFORNIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

BRIEF OF NEW MEXICO OPPOSING MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING.

PRELIMINARY STATEMENT

On the 26th day of October, 1954, the Court entered an Order in this case which reads as follows:

> "Motion of California in ten original to join Colorado, New Mexico, Utah and Wyoming will be held for sixty days to enable those states to file printed responses."

In response to the Order of the Court, Colorado and

Wyoming have filed herein their separate brief limited to the question of joinder from the standpoint of the four states, Colorado, Wyoming, New Mexico, and Utah, as States of the Upper Basin. The status of Colorado, Wyoming, New Mexico and Utah as Upper Basin states, or as States of the Upper Division, are all identical insofar as the question of joinder is concerned. However, as will be seen by examination of the language of the Colorado River Compact of 1922, New Mexico and Utah are also states of the Lower Basin. For this reason, New Mexico adopts the brief filed herein by the states of Colorado and Wyoming in opposition to joinder based upon the Motion of California. However, in view of the fact that the brief filed by Colorado and Wyoming does not deal with the status of New Mexico and Utah as states of the Lower Basin, we deem it appropriate for these two states to file separate briefs opposing the Motion to join based upon the status of New Mexico and Utah as states of the Lower Basin.

STATUS OF NEW MEXICO AS DEFINED IN COLORADO RIVER COMPACT OF 1922

Article II of the 1922 Compact reads in part as follows:

"As used in this compact: —

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also

all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

Article III reads in part as follows:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum."

Thus by Article II c and II f, New Mexico is one of the "States of the Upper Division" and of the "Upper Basin"; also by II g it is one of the States of the "Lower Basin". (Text of Colorado Compact, November 24, 1922, Page 1, Appendixes to the Answer of California).

It should be noted that the allocation of "exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum," to both the Upper Basin and to the Lower

Basin, III a, includes "all water necessary for the supply of any rights which may *now* exist." The provisions of III b refers to the right of the Lower Basin to *increase* its beneficial consumptive use of such waters by one million acre feet per annum.

By Article VIII "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."

STATEMENT OF POSITION OF NEW MEXICO

New Mexico's principal interest in the consumptive use of water from the Colorado River System arises because of its status as one of the four states of the Upper Basin and of the Upper Division. Its interest as a State of the Lower Basin is dependent upon its ability to make consumptive use of a portion of the water of the Gila River and its tributaries which rise in the Western part of the State of New Mexico and flow across Arizona and into the Colorado River. It is physically impossible for New Mexico to divert for consumptive use in the State any waters from the main stream of the Colorado River, or from Lake Meade or any other reservoir on the main stream. Her water must come from the Gila or its tributaries in New Mexico, or possibly by exchange with Arizona, of main stream water for tributary water, which can be effected by negotiation —not by litigation.

The quantity of water which it may divert for beneficial consumptive use within the State is limited by physical and geographical factors. The acreage presently being irrigated is less than 10,000 acres, a figure which is infinitesimal compared to the claims of Arizona and California. Both states, however, recognize that New Mexico has the

right to an equitable share of the beneficial consumptive use of the waters of the Gila and its tributaries. (Answer of Defendants, page 66, paragraph 63—Bill of Complaint, page 30, Brief of Arizona.)

ARGUMENT

New Mexico objects to being joined as a party to this litigation because:

1. The pleadings do not show the existence of a justiciable controversy within the original jurisdiction of this court between New Mexico and any other party to the cause of action. This is true whether the status of New Mexico is considered as a "State of the Upper Division" or as a State of the Lower Basin.

2. The equitable share of New Mexico as a State of the Lower Basin, to the allocations made by Article III a and III b of the 1922 Colorado River Compact to the States of the Lower Basin, is admitted by both Arizona and California and disputed by no other party. It is not in the best interest of New Mexico at this time and in the present suit to be compelled to litigate and have determined the exact magnitude of this equitable share in terms of acre feet of water. Nor do the issues made by the pleadings between the real parties to this case make necessary the determination of the magnitude of such equitable interest of New Mexico at this time. Such a determination would depend upon facts that are hypothetical and highly speculative and under existing conditions would be premature.

3. Rule No. 19 of the Rules of Civil Procedure is not applicable or appropriate in this case.

4. It is not contended by California that the four

states of the Upper Division are "indispensable" parties in the sense that the case may not proceed without them.

5. Joinder of the four states at this time, under present status of pleadings, would be premature.

The following principles apply on the question of joinder of all four states, Colorado, Wyoming, Utah, and New Mexico, as well as to New Mexico and Utah as states of the Lower Basin:

> It will not grant relief against a state unless the complaining state shows an existing or presently threatened injury of serious magnitude. *Missouri vs. Illinois,* 200 U.S. 496, 521; *New York vs. New Jersey,* 256 U.S. 296, 309; *North Dakota vs. Minnesota,* 263 U.S. 365, 374; *Connecticut vs. Massachusetts,* 282 U.S. 660, 669; *Alabama vs. Arizona,* 291 U.S. 286, 291; *Washington vs. Oregon,* 297 U.S. 517, 528.
>
> A potential threat of injury is insufficient to justify an affirmative decree against a state. The court will not grant relief against something feared to occur at some future time. *Alabama vs. Arizona,* supra. The judicial power does not extend to the determination of abstract questions. *New York vs. Illinois,* 274 U.S. 288; *United States vs. West Virginia,* 295 U.S. 463.
>
> The court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity. *Alabama vs. Arizona,* supra., *Arizona vs. California,* 283 U.S. 423; *U. S. vs. West Virginia; Massachusetts vs. Missouri.*
>
> To predetermine, even in the limited field of water power, the rights of different sovereignties pregnant with future controversies, is beyond the judicial function. *U.S. vs. Appalachian Power Company,* 311 U.S. 377, 432.
>
> The exercise of original jurisdiction in an inter-state

case is not mandatory. (Georgia vs. Pennsylvania Railroad Company, 324 U.S. 439, 464; North Dakota vs. Chicago and Northwestern Railroad Company 257 U.S. 485.) The mere fact that a state is plaintiff is not enough (Wisconsin vs. Pelican Insurance Co., 127 U.S. 265; Oklahoma vs. A.T. & S.F. Ry., 220 U.S. 277).

Rule 19 of the Federal Rules of Civil Procedure is not necessarily controlling in this case. Rule 9 of the Supreme Court rules governing procedure in original actions, sub-paragraph 2 reads as follows: "The form of Pleadings and Motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a *guide* to procedure in original actions in this court." Sub-paragraph 3 of the rule governs the filing of the initial Pleading in an original action, and the procedure followed by the court in either granting or refusing a Motion for leave to file the initial petition. Sub-paragraph 6 of the rule states "additional Pleadings may be filed and subsequent proceedings had as the court shall direct."

In this case, the State of Arizona filed its Motion for leave to file its initial pleading and leave was granted by the court. The court no doubt determined that the petition stated a justiciable controversy between the State of Arizona and State of California and the nine additional defendants. California answered the petition of Arizona and joined issue on the allegations of Arizona's petition and asserted four affirmative defenses. Subsequently, the United States and the State of Nevada sought and were granted leave to intervene. We submit that the initial petition of the State of Arizona did not state a justiciable controversy with the states of Colorado, Wyoming, Utah and New Mexico. We submit further that neither the State of

Nevada nor the United States has alleged any fact creating a justiciable controversy with either of the four absent states.

In the case of *Nebraska vs. Wyoming,* 295 U.S. at page 43, the Court said:

> "Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party or whether at a later stage of the cause pleadings or proof may disclose a necessity to bring her into the suit."

We believe the above language is applicable to the pleadings in this case and that the motion of California should be denied.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original [redacted] 1961

STATE OF ARIZONA, Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants.

UNITED STATES OF AMERICA, Intervenor,
STATE OF NEVADA, Intervenor.

BRIEF OF THE STATE OF COLORADO AND THE STATE OF WYOMING OPPOSING THE MOTION OF THE STATE OF CALIFORNIA TO JOIN THE STATES OF COLORADO AND WYOMING AS PARTIES TO THIS ACTION

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IN THE

Supreme Court of the United States

October Term, 1954

No. 10 Original

STATE OF ARIZONA, Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants.

UNITED STATES OF AMERICA, Intervenor,
STATE OF NEVADA, Intervenor.

BRIEF OF THE STATE OF COLORADO AND THE STATE OF WYOMING OPPOSING THE MOTION OF THE STATE OF CALIFORNIA TO JOIN THE STATES OF COLORADO AND WYOMING AS PARTIES TO THIS ACTION

Because their interests in this matter are identical, the States of Colorado and Wyoming join in this brief. For convenience of reference, they will be referred to herein as "Respondents."

STATEMENT OF THE QUESTIONS PRESENTED

California, by her motion, seeks to make respondents parties to this action. The motion presents four questions for determination, only three of which are applicable to

respondents. The remaining question is directed to the interests of the States of Utah and New Mexico as Lower Basin States, and is applicable only to the States of Utah and New Mexico. The three questions presented and applicable to respondents are:

1. Are the rights and obligations of respondents under the Colorado River Compact in issue in this action, and if so, is there a justiciable controversy existing upon which respondents' rights and obligations thereunder can be adjudicated?
(See paragraph I, page 2, California's motion).

2. Are the respondents parties in interest in the Boulder Canyon Project Act and the California Self-Limitation Act, and if so, is there a justiciable controversy existing upon which respondents' interests therein may be adjudicated?
(See paragraph III, pages 3 and 4, California's motion).

3. Is there a justiciable controversy existing between the respondents and the United States, requiring determination in this action?
(See paragraph IV, page 4, California's motion).

STATEMENT OF THE CASE

I. PURPOSE OF PRESENT ACTION.

The present action was brought to divide, between the States in the Lower Basin, the water use to which the Lower Basin of the River is entitled under the Colorado River Compact.

THE COLORADO RIVER COMPACT DOES NOT AND WAS NOT INTENDED TO DIVIDE THE WATER USE OF EITHER THE UPPER BASIN OR THE LOWER BASIN BETWEEN THE STATES WITHIN EITHER BASIN.

The division of water use between the States of a basin is a matter outside the scope of the compact. This

principle has been recognized by all seven of the Colorado River States and the United States.

The Colorado River Compact divides water use only between two areas, designated as the Upper Basin and Lower Basin.

Respondents are located in the Upper Basin.

California and Nevada are located solely in the Lower Basin, and Arizona, although having a small area located in the Upper Basin, is located principally in the Lower Basin.

Respondents have no rights in the water use allotted to the Lower Basin by the Compact.

The States in the Upper Basin, including respondents, by agreement, have divided the water use allotted to the Upper Basin between the States in the Upper Basin.

Unlike the Upper Basin, the Lower Basin States have been unable to agree upon a division of the water use allotted to the Lower Basin by the Compact.

Consequently, this action was commenced by Arizona against California to accomplish a division of the water use in the Lower Basin by judicial decision. Nevada intervened to have adjudcated her rights to the use of water allotted to the Lower Basin by the Compact. The United States intervened to protect its rights and those of its instrumentalities and wards to the use of waters in the Lower Basin.

Arizona seeks no relief as against the Upper Basin or respondents.

Nevada seeks no relief as against the Upper Basin or respondents.

The United States seeks no relief as against the Upper Basin or respondents.

Neither Arizona, Nevada, nor the United States has asserted that the respondents are necessary or indispens-

able parties to a determination of this action.

Of the present parties to this action, California, and California alone, asserts that respondents are necessary or indispensable parties to this action.

II. PURPOSE OF CALIFORNIA'S MOTION

California, by her motion to make respondents parties, seeks to expand the action beyond its original purpose of dividing water use in the Lower Basin, to one including the adjudication of interbasin rights and obligations, including the rights and obligations of the respondents and the other Upper Basin States under the Compact; and also to adjudicate the respective rights of respondents and the United States to the use of waters of the Colorado River.

III. MOTION DOES NOT ALLEGE EXISTENCE OF JUSTICIABLE CONTROVERSY

California, by her motion, alleges three reasons why respondents are necessary or indispensable parties.

1. That there are in controversy in the present action many issues or interpretation of the Compact, and that these issues of interpretation affect the rights and obligations of respondents.
   (See paragraph I, page 2, California's motion).

2. That the meaning and effect of the Boulder Canyon Project Act and the California Self-Limitation Act are in controversy in this action, and that the issues of interpretation affect the rights and obligations of respondents.
   (See paragraph III, pages 3 and 4, California's motion).

3. That the claims of the United States in this action affect the rights and obligations of respondents.
   (See paragraph IV, page 4, California's motion).

There is no allegation in the motion that respondents, by any acts or ommissions, are depriving California or any other party to this action, of any rights claimed under the Compact or otherwise; there is no allegation that respondents are violating the Colorado River Compact, the Boulder Canyon Project Act, or the California Self-Limitation Act.

California's motion, and brief in support thereof, are premised on the assumption that at some time in the future a fact situation *may* arise, which *may* create a controversy, which *may* require the interpretation of interbasin rights and the rights and obligations of respondents.

IV. PURPOSE AND BACKGROUND OF COLORADO RIVER COMPACT

To understand the position of respondents, a brief resume of the background and purposes of the Colorado River Compact is necessary.

The Colorado River rises in the State of Colorado and flows through western Colorado and thence into Utah and enters Arizona near its northeast corner. For approximately 145 miles it forms the boundary between Arizona and Nevada, for 235 miles it forms the boundary between Arizona and California, and for 16 miles the boundary between Arizona and Mexico. Its drainage basin encompasses portions of the seven States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California.

The source of most of the waters of the river is in the Upper Basin of the River, located principally in Colorado, Wyoming, Utah and New Mexico.

The river, in its natural state, has great fluctations in flow, not only in the same year, varying with the seasons, but from year to year.

Before construction of Hoover Dam, which impounds water in Lake Mead, floods caused great damage, particularly in the Lower Basin of the river. Prior to the negotia-

tion of the Colorado River Compact in 1922, there was a demand in the Lower Basin of the river, and particularly in Southern California, for the construction of a large storage reservoir in the Lower Basin of the river, for flood control and to accumulate waters during high flows of the river for use during low flows, to provide a firm water supply for power production, irrigation and other uses.

At the same time, Southern California desired the construction of an All-American Canal to serve the Imperial Valley, to replace the canal then serving the Valley, which was located in part in Mexico.

To accomplish these purposes, California urged Congress to construct a large storage reservoir on the river in the Lower Basin and to build the All-American Canal.

The States in the Upper Basin of the river, realizing that with the construction of these projects, development of the use of waters of the river in the Lower Basin would increase more rapidly than in the Upper Basin, insisted that the Upper States be given some protection. The Upper States feared that prior large scale development of the use of the waters in the Lower Basin, would give rise to a claim that later use in the Upper Basin could not interfere with an existing economic development in the Lower Basin, based on the prior use in that Basin.

As a result of this situation, the Colorado River Compact was negotiated (H. Doc. 717, 80th Congress, 2d Sess., p. A17, 1948). The full text of the Compact is set forth at pages 1-8 of the Appendixes filed herein by California in connection with her answer. Its fundamental underlying premise is to protect the Upper States in their future development and use of the waters of the river, while at the same time permitting the Lower States to proceed with immediate development and use. Thus, the first major purpose of the Compact, as stated in Article I of the Compact, is "to provide for the equitable division and apportionment of the use of the waters of the Colorado River system."

By the Compact, the river basin was divided into two basins, denominated the Upper Basin and the Lower Basin, with the division point at Lee Ferry, a point on the river just South of the Utah-Arizona border. The principal protection to the Upper Basin is found in Article III(a), which provides:

> "There is hereby apportioned from the Colorado River system *in perpetuity* to the Upper Basin and to the Lower Basin respectively, the exlusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist." (Emphasis ours).

We call the Court's attention to the fact that the foregoing apportionment *does not apportion or divide the water use between the individual states* of either basin, but only as between the Upper and Lower Basins of the river.

The Upper Basin contains those areas from which waters naturally drain into the Colorado River system above Lee Ferry, plus areas of the Upper Basin States located without the drainage area but which shall be served by waters diverted above Lee Ferry. The Lower Basin is the area from which waters naturally drain into the Colorado River system below Lee Ferry, plus the parts of the Lower Basin States without the drainage area which shall be served by waters diverted below Lee Ferry. (Article II(f) and (g) Compact).

Colorado and Wyoming are located solely within the Upper Basin. California and Nevada are located solely within the Lower Basin. New Mexico and Utah are located in part in the Upper Basin and in part in the Lower Basin, but their prinicipal interests are in the Upper Basin. Arizona is located in part within the Upper Basin and in part within the Lower Basin, but her principal interests are in the Lower Basin. (Articles II (f) and (g) Compact).

Recognizing these interests, the Compact divides the States into two political groups, termed States of the Upper Division, which includes Colorado, New Mexico, Utah and Wyoming, and States of the Lower Division, which includes Arizona, California and Nevada. (Article II (c) and (d) Compact).

After the Compact was negotiated and it became effective, Hoover Dam was authorized and constructed. The All-American Canal was authorized and constructed. The Lower Basin obtained the facilities of flood control, storage and the All-American Canal which it desired, and did proceed with its immediate development and use of the waters in the Lower Basin. In addition, to aid water use and development in the Lower Basin, Parker Dam, Davis Dam and other water storage and use facilities have been constructed in the Lower Basin.

As was anticipated, the development and use of the waters of the river in the Upper Basin has been far less rapid than in the Lower Basin.

The present beneficial consumptive use in the Upper Basin is but about one-third of its apportionment under Article III (a) of the Compact, being approximately 2,500,000 acre feet of the 7,500,000 acre feet apportioned (see Hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, Second Session, on S. 1555, page 286). The unused portion of the Upper Basin apportionment is flowing into the Lower Basin and will continue so to flow until Upper Basin use increases to the amount of its apportioned share.

SUMMARY OF ARGUMENT

I. As to the questions of interpretation of the Compact raised by the motion, respondents contend:

A. The present action is one to divide water use in the Lower Basin. The Compact does not and was not intended to divide water use within a basin. The division of water use within a basin is outside the scope of the Compact. Consequently, this is not an action on or to enforce the Compact, but rather to determine an issue outside the scope of the Compact. The fact that respondents are parties to the Compact does not require their presence to determine the present issue, which is not within the scope of the Compact.

B. There is no justiciable controversy existing between respondents and California, or any other party to this action, requiring or permitting the interpretation of or adjudication of respondents' rights and obligations under the Compact. Respondents' rights and obligations under the Compact cannot be interpreted or adjudicated in the absence of an existing justiciable controversy. There is no allegation or assertion that respondents are violating the Compact or depriving California, or the Lower Basin, or any of the parties to this action, of any rights which they claim under the Compact. Respondents are not required to submit to an adjudication of their rights and obligations under the Compact in the absence of an existing justiciable controversy, and upon assumed or hypothetical facts.

II. As to the questions of interpretation of the Boulder Canyon Project Act and the California Self-Limitation Act, respondents contend:

A. The present controversy involving the Boulder Canyon Project Act and the California Self-Limitation Act relates solely to a dispute between Arizona and California, over the division of water use in the Lower Basin. Respondents have no rights in the water use to which the

Lower Basin is entitled under the Compact. Respondents have no rights or obligations involved in this controversy, and are not necessary parties to any controversy concerning these Acts.

B. The rights and obligations of respondents, if any, under the Boulder Canyon Project Act and the California Self-Limitation Act cannot be adjudicated until such time as there is a justiciable controversy existing between the respondents and some Lower Basin State, requiring such adjudication. There is no allegation in the motion that respondents are depriving California, or any other party to this action, of any rights which they claim under these Acts. There being no allegation of the existence of a justiciable controversy, respondents cannot be required to submit to an adjudication of their rights or obligations.

III. As to the claims of the United States in this action, respondents contend:

A. The United States has made no claims against and seeks no relief in this action against respondents. In the absence of such claims by the United States against respondents, there is no issue between the United States and the respondents to be determined in this action, and to which the respondents are necessary parties.

B. There is no allegation of the existence of any justiciable controversy between the respondents and the United States. Neither California nor the United States allege that the respondents are depriving the United States of any rights which it claims. The fact, if it be a fact, that at some time in the future, under some circumstances, a justiciable controversy may arise between the respondents and the United States, is not a valid ground for the requirement of the presence of respondents to the present action.

ARGUMENT

I. THE ISSUE IN CONTROVERSY IN THE PRESENT ACTION IS THE DIVISION OF WATER USE IN THE LOWER BASIN, TO WHICH RESPONDENTS ARE NOT NECESSARY OR INDISPENSABLE PARTIES.

That the issue in this action is the division of water use in the Lower Basin is clearly apparent.

Arizona, by her complaint, prays for a share of the water use "apportioned to the Lower Basin by the Colorado River Compact," subject to "the availability of such water under the Colorado River Compact." (See page 30, Arizona's complaint).

Nevada, in her petition for intervention, prays for an adjudication of her share of the water use apportioned to the Lower Basin by the Compact. (See page 25 of Nevada's petition for intervention).

California, in her answer to Arizon's complaint, asks for no affirmative relief, but alleges by way of affirmative defenses that her claims to the beneficial consumptive use of water in the Lower Basin are superior to those of Arizona, and at page 2 of her answer states:

> "This controversy centers on the desire of Arizona to secure a right to the use of water for the Central Arizona Project, which has not been authorized by the Congress. She seeks to obtain water for that project by taking it from the existing and operating California projects."

It is equally clear that the Colorado River Compact does not, and was not intended to divide the water use of either the Upper or Lower Basins.

The Colorado River Compact Commission, which negotiated the Compact, deliberately avoided any attempt to allocate waters between the States.

"During the public hearings and business meetings of the Commission, it became apparent that any attempt to allocate waters individually to the several states would be a protracting and probably unsuccessful undertaking. Participants have stated that the negotiations would have broken up but for Mr. Hoover's proposal: that the Commission limit its efforts to a division of water between the Upper Basin and the Lower Basin, leaving to each basin the future internal allocation of its share."

(The Hoover Dam Documents, Second Edition, 1948, published under H. R. 391 of December 4, 1947, page 22).

"The Colorado River Compact does not attempt to divide the water of the river between individual states."

(The Hoover Dam Documents, supra, page A50).

The Upper Basin States have, by Compact, agreed upon a division between themselves of the water use allotted to the Upper Basin by the Colorado River Compact. This agreement is the Upper Colorado River Basin Compact, which was negotiated by the Upper Basin States with the consent of Congress. (See 63 Stat. 31, Appendix 30, Article VII).

Since the Lower Basin States have been unable to agree upon a division of the water uses in the Lower Basin, several attempts have been made to determine the division by litigation. (See *Arizona vs. California*, 283 U. S. 423, 51 S. Ct. 522; *Arizona vs. California*, 292 U. S. 341, 54 S. Ct. 735; *Arizona vs. California*, 298 U. S. 558, 56 S. Ct. 848; Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on Senate Joint Resolution 145, being a resolution authorizing commencement of an action by the United States to determine interstate water rights in the Lower Colorado River Basin).

The latest of these attempts is the present action in-

stituted by the State of Arizona gainst the State of California, and in which the State of Nevada and the United States have intervened.

The principle that the division of water use within a basin is solely an issue between the States of the basin, and not requiring the acquiescence or participation of the States of the other basin, was first recognized by the participants in the negotiation of the Compact, as we have shown above.

The same principle was later recognized by the United States Congress in the Boulder Canyon Project Act of December 21, 1928, (45 Stat. 1057), wherein, in the second paragraph of Section 4 (a) of that Act, the States of Arizona, California and Nevada were authorized to enter into an agreement for the division of the Lower Basin water use, and with no requirement that the Upper Division States acquiesce in or be parties thereto.

This same principle was also recognized by the Upper Basin States and the United States in the negotiation of the Upper Colorado River Compact, which divided the water use of the Upper Basin, and which Compact was consented to by the United States Congress. Congress and the Upper Division States did not consider that the Lower Basin States were necessary parties to that Compact, and so far as we are informed, the Lower Basin States have not contended that the Upper Basin Compact is invalid because the Lower Basin States are not parties thereto.

This same principle was recognized by the State of California in 1948. At that time, the State of California was urging the passage by Congress of the so-called McCarran Resolution, which would have required the Attorney General of the United States to institute litigation for the purpose of determining the division of the water uses in the Lower Basin. At the hearings on the McCarran Resolution in the Senate, the Assistant Attorney General of the State of California stated as follows:

"Thus, the focal point of the proposed suit is the determination of the rights of the Lower Basin States among themselves, under, and not in derogation of, the disputed documents which constitute the law of the river. There is no need to go further. NO DISPUTES OR PROBLEMS REQUIRING PRESENT DISPOSITION ARE BELIEVED TO EXIST BETWEEN THE UPPER BASIN AND THE LOWER BASIN. There is no need to determine the division of water among the Upper Basin States. They have for nearly two years been engaged in negotiation of a compact for that purpose, and it is believed that this effort will be effectual." (Emphasis ours).

"The three major issues discussed by Mr. Ely and Mr. Howard directly relate to the division of the Lower Basin water. HENCE THE UPPER BASIN STATES ARE NOT DIRECTLY CONCERNED AND NEED NOT BE MADE PARTIES." (Emphasis ours). (Hearings before the Senate Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on S. J. Res. 145, at page 129).

The same statement was made at the House hearings. (See Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, Eightieth Congress, Second Session, on H. J. Res. 225, H. J. Res. 226, H. J. Res. 227, H. J. Res. 236, and H. R. 4097, at page 214).

The three major issues referred to by the Assistant Attorney General of the State of California in these hearings are briefly:

1. By what method shall the beneficial consumptive use of water in the Lower Basin be measured?

2. Are the waters referred to in Article III(b) of the Compact apportioned water or "excess or surplus" water and unapportioned?

3. How are evaporation losses from the Lower Basin mainstream storage reservoirs to be charged in the Lower Basin?
   (See pages 19 and 20 of Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on S.J. Res. 145).

These are the same three issues presented by Arizona's complaint in the present action, which are found in paragraph XXII, at pages 25 and 26 of Arizona's complaint, which are:

1. Is the water referred to and affected by Article III(b) of the Colorado River Compact apportioned or unapportioned water?
2. How is beneficial consumptive use to be measured?
3. How are evaporation losses from Lower Basin mainstream reservoirs to be charged?

Respondents respectfully submit that the purpose of and the issue in this action is the division of water use in the Lower Basin; that this is an issue solely between the States of the Lower Basin, and does not require the presence of respondents for its determination.

II. THERE IS NO JUSTICIABLE CONTROVERSY REQUIRING OR JUSTIFYING THE INTERPRETATION OF THE COMPACT AS TO ANY RIGHTS OR OBLIGATIONS OF RESPONDENTS.

California raises many questions of interpretation of the Compact which she says should be determined in this action.

Before proceeding to discuss these questions in detail, we point out:

A. BY ARTICLE III(a) OF THE COMPACT, THE UPPER BASIN IS APPORTIONED "THE EXCLUSIVE BENEFICIAL CONSUMPTIVE USE OF 7,500,000 ACRE FEET OF WATER PER ANNUM."

THE UPPER BASIN'S PRESENT CONSUMPTIVE USE IS ABOUT 2,500,000 ACRE FEET, OR ABOUT ONE-THIRD OF THE APPORTIONMENT. THERE IS NO ASSERTION THAT THE UPPER BASIN IS EXCEEDING ITS RIGHTFUL USE UNDER THE COMPACT.

B. THE COMPACT, BY ARTICLE III(c), III(d) AND III(e), IMPOSES CERTAIN OBLIGATIONS UPON THE UPPER BASIN AND THE UPPER DIVISION STATES. BUT CALIFORNIA DOES NOT ASSERT ANY VIOLATIONS OF THESE OBLIGATIONS.

C. NOR DOES CALIFORNIA ASSERT THAT THE UPPER BASIN OR THE UPPER DIVISION STATES ARE VIOLATING THE COMPACT IN ANY RESPECTS.

D. THERE IS NO CONTROVERSY EXISTING BETWEEN THE UPPER BASIN AND LOWER BASIN.

GENERALLY, THE QUESTIONS OF INTERPRETATION RAISED BY CALIFORNIA ARE BASED ON THE PREMISE THAT AT SOME TIME IN THE FUTURE, A FACT SITUATION *MAY* ARISE WHICH *MAY* CAUSE A CONTROVERSY TO EXIST, THE DETERMINATION OF WHICH *MAY* REQUIRE AN INTERPRETATION OF THE COMPACT.

Respondents strenuously object to any attempt to determine their rights under the Colorado River Compact,

until such time as they are accused of a violation of the Compact, or until such time as they are accused of some act which deprives some Lower Basin State of some right which that State claims that it has by virtue of the Compact.

Here the Upper Division States have been accused of no violation of the Compact whatsoever.

The respondents also strenuously object to being made parties to this litigation for the purpose of interpreting the rights of the respondent States under the Compact on some theoretical or imagined fact situation, which could only occur many years in the future, and with no assurance that the suppositious controversy would ever exist.

Respondents further urge that they are entitled to have their rights under the Compact determined at the time that an actual justiciable controversy exists, and to have the interpretation of the Compact made with relation to an existing controversy and an actual fact situation. The position of the respondents in this respect is not without support by decisions of this Court. This Court has said:

> "Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of the state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using or threatening to use more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."
>
> *Colorado vs. Kansas,* 320 U.S. 383, 393, 394, 64 S. Ct. 176, 181.

The Court will not grant relief against a state unless the complaining state shows an existing or presently threatened injury of serious magnitude.

Missouri vs. Illinois, 200 U.S. 496, 521, 26 S. Ct. 268, 270; *New York vs. New Jersey,* 256 U.S. 296, 309, 26 S. Ct. 268, 270; *North Dakota vs. Minnesota,* 263 U.S. 365, 374, 44 S. Ct. 138, 139; *Connecticut vs. Massachusetts,* 282 U.S. 660, 669, 51 S. Ct. 286, 289; *Alabama vs. Arizona,* 291 U.S. 286, 291, 54 S. Ct. 399, 401; *Washington vs. Oregon,* 297 U.S. 517, 522, 56 S. Ct. 540, 542.

A potential threat of injury is insufficient to justify an affirmative decree against a state. The Court will not grant relief against something feared to occur at some future time.

Alabama vs. Arizona, supra.

The judicial power does not extend to the determination of abstract questions.

New York vs. Illinois, 274 U.S. 488, 47 S. Ct. 661; *United States vs. West Virginia,* 295 U.S. 463, 474, 55 S. Ct. 789, 793.

The Court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity.

Alabama vs. Arizona, supra; Arizona vs. California, 283 U.S. 423, 464, 51 S. Ct. 522, 529; *U. S. vs. West Virginia, supra; Massachusetts vs. Missouri,* 308 U. S. 1, 60 S. Ct. 39.

To predetermine, even in the limited field of water power, the rights of different sovereignties pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.

U. S. vs. Appalachian Power Company, 311 U. S. 377, 423, 61 S. Ct. 291, 306.

California does not attempt to allege any facts constituting the existence of a justiciable controversy with respondents, nor would any such attempt be justified. California does not and cannot contend that the uses in the Upper Basin are in excess of its rights under the Compact. California does not and cannot contend that respondents, or the Upper Division States, are evading their obligations to the Lower Basin under the Compact.

As we shall presently show, each and every interpretation of the Compact sought by California, involving the rights and obligations of respondents, is based upon the assumption that at some time in the future, a situation or condition may arise which may require adjudication.

Under paragraph II of her brief, pages 31 to 53, California sets forth the various questions of interpretation of the Compact which she desires that respondents be required to litigate in this action. We will proceed to discuss these questions and show in each instance that there is no justiciable controversy upon which respondents can be required to litigate these questions.

DISCUSSION OF THE PARTICULAR QUESTIONS OF INTERPRETATION RAISED BY CALIFORNIA UNDER ARGUMENT II, PAGE 31 OF HER BRIEF.

California states, "THE FOUR STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING ARE NECESSARY PARTIES TO THIS ACTION BECAUSE THEY ARE PARTIES TO THE COLORADO RIVER COMPACT, THE MEANING AND EFFECT OF WHICH ARE IN CONTROVERSY IN THIS CASE, AND NO DECREE CONSTRUING THAT AGREEMENT CAN BE FULLY EFFECTIVE WHICH DOES NOT DETERMINE THEIR RIGHTS AND OBLIGATIONS AS WELL AS THOSE OF THE PRESENT PARTIES."

Under "A", page 31 of her brief, California states that respondents have certain obligations under Articles

III(c), III (d) and III(e) of the Compact, and certain rights under Articles III(a), III(e), III(f) and III(g) of the Compact, and that respondents have rights and obligations under Articles VII and VIII of the Compact.

There is, however, no allegation by California that respondents, or the Upper Division States, are exceeding their rights or evading their obligations under these various articles of the Compact, to the injury of California or the Lower Basin.

In the absence of such an allegation, there is no justiciable controversy upon which respondents' rights and obligations under these articles of the Compact can be adjudiciated.

Under Argument II "B", pages 32 to 35 of brief, California discusses her controversy with Arizona over the waters of the Gila River, which is purely a lower basin dispute. As to respondents' interest therein, California states at page 34 of the brief, "The States of the Upper Division, in the calculation of their obligation under Article III(c), are thus directly affected by the question of whether or not the uses on the Gila River and other Lower Basin tributaries are accountable under Article III(a)."

Article III(c) has to do with the obligation of the Upper Division States in case there is a shortage of water to supply Mexico under the Mexican Treaty.

In other words, California says that should the time come that the Upper Division States are required to furnish water at Lee Ferry to supply a deficiency to Mexico under Article III(c), that it may then be to the advantage of the Upper Division States if California is right in her interpretation of the Gila River controversy.

California does not allege that there now exists a shortage in the supply to Mexico under the treaty ,and that the Upper Division States are refusing to recognize their obligation under Article III(c).

What California says in effect is that at some time in the future there *may* be a shortage of water to Mexico, and that at that time the Upper Division States *may* refuse to recognize their obligation under Article III(c), because they *may* not agree with California on the Gila River dispute.

The facts are that the Upper Division States are now consumptively using but approximately 2,500,000 acre feet of their apportioned 7,500,000 acre feet; and that under the present uses there is more than sufficient water to satisfy the Mexican needs from the unused portion of the Upper Basin's share alone.

Under Argument "C", (page 35 of brief, California raises the question that Article VIII of the Compact, providing "present perfected rights to beneficial use of waters of the Colorado River system are unimpaired by this Compact", means unimpaired as to quality as well as quantity. At the bottom of page 35 of her brief, California says, "It is a question of fact, to be developed at the trial, what effect the increased utilization of water in the Upper Basin will have upon the concentration of salts in the residue reaching Lee Ferry."

This, we believe, is typical of California's entire position of attempting in this case to determine not only all possible questions of interpretation that may arise in the future, but also to attempt to try in advance questions of fact which may hereafter arise.

We may reasonably assume from California's statement which we have just quoted, that if the Upper Division States are made parties, California will produce testimony at the trial that increased use of water, in the Upper Basin, may affect the quality of the water reaching Lee Ferry, and therefore, this Court should then determine that there can be no future development in the Upper Basin because the quality of the water *might be affected*.

There is no present allegation that the present uses

in the Upper Basin are depriving California of a quality of water to which she claims she is entitled under her interpretation of the Colorado River Compact. Nevertheless, because the Upper Basin *may,* at some time in the future, make such increases in its use in some manner which might affect the quality of the water, the Upper Division States are now to be brought into Court to try this issue upon conjecture and opinion. We submit that states should not have their rights to water, which are their very life blood, determined on any such hypothetical and conjectural assumptions. Should the time come that water uses in the Upper Basin *do* affect rights which California claims to have under the Compact, then and only then should such issues be determined.

Under Argument "D", (page 36 of brief), California discusses the manner of measurement of beneficial consumptive use. California contends that it should be measured by one method, and Arizona contends it should be measured by another.

The respondents are not concerned at this time with what particular method is used to divide the water use in the Lower Basin. As to the division of the waters within a particular basin, the particular method of measurement is a matter for those states themselves to determine.

If and when a controversy arises between the two basins as to what method of measurement shall be used to determine inter-basin rights and obligations, that question can then be determined. The question will not arise in the foreseeable future.

California states, at the top of page 38 of her brief, that if her method of measurement is used for inter-basin purposes, the Upper Basin will have between 300,000 and 500,000 acre feet less of consumptive use than if the Arizont method is used.

Yet, as we have pointed out heretofore, the Upper Basin consumptive use is only about 2,500,000 acre feet,

and its apportionment is 7,500,000 acre feet. Under either method of measurement contended for, the Upper Basin use is well within the apportionment.

When Upper Basin consumptive use approaches the Upper Basin apportionment of 7,500,000 acre feet, then and not before, there may exist a justiciable controversy upon which to litigate the question of what method of measurement of consumptive use shall be used in determining interbasin obligations. At this time, there is no such controversy. Admittedly the Upper Basin is well within its apportioned use, whichever method of measurement is used.

Argument "E" (page 39, California's brief). Under this argument, California discusses the matter of how salvage water is to be charged. What we have said with regard to Argument "D" likewise applies to this argument. At some time in the future, an interbasin controversy may arise over the question of how salvage waters are to be charged. At the present time, this is an intrabasin controversy between Arizona and California. It only becomes important to the Upper Basin when the Upper Basin uses or the Lower Basin demands raise the question.

There is not now any controversy between the two basins over this question, for irrespective of how salvaged waters are to be charged, the Upper Basin use is well within its apportionment under the Compact.

Argument "F" (page 41 Brief). California contends that the Upper Basin uses are limited to a maximum of 7,500,000 acre feet in a given year under Article III(a) of the Compact.

California does not allege that the Upper Basin uses have in any year exceeded 7,500,000 acre feet. California, in effect, contends that at some time in the future, the Upper Basin *may* so develop its use, that it *might* seek to beneficially consume more than 7,500,000 acre feet of water in one year, and that *if* this did happen, it would be contrary to California's interpretation of the Compact, and therefore, this Court should now determine this question.

Until the time arrives that the Upper Basin use exceeds 7,500,000 acre feet in any one year, there is no justiciable controversy upon which the Court should make an interpretation.

Argument "G" (page 43, California brief). Under Argument "G", California states that the Upper Basin States are interested in the question of how rights may be acquired in waters surplus to those specified in Article III(a) and Article III(b). California says rights may be obtained by her in such surplus by appropriation. California does not assert that the Upper Basin is depriving her of any such waters she claims by her appropriation theory. What California does say is that the Upper Basin, at some time in the future, *may* attempt to use more than its apportioned 7,500,000 acre feet, and that *if* and when that time arrives, the Upper Basin use of the excess over 7,500,000 acre feet is subject to California's prior uses. It is again necessary to point out that the Upper Basin uses are but approximately one-third of its apportionment. Yet, California would have the Upper Basin States litigate an issue now which, if it ever arises, can only arise many years in the future and after the Upper Basin has increased its use to an excess of 7,500,000 acre feet.

Argument "H" (page 45, California brief). Under this argument, California discusses the question of whether the waters mentioned in Article III(b) are apportioned or unapportioned waters.

In the first place, III(b) water is water allocated solely to the Lower Basin, and respondents have no rights therein. In the second place, in 1948, California represented to the United States Congress, in the McCarran hearings heretofore mentioned, that this issue is a controversy between Arizona, California and Nevada, and that the respondents were not necessary parties to its determination. (See Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, on S. J. 145, page 129, supra).

With this we agree.

However, California, in her argument, in effect says that *if* her contention is correct, that the waters are unapportioned, and *if* III(b) waters are surplus waters, and *if* after October 1, 1963, either basin shall have reached its total beneficial consumptive use, and *if* at that time a further apportionment is thereafter made under Article III(g), and *if* the Upper Basin receives an additional apportionment, that then it may be to the advantage of the Upper Basin *if* III(b) water is construed as unapportioned water, and therefore the Upper Basin has an interest in this controversy.

Upon such a speculative and conjectural statement, California is seeking to make the Upper Division States litigate their rights.

There is no controversy existing at this time between the Upper and Lower Basins on this point. No controversy, in any event, could exist prior to October 1, 1963, which by Article III(f) is the earliest date when the matter of further apportionment can be considered.

No justiciable controversy exists between respondents and California on this question.

Argument "I" (page 46 of brief). California says that the Upper Division States are affected by the controversy between California, Arizona and Nevada over the charging of reservoir evaporation losses on Lower Basin reservoirs.

This obviously is a Lower Basin controversy. The respondents are not interested in how California, Nevada and Arizona charge the reservoir losses in the Lower Basin.

The Upper Basin States, by the Upper Colorado River Compact, charge the reservoir losses in the Upper Basin among the Upper Basin States as a consumptive use under the Colorado River Compact. (Article V, Upper Colorado River Compact).

The apportioning of the reservoir losses in the Lower Basin is purely a Lower Basin problem. The respondents are not necessary parties to a determination of this issue, and the State of California, in the McCarran hearings, represented to the United States Congress that the Upper Basin States are not directly concerned and need not be made parties to the litigation to determine this issue. With this we agree. (See Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on S. J. 145, page 129, supra).

Certainly, there is no allegation of any justiciable controversy existing between California and respondents over this question.

Argument "J" (page 48 of brief). The claims of the United States mentioned in Argument "J" of California's brief will be hereinafter discussed.

Argument "K" (pages 48 to 53 of brief). California argues that because the respondents are signatories to the compact, they must be joined in this action . That is exactly contrary to the position taken by the State of California in the McCarran hearings heretofore cited.

We repeat that California, and California alone, takes the position that the respondents and the Upper Division States are necessary parties.

This action to divide the water use in the Lower Basin is not an action to enforce the Colorado River Compact. This is an action to determine a question which was purposely eliminated from the Compact. The Compact does not and did not intend to divide the water use between the individual states within a basin. This action to divide the water use in the Lower Basin is not an action to enforce the Compact, but an action to determine rights which exist outside of the scope of the Compact.

It is also contended by California, at page 51 of her brief, that irrespective of the Compact, "All parties hav-

ing interests in Colorado River system waters must be joined." This Court has held otherwise. In the case of *Nebraska vs. Wyoming,* 295 U. S. 40, 55 S. Ct. 568, Nebraska instituted an original proceeding in this Court against Wyoming, seeking an equitable apportionment of the waters of the North Platte River. Wyoming filed a motion to dismiss, one of the grounds of which was that the State of Colorado was an indispensable party because the North Platte rises in Colorado and drains a considerable area therein. In other words, Wyoming contended that Colorado, having an interest in the North Platte River System, was an indispensable party to the controversy between Nebraska and Wyoming. This Court said, at page 43, of the U. S. Report:

> "The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proof may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

Later Nebraska amended her complaint, alleging that Colorado,

> "By diversions of water from the river for irrigation purposes were violating the rule of priority of appropriation in force in the three states and depriving Nebraska of water to which she was equitably entitled." *Nebraska vs. Wyoming,* 325 U. S. 589, 591, 592, 65 S. Ct. 1332, 1338.

Upon these allegations the Court joined Colorado as a party. *Nebraska vs. Wyoming,* 296 U. S. 553, 56 S. Ct. 369.

Following the rule laid down in the Nebraska vs. Wyo-

ming cases, respondents state that California asserts no wrongful act of Colorado or Wyoming in the present case, nor does California allege that respondents are depriving California of any waters of the river to which she is entitled. In the absence of such allegations, respondents are not necessary parties to this action to divide water use in the Lower Basin.

Nor did this Court alter t. is rule in the three Arizona vs. California cases cited at page 51 of California's brief.

However, this Court, in one of these cases, *Arizona vs. California et al.*, 283 U. S. 423, 463, 464, 51 S. Ct. 522, 529, re-affirmed the rule that adjudication of rights to interstate waters must be founded on an existing justiciable controversy. This Court said:

> "There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be appropriated. *New Jersey vs. Sargent,* 269 U. S. 328, 338, 46 S. Ct. 122, 70 L. Ed. 289. This Court cannot issue declaratory decrees."

III. THE RESPONDENTS ARE NOT NECESSARY PARTIES TO A DETERMINATION OF THE CONTROVERSY BETWEEN ARIZONA AND CALIFORNIA UNDER THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA SELF-LIMITATION ACT.

At page 58 of her brief, California states "THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THIS ACTION IN THEIR CAPACITY AS THIRD PARTIY BENEFICIARIES OF THE STATUTORY COMPACT BETWEEN THE UNITED STATES AND CALIFORNIA EVIDENCED BY THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT."

The Boulder Canyon Project Act (45 Stat. 1057) and the California Self-Limitation Act (Chapter 16 Calif. Stats. 1929, p. 38), relate to the division of water use in the Lower Basin. These Acts are set forth at pages 9 to 31 in Appendixes to California's answer filed herein.

The Boulder Canyon Project Act, which authorized the construction of Hoover Dam, provided in Section 4(a) that no construction should be commenced until one of two conditions had been performed:

1. That all seven Colorado River Basin States ratify the Colorado River Compact; or
2. If all seven States fail to ratify the Compact in six months, then it must be ratified by six of the seven Basin States, including California, and California, by legislative act, agree "for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming" to limit her beneficial consumptive use of water from the Colorado River, for use in California, to 4,400,000 acre feet of the water apportioned to the Lower Basin by Article III(a) of the Compact, plus not more than one-half of the excess or surplus waters unapportioned by the Compact, and such uses to be subject to the Compact.

Arizona did not ratify the Compact in the six months period. The other six States, including California, did ratify the Compact, and California did pass the legislative act limiting her uses as provided for in the Boulder Canyon Project Act. This legislative act of California is commonly referred to as the California Self-Limitation Act.

California contends that Arizona is not entitled to any benefits under the California Self-Limitation Act. Her position is set forth at pages 60 and 61 of California's answer to Arizona's complaint as follows:

"Arizona, in this action, seeks to establish alleged rights dependent upon that State's participation as a party to the Colorado River Compact as a Seven-State Compact, and also seeks to establish alleged rights as a third party beneficiary of the said Statutory Compact. Arizona has not herein, or otherwise, offered to do equity and to waive any rights as such third party beneficiary, or by such waiver, or otherwise, to place California in the same position in its relation to Arizona as that which California would have occupied with respect to contractual or other rights to the use of waters of the Colorado River system, had the Legislature of the State of Arizona approved and ratified the proposed Colorado River Compact as a Seven-State Compact prior to June 25, 1929. Arizona cannot, as of February 24, 1944, and thereafter, be permitted to assert, to her advantage, and to California's detriment, rights allegedly derived from, and dependent upon, both the Colorado River Compact and the Statutory Compact." (See pages 60 and 61 of California's answer to complaint).

This is purely a dispute between Arizona and California, and the controversy relates solely to the division of the water use in the Lower Basin. This dispute has no application to inter-basin rights and obligations, nor does California allege that respondents have committed any act or omission which deprives California of any rights which she claims under these two Acts. Neither does California point out in what respect the Acts create any rights in or imposes any obligations upon respondents.

California argues that merely because respondents are named as beneficiaries in the Acts, they are necessary parties to this dispute.

This respondents deny.

Whether Arizona is or is not entitled to the benefits of this Act is a matter of no moment to respondents.

The question of whether the division of the use of the waters to which the Lower Basin is entitled under the Compact is affected by the Limitation Act, affects no rights or obligations of respondents. Respondents' rights and obligations remain the same no matter what the division of water use may be in the Lower Basin.

The mere fact that respondents are named as beneficiaries in the Acts does not create in respondents any interest in how those Acts may affect the division of water use in the lower Basin.

The mere fact that respondents are named in these Acts is not and should not be sufficient to involve respondents in this litigation, in the absence of any allegation that a justiciable controversy exists between respondents and California, involving the interpretation of respondents' rights and obligations thereunder. There is no such allegation. The respondents have been accused of no wrongful act or omission which deprives California of any right she claims.

Also, Arizona's claims under said Acts, do not affect respondents, for Arizona admits by her complaint that her claims to water use are subject to the Colorado River Compact and the availability of water under said Compact. (See prayer, p. 30 Arizona complaint).

> "Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of the state, for the burden on the complaining state is much greater than generally required to be borne by private parties. Before the court wll intervene the case must be of serious magnitude and fully and clearly proved."
>
> *Colorado vs. Kansas,* 320 U. S. 383, 64 S. Ct. 176, 181.

> "The governing rule is that this Court will not assert its extraordinary power to control the conduct of one state at the suit of another unless the threatened

invasion of rights is of serious magnitude and established by clear and convincing evidence."

Connecticut vs. Massachusetts, 282 U. S. 660, 669, 51 S. Ct. 286, 289.

The Supreme Court's jurisdiction "in respect of controversies between states will not be asserted in the absence of absolute necessity."

Alabama vs. Arizona, 291 U. S. 286, 291, 54 S. Ct. 399, 401.

It is respectfully submitted that respondents have no interests in issue in this dispute, and its determination does not require the presence of respondents as parties thereto.

IV. THERE IS NO JUSTICIABLE CONTROVERSY EXISTING BETWEEN RESPONDENTS AND THE UNITED STATES REQUIRING THE PRESENCE OF RESPONDENTS AS PARTIES TO THIS ACTION.

At page 61 of her brief, California states: "THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THE ADJUDICATION OF THE CLAIMS OF THE UNITED STATES TO THE WATERS OF THE COLORADO RIVER SYSTEM."

We have carefully read the petition in intervention filed herein by the United States of America. Nowhere in the petition do we find any claim of the United States against the Upper Division States or the Upper Basin or the respondents.

The United States makes certain affirmative claims to water use *in the Lower Basin,* and asks the Court to quiet the title of the United States of America in its right as asserted in the petition against the adverse claims of the State of Arizona and the California defendants. (Page 42, United States Petition of Intervention).

The United States has not requested that the Upper

Division States be made parties to this proceeding on the ground that they are necessary parties to the determination of the rights of the United States in the waters in the Lower Basin.

The United States has treated this action as one to determine the rights to the use of water in the Lower Basin of the river.

There is no allegation in the petition for intervention of the United States or California's motion, that the Upper Division States are now impairing, or are presently threatening to impair, or interfere with any rights which the United States claims in the waters of the river.

There is no justiciable controversy existing at this time between the Upper Division States and the United States of America.

So far as any claims of the United States to the waters of the river in the Upper Basin, the Upper Basin has made provision in the Upper Colorado River Compact as follows:

> "The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State."
>
> (Article VII, Upper Colorado River Compact, supra).

California again enters the realm of speculation and conjecture. At page 64 of her brief, she in effect says that *at some time in the future,* the United States *may* make some claim for Indian or other uses, which *may* be so large that there *may* not be sufficient water in the river to supply those claims and the uses contemplated by the Compact, including the use apportioned to the Upper Basin.

If and when that time arrives, we assume these questions may be the subject of litigation to which all the States may be parties. At the present time no such situation evists. Consequently, there is no present justiciable controversy between the Upper Basin and the United States.

The present action is directed to a division of the water use in the Lower Basin under present conditions, and not on some condition or situation which may exist at some time in the future.

In an action brought by the United States against the State of West Virginia, to determine differences of opinion over the waters of a river, this Court said:

> "But there is presented here, as respects the State, no case of an actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion between the officials of the two governments . . . . . There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See *Nashville, Chattanooga and St. Louis R. Co. vs. Wallace,* 288 U. S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191. Until the right asserted is threatened with invasion by the act of the State, which served both to define the controversy and establish its existence in the judicial sense, there is no question presented which is justiciable by a Federal Court. See *Fairchild vs. Hughes,* 258 U. S. 126, 129, 130, 42 S. Ct. 274, 66 L. Ed. 499; *State ex rel Texas vs Interstate Commerce Commission,* 258 U. S. 158, 162, 42 S. Ct. 261, 66 L. Ed. 531; *Commonwealth of Massachusetts vs. Mellon, supra,* 262 U. S. 477, 483-485, 43 S. Ct. 597, 67 L. Ed. 1078; *State of New Jersey vs.*

Sargent, supra, 269 U. S. 328, 339, 340, 46 S. Ct. 122, 70 L. Ed. 289." *United States vs. West Virginia,* 295 U. S. 463, 473, 474, 55 S. Ct. 789, 793.

Respondents respectfully submit there is no justiciable controversy existing between the United States and respondents requiring respondents' presence as parties to this action.

V. CONCLUSION

The opposition of the respondents to being parties to this action is more than mere reluctance to engage in expensive and prolonged litigation. Water is the lifeblood of the Upper Basin. Without it, growth and development ceases. The last major source of water available for the growth and development of the Upper Basin is the water use apportioned to the Upper Basin from the Colorado River by the Colorado River Compact.

It is of paramount importance, therefore, that the states in the Upper Basin be not required to adjudicate the Upper Basin's rights under this Compact upon speculative, assumed and imagined statements of fact, which, if they ever arise, can only arise in the distant future.

These States are entitled to have their rights under the Compact interpreted in the light of an existing set of facts, creating at the time of the interpretation a justiciable controversy, so that the interpretation of the rights of these States can be made in the light of the facts then existing.

The Upper Division States are now attempting to obtain from the United States Congress an authorization for a basin-wide development to utilize a modest portion of the 7,500,000 acre feet of consumptive use apportioned to the Upper Basin. This proposed project would utilize the beneficial consumptive use of an estimated 1,700,000 acre feet per annum, which added to the present beneficial consumptive use of 2,500,000 acre feet, would make a total of but 4,200,000 acre feet of the 7,500,000 acre feet apportioned to the Upper Basin. (See Hearings Before the Subcommitteee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Congress, Second Session, on H. R. 4449, H. R. 4443, and H. R. 4463, page 697).

Moreover, the period of construction of the works to bring this development to fruition will take an estimated thirty-three years. (See Table following page 192 of the

Hearings in the House of Representatives referred to above).

In the meantime, the growth and development in the Upper Basin is outrunning the waters now available. Any delay in the development of water use in the Upper Basin is a matter of very great moment to the Upper Division States. The inclusion of the Upper Division States as parties to this litigation will be urged by opponents of development in the Upper Basin, as a reason why Congress should delay the authorization of development until the conclusion of the litigation. In fact, such argument has already been made before the Eighty-third Congress of the United States by a representative of the State of California. The Assistant Attorney General of the State of California, Mr. Ely, in testifying before the United States Senate on the proposed plan for development in the Upper Basin said:

> "The meaning of the Document (Colorado River Compact) is now in controversy in the Supreme Court, in respects which affect the measure now before you."
>
> (See Hearings Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United State Senate, 83rd Congress, Second Session, on S. 1555, page 587).

As we have shown, there is no justiciable controversy in issue in the present action involving the rights and obligations of the respondents under the Compact.

The division of the waters to which the Lower Basin is entitled under the Colorado River Compact can be made in this litigation without the appearance of the respondents herein. California, and California alone, urges the necessity of the Upper Division States as necessary parties, and yet California, in 1948, represented to the Legislative branch of the United States Government that there

was no dispute or problem requiring present disposition between the Upper Basin and the Lower Basin. California admitted at that time that the same issues which Arizona has raised by her complaint, were the only issues requiring adjudication to determine the rights of the Lower Basin States among themselves; and that the Upper Basin States were not directly concerned and need not be made parties to the litigation.

We respectfully submit that the motion of California should be denied.

Respectfully submitted,

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No. 10, Original

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

BRIEF OF THE STATE OF NEVADA, INTERVENER, IN RE MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

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No. 10, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

BRIEF OF THE STATE OF NEVADA, INTERVENER, IN RE MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

STATEMENT

Heretofore and after the United States and the State of Nevada were permitted to intervene in the original case, and after the cross-pleadings of the complainant, the defendants and the interveners had been filed, whereby the issues were drawn between said parties, the California defendants interposed their motion to join as additional parties the States of Colorado, New Mexico, Utah and Wyoming, each said State being a signatory to the Colorado River Compact. The main ground upon which said motion was and is predicated being that "The meaning and effect of the Colorado

River Compact are in controversy in the present case" and that "No decree determining the meaning and effect of that Compact, considered as a contract, can be fully effective in the absence of the other four parties to it." Defendants' Motion to Join, page 2, par. I.

The States of Colorado, New Mexico, Utah and Wyoming, having filed herein their respective briefs opposing the granting of the motion to join them as parties in the case, notwithstanding the fact that each of them is a party to the Colorado River Compact, wherein most valuable rights to the beneficial consumptive use of the waters of an interstate stream were and are apportioned to the respective upper and lower basins, which said rights are interrelated and subject to be drawn in question by the issues developed by the pleadings filed herein by the original parties and the interveners.

A substantially correct summary of the issues so developed by the pleadings is contained in Exhibit A, pages 7–22, California's Motion to Join, as Parties, the States of Colorado, New Mexico, Utah and Wyoming. Nevada submits that the issues as stated in the summary thereof demonstrates that the States of New Mexico and Utah are indispensable parties, and that Colorado and Wyoming are, at least, necessary parties.

The States of New Mexico and Utah are Indispensable Parties

New Mexico and Utah, in addition to being classed as States of the Upper Basin of the Colorado River Stream System, are States of the Lower Basin, with the right accorded each of them to the beneficial consumptive use of its equitable share of the water apportioned to the Lower Basin by the Colorado River Compact. Art. II(g), Art. III(a), (b), (g), Compact: Pages 2–3, Brief, New Mexico. Utah, in its brief in opposition to California's motion, admits it has a limited right of participation in the Lower Basin waters, and attempts to avoid participation in the instant case by stating they are now negotiating with Arizona for distribution of Utah's share in such waters by Compact. Page 20, Utah's Brief.

In this connection, it is interesting to note that Article XVIII, Paragraph b, of the Upper Colorado River Basin Compact to which New Mexico and Utah are signatories, provides: "The State of New Mexico and the State of Utah reserve their respective rights and interest under the Colorado River Compact as States of the Lower Basin." Vol. II, page 75, California's Appendixes to Answer.

Nevada was given leave to intervene herein by Order of this Court entered June 1, 1954, pursuant to its motion and petition therefor, filed December 21, 1953. Upon the filing of said motion and petition, service of copies thereof was made upon the respective Attorneys General of Colorado, New Mexico, Utah and Wyoming, even though they were not parties in the case.

Nevada specifically alleged in its petition the necessity of the increasing of the beneficial consumptive use of water in the Lower Basin by one million acre-feet of water as provided and authorized in and by Article III(b) of the said Compact, and that said increase must be had by authoritative concerted action of the five Lower Basin States. See pars. Nos. VIII, X, XI, XIII, XX, XXIV. Further, in the prayer of its petition, Nevada prayed that the rights of the States of Arizona, California, Nevada, New Mexico, Utah and the United States in and to the use of the waters of the Colorado Stream System be adjudicated and forever set at rest, and also that the additional one million acre-feet of water as provided in Article III(b) of the Compact, is water apportioned to the Lower Basin, subject to use only when all of the Lower Basin States shall have by authoritative compact or agreement increased the beneficial consumptive use in said Basin.

During the month of May, 1954, the United States, as intervener in the case, filed and submitted its Memorandum Requesting Pre-Trial Conference, based upon the ground that the basic issues in the case were far-reaching fundamental questions relating to the respective rights of the parties litigant in the Colorado River System; that from the pleadings the broad scope of the long-standing controversy was manifest. Page 2, Memorandum.

Nevada interposed its Memorandum in Reply to the Memorandum of the United States, and therein specifically pointed out the necessity of the joinder of New Mexico and Utah, as follows:

> Notwithstanding the fact that New Mexico and Utah unquestionably possess rights to the use of the waters of the Colorado River Stream System apportioned to the Lower Basin States and by reason thereof each said State is an indispensable party to this cause, neither of them has been made a party thereto nor has either petitioned the Court for leave to intervene. Nevada most respectfully suggests that unless and until New Mexico and Utah are made or become parties herein, vital issues pertaining to the apportionment of the waters to which all of the Lower Basin States are entitled under the Compact cannot be judicially fixed and determined. And Nevada has so alleged in Paragraphs XIII, XIV of the Petition of Intervention on Behalf of the State of Nevada filed herein December 21, 1953. Nevada suggests that all of the vitally necessary issues are not now sufficient, or at all, joined to warrant a pre-trial conference.

and,

> Answering Paragraph IV of the Request for Pre-Trial Conference of the United States, the State of Nevada denies that the reasons mentioned by the United States justify a pre-trial conference at this juncture of the proceeding and in this connection alleges that all the Lower Basin States are indispensable parties to this cause and until all such States are parties hereto and the issues fully joined between them and the United States, a pre-trial conference is premature. Nevada Memorandum, Pars. I, IV.

Copies of the Nevada Memorandum were served on the Attorneys General of New Mexico and Utah, notwithstanding the fact that neither of said States were parties in the case. Notice that

beyond question Nevada considered them indispensable parties with valuable rights in and to the waters apportioned to the Lower Basin States by the Colorado River Compact; rights that of necessity must be fixed and determined in order that each of the Lower Basin States would in time to come receive its equitable share of such water, without further prolonged litigation.

Neither the State of New Mexico nor Utah has answered Nevada's contention that Article III(b) water to the extent of one million acre-feet, can only be brought into the beneficial consumptive use increase in the apportionment of water to the Lower Basin so agreed to in the Colorado River Compact, unless and until all the States in the Lower Basin by compact or agreement, so determine. Certainly New Mexico and Utah are vitally interested in securing for their people every acre-foot of water possible, and having reserved their respective rights to the use of water apportioned the Lower Basin when becoming signatories to the Upper Basin Compact, they reserved valuable rights to participate in the apportionment between the Lower Basin States, not only of III(b) water, but also III(a) water.

To now object to becoming parties in the case, and pleading their rights to the beneficial consumptive use of the waters in question, can have but one ultimate result, i.e., that whatever final judgment and decree may be entered by this Court herein, without the determination of the rights of New Mexico and Utah, the door will remain open for them or either of them in years to come, to seriously question the rights of California and Nevada and even those of Arizona.

The Status of New Mexico and Utah With Respect to Waters Apportioned the Lower Basin States by the Colorado River Compact

As stated hereinbefore, the States of New Mexico and Utah in Article XVIII(c) of the Upper Colorado River Basin Compact, therein reserved their respective rights and interest under the Colorado River Compact as States of the Lower Basin. Most certainly

those rights extend to the beneficial consumptive use of a portion of the waters of the Colorado River Stream System apportioned to the Lower Basin States in and by Article III(a) and (b) of the Colorado River Compact. Arizona, the complainant herein, alleges in its Complaint that "Arizona expects to negotiate with New Mexico and Utah a compact which will define the respective rights of those States to participate as Lower Basin States in the use of Colorado River water apportioned now or hereafter to such Lower Basin." Par. XV, Arizona's Complaint. In the prayer of such Complaint Arizona prays, first, that its title to the annual beneficial consumptive use to 3,800,000 acre-feet of water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted, subject only to the rights of the States of New Mexico and Utah; second, that California be forever limited to 4,400,000 acre-feet of such apportioned water; third, that the defendants be forever enjoined from asserting against plaintiff in any manner, any claim to the waters of said River System which interferes with plaintiff's rights to the use of 3,800,000 acre-feet of water so apportioned, subject only to the right of New Mexico and Utah; fourth, that as to surplus waters, California be entitled to one-half thereof, and Arizona to the remainder, less a quantity of not to exceed one twenty-fifth of the total to the State of Nevada, less whatever rights New Mexico and Utah may have in such surplus.

It is apparent from the briefs of New Mexico and Utah, notwithstanding their express reservations in the Upper Colorado River Compact as to their rights as Lower Basin States under the Colorado River Compact, that they and each of them rely upon the alleged expectations of an Arizona Compact to satisfy their respective rights as Lower Basin States, to the beneficial consumptive use of the waters in question. In brief, relying upon a compact entered into with one Lower Basin State concerning Lower Basin water, to the exclusion of the rights of two other Lower Basin States, California and Nevada.

The aspects of the case have been most materially changed since

the intervention of the State of Nevada, so ordered June 1, 1954. Most certainly now Nevada's right to the beneficial consumptive use of Lower Basin water must be adjudicated. Nevada, as well as California, has the right to insist that the rights of New Mexico and Utah to the use of Lower Basin water, whether it be apportioned III(a), or III(b), or unapportioned surplus water, be stated, and claims therefor submitted to the Court in proper pleadings therefor.

New Mexico and Utah each have a vital interest in the subject matter in this case; an interest that cannot be settled, determined and adjudicated by a compact or agreement with one particular State; an interest that is not severable from the interest of each and all of the Lower Basin States.

The Rule With Respect to the Joinder of Necessary and Indispensable Parties

With all due respect to the authorities for and against the joinder of the States of Colorado, New Mexico, Utah and Wyoming, cited and relied upon by the respective parties for and against the motion to so join them, Nevada submits that the leading case indicating the criteria by which to determine whether or not a party is indispensable is *State of Washington vs. United States, C.C.A.9, 87 F. (2d) 421*, decided December 18, 1936, and followed with approval in *Pioche Mines Consol. Inc. vs. Fidelity-Philadelphia Trust Co., C.C.A.9, 202 F.(2d) 944*, decided March 23, 1953. The State of Washington vs. United States case concerned a suit by the United States against the Columbia River Packers Association, et al., in which the States of Washington and Oregon filed motions for leave to intervene. From a decree for plaintiff (U. S. v. Columbia River Packers Ass'n., 11 F. Supp. 675), the defendants appeal, and, from orders denying their respective motions for leave to intervene, the States of Washington and Oregon separately appeal. In course of the opinion the Court said at page 427:

> In cases where there is error in non-joinder of parties, either necessary or indispensable, the Courts have fallen

into common error by designating the error as "jurisdictional." The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from Shields v. Barrow, supra 17 How.130, 141, 15 L.Ed. 158: "As is observed by this court, in Mallow v. Hinde, 12 Wheat.(193) 198 (6 L.Ed. 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'" Citing cases.

There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent

party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.

Applying the rule to the instant case, by answering the four several questions therein:

(1) Is the interest of New Mexico and Utah distinct and severable with respect to the waters apportioned to the Lower Basin?

Answer: No. The Colorado River Compact apportions no water to any individual State. Each State is entitled to its equitable share thereof upon proof of the necessity for beneficial consumptive use.

(2) In the absence of such party, can the Court render justice between the parties before it?

Answer: No. The rights to the beneficial consumptive use of the waters in question are interrelated and the final determination of any one right detracts from every other right therein to the extent determined for the one right so adjudicated.

(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?

Answer: The right and interest of a party in and to the beneficial consumptive use of the waters in question are interrelated to the rights and interest of all other parties to the same waters. Any adjudication and determination of those rights and interest will injuriously affect the right and interest of the absent party.

(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

Answer: No. Litigation must come to an end. Courts certainly do not approve or sanction interminable litigation where most material issues with respect to valuable and vital rights and interests are the subject matter of the case and where an indispensable party in interest is available, any final determination of the like interest of the parties presently before the Court having an interest in a common fund, i.e., the waters the subject of the instant case,

leaving the interest of the absent party undetermined, would not be consistent at all with equity and good conscience.

Nevada respectfully submits that New Mexico and Utah are indispensable parties.

The States of Colorado and Wyoming are Necessary, If Not Indispensable, Parties

Aside from the grounds set forth in California's motion to make Colorado and Wyoming parties in the instant case, and aside from California's reasons that such States are necessary parties, Nevada submits that such States are necessary, if not, in fact, indispensable parties for the following reasons.

Notwithstanding the provisions of Section 4 (a), Boulder Canyon Project Act, pursuant to which the California Limitation Act was enacted whereby it is claimed the signatory States to the Colorado River Compact became third party beneficiaries, the Boulder Canyon Project Act in Section 4(a) provides that uses of the waters of the Colorado River for the purposes in said section set forth shall always be subject to the terms of the Colorado River Compact.

Neither Sections 4(a) of the Project Act nor the California Limitation Act contains any reference whatever to Article III(b) of the Compact. Nevada reiterates that Article III(a) of the Compact apportions to the Upper and Lower Basins respectively, in perpetuity 7,500,000 acre-feet of water per annum; that in addition to such apportionment in Paragraph (a), the Lower Basin was given the right to increase its beneficial consumptive use of such water by 1,000,000 acre-feet per annum, in Paragraph (b) of said Article.

Long ago in 1934, this Court had before it the case of *Arizona vs. California, Colorado, Nevada, New Mexico, Utah, Wyoming, the Secretary of the Interior, et al. 292 U.S.341*, where Arizona sought to enjoin the defendants from carrying out the provisions of the Colorado River Compact and/or the Boulder Canyon Project Act. Justice Brandeis delivered the opinion of the Court. With

respect to Article III(b) of the Compact, it is most apropos that the language of the Court be here quoted:

> Nor does Arizona show that article III(b) of the compact is relevant to an interpretation of section 4(a) of the Boulder Canyon Project Act upon which she bases her claim of right. It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under article III(b). But the act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the compact. The act merely places limits on California's use of waters under article III(a) and of surplus waters; and it is "such" uses which are "subject to the terms of said compact."
>
> There can be no claim that article III (b) is relevant in defining surplus waters under section 4 (a) of the act; for both Arizona and California apparently consider the waters under article III (b) as apportioned. It is true that Arizona alleges (not in the bill however but in her brief) that she "hopes to be able to show in the case hereafter to be brought" by evidence of Congressional Committee hearings and other legislative history that the failure in the statute to apportion the 1,000,000 acre-feet of waters was due to an understanding by Congress that article III (b) of the compact had already assigned these waters to Arizona, and that the limitation on California was passed in the light of this understanding. This hope, if fulfilled, would not make article III (b) relevant. The allegation is, not that Congress incorporated article III (b) into the act; it is that Congress understood that article III (b) had allotted all the waters therein to Arizona.
>
> The considerations to which Arizona calls attention do not show that there is any ambiguity in article III (b)

of the compact. Doubtless the anticipated physical sources of the waters which combine to make the total of 8,500,000 acre-feet are as Arizona contends, but neither article III (a) nor (b) deal with the waters on the basis of their source. Paragraph (a) apportions waters "from the Colorado River system," i.e., the Colorado and its tributaries, and (b) permits an additional use "of such waters." The compact makes an apportionment only between the upper and lower basin; the apportionment among the states in each basin being left to later agreement. Arizona is one of the states of the lower basin, and any waters useful to her are by that fact useful to the lower basin. But the fact that they are solely useful to Arizona, or the fact that they have been appropriated by her, does not contradict the intent clearly expressed in paragraph (b) (nor the rational character thereof) to apportion the 1,000,000 acre-feet to the states of the lower basin and not specifically to Arizona alone. It may be that, in apportioning among the states the 8,500,000 acre-feet allotted to the lower basin, Arizona's share of waters from the main stream will be affected by the fact that certain of the waters assigned to the lower basin can be used only by her; but that is a matter entirely outside the scope of the compact.

The provision of article III (b), like that of article III (a), is entirely referrable to the main intent of the compact, which was to apportion the waters as between the upper and lower basins. The effect of article III (b) (at least in the event that the lower basin puts the 8,500,000 acre-feet of water to beneficial uses) is to preclude any claim by the upper basin that any part of the 7,500,000 acre-feet released at Lee Ferry to the lower basin may be considered as "surplus" because of Arizona waters which are available to the lower basin alone.

It is submitted that there can be no question but that Article III (b) constitutes an apportionment of the waters of the Colorado Stream System to the beneficial consumptive use in and by the Lower Basin States of an additional 1,000,000 acre-feet of water per annum, and that this additional amount of water comes from the stream system as a whole, with the major portion thereof provided in and by the flow of the river in and from the Upper Basin States. Certainly it cannot be gainsaid that the Upper Basin States are not interested in whether the Lower Basin has perfected its right to have the additional 1,000,000 acre-feet of water applied to beneficial consumptive use. Such use will of necessity affect the beneficial use of waters apportioned the Upper Basin when called upon to deliver at Lee Ferry all or the major portion thereof. The III (b) water, it is submitted, cannot be deemed surplus water by any Upper or Lower Basin State. It is apportioned water, dedicated to the beneficial consumptive use in the Lower Basin States, and by reason thereof, is of such character as to be interrelated with the rights and interest of the Upper Basin States in the common fund, the waters of the Colorado River Stream System, which said interest cannot on the part of any State signatory to the Colorado River Compact, be deemed severable.

Nevada respectfully submits that Colorado and Wyoming at the very least, are necessary parties herein.

Dated: February 1, 1955.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

Reply Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

(See List of Attorneys on Inside Cover)

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IN THE

Supreme Court of the United States

October Term, 1954

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

Reply Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

STATUS OF MOTION TO JOIN COLORADO, NEW MEXICO, UTAH, AND WYOMING

On July 15, 1954, the State of California and the other California defendants filed in this Court a motion to join, as parties to this action, the States of Colorado, New Mexico, Utah, and Wyoming. On August 13, 1954, Arizona filed a response in

opposition. On October 7, 1954, the California defendants filed a brief in support of their motion. That brief includes a detailed statement of the case. On December 27, 1954, briefs opposing the motion were filed individually by New Mexico and Utah and jointly by Colorado and Wyoming. Both New Mexico and Utah expressly adopt the joint brief of Colorado and Wyoming. On February 7, 1955, Nevada filed a brief in support of the Motion.

1. Grounds for the Motion

This suit was initiated on the complaint of Arizona. Arizona seeks a decree quieting her claimed title and establishing her alleged rights to the annual beneficial consumptive use of specified quantities of the water of the Colorado River System. The California defendants have traversed the complaint and, in affirmative defenses, have set up claims to the annual beneficial consumptive use of water which are inconsistent with the claims of Arizona. Nevada and the United States, both interveners, have asserted claims inconsistent with those of both plaintiff and defendants.

Issues which must be determined in resolving the controversy between the present parties fall into three closely related categories:

(1) The meaning and effect of the Colorado River Compact to which States opposing this motion are parties.

(2) The meaning and effect of a Statutory Compact between the United States and California of which the States opposing this motion are, like

Arizona and Nevada, third party beneficiaries. The Statutory Compact (evidenced by the Boulder Canyon Project Act and the California Limitation Act) incorporates by reference terms and provisions of the Colorado River Compact, involves interpretations of the Boulder Canyon Project Act, and must be construed *in pari materia* with the Colorado River Compact and the Project Act.

(3) The quantity of water legally and physically available for beneficial consumptive use in the Lower Basin of the Colorado River from the Colorado River System. This involves questions of fact and questions of law, including the meaning and effect of the Colorado River Compact, the Statutory Compact, the Boulder Canyon Project Act, the Mexican Water Treaty, water delivery contracts, statutes, and laws upon which the present parties predicate their claims.

The determination of these claims requires a determination of the amount of the water that is available to the Lower Basin. Most of this water comes from the Upper Basin. Arizona's quiet title action thus operates against the rights of the absent States as well as against the rights of the present parties.

A decree in Arizona's favor would presuppose the following determinations of the rights and obligations of the absent States:

1. That the apportionment of the use of 7,500,000 acre-feet per annum made by Article III(a) of the Colorado River Compact to the Lower Basin is not to be charged with the uses made from Lower Basin tributaries, but may be claimed in its

entirety from the main stream, *i.e.*, from the waters flowing from the four absent States. (Initial California Brief on pending motion, pp. 32-35)

2. That this apportionment by Article III(a) to the Lower Basin is identical with the 75,000,000 acre-feet which the four States are required by Article III(d) of the Compact to let pass Lee Ferry in each ten-year period. The absent States, accordingly, are entitled to no credit against the Mexican Treaty burden with respect to any of that 75,000,000 acre-feet, but are obliged, under Article III(c), to let down additional water to meet one-half of the Treaty burden. (*Ibid.*)

3. That the 1,000,000 acre-feet of "increase of use" permitted to the Lower Basin by Article III(b) of the Compact is apportioned in perpetuity to the Lower Basin, and the right thereto, as against the Upper Basin, is not dependent upon any actual increase in use. (*Id.* at 45-46)

4. That no State may acquire any right in unallocated waters by contract, appropriation or use, but only by virtue of some possible later compact among the seven States under Articles III(f) and III(g) of the Colorado River Compact. This would require Arizona's consent. (*Id.* at 43-45)

5. That the 3,800,000 acre-feet claimed by Arizona is net of all "salvaged" waters; she may use another 1,000,000 or more acre-feet of salvaged water without any charge at all, either to the Lower Basin's allocation under the Colorado River Compact, or to surplus water available for the Mexican Treaty. (*Id.* at 39-41)

6. That consumptive use of water is to be measured, not in terms of the quantities in fact consumed in growing crops or by domestic uses, but in terms of the resulting depletion of the virgin flow of the main stream. (*Id.* at 36-39)

7. That reservoir losses are to be charged against the apportionments made by Article III(a) of the Colorado River Compact. (*Id.* at 46-47)

8. That Arizona effectively ratified the Colorado River Compact, converting it to a seven-state Compact. (*Id.* at 58-59)

9. That the Statutory Compact, although in terms enacted as an accompaniment only to a six-state Compact, continues as an accompaniment of the seven-state Colorado River Compact. (*Ibid.*)

One or more of the present parties—California, Nevada and the United States—disagrees with Arizona on each of these points. Each of these issues involves rights and obligations of the absent States.

2. Briefs Opposing the Motion

The briefs of the absent States opposing the pending motion are notable because in almost no particular do they deny facts or contentions relied on by California in the pending motion and supporting brief. None of the four absent States denies that the controversy turns on disputes, which California's previous brief lists, over construction of the Compacts and Statutes. None of the four absent States denies that its rights

and obligations would necessarily be affected by a resolution of these disputes. None of the four States denies that it is a party to the Colorado River Compact and a joint obligee of the Statutory Compact. None of the four States offers any authority to controvert the universally accepted proposition that joint obligees are indispensable, and, *a fortiori,* necessary parties.

Neither New Mexico nor Utah denies that she has rights in an undetermined share of a "common fund" of water available to the States with territory in the Lower Basin of the Colorado River System. Neither New Mexico nor Utah cites any authority to controvert the universally accepted proposition that claimants to a share in a common fund are indispensable and, *a fortiori,* necessary parties to a suit to determine rights in the fund.

Principal reliance of the four States in opposing the motion rests on two contentions, neither of which is supported by reason or authority. The first contention is that the usual rules for determining necessary parties do not apply to actions between States. The second contention is that because, or so the absent States claim, there is no present use of water in the Upper Basin which conflicts with uses in the Lower Basin, the controversy between present parties and the absent States is not presently justiciable. This brief will show that both contentions are unsound. The rules of compulsory joinder apply with equal force to States and to private litigants. An independently justiciable controversy between present parties and absent parties is not a requirement for compulsory joinder of the absent

parties. Even if an independently justiciable controversy were required, the motion should nevertheless be granted because Arizona's complaint states a controversy which, if justiciable as to present parties, is no less justiciable against the absent States.

ARGUMENT

I.

THE FACT THAT THIS SUIT IS BETWEEN STATES OR THAT THE SUIT IS WITHIN THE ORIGINAL JURISDICTION OF THE SUPREME COURT IS NO REASON FOR DISREGARDING THE USUAL AND PRESCRIBED RULES FOR DETERMINING NECESSARY PARTIES

Rule 9(2) of the ~~Revised~~ Rules of the Supreme Court, effective July 1, 1954, provides that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions in this court." Rule 19(b) of the Federal Rules provides that necessary parties are those "who ought to be parties if complete relief is to be accorded between those already parties."

New Mexico says that Rule 19 "is not applicable or appropriate in this case." (New Mexico Brief, p. 5.) The brief of Colorado and Wyoming and the brief of Utah are less explicit, but in their insistence that different criteria apply because states are to be made parties, their arguments take a similar position. Succinctly stated, the New Mexico position is: That in original actions in the

Supreme Court, *additional parties* will not be joined even though they "ought to be parties if complete relief is to be accorded between those already parties." The position of the other three States is similar: That *states* will not be joined even though they "ought to be parties if complete relief is to be accorded between those already parties."

Of course there is no authority for such propositions. The law of necessary parties has been shaped by considerations that apply irrespective of the forum for trial or the nature of the parties. Rule 19 merely recognizes and codifies a rule of federal practice which had previously existed. (See authorities cited in the initial California brief on this motion, page 28.) This Court, in the exercise of its original jurisdiction, has consistently cited and applied the rules of necessary and indispensable parties first developed in cases heard on appeal from lower federal courts. See *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *New Mexico* v. *Lane*, 243 U.S. 52 (1917); *Arizona* v. *California*, 298 U.S. 558 (1936). A leading and frequently quoted decision in which a judgment was reversed for failure to join a necessary party is *State of Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936). In that case the absent necessary party was a state. In none of these cases has there been the slightest suggestion that different rules or different considerations apply because the case is within the original jurisdiction of this Court or because the party sought to be joined is a State.

Recently, in the pending case of *Texas* v. *New Mexico,* this Court ordered the Special Master to hear evidence on the indispensability of the United States, and to report to the Court on the issue. 344 U.S. 906 (1952). Since no special instructions were given to the Master, it is apparent that the Court expected him to apply the traditional rules of compulsory joinder. The report of the Special Master does not suggest that he departed from the classic formula in considering the question. (Report of Special Master, *Texas* v. *New Mexico,* No. 9 Original, October Term, 1953.)

Utah concedes that the numerous decisions cited in California's initial brief hold "that in actions upon contracts, decrees construing the terms thereof cannot be entered unless all parties thereto are present in the action." She cites no decision to the contrary, but would limit the effect of the decisions to "their own peculiar set of facts." (Utah Brief, p. 7.) No decision, she says, has applied the rule with respect to compacts in litigation between states. On this view, apparently, all cases between states are unique. The fact is that if Rule 19 and the principle it adopts are inapplicable to this case, the motion must be decided in a legal vacuum, because no other body of precedents or principles exists.

Of the reasons for the rules of necessary parties, the States opposing the pending motion say nothing.

So firmly established is the rule where rights of joint obligees are involved that the rule has become recognized as not only a rule of procedure,

but a part of the substantive law of contracts. The Restatement of Contracts, Section 129 (1932) states it thus:

> An action to enforce a joint right under a contract must be brought by or in the name of all surviving obligees.
>
> *Comment: a.* The persons having a joint right will generally be promisees, but where third party beneficiaries are allowed to enforce a promise, the joint right may be that of such beneficiaries.

For this rule there are at least three reasons. These reasons are: (1) to avoid multiplicity of suits and the unjustified harassment of an obligor; (2) to avoid inconsistent judgments in successive actions involving the same promise; and (3) to avoid a hollow or unenforceable judgment.

All three considerations apply to the present suit. In the first place, a decree based upon the two Compacts which are in dispute—the Colorado River Compact and the Statutory Compact—will be only a prelude to further controversy and litigation if the decree does not bind all the parties with rights under both Compacts.

In the second place, a decree quieting title in present parties without binding the absent States would be a precarious basis for future expansion and development; there would be continuing concern that a later suit might determine that the decree was based on an overly generous assumption about the amount of water available to the Lower Basin as against the Upper Basin.

Thirdly, a decree construing the Compacts and statutes constituting the "Law of the River," and which binds only three of the seven Colorado River Basin States, simply will not work. It will create the possibility of two Colorado River Compacts, each purporting to apply to the whole River.

This, however, is the result for which the absent States argue. They do not and cannot deny that their rights and obligations are controlled by the Compacts in dispute. They do not deny that the effect of these Compacts must be determined —as to the present parties—in this suit. They say only that the effect of the Compacts, as to them, must be left to future litigation.

Denial of the motion on this basis would be unfair to the defendants because it might involve them in later litigation over the same rights and obligations now in dispute. Denial of the motion on this basis would harm interests within the entire Colorado River Basin because it would prevent an early determination of issues which must be decided before the resources of the Basin can be developed. Denial of the motion on this basis would result in abuse of the processes of this Court, because any decree would be empty and ineffectual if but three of seven affected States were bound.

Only two decisions cited in the briefs opposing the pending motion concern the problem of necessary parties. *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935), and 296 U.S. 553 (1935). The opposing briefs draw an erroneous conclusion

from the first; they are inaccurate with respect to the second.

Both decisions were in the early stages of *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), which started as a suit by Nebraska against Wyoming over rights to the use of the water of the North Platte River. Wyoming first moved to dismiss Nebraska's Bill of Complaint on the ground that Colorado was a necessary and indispensable party. The Court denied the motion on the ground that the complaint showed no claim by Colorado to rights to the diversion and use of the North Platte. The complaint said only that the North Platte originates in Colorado. 295 U.S. 40 (1935).

Some eight months later, the Court unanimously and without opinion ordered that Colorado be made a party "in accordance with the prayer of the amended and supplemental answer of the State of Wyoming." 296 U.S. 553 (1935). Colorado and Wyoming (page 27) and Utah (page 10) state in their briefs opposing the pending motion that this action was on the basis of an amended complaint by Nebraska alleging out-of-priority diversions depriving Nebraska of water to which she was equitably entitled.

These statements are incorrect. At the time of the decision making Colorado a party, entered December 23, 1935, Nebraska had not amended her complaint and did not do so until, in effect, by replication filed June 12, 1936. As the Court's order clearly indicates, its basis was Wyoming's Amended and Supplemental Answer. That Supplemental Answer, so far as it dealt with Colorado's actions, alleged no present injury by Colorado but recited only contemplated

and threatened diversions by Colorado of waters which were the subject matter of the dispute between Nebraska and Wyoming.[1]

"TWENTIETH

[1] "Defendant says that a portion of the head-waters of the North Platte River are located in the State of Colorado and that approximately thirty per cent of the waters of said river available for use in Nebraska and Wyoming originates in Colorado. Complainant, in this suit, seeks a decree determining the rights of Nebraska and Wyoming to the use of the waters of said river. And defendant says that the waters to be apportioned in this action must, of necessity, involve the waters, extensive in amount, rising in the State of Colorado. Defendant says that the respective rights of Colorado and Wyoming to the use of the waters of the North Platte River have never been determined as between said states, and that the State of Colorado and its citizens now contemplate and for a long time have contemplated and threatened and now threaten the diversion and use in Colorado of waters of the North Platte River, which diversion and use would have the effect of taking from the North Platte River a large quantity of water, to-wit, upwards of 250,000 acre feet per annum, all which water now flows in the channel of the North Platte River into the State of Wyoming, and will of necessity be the subject matter pro tanto of the determination of the rights in this action of the present parties.

"Defendant says that if the present suit is permitted to proceed without making the State of Colorado a party, defendant will be subjected to further litigation with the State of Colorado and its appropriators, involving the waters of the North Platte River which constitute the subject matter of this suit. And defendant says that a proper and equitable allocation of the waters of the North Platte River, as complainant well knows, cannot be made between the present parties upon any equitable basis without at the same time determining the rights, whatever they may be, of the State of Colorado and of its appropriators in said waters. And

(*Footnote Continued on Next Page*)

defendant says that the State of Colorado is a necessary and indispensable party to this action.

• • •

"TWENTY-SECOND

"Defendant says that in 1923 the States of Nebraska and Colorado negotiated and executed what is called the 'South Platte River Compact' between said states, which Compact was later duly approved by the legislatures of said respective states and by the Congress of the United States; that the South Platte and the North Platte Rivers, by their junction at or near the City of North Platte, Nebraska, form the Platte River; and that said Compact distributes and apportions between Colorado and Nebraska the waters of the South Platte River without regard to and without providing for the supply of any waters from the South Platte River for the use of prior appropriators on the Platte River. Defendant says that the effect of said Compact was to relieve the waters of the South Platte River from any and all obligation to contribute to the supply of the waters of the Platte River required for the satisfaction of rights out of the Platte River. And defendant says that in the division of the waters to which the parties hereto may be found by the court to be equitably entitled due regard should be had to the burden which, but for the said South Platte River Compact, would exist and rest upon the South Platte River to contribute its just proportion to the waters required to satisfy appropriators from the Platte River.

"And defendant says that because of the matters in this article alleged the State of Colorado is a necessary party to this action and to a final determination of the rights of the parties herein.

"WHEREFORE, defendant prays that this court issue its subpoena to the State of Colorado and its Governor and Attorney General, directing that appearance be made by said state before this court at a time to be fixed in said subpoena, and requiring it by an appropriate pleading to show its and its appropriators' interests in the water of the North Platte and South Platte Rivers; that upon final hearing this court find and determine the equitable share of the water of the North Platte River to which the State of Colorado, this defendant and the complainant are respectively en-

(Footnote Continued on Next Page)

The opinion on the merits in *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), is quoted in both the Colorado and Wyoming Brief (page 27) and in the Utah Brief (page 9) for the apparent pur-

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titled; and that the prayer of complainant's Bill of Complaint be denied except to the extent that this defendant has joined therein. And defendant prays for such further, other and different relief as to the court may seem just and equitable."

From Wyoming's Amended and Supplemental Answer filed December 12, 1935.

Nebraska's objections to filing Wyoming's Amended and Supplemental Answer unless Article Twentieth and the Prayer as it related to Colorado were stricken are also instructive. These objections, filed December 13, 1935, may be summarized as follows:

1. The Court had decided on April 1, 1935, that Colorado was not a proper party because Nebraska had asserted no wrongful act of nor asked any relief against Colorado.

2. "Said allegations [Article twentieth] seek to import into this controversy an issue which is extraneous thereto, and foreign to any issue between the State of Nebraska and the State of Wyoming . . . ." (p. 2.)

3. Neither legal nor equitable relief was asked against Colorado.

4. Wyoming's pleading was not a Cross-Bill.

5. The attempt at joinder was made too late.

6. No change had occurred in the subject matter of the controversy.

7. The addition of another party would delay the proceedings.

8. The matter had already been referred to a Special Master and no application was made to enlarge the scope of his reference.

The substance of many of these objections has been raised by the Upper Basin States against the present motion.

pose of showing that allegations of present damage by Colorado uses were the basis of the Court's order making Colorado a party. The implication is that without such allegations a state is not a necessary party. The fact is, however, that *such allegations had not been made when Colorado was ordered into the suit.* The quotations in the opposing briefs from the 1945 opinion are responsive to *Colorado's* motion to dismiss, a motion which was first made after the Master had proceeded on the merits and had heard Nebraska's case. *Nebraska* v. *Wyoming,* 325 U.S. at 592. Colorado was not seeking dismissal on the ground that she was not a necessary or proper party, but on the ground that a case for a decree against Colorado had not been established. The joinder issue, raised by the defendant Wyoming, and which had resulted in impleading Colorado as a party defendant, had been disposed of a decade earlier.

The two 1935 decisions in *Nebraska* v. *Wyoming* are pertinent for three reasons: (1) They are the only instances where this Court has had occasion to rule, in the exercise of its original jurisdiction, on the question of compulsory joinder of States. (2) Wyoming's allegation of threatened harm, quoted in the footnote on page 13, was sufficient basis to require compulsory joinder. (3) This Court gave no indication in deciding the issue of necessary parties that the usual rules do not apply.

The case now before the Court is much stronger than the second *Nebraska* v. *Wyoming* decision for the joinder of absent States. In addition to factors almost identical, the present litigation embraces the determination of rights and liabilities under

the Colorado River Compact, to which all the absent States are parties, and the Statutory Compact of which they are all third party beneficiaries. The Court must decide issues under these Compacts which vitally affect the absent States.

Two other points raised by the absent States in opposition to joinder may be disposed of briefly.

New Mexico states as one reason for her objection to being joined as a party that "It is not contended by California that the four states of the Upper Division are 'indispensable' parties in the sense that the case may not proceed without them." (Pages 5-6) The issue of indispensability of parties arises only when parties sought to be joined are without the jurisdiction of the Court, or when joinder would deprive the Court of jurisdiction. Neither condition prevails here. Any determination that the absent States are indispensable would be outside the issues presented by the motion. However, the absent States would be indispensable if indispensability were in issue. (Initial California Brief, p. 30.) *A fortiori,* they are necessary parties.

The other contention, as stated in the Utah Brief, is that "This is not an action based primarily upon the [Colorado River] Compact." (Page 6.) Similarly, the Colorado and Wyoming brief develops the contention that, because the Colorado River Compact divides the use of water between the Upper and Lower Basins, and not among States, the Upper Basin States are not necessary parties to a suit over the use of Lower Basin water. To this there are three answers:

(1) The issues raised in the Arizona Complaint necessarily involve construction of provisions of the Colorado River Compact, the resolution of which necessarily will affect the rights and obligations of the Upper Basin States under the Compact. The Court must determine the respective rights in water available for use in the Lower Basin. But to do so it must first determine how much water is available to the Lower Basin under the terms of the Colorado River Compact. The size of the pie must be determined before deciding how the pie will be cut. This cannot be done without adjudicating the corresponding rights and obligations of the Upper Basin States.

(2) Arizona's complaint, as her complaint shows, alleges a breach by California of its obligation under the Statutory Compact. The States opposing this motion are third-party beneficiaries of that Compact and must be joined in the action brought by Arizona as joint obligee.

(3) Because claims of the United States are asserted independently of the Colorado River Compact, they are necessarily claims against the Colorado River System as a whole.

The States opposing the pending motion do not deny that the questions of interpretation of the Colorado River Compact, analyzed in detail in California's initial brief on the motion, are involved in the present controversy. They do not deny that they are joint obligees, with Arizona and Nevada, of the Statutory Compact. They do not deny that a determination of issues which must be decided in the suit among the present parties

necessarily affects their rights and obligations. Were private individuals or corporations situated as the absent States are with reference to the present litigation, their joinder would clearly be necessary. That the absent parties are States provides no reason for changing the rules.

II.

AN INDEPENDENTLY JUSTICIABLE CONTROVERSY BETWEEN PRESENT PARTIES TO THE SUIT AND THE FOUR ABSENT STATES IS NOT REQUIRED FOR THEIR JOINDER

The four absent States argue that they cannot be joined as parties unless an independently justiciable controversy exists between them and the present parties. This the California defendants deny. If there is a justiciable controversy among the parties now before the Court, the absent States must be joined because, in the language of Rule 19(b) of the Federal Rules of Civil Procedure, they "ought to be parties if complete relief is to be accorded between those already parties."

The tests of compulsory joinder have been developed by the federal courts without any suggestion that a separately justiciable controversy is required as to parties sought to be joined.[1] Federal

[1] Only one case has been discovered which expressly discusses a concept of "justiciable controversy" in the context of compulsory joinder: *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F.2d 703 (3d Cir. 1940). In that case, the court said that the parties sought to be joined were neither necessary nor indispensable because their legal inter-

Rule 19 makes no such requirement. To superimpose a requirement of an independently justiciable controversy as to parties sought to be joined would undermine the strength of those rules and the sound judicial policy on which they are based—to fully and effectively dispose of a case or controversy before the court.

The only requirement for justiciability which the absent States argue is lacking is that which may best be described as "ripeness for judicial determination." The requirement is based on a number of considerations: avoiding decision of a feigned controversy, avoiding decision where only abstract questions are presented, avoiding

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ests would not be affected. Hence, reasoned the court, issues as to the third parties were not "cognizable" or "justiciable." The court was unquestionably correct in its view that parties whose legal interests could not be affected by any possible judgment or decree should not be joined. In the present case, however, legal interests of the absent States clearly would be affected by any decree that is entered. This the absent States do not deny. Their only contention is that issues as to them are not yet ripe for judicial determination, and hence do not now constitute a "justiciable controversy." This is completely different from the concept of "justiciable controversy" in the *Goldwyn* case where the term was used to mean "affecting legal interests." The sense in which the court in the *Goldwyn* case used "justiciable controversy" is made clear by the manner in which it distinguished three leading Supreme Court decisions on compulsory joinder, all three of which are cited in the initial California brief: *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 77 (1920); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Northern Indiana R.R.* v. *Michigan Central R.R.*, 15 How. 233 (U.S. 1854). The court in the *Goldwyn* case distinguished each of these three cases on the ground that the legal interests of the absent parties (as in present case) would have been materially affected.

decision of a controversy that may never require determination. See *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237 (1952). Where issues not ripe for decision in a separate and independent suit against absent parties must in any event be determined in a controversy between other parties which is justiciable, the reasons behind the "ripeness" rule do not militate against compulsory joinder. The controversy between those already parties insures the necessary "concrete" and "immediate" clash of interests, and avoids all of the hazards which courts have tried to avoid in delimiting the "ripeness" requirement for a justiciable controversy.

The point could be illustrated by many examples from the present suit. One of the issues between present parties is the definition of "beneficial consumptive use" in the Colorado River Compact. If the absent States are right, a separate suit by or against them would not now be sufficiently concrete for adjudication. However, because the beneficial consumptive use issue will be determined in the present suit in any event, all the reasons for the ripeness requirement are satisfied. To say that parties who cannot sue or be sued cannot be joined to another suit is to say, in effect, that the Colorado River Compact must be construed, not by one decree, but by two, separated in time by thirty years or so. If ever there were a situation which demanded the opposite result, this is it.

Many federal cases indicate, without expressly discussing the problem, that a separately justiciable controversy is unnecessary to a determination that absent parties are necessary or indispensable:

Minnesota v. *Northern Securities Company,* 184 U.S. 199 (1902). The State of Minnesota brought an original action to enjoin the Northern Securities Company from acquiring the stock of and exercising control over two parallel and competing railroads in Minnesota. There was no cause of action against the railroads and no relief against them was sought. Moreover, there was no controversy between the railroads and the Northern Securities Company. Nevertheless, they were held to be indispensable parties because their rights necessarily would have been affected by the litigation.

Northern Indiana Railroad v. *Michigan Central Railroad,* 15 How. 233 (U.S. 1854). The complainant sought to enjoin the defendant from infringing plaintiff's franchise by constructing and operating a certain railroad line. Defendant claimed a right to construct the road by reason of its contract with a third railroad, New Albany. Although there was no cause of action apparent between the New Albany railroad and the original parties to the action, the Court held that New Albany was indispensable because the validity of its franchise and its contract with the defendant Michigan Central necessarily would be determined.

Mallow v. *Hinde,* 12 Wheat. 193 (U.S. 1827). The action involved a dispute over the ownership of real property. The plaintiff's title was based on a contract executed by the beneficiary of a trust, and the defendant claimed a title based on a contract executed by the trustee. Because the validity of these contracts necessarily would have to be determined, both the beneficiary and the trustee were held to be indispensable. There was no indi-

cation of a presently justiciable controversy between them and the original parties.

Keegan v. *Humble Oil & Refining Company,* 155 F.2d 971 (5th Cir. 1946). The validity of an oil lease was in issue. Owners of royalty interests under the lease were held to be indispensable even though no present cause of action existed between them and the original parties. They were indispensable because their legal interests necessarily would have been affected by the litigation. Cancellation of the lease would have destroyed their royalty interests in the lease.

That an independently justiciable controversy is not required as to all parties is even more clearly demonstrated in a series of cases involving declaratory judgment actions on liability insurance policies. There is abundant authority that insurance companies in suing the insured for a declaratory determination of non-liability must join the injured party even though the liability of the insured to the injured party has not been established, and will not be established in the declaratory judgment action. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270 (1941); *Central Surety & Ins. Corp.* v. *Norris,* 103 F.2d 116 (5th Cir. 1939);[1] *Central Surety & Ins. Corp.* v. *Caswell,*

[1] The court in reversing the judgment which dismissed third party tort claimants said: "The interest of Ruddell and Rosser [the tort claimants] in the question the Insurance Corporation is trying to get adjudicated by a declaratory judgment is real and substantial though not immediate. They ought to be retained as parties to be heard on it and to be bound by the result." 103 F. 2d at 117.

91 F.2d 607 (5th Cir. 1937).[1] This is so even though the injured party has no action against the insurance company until the insured's liability is established.[2]

The principle that an independently justiciable case or controversy is unnecessary as to all parties is firmly established in cases involving intervention. In *Securities and Exchange Commission* v. *United States Realty & Improvement Company,* 310 U.S. 434 (1940), the Court permitted the SEC to intervene to contest the propriety of a Chapter XI bankruptcy proceeding even though there was no basis for any independent action involving the SEC. There was a dissenting opinion which was confined to issues of statutory construction; the Court's constitutional power was not even discussed. See CLARK, CODE PLEADING, Sec. 65 (2d ed. 1947); Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts,* 50 YALE L. J. 65 (1940).[3]

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[1] "[W]e assume the District Court reached the conclusion that a case of actual controversy between the insurer and the passengers was not presented and therefore as to them the court was without jurisdiction . . . . The injured passengers have a material interest in the outcome of the suit. Appellant has the right to have its obligations to them as well as the insured determined. The passengers are necessary and proper parties. The judgment dismissing the suit as to them was wrong." 91 F.2d at 608-09.

[2] In a few states direct action statutes permit injured parties to sue insurance companies directly. See *Watson* v. *Employers Liability Assurance Corp.,* 348 U.S. 66 (1954). Comment, *Consent and the Constitution,* 5 STAN. L. REV. 514 (1953).

[3] Compare 28 U.S.C. § 2403 (1952) which requires the court to allow the United States to intervene in any action

Although the tests of permissive intervention and compulsory joinder differ, any constitutional requirement of an independently justiciable controversy would necessarily apply with equal force to both situations. If the absence of an independently justiciable controversy is no bar to intervention, it is no bar to compulsory joinder. That there is any constitutional barrier to intervention by the absent States in the present litigation is inconceivable. Nevada, a Lower Basin State, has already been granted permission to intervene in the present action. *Arizona* v. *California,* 347 U.S. 985 (1954). This leaves no doubt that New Mexico and Utah, also Lower Basin States, could intervene. The present suit is the fourth interstate suit involving the Colorado River, and it is the first in which all seven States of the River Basin were not initially named as parties. *Arizona* v. *California,* 283 U.S. 423 (1931); 292 U.S. 341 (1934); 298 U.S. 558 (1936).

The foregoing authorities demonstrate that a separately justiciable case or controversy is not necessary between all parties before a federal court. Once a court has a justiciable case or controversy before it, the judicial power granted by Article III of the Constitution of the United States includes the power to deal with all issues and parties necessary to an effective disposition of the case. Chief Justice Marshall said in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 823 (U.S. 1824):

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involving the constitutionality of a statute of the United States affecting the public interest. See *United States* v. *Johnson,* 319 U.S. 302 (1943).

> We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The principle is at the basis of the familiar doctrine of ancillary jurisdiction. Merely to catalogue instances in which the principle has been applied would require a treatise on the jurisdiction of federal courts. See 3 MOORE, FEDERAL PRACTICE, Pars. 13.15, 14.26 (2d ed. 1948); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953): *Note on Pendent Jurisdiction,* pp. 802-809; *Note on Class Actions and Intervention,* pp. 929-937; *Note on Third-Party Practice,* pp. 942-943; *Note on Separate and Independent Claims or Causes of Action,* pp. 1044-1048.[1]

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[1] A few illustrative cases are *Brooks* v. *United States,* 119 F.2d 636 (9th Cir.), *cert. denied,* 313 U.S. 594 (1941) (federal district court in Arizona may decide rights in waters of Gila River in New Mexico incidental to a determination of water rights in Gila River in Arizona, although there is no independent jurisdictional basis for a determination of the rights in New Mexico); *Phelps* v. *Oaks,* 117 U.S. 236 (1886) (jurisdiction based on diversity of citizenship retained after the intervention of a party who destroyed complete diversity); *Stewart* v. *Dunham,* 115 U.S. 61 (1885) (class action removed to federal court because of diversity; jurisdiction retained after intervention of a member of the class of same citizenship as defendant); *Hurn* v. *Oursler,* 289 U.S. 238 (1933) (federal claim for copyright infringement joined with state claim for unfair competition; jurisdiction over the federal claim held to include the power to decide the state claim); *Siler*

If this Court were to decide that an independently justiciable controversy were required in order to join additional parties, it would add a new and uncertain qualification to present rules of joinder. Such a qualification resting on constitutional grounds would import uncertainty as to jurisdiction into all multi-party situations. Denial of the motion on this ground would undermine the salutary principle that the power to decide a case is the power to decide it completely.

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v. *Louisville & Nashville R.R.*, 213 U.S. 175 (1909) (jurisdiction based on federal question, but case disposed of on issue of state law); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926) (federal court has ancillary power to decide compulsory counterclaim for which there is no independent ground for federal jurisdiction); *Kelly* v. *Pennsylvania R.R.*, 7 F.R.D. 524 (E.D. Pa. 1948) (federal court has ancillary jurisdiction over third party complaint for which there is no independent ground for federal jurisdiction).

In *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922), an original action, the Supreme Court reflected this basic principle of ancillary jurisdiction in the following statement:

> It long has been settled that claims of property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised,—and *this although independent suits to enforce the claims could not be entertained in that court.* (Emphasis added.)

III.

THE CONTROVERSY PRESENTED BY THE PLEADINGS IS JUSTICIABLE AS TO THE FOUR ABSENT STATES

The dominant argument of the absent States opposing this motion is that there is no justiciable controversy between them and the present parties. Two reasons are given: That the controversy is solely a Lower Basin dispute, and that because there is no physical shortage of water now, the issues are not now justiciable. Both these reasons are unsound.

A. The Controversy Is Not Solely a Lower Basin Dispute

1. Arizona's prayer to quiet title to 2,800,000 acre-feet of III(a) water from the main stream presupposes a determination that the Lower Basin has title, as against the Upper Basin, to 7,500,000 acre-feet of main stream water under Article III(a) of the Colorado River Compact.

Arizona derives her claim on the main stream to 2,800,000 acre-feet per annum of the 7,500,000 acre-feet of uses apportioned by Article III(a) to the Lower Basin by a process of subtraction:

(1) Arizona first asserts that the 7,500,000 acre-feet is all physically present in the main stream, flowing at Lee Ferry,[1] and identified with the 75,000,000 acre-feet which Article III(d) requires the four States of the Upper Division to let pass Lee Ferry in each ten-year period.[2] This is the

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[1] Reply to California's Answer, par. 8, p. 16.

[2] *Id.* at par. 11, p. 18.

hinge of her whole case. She denies that the uses on the Gila are chargeable under Article III(a), and identifies them with the increase of use permitted to the Lower Basin by Article III(b).[1]

(2) Arizona concedes to California 4,400,000 acre-feet per annum, and to Nevada 300,000 acre-feet per annum, of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) and which she says is to be found flowing at Lee Ferry.[2]

(3) On this argument, there is left a residue of 2,800,000 acre-feet of III(a) water, in the main stream, to which Arizona seeks to quiet title.[3]

Putting aside for the moment all other questions —such as whether California and Nevada are in fact limited to the quantities Arizona concedes, or whether uses shall be measured in one way or another—it is clear that Arizona cannot quiet title to a residue of 2,800,000 acre-feet of III(a) water on the main stream unless, in fact, the initial figure of 7,500,000 acre-feet of III(a) water at Lee Ferry is correct.

If it is, then, by hypothesis, the absent States of the Upper Division are at once confronted by the obligation in Article III(c), which states that the Mexican burden shall be "supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)," but if such surplus shall prove insufficient, "the States of the Upper

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[1] *Id.* at par. 8, p. 17.

[2] *Id.* at par. 37(b), p. 28.

[3] *Id.* at par. 41, p. 33.

Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)." Since, on Arizona's hypothesis, the 75,000,000 acre-feet delivered under Article III(d) contains no surplus, but is identified with the Lower Basin's apportionment under Article III(a), the four absent States of the Upper Division must add enough water to meet the deficiency in the Mexican burden. As this burden is fixed by treaty at a minimum of 1,500,000 acre-feet per annum, measured at the Mexican boundary, the effect of Arizona's prayer is to add at least 750,000 acre-feet per year, or 7,500,000 acre-feet in ten years, or ten per cent, to the burden on the States of the Upper Division imposed by Article III(d).

In short, Arizona's suit is necessarily an action to quiet title in the Lower Basin to 7,500,000 acre-feet per annum of III(a) water at Lee Ferry, as against the four absent States of the Upper Division. That step must be accomplished before she can find title to herself in 2,800,000 acre-feet of III(a) water in the main stream, even if she wins every point against California and Nevada.

On the interpretation of California and Nevada, however, the uses on the Gila River System are chargeable to the Lower Basin's apportionment under Article III(a), which provides that the water apportioned to each Basin "shall include all water necessary for the supply of any rights which may now exist," which, of course, includes the very old rights on the Gila. That being so, the California defendants say there is no relationship whatever between the obligation of the States of

the Upper Division under Article III(d) to deliver 75,000,000 acre-feet during each ten-year period at Lee Ferry, and the apportionment of uses made by Article III(a) to the Lower Basin. If this is true, then, to the extent that the apportionment of 7,500,000 acre-feet per annum is represented by uses of the waters of the Gila River System or other tributaries in the Lower Basin, the 75,000,000 acre-feet delivered under Article III(d) includes an equivalent quantity of waters of some category other than those apportioned by Article III(a). On any theory of measurement, this equivalent quantity amounts to several million acre-feet in each ten-year period. The California defendants say that this component of the waters passing Lee Ferry is excess or surplus waters unapportioned by the Colorado River Compact, covered in part by the Lower Basin's right to increase its use under Article III(b), and available for use by California under the terms of the Statutory Compact as well as available for satisfaction of the Treaty burden.

In any event, it is quite apparent that the status of the 75,000,000 acre-feet minimum guaranteed at Lee Ferry affects the rights not only of the Lower Basin States under Articles III(a) and III(b) of the Colorado River Compact and the right of the State of California under the Statutory Compact to the use of excess or surplus waters, but also the correlative obligation of the Upper Division States under Article III(c) to bear one-half the deficiency of the Mexican burden. It is impossible to determine that deficiency without first determining whether the 75,000,000 acre-feet includes any excess or surplus waters available in part for discharge of that

burden, as California says, or whether the 75,000,000 acre-feet is all apportioned to the Lower Basin under Article III(a), as Arizona says.

The net effect of the decree which Arizona seeks would be to quiet title in the Lower Basin to 75,000,000 acre-feet at Lee Ferry per ten-year period as water apportioned to the Lower Basin under Article III(a). If this suit is justiciable against California, it is manifestly justiciable against the absent States of the Upper Division—the four obligors under Articles III(c) and III(d). It is against them that Arizona must quiet that title.

Other issues of interpretation of the Colorado River Compact which require a determination affecting the four absent States are catalogued in the "Summary of the Controversy" (Exhibit A to the pending motion), *e.g.*, "whether, if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required" (*Id.* at p. 19) under Article III(e), as the California defendants contend, or whether such waters may be retained in the Upper Basin for power generation. Compare the discussion of this point by Governor Ed Johnson of Colorado, p. 54 *et seq.* of the present brief.

2. *Arizona's contention that the six-state Colorado River Compact, to which she was not a party, has been superseded by a seven-state Compact, to which she is a party, raises a justiciable issue with all parties to the six-state Compact.*

Another critical and clearly justiciable issue in the pending suit is whether Arizona is a party to the Colorado River Compact. The Compact is a

contract which became effective by Presidential proclamation in 1929. Arizona was not a party. This situation continued for at least 15 years. Arizona asserts that in 1944 she ratified what thereby became a seven-state Compact. A new party cannot be imported into a contract without the consent of all of the existing parties. "In making a contract, parties are as important an element as the terms with reference to the subject-matter. . . . A new party could no more be imported into the contract and imposed upon [an existing party] without its consent, than a change could be made in like manner in the other pre-existing stipulations." *First National Bank of Quincy* v. *Hall,* 101 U.S. 43, 50 (1880). Whether Arizona, by her unilateral action in 1944, could become a party to a contract concluded and effective in 1929 cannot be determined in this suit without the presence of all of the original parties.

California contends that her obligation under the Statutory Compact, evidenced by the California Limitation Act, is conditioned upon existence of a six-state Colorado River Compact and the absence of a seven-state Colorado River Compact. She was required by the Boulder Canyon Project Act to assume the burdens of the Limitation Act because, and only because, Arizona refused to ratify the Colorado River Compact and the four absent States refused to acquiesce in a six-state Compact unless it should be accompanied by a limitation upon California's rights. The federal statute, the state statute, and the Presidential proclamation are explicit as to the mutually exclusive character of the six-state and seven-state settlements, as to the fact that the Limitation Act should become operative only in the

absence of a seven-state agreement, and as to the six-months time limit for the crystallization of one result or the other. This issue—whether the tardy ratification of a seven-state agreement by Arizona, fifteen years after expiration of the time stipulated in the Project Act, was unilaterally effective, and whether, if so, the Statutory Compact continues effective—is equally justiciable as to all six States which are beneficiaries of the Statutory Compact. It cannot be litigated without the presence of all six of those States.

3. Arizona's allegations that California has breached the Statutory Compact raise a justiciable controversy with all six co-beneficiaries.

Arizona alleges that California has breached its obligations under the Statutory Compact. (Arizona Complaint, pars. XXVI, XXVII.) California's obligation under that Compact is a single and indivisible promise to the United States for the express benefit of the six other States of the Colorado River Basin, of which Arizona is but one. If California has broken that promise, a justiciable controversy necessarily is raised between her and all six co-beneficiaries.

California by that Compact agrees to limit her consumptive uses so that they

> shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by

said compact, such uses always to be subject to the terms of said compact. (Chap. 16, Calif. Stats. 1929, p. 38.)

The breach alleged is that California claims rights in "excess or surplus waters unapportioned by said Compact," has made contracts with the United States for the storage and delivery of such excess or surplus waters, and has built works to use them, whereas (says Arizona) no state can acquire any rights in excess or surplus waters unless and until a new compact, to be made after October 1, 1963, apportions them. The questions of whether excess or surplus waters are open to appropriation, or may be salvaged and stored by the United States and disposed of by Government contract, or are withheld from all states until all (including Arizona) agree on a new compact, are manifestly questions equally affecting all seven States. If California has breached the Statutory Compact in asserting and using the rights to excess or surplus waters given her on the face of the Statutory Compact (and California denies that she has), the breach is against all beneficiaries of that Compact, not Arizona alone.

B. The Assumption as to Water Availability Relied on by the Absent States Is Incorrect. In Any Event, the Facts Are Not Properly the Subject of Judicial Notice and Should Be Determined Only After Hearing

The absent States argue that the present controversy is not justiciable as to them because there is no imminent shortage of water which will affect them. They declare that 7,500,000 acre-feet of

water is apportioned for annual beneficial consumptive use in the Upper Basin of the Colorado River, and that after presently contemplated projects are in operation beneficial consumptive use in the Upper Basin will be an estimated 4,200,000 acre-feet per annum. (Colorado and Wyoming Brief, p. 36.) "The unused portion of the Upper Basin apportionment," say the absent States, "is flowing into the Lower Basin and will continue so to flow until Upper Basin use increases to the amount of its apportioned share." (*Id.* at p. 8.)

The statement that present and immediately contemplated beneficial consumptive uses will total only 4,200,000 acre-feet per annum is not meaningful because "beneficial consumptive use" is in controversy in the present litigation as to its definition, its method of measurement, its relation to reservoir evaporation losses, as well as a number of other aspects. The controversies over "beneficial consumptive use" involve approximately two million acre-feet of water per annum throughout the entire Colorado River Basin. (See initial California Brief, p. 38.)

The argument of the absent States assumes that whatever water is apportioned by the Colorado River Compact is at all times physically available. The assumption is, unfortunately, incorrect. How much water is physically available is a difficult and complex problem to which answers vary, but in any case it is not a subject for judicial notice. A view contrary to the assumption by the absent States in their briefs, was recently expressed by Governor Ed C. Johnson of Colorado:

> Under the Seven State Compact the Upper States must deliver at Lee Ferry in each ten year period 75 million acre-feet to the Lower States and 7½ million acre-feet to Mexico before they can use one drop of water themselves beyond what they used before the Seven State Compact was ratified. In the current ten year period that will leave only 3,250,000 acre-feet per year for their total use. In the previous ten year period they would have had 4,150,000 acre-feet a year. In 1902 the Upper Basin States under this formula would have had no water at all.[1]

C. Present Use of Water in Dispute Is Not Necessary to Constitute a Justiciable Controversy

In *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), Colorado argued that because water was passing unused down the North Platte River during the irrigating season, there was no justiciable controversy. Colorado's demands related at least in part to future rather than to present uses. The Court said, at page 609:

> The claim of Colorado to additional demands may not be disregarded. The fact that Colorado's proposed projects are not planned for the immediate future is not conclusive in view of the present over-appropriation of natural flow. The additional demands on the river which those projects involve constitute a threat of further depletion.

In the instant case, as in *Nebraska* v. *Wyoming,* natural flow is overappropriated. (Answer of

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[1] The full text of Governor Johnson's statement, made on December 20, 1954, is annexed as an appendix to this brief.

Defendants to Arizona Complaint, par. 3; *Problems of Imperial Valley and Vicinity,* SEN. DOC. No. 142, 67th Cong., 2d Sess. (1922), p. 5.)

At page 610 in the same opinion the Court explained the basis for the doctrine that claims to water in excess of supply create a justiciable interstate controversy:

> But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

The principle is clearly applicable to the instant case. That the States opposing the present motion have claims to the use of water which conflict with claims of present parties to this suit, they do not deny. The only matter in doubt is not whether but when the actual shortage will take place. If the figures of Governor Johnson, quoted on page 37, *supra,* are correct, the shortage may take place very soon.

D. The Requirements for a Justiciable Controversy Do Not Change When States Are Parties

The absent States argue that usual requirements for a justiciable controversy are inapplicable to litigation between states. The cases cited in their briefs, however, contribute nothing toward proving such an exception. The reason for doubt-

ing the existence of an exception applicable to states is compelling.

If the issues between the absent States and the present parties are nonjusticiable, the reason can only be that they do not present a case or controversy within the meaning of Article III, Section 2 of the United States Constitution. What the argument necessarily means, if valid, is that the words "case" and "controversy" in the Constitution have one meaning as to private persons, another meaning as to states. The distinction would import endless and unnecessary confusion, and is without any support in the decisions.

So far as they are pertinent in this connection at all, the cases cited by the States opposing the motion stand for the propositions that between states more material injury must be shown to justify relief than in cases between other types of litigants and that a case against a state must rest on clearer proof. Both of these are considerations relevant to the decree or final disposition of litigation. They have nothing to do with jurisdiction or joinder of parties.

Colorado v. *Kansas,* 320 U.S. 383 (1943), is a clear example. This case is cited or quoted in the Colorado and Wyoming Brief at pages 17 and 31, in the Utah Brief at pages 7-8, 9, 11, 13, 16, 19, and 21. The fact that the quoted language from this case has nothing to do with the jurisdictional issue of justiciable controversy is clearly shown by the history of the litigation. Jurisdiction to determine this dispute over the right to use waters of the Arkansas River was determined in *Kansas* v. *Colorado,* 185 U.S. 125 (1902), when the Court

overruled Colorado's demurrer to Kansas' complaint. After hearing, this Court determined that the plaintiff had not established a basis for relief. 206 U.S. 46 (1907). This was an adjudication on the merits and constituted an exercise of jurisdiction. So likewise did the decision in 1943, when the roles as plaintiff and defendant were reversed and a Kansas water users' association was an added party defendant. The Utah Brief recognizes this situation when it describes the two States, after 1907, as "operating under a 'decree of the court' subject to a reopening at a future time when present injury existed." (Page 8.) The exercise of jurisdiction presupposes that the controversy was justiciable. Peculiarities based on the nature of states as parties go to the decision on the merits, and not to justiciability and jurisdiction.

What is true of *Colorado* v. *Kansas* is also true of a number of other cases cited by the absent States; they have nothing to do with jurisdiction or joinder of parties.[1]

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[1] *Missouri* v. *Illinois*, 200 U.S. 496 (1906), Colorado and Wyoming Brief page 18, Utah Brief pages 11, 20, New Mexico Brief page 6. The jurisdictional matters had been disposed of in *Missouri* v. *Illinois*, 180 U.S. 208 (1901), when demurrer to the complaint had been overruled. Dismissal of the bill without prejudice in 1906 was clearly an adjudication on the merits after a careful review of complex evidence and a weighing of equities. What is said about judicial restraint in matters between states has nothing to do with the test of a justiciable controversy.

Connecticut v. *Massachusetts*, 282 U.S. 660 (1931), Colorado and Wyoming Brief pages 18, 32, Utah Brief pages 11, 21, New Mexico Brief page 6. The decision was a denial of an

In *Arizona* v. *California*, 283 U.S. 423 (1931), the first decision by this Court in the Colorado River litigation, the Court did refuse to take jurisdiction. Arizona's bill against California,

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injunction sought by Connecticut to prevent Massachusetts from diverting water from the watershed of the Connecticut River for storage and use in the Boston metropolitan area. The decision after careful review of the evidence was an exercise of jurisdiction, and necessarily a determination that there was a justiciable controversy.

New York v. *New Jersey*, 256 U.S. 296 (1921), Colorado and Wyoming Brief page 18, Utah Brief page 11, New Mexico Brief page 6. This was a suit to prevent New Jersey from discharging sewage into the New York harbor. Again, the dismissal after a careful review of the evidence constituted an exercise of jurisdiction and a necessary determination that there was a justiciable controversy. The decree was without prejudice to renewal of an application for an injunction.

North Dakota v. *Minnesota*, 263 U.S. 365 (1923), Colorado and Wyoming Brief page 18, Utah Brief page 11, New Mexico Brief page 6. North Dakota sought to enjoin activities in Minnesota which allegedly caused flooding and destruction in the plaintiff state, and also to recover money damages on behalf of North Dakota citizens. The bill was dismissed without prejudice because proof of the causal connection between the works in Minnesota and floods in North Dakota was lacking. Money damages for North Dakota citizens were held forbidden by the Eleventh Amendment. Again, the case shows an exercise of jurisdiction and the presence of a justiciable controversy.

Washington v. *Oregon*, 297 U.S. 517 (1936), Colorado and Wyoming Brief page 18, Utah Brief page 11, New Mexico Brief page 6. Washington's bill for an equitable apportionment and injunctive relief against Oregon, relating to the waters of the Walla Walla River, was dismissed on the merits after a careful review of the evidence. Again, there was an exercise of jurisdiction connoting the presence of a justiciable controversy.

Colorado, Nevada, New Mexico, Utah, Wyoming, and the Secretary of the Interior seeking to restrain the building of Hoover Dam was dismissed. The Court pointed out that Arizona's complaint showed 9,000,000 acre-feet of unappropriated water available and no prospect of interference with Arizona's right to appropriate it. Since 1931 there have been a number of significant changes in circumstances: a protracted dry period since that date; increased uses throughout the Basin; execution of a Treaty guaranteeing Mexico 1,500,000 acre-feet per annum; purported ratification of the Colorado River Compact by Arizona and the negotiation of purported water delivery agreements by the Secretary of the Interior with Arizona. In the 1931 case all the parties but Arizona agreed there was no justiciable controversy[1]; today everyone agrees that a justiciable controversy among present parties to the suit exists.[2]

In other cases cited in one or more of the briefs of the absent States, in which no justiciable controversy was found, the reasons for finding

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[1] Motion of Ray Lyman Wilbur, Secretary of the Interior, to Dismiss the Bill of Complaint, p. 2; Motion to Dismiss filed by California, Colorado, Nevada, New Mexico, Utah, and Wyoming, p. 1.

[2] Arizona Motion for Leave to File Bill of Complaint and Bill of Complaint, p. 5; California Answer to Bill of Complaint, par. 74; Nevada Answer to United States Petition of Intervention, par. XVIII; United States Brief in Support of Motion for Leave to Intervene, p. 29 *et seq.*

absence of a justiciable controversy are clearly inapplicable to the present case.[1]

Only one other group of cases cited by the absent States requires notice. New Mexico cites two decisions on pages 6 and 7 of its brief for the proposition that "The exercise of original jurisdiction in an interstate case is not man-

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[1] In *Alabama* v. *Arizona*, 291 U.S. 286 (1934), the plaintiff State was denied leave to file its bill of complaint to restrain the operation of the prison-made-goods statutes of five States. A number of grounds are given in the opinion, among them the fact that the bill on its face did not show an injury justifying relief.

In *Massachusetts* v. *Missouri*, 308 U.S. 1 (1939), Massachusetts was denied leave to file a complaint against Missouri to prevent application of Missouri taxes with respect to property left by a Massachusetts domiciliary and held by Missouri trustees. No justiciable controversy in such a case is presented when a state is the party litigant, at least where the property is adequate to meet all taxes assessed by the states in question.

In *New York* v. *Illinois*, 274 U.S. 488 (1927), the Court granted a motion to strike one paragraph from the complaint of New York in an action against Illinois to prevent lowering the level of the Great Lakes. The paragraph concerned New York's right to use the waters of the Niagara and St. Lawrence Rivers for power, but alleged no plans to do so.

In *United States* v. *West Virginia*, 295 U.S. 463 (1935), the Court dismissed an action to restrain the building of a dam in the New and Kanawha Rivers, and to declare the rivers navigable. No controversy was stated with West Virginia which purported to be merely the licensor of the corporate defendants who were building the dam. Dismissal of the State deprived the Court of original jurisdiction over the corporate defendants.

United States v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), is cited merely for its dictum, at page 423, that the Court will not decide abstract propositions.

datory." *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945); *North Dakota* v. *Chicago & Northwestern R.R.*, 257 U.S. 485 (1922). Neither of the two cases was an interstate case, although a state was plaintiff in both. Neither case stands for this proposition, even by way of dictum. The proposition for which the two cases actually stand is stated in *Georgia* v. *Pennsylvania Railroad, supra,* at 464-65:

> The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice.

This principle has no application to suits between two or more states. In such cases the United States Supreme Court is the only forum available.

In sum, what the cases cited by the opposing briefs show is that different criteria control the granting of relief against states, but not the exercise of jurisdiction. The California defendants believe that not only should the Court take jurisdiction but should grant a decree settling the controversy.

IV.

CLAIMS OF THE UNITED STATES MATERIALLY AFFECT THE FOUR ABSENT STATES AND ARE NOT DISPOSED OF BY THE UPPER COLORADO RIVER BASIN COMPACT

The United States in its petition of intervention has asserted a number of different claims to the use of water of the Colorado River System. These claims include rights:

(1) To store water for the servicing of water delivery contracts which aggregate nearly 8,500,000 acre-feet per annum of the water stored in Lake Mead;

(2) To comply with international obligations arising from the Mexican Treaty of 1944;

(3) To fulfill the Government's obligations to Indians and Indian tribes;

(4) To protect the interest of the United States in fish and wildlife, flood control and navigation;

(5) To meet the needs of the National Park Service, the Bureau of Land Management, and the Forest Service;

(6) To service contracts for generation and delivery of electric power.

The issues these claims present are as justiciable against States of the Upper Basin as against States of the Lower Basin. As the initial California brief on the pending motion developed in some detail, these claims involve the States opposing the pending motion in several ways:

(1) Their disposition will affect obligations of those States to make water available to the Lower Basin;

(2) Each category of claims involves questions of law in common to all of the States of the Colorado River Basin;

(3) A determination that Indian rights are outside and superior to rights under the Colorado River Compact would render the Compact unworkable.

Utah replies that the "complete answer" is Article VII of the *Upper* Colorado River Basin Compact of 1948. (Utah Brief, pp. 18-19.) The same position is taken by Colorado and Wyoming. (Colorado and Wyoming Brief, p. 33.) Article VII provides that water uses by the United States are charged to the State in which such uses occur.

Although California agrees that the principle in Article VII of the Upper Colorado River Basin Compact is sound, that principle is not accepted by the United States in this suit. (See par. XXVII and par. XXXVII of the United States Petition of Intervention, relating to Indian rights.) The *Upper* Colorado River Basin Compact, although consented to by Congress, does not bind the United States. Congress can subject the United States to an interstate compact, and did so in the Boulder Canyon Project Act, which approved the Colorado River Compact. (See Boulder Canyon Project Act, Secs. 8, 13, 18, Appendix No. 2 to the California Answer, Appendix Vol. I, p. 9.) It did not do so in approving the *Upper* Colorado

River Basin Compact. 63 STAT. 31 (1949). The Report of the House Committee on Public Lands on the Resolution which granted consent to the Upper Basin Compact explicitly recognized that "the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto . . . ." (See Extract from Report, Appendix No. 32 to California Answer, Appendix Vol. II, p. 89.)

Even without the declaration in the legislative history Article VII of the Upper Basin Compact would not bind the United States. An interstate compact is not a statute of the United States. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The function of an interstate compact is to establish rights between States, not between States and the United States.

Furthermore, the Upper Basin Compact does not even purport to apply to the Lower Basin rights and obligations of New Mexico and Utah with respect to the United States.

V.

LOWER BASIN RIGHTS OF NEW MEXICO AND UTAH ARE NOT DE MINIMIS

Utah in her brief, at pages 15-16, says:

> The interests of the State of Utah in the waters of the Lower Basin are certainly *de minimus* [*sic*]. Their maximum rights and claims to the waters of the Lower Basin do not equal in magnitude even 2½ percent of the water allocated by the Compact to the

> Lower Basin exclusive of surplus or unappropriated water. Clearly applicable here is the statement of this court in *Colorado* v. *Kansas,* 320 U.S. 383, 88 L. Ed. 116 at page 124: "Before the court will intervene the case must be of serious magnitude and fully and clearly proved."

Of the authority cited, it is necessary to say again what was said under point III of this brief. Magnitude of the injury and clarity of proof are matters that become pertinent after the Court has assumed jurisdiction. In any case, Utah's *de minimis* is hard to reconcile with the facts.

It is not clear whether Utah refers to 2½ per cent of 7,500,000 acre-feet of water or to 2½ per cent of 8,500,000 acre-feet. In the first case, the quantity is 187,500 acre-feet. In the second instance it is 212,500 acre-feet. One acre-foot of water is 43,560 cubic feet, or 325,850 gallons. 187,500 acre-feet is about 61 billion gallons. One acre-foot will supply the domestic needs of five or six persons for one year. The quantity that Utah says is "certainly *de minimis*" would supply the yearly needs of a city of 1,000,000 persons, or five cities with the population of Salt Lake City. The beneficial consumptive use of water for irrigation prevailing in southern Utah averages around two acre-feet per acre per year. (United States Bureau of Reclamation, Region 3, *Water Supply of the Lower Colorado River Basin* [1952], p. 105). Thus, the quantity of water claimed by Utah is enough to irrigate approximately 100,000 acres.

In *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), the Court's decree (259 U.S. at 496) had been entered only a few months when it had to be modified to recognize the right of Colorado to a "relatively small amount of water" appropriated before 1902 from Deadman Creek. 260 U.S. 1 (1922). This relatively small amount continued to be a problem and fourteen years later was determined to be 2,000 acre-feet per year. 298 U.S. 573 (1936). The entire water supply in controversy in *Wyoming* v. *Colorado* was determined to be 288,000 acre-feet per annum. 259 U.S. at 496. In *Nebraska* v. *Wyoming,* 296 U.S. 553 (1935), Colorado was joined as a party on the basis of Wyoming's allegation that Colorado's claims were "upwards of 250,000 acre feet per annum." (See footnote 1, p. 13 *supra.*)

Recent legislation authorized the so-called "second barrel" of an aqueduct to furnish an additional eighty cubic feet per second of capacity for San Diego, California. 65 STAT. 404 (1951). This capacity amounts to a maximum, at full utilization, of some 58,000 acre-feet per annum. This brief statute is laced, in five separate places, with disclaimers that the facility in any way increases the rights of San Diego to the use of Colorado River water, all at the insistence of counsel for the Upper Basin States. *Hearing No. 44 before Committee on Armed Services on H.R. 5102,* 82d Cong., 1st Sess. (1951), p. 1889. This 58,000 acre-feet for San Diego is less than one-third of what Utah now calls *de minimis.*

Utah also says that she is now negotiating with Arizona for a distribution by compact of her share of Lower Basin water. (Utah Brief, p. 20.) She also says that her presence in this suit would

be "absolutely to preclude the possibility of an amicable settlement of Utah's rights by compact and by negotiations." *Id.* at p. 16. New Mexico says, without further explanation, that "[I]t is not in the best interest of New Mexico at this time and in the present suit to be compelled to litigate and have determined the exact magnitude of this equitable share in terms of acre feet of [Lower Basin] water." (New Mexico Brief, p. 5.)

Why Utah is negotiating a compact to settle interests she regards as *de minimis* is not explained. Nor does she explain how, in a compact with Arizona, she can establish her share in water to which five States and the United States assert claims. Utah does not explain why her joinder would foreclose any possibilities for negotiation that now exist. No reason is apparent why pendency of litigation should interfere with any negotiations.

CONCLUSION

The Upper Basin States in their briefs impugn the motives of the California defendants in filing the pending motion.[1] California's sole purpose in

[1] The Upper Basin States quote statements by California representatives before Congressional Committees that the problems of the Lower Basin could be litigated without affecting the legal rights of the Upper Basin States. For Upper Basin response at that time see *Hearings before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S. J. Res. 145,* 80th Cong., 2d Sess. (1948) p. 198: "We feel that any matter which involves the interpretation or application of the Colorado River compact necessarily involves every State which is signatory to that compact. In fact, we feel that in any litigation each of the signatory States would be an indispensable party to the litigation." To the same effect see pp. 183, 184-85, 187, 189, 302.

seeking to join the absent States is to assure a decree that will settle with finality the vital issues affecting the waters of the Colorado River System. California too dislikes litigation, but prefers a single case to a series of cases. Especially does she wish to avoid future litigation in which a decree in this case would be *res judicata* as to three States and the United States, but not as to the four absent States.

The absent States must be made parties because Arizona, California, Nevada, and the United States have joined in asking this Court to resolve a controversy which deeply affects the welfare and future of the entire Colorado River Basin. The compacts and laws which this Court must construe and apply if it is to resolve that controversy constitute the Law of the River. All of the States of the Colorado River Basin have participated in making that law, all are deeply affected by it. To avoid uncertainty, confusion, and endless controversy there must be but one Law of the River. To that end, it is necessary that Colorado, New Mexico, Utah, and Wyoming be made parties to this suit.

Colorado, New Mexico, Utah and Wyoming urge they should not be joined in this suit because there is water in the Upper Basin not yet being used. If the Upper States are not joined for the reason that the water in the Upper Basin is not yet being used, a judicial decision will be impossible until water in dispute is actually unavailable to communities that have become dependent upon it. Decisions could be made only when costly projects would be rendered useless for lack of water.

To so hold, for whatever reason, would be to decide that waste, privation, and human suffering are requisites to judicial decision. The California defendants do not believe that this is or ever will be the law. The issues which must be decided are as sharply delineated today as they will be in either the near or the distant future. The controversy is actual and real; the need for decision is pressing.

For the reasons stated in this brief and the initial brief, the defendants respectfully urge that the motion be granted.

Respectfully submitted,

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APPENDIX

STORAGE BELOW THE STATE OF COLORADO IS NOT THE ANSWER[1]

By Ed C. Johnson
United States Senator, Colorado

Interested persons on the Eastern and Western Slopes of Colorado have expressed confidence in me, as Governor, to resolve the very controversial water problem that plagues both slopes. This is a tremendous responsibility and challenge but its vital nature demands my acceptance. Accordingly, I shall do my utmost to work out something which will benefit both slopes and injure neither.

However, before we begin the task of allocating Colorado's share of the water of the Colorado River System, we first must take stock of the quantity and the location of the water that is available to us. There are very serious misconceptions, widely held, in regard to the burdens placed on this state by the specific provisions of the Seven State Compact and the official interpretations with respect to them. These limitations should be understood clearly by all parties concerned, since they are basic to any plan to develop the Upper Colorado River Basin. It is with that purpose in mind that I have prepared this document. If my conclusions are in error I want to be show wherein the error lies.

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[1] This statement was issued on December 20, 1954, while Governor Johnson was United States Senator and Governor-elect of Colorado. It is reproduced as an extension of remarks of Representative John P. Saylor, of Pennsylvania. 101 Cong. Rec. A168-A171 (January 13, 1955).

Either the Seven State Compact specifically denies to the Upper Basin the right to withhold water which it cannot use for agricultural and domestic purposes or it does not deny us such a right. Either it denies to the Upper Basin the right to withhold water to develop power or it does not deny us that right. Let us look at the document which has been ratified by the Legislatures of seven states for the correct answers to these pertinent questions.

Here is that irrevocable record:

Article II

> (h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

Article III

> (e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

The Honorable Herbert Hoover, Secretary of Commerce of the United States, was appointed by the President to serve as Chairman of the Seven State Compact Commission as the Official Representative of the Government of the United States, pursuant to an Act of Congress. He was the Chairman of the Colorado River Commission that drafted and signed the Seven State Colorado River Compact. In answer to the question propounded by Congressman Hayden these points in

the compact were interpreted officially by him on January 27, 1923, before any state had ratified the Compact, as follows:

Question 14. Can paragraph (d) of Article III be construed to mean that the States of the upper division may withhold all except 75,000,000 acre-feet of water within any period of 10 years and thus not only secure the amount to which they are entitled under the apportionment made in paragraph (a) but also the entire unapportioned surplus waters of the Colorado River?

Answer. No. Paragraph (a) of Article III apportions to the upper basin 7,500,000 acre-feet per annum. Paragraph (e) of Article III provides that the States of the upper division shall not withhold water that cannot be beneficially used. Paragraph (f) and (g) of this article specifically leave to further apportionment water now unapportioned. There is, therefore, no possibility of construing paragraph (d) of this article as suggested.

Question 19. Why is the impounding of water for power purposes made subservient to its use and consumption for agricultural and domestic purposes, as provided in paragraph (b) of Article IV?

Answer.

(a) Because such subordination conforms to established law, either by constitution or statute, in most of the semiarid States. This provision frees the farmer from the danger of damage suits by power companies in the event of conflict between them.

(b) Because the cultivation of land naturally outranks in importance the generation of power, since it is the most important of human activities, the foundation upon which all other industries finally rest.

(c) Because there was a general agreement by all parties appearing before the commission, including those representing power interests, that such preference was proper.

Question 20. Will this subordination of the development of hydroelectric power to domestic and agricultural uses, combined with the apportionment of 7,500,000 acre-feet of water to the upper basin, utterly destroy an asset of the State of Arizona consisting of 3,000,000 horsepower, which it is said could otherwise be developed within that State if the Colorado River continues to flow, undiminished in volume, across its northern boundary line and through the Grand Canyon?

Answer.

(d) The compact provides that no water is to be withheld above, that cannot be used for purposes of agriculture. The lower basin will therefore receive the entire flow of the river, less only the amount consumptively used in the upper States for agricultural purposes.

On December 15, 1922, Honorable Delph E. Carpenter, Commissioner for Colorado, reported to Governor Oliver H. Shoup his analysis of this compact which he helped to formulate. His comments and observations are especially pertinent. In this official report he said:

"Power claims will always be limited by the quantity of water necessary for domestic and agricultural purposes. The generation of power is made subservient to the preferred and dominant uses and shall not interfere with junior preferred uses in either basin."

On March 20, 1923, Delph E. Carpenter in a joint letter to Colorado Senator M. E. Bashor and Colorado Representative Royal W. Calkins said among other things:

> All power uses in both basins are made subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

The interpretation of Honorable W. S. Norviel, Commissioner for Arizona, published January 15, 1923, contains this language:

> "The third principle established by the compact was to fix a time when the remainder of the water unallotted and unused might be apportioned.
>
> The fourth principle fixes a preference in agricultural uses over power.
>
> The fifth principle, that the upper states shall not withhold water that cannot be reasonably applied for agricultural uses."

Senator Hayden, Arizona, propounded 19 questions to Honorable A. P. Davis, Director United States Reclamation Service, to which the Director made the following replies on January 30, 1923:

> *Question 10.* Is it true that, if the Colorado River compact is adopted, all of the water that Arizona will ever get out of the main river will be enough to irrigate only 280,000 acres of land, of which 130,000 acres are now embraced in the Yuma project and 110,000 acres in the Parker project?
>
> *Answer.* The Colorado River compact does not attempt to divide the water of the river

between individual States. Except for rights already initiated by California and Nevada, there is nothing in the compact that will prevent the State of Arizona from taking from the river all the water that it can put to beneficial use.

Question 19. Any further comment that you may care to make relative to the approval of the Colorado River compact by the Arizona State Legislature will be appreciated.

Answer. The Colorado River compact provides that the lower basin shall be guaranteed an average of 7,500,000 acre-feet of water annually from the upper basin and all of the yield of the lower basin, and that any water not beneficially used for agricultural and domestic uses shall likewise be allowed to run down for use below.

It should be noted that these official interpretations were made before the compact was ratified by any State except Nevada and were not disputed by Colorado or any other State at the time it ratified the compact. Most certainly we are bound hand and foot by them.

At the time the Seven State Compact was adopted and ratified, it was contemplated that a treaty would be negotiated later between the United States and Mexico which would allocate to Mexico certain quantities of water defined in acre-feet, out of the Colorado River System. Furthermore, it spelled out just how that burden should fall upon the Lower Basin and the Upper Basin. The compact specified that to the extent there is surplus water in the Colorado River System, such surplus water would be utilized and

the balance of the burden would be shared equally by the Upper and Lower Basins.

Article III

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

If the Upper Basin States build Storage Reservoirs at the Glen Canyon and Echo Park sites as is now contemplated, the water withheld thereby will of necessity, be surplus water since the Upper States cannot use it for agricultural or domestic purposes, and the Upper States, therefore, must deliver such water to Mexico as is

allocated to her under the provision of the Seven State Compact.

Senator Hayden asked Chairman of the Commission, Herbert Hoover, about this and was answered as follows:

> *Question 15.* Does paragraph (d) of Article III in any way modify the obligation of the States of the upper division, as expressed in paragraph (c), to permit the surplus and unapportioned water to flow down in satisfaction of any right to water which may hereafter be accorded by treaty to Mexico? Within any year of a 10-year period, could the States of the upper division shift to the States of the lower division the entire burden of supplying such water to Mexico.
>
> *Answer.*
>
> (a) No. It is provided in the compact that the upper States shall add their share of any Mexican burden to the delivery to be made at Lee Ferry, whenever any Mexican rights shall be established by treaty. By paragraph (c) of Article III, such an amount of water is to be delivered in addition to the 75,000,000 acre-feet otherwise provided for.
>
> (b) In the face of the specific provision of Article III (c) that the burden of any deficiency must be "equally borne," I can see no possibility of placing upon the lower division the entire burden. If the surplus is sufficient, there is no burden on anyone. If it is insufficient the plain language is that it must be equally shared, with the equally plain provision that the upper division must furnish its half.

Delph Carpenter in his official report to Governor Shoup said:

> "Any waters necessary to supply lands in the Republic of Mexico (hereafter to be determined by international treaty) shall be supplied from the surplus flow of the river. If the surplus is not sufficient, any deficiency shall be borne equally by the upper basin and the lower basin. * * *"

I am certain that Mr. Carpenter would have added, had he thought such a doubt were to be raised, "Water held in the Upper Basin to generate power and which for physical reasons could not be used by the Upper Basin for agricultural or domestic purposes is surplus water to the Upper Basin." Such an interpretation must be crystal clear to any student of the Seven State Compact and the official interpretations of its provisions.

The Upper and Lower Basins were each apportioned from the Colorado River System the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, and in addition the Lower Basin was given the permission to increase its beneficial consumptive use of an extra million acre-feet per annum of surplus water. However, the 7,500,000 acre-feet awarded to the Lower States had a very clear priority over the 7,500,000 acre-feet awarded to the Upper States. In reality, the compact gave the Lower States 7,500,000 acre-feet of water per annum and the Upper States that much water if there should be any water left in the River, provided the Upper States used that water only for domestic or agricultural purposes.

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

But here is the catch in this award:

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

The following quotes from the questions by Senator Hayden and answered on January 27, 1923, by Chairman of the Commission Herbert Hoover leave nothing to the imagination with respect to the extra one million acre-feet of surplus water awarded the Lower Basin. The extra million acre-feet is to be met out of surplus waters over and above the 7,500,000 acre-feet allocated annually to each of the two basins and it does not take priority over the Upper States award of 7,500,000 feet provided they use all of their

7,500,000 for agricultural and domestic purposes. If the Upper Basin stores water for power purposes at least a million acre-feet per annum must go to satisfy this demand.

Question 6. Are the 1,000,000 additional acre-feet of water apportioned to the lower basin in paragraph (b) of Article III supposed to be obtained from the Colorado River or solely from the tributaries of that stream within the State of Arizona?

Answer. The use of the words "such waters" in this paragraph clearly refers to waters from the Colorado River system, and the extra 1,000,000 acre-feet provided for can therefore be taken from the main river or from any of its tributaries.

Question 22. Does the Colorado River Compact apportion any water to the State of Arizona?

Answer. No, nor to any other State individually. The apportionment is to the groups.

It should be noted, and I repeat, that Secretary Hoover's official interpretations were made before the compact was ratified by any state; furthermore it was not disputed by any of them when they did ratify it.

On December 15, 1922, Colorado Commissioner Delph E. Carpenter in his official report to the Governor of Colorado, the Honorable Oliver H. Shoup, submitted several tables explaining the allocation of the water of the Colorado River System.

Table 4 reads as follows:

Table 4

	Acre-feet
"Upper Division Allocation, includes present consumption	7,500,000
Lower Division Allocation, includes present consumption	7,500,000
Lower Division permissible increase in water consumption	1,000,000
Total allocated or permitted	16,000,000
Unallocated surplus (estimated)	4,500,000
Estimated average annual water supply	20,500,000"

Mr. Carpenter also said in this report:

> "At any time after 40 years, if the development in the Upper Basin has reached 7,500,000 acre-feet annual beneficial consumptive use or that of the Lower Basin has reached 8,500,000 acre-feet, any two States may call for a further apportionment of any surplus waters of the river, * * *."

On March 20, 1923, Colorado Commissioner Delph E. Carpenter in a joint letter to Colorado Senator M. E. Bashor and Colorado Representative Royal W. Calkins said, among other things:

> Paragraph (b), Article III permits the lower basin to increase its annual beneficial consumptive use of water 1,000,000 acre-feet. The two paragraphs permit an aggregate annual beneficial consumptive use of 8,500,000 acre-feet, and no more. The words "per annum", as used in paragraph (b) are not synonymous with the word "annually." No cumulative increase is intended by that paragraph.

On February 10, 1923, Colorado Commissioner Delph E. Carpenter addressed a telegram to the Honorable Herbert Hoover, Chairman, Colorado River Commission and received a prompt reply. On February 13, 1923, he addressed a telegram to the Honorable R. T. McKisick, Deputy Attorney General, Sacramento, California, and that same day received a reply.

These exchanges of telegrams are pertinent to an understanding of this phase of the compact and are inserted here.

Telegram

CAPITOL BUILDING
Denver, Colo., February 10, 1923

HON. HERBERT HOOVER,
Chairman, Colorado River Commission,
Washington, D. C.:

Do you concur with me that the intent of the commission in framing the Colorado River Compact was as follows:

That paragraph (b) of Article III means that the lower basin may increase its annual beneficial consumptive use of water 1,000,000 acre-feet and no more?

DELPH E. CARPENTER

Washington, D. C., February 12, 1923

DELPH E. CARPENTER,
State Capitol, Denver, Colo.:

I concur with you, and shall so advise Congress in my report, that the intent of the Commission in framing the Colorado River Compact was as follows:

Paragraph (b) of Article III means that lower basin may acquire rights under the compact to annual beneficial consumptive use of water in excess of the apportionment in paragraph (a) of that article by 1,000,000 acre-feet and no more. There is nothing in the compact to prevent the States of either Basin using more water than the amount apportioned under paragraphs (a) and (b) of Article III, but such use would be subject to the further apportionment provided for in paragraph (f) of Article III and would vest no rights under the present compact.

HERBERT HOOVER

Denver, Colo., February 13, 1923.

R. T. MCKISICK,
Deputy Attorney General,
Sacramento, Calif.:

Do you concur with me that intent of Commission in framing Colorado River Compact was as follows:

That paragraph (b) of Article III means that the lower basin may increase its annual beneficial consumptive use of water 1,000,000 acre-feet and no more?

DELPH E. CARPENTER

Sacramento, Calif., February 13, 1923

HON. DELPH E. CARPENTER,
State Capitol, Denver, Colo.:

Am of opinion that paragraph (b) of Article III permits increase of annual beneficial consumption use of water by lower basin to 8,500,000 acre-feet total or 1,000,000 in excess quantity apportioned each basin in perpetuity

by paragraph (a), Article III, and no more. When both paragraphs are read together no other construction tenable. "Per annum" not synonymous with "annually."

R. T. McKisick

Sacramento, Calif., February 15, 1923

Delph E. Carpenter
Denver, Colo.:

My interpretation of Article III and VIII well expressed in McKisick's wire of the thirteenth.

W. F. McClure
Seven State Compact Commissioner
for California

Utah Commissioner, R. E. Caldwell in his report to the Utah Senate, among other things said:

> The Lower Basin States, for the most part, when they divert their water, wholly consume it and they get no credit for use of return flow for it does not exist, and they are, therefore, limited to the diversion of 8,500,000 acre-feet and are held strictly to the requirement of "consumptive beneficial use" of such as they do divert.

In the report to the Governor of California by Honorable W. F. McClure, Commissioner for California, made January 8, 1923, appears this statement:

> In conclusion permit me to add that the terms of the compact do full justice to the

states in interest, and the equitable division and apportionment of the use of the waters of the Colorado River System whereby the Lower Basin is allocated 7,500,000 acre-feet per annum, with an allowable increase of 1,000,000 acre-feet per annum by reason of the probably rapid development upon the lower river, and fully guarantees to California an ample water supply to adequately care for the enormous future growth of the Imperial Valley and adjacent territory.

The Honorable Herbert Hoover, who, as I have said, was the chairman of the commission that drafted and approved by its unanimous vote the Seven State Compact, said:

> "The Lower Basin will, therefore, receive the entire flow of the river, less only the amount consumptively used in the Upper States for agricultural purposes."

The Honorable A. P. Davis, Director of the Reclamation Bureau, on January 30, 1923, announced that:

> "The Colorado River Compact provides that the Lower Basin shall be guaranteed an average of 7,500,000 acre-feet of water annually from the Upper Basin and all of the yield of the Lower Basin, and that any water not beneficially used for agricultural and domestic uses (in the Upper Basin) shall likewise be allowed to run down for use below."

This data proves conclusively that the extra 1,000,000 acre-feet of water per annum allocated to the Lower Basin is to be acquired from the

surplus and otherwise unallocated water of the Colorado River System. The same is true of the 1,500,000 allocated annually by treaty to the United States of Mexico..

I am compelled to keep emphasizing that whatever water is stored in the Glen Canyon and Echo Park reservoirs will be surplus to the agricultural and domestic needs of the Upper Basin, and must be delivered to the Lower Basin to satisfy the award of 1,500,000 acre-feet to Mexico and 1,000,000 acre-feet to the Lower Basin. Furthermore, should the Lower Basin require an additional supply of water for agricultural and domestic purposes the water stored in these reservoirs must be released.

Under the Seven State Compact the Upper States must deliver at Lee Ferry in each ten year period 75 million acre-feet to the Lower States and 7½ million acre-feet to Mexico before they can use one drop of water themselves beyond what they used before the Seven State Compact was ratified. In the current ten year period that will leave only 3,250,000 acre-feet per year for their total use. In the previous ten year period they would have had 4,150,000 acre-feet a year. In 1902 the Upper Basin States under this formula would have had no water at all.

The Reclamation Bureau estimates that the proposed Storage Reservoirs in the Upper Colorado Basin will cost the Upper Basin 880,000 acre-feet annually in evaporation. It will be charged to the Upper Basin as consumptive use. Colorado's portion of that loss would be 400,000 acre-feet.

Water still does not run up hill, and storage down the river from Colorado to generate electric energy, frowned upon by the Seven State Compact, cannot secure for us one drop of water, but to the contrary, will cost us 400,000 acre-feet annually in evaporation, which under the Upper Colorado Basin Compact will be charged to Colorado as consumptive use.

Colorado is close to the bottom of the barrel insofar as Colorado River water is concerned. Colorado has a record of lavish generosity to all of her neighbor States. Now at this late date it will be state suicide unless she looks after her own interests with courage and wisdom. She positively cannot afford the loss of 400,000 additional acre-feet. She cannot afford to agree to a storage plan whose certain effect will be to create additional surplus water out of the Upper Basin's meager supply, which under the Seven State Compact must go to the Lower Basin. Colorado must insist that the 42 reservoirs surveyed in the high country of Colorado be authorized simultaneously with the authorization of the Storage Plan and which will give Colorado an absolute right to the water which is developed.

The Hill report prepared pursuant to a contract with the Colorado Legislature indicates there is something over a million acre-feet of unappropriated water in the Colorado River System in Colorado. However, the Hill report did not charge Colorado with the burden of Colorado's portion of the priority commitment to Mexico, which under the Seven State Compact cannot be less than 375,000 acre-feet. And, another thing,

if Glen Canyon and the Echo Park reservoirs are built, Colorado's portion of the Mexican burden becomes not less than 750,000 acre-feet annually. Had Mr. Hill recognized these binding and irrevocable priorities and the evaporation of the down-river storage plans, which is to be charged to Colorado as "consumptive use" of 400,000 acre-feet, he could not have shown any unappropriated water whatsoever in Colorado for Colorado.

Colorado has entered into irrevocable compacts with all of the States to the East, West, North, and South. In each of these compacts Colorado has been generous to a fault. Now most of her water is lost forever, and yet her neighbors are asking her to surrender more and more of this most precious resource. The time has come when Colorado's dwindling supply must be guarded jealously and protected fully. That is a responsibility which I, as Governor of Colorado, must assume.

Who will say that the Glen Canyon Dam in the State of Arizona and the Echo Park Dam on the Colorado-Utah border are not extraordinary dams from an engineering point of view. Glen Canyon is the sort of project that makes an engineer's mouth water, and the Reclamation Bureau is a Bureau of engineers. Who will say that these projects will not be of incalculable value to the Lower Basin. Glen Canyon, which will collect 100,000 acre-feet of silt a year, will extend the life of the Hoover Project 500 years, but what I want someone to tell me is, "Why should they

be built with Upper Colorado Basin Funds at the water expense of the State of Colorado?"

There is only one route remaining for us to take. We must put our water to beneficial use in our own state if we are to gain any right to it. That is the plain language of the Seven State Compact. It states that condition without equivocation. The Reclamation Bureau has explored 42 reservoir sites high up on the Colorado River System in Colorado. We cannot, we dare not settle for less than their authorization now. Congressional authorization does not mean immediate construction, but it will give to these proposed reservoir sites an official priority. Colorado contributes 72 per cent of the water of the Upper Colorado River Basin. Is it asking too much that we be allowed to use less than one-fourth of what we produce? If that is wrong, then I am wrong.

ED C. JOHNSON

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervenor.

STATE OF NEVADA,

Intervenor.

Motion on Behalf of the California Defendants for Leave to File an Amended Answer to the Bill of Complaint of Arizona

and

Amendatory Answer.

(See List of Attorneys on Inside Cover)

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IN THE

Supreme Court of the United States

October Term, 1953

No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

Motion on Behalf of the California Defendants for Leave to File an Amended Answer to the Bill of Complaint of Arizona.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Defendants, State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, The City of Los Angeles, The

City of San Diego and County of San Diego, hereinafter called the California Defendants, by their duly authorized attorneys respectfully move the Court for leave to file this amendment to Paragraph 68 of their Answer to Arizona's Bill of Complaint, all other provisions of that said Answer remaining unchanged.

Statement.

Paragraph XXII of Arizona's Bill of Complaint alleged that the controversy between plaintiff and defendants relates to three legal questions there summarized. The Answer of the California Defendants to Arizona's Bill of Complaint, paragraph 68, denied that the subject of the controversies is fully or accurately set out in the Bill of Complaint, and alleged that there are additional subjects of controversy between complainant and defendants.

After the filing of the Answer of Defendants to Arizona's Bill of Complaint, the United States of America and the State of Nevada filed Petitions of Intervention. These Petitions broadened the scope of the litigation, adding additional subjects of controversy. The California Defendants, in their Answers to those Petitions, summarized the issues in the controversy as disclosed by the pleadings up to that time. That summary of the issues is appended as Exhibit A to the Answer of California Defendants to Petition of Intervention on Behalf of the United State of America and is incorporated by reference in their Answer to Nevada's Petition.

To bring the defendants' pleadings in answer to Arizona into conformity with those subsequently filed in an-

swer to the United States and Nevada, the California Defendants ask that leave be granted to file this amendatory answer to Arizona's Bill of Complaint, amending paragraph 68 of their original answer to Arizona so as to state the subject matter of the controversy in the same terms as in their answers to the United States and Nevada.

Amendatory Answer.

Paragraph 68 of the Answer of the California Defendants to Arizona's Bill of Complaint is amended to read as follows:

Answering Paragraph XXII of the said Bill of Complaint, admit that controversies exist between the plaintiff and the defendants as to the interpretation, construction and application of the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, but deny that the subject of such controversies is fully or accurately set out in the said Paragraph XXII, and allege that there are additional subjects of controversy disclosed by Affirmative Defenses and denials contained in this Answer. Deny the accuracy or validity of the alleged solutions to the controversies suggested by Arizona in said Paragraph XXII, and deny that Arizona's position is sustained by this Court's decision in *Arizona v. California,* 292 U. S. 341, or in any other decision. Allege that the controversy, as disclosed by the pleadings filed to date, is summarized in Exhibit "A" annexed to Defendants' Answer to the Petition of Intervention on Behalf of the United States, and herein incorporated by reference as though fully stated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. [redacted] Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

SPECIAL MASTER'S REPORT ON THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN AS PARTIES THE STATES OF NEW MEXICO, UTAH, COLORADO AND WYOMING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 10 Original

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Complainant,

vs.

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Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

SPECIAL MASTER'S REPORT ON THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN AS PARTIES THE STATES OF NEW MEXICO, UTAH, COLORADO AND WYOMING.

I. STATEMENT.

1.

Under leave granted by this Court, the State of Arizona filed its Bill of Complaint on January 19, 1953.

The California defendants named therein, to-wit, the State of California, Palo Verde Irrigation District, Im-

perial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California, filed their joint Answer on May 19, 1953.

On August 8, 1953, the complainant, State of Arizona, filed its Reply to said Answer.

On July 15, 1954, said California defendants filed an Amendment to their Answer.

Therewith, the California defendants filed a Motion and Supporting Brief to join as necessary parties the States of Colorado, New Mexico, Utah and Wyoming. These four States are *within the Colorado River System,* as that term is defined by Article II(a) of the Colorado River Compact, hereinafter identified and described, and are States of the Colorado River Basin, as that term is defined by Article II(b) of the Colorado River Compact. These States are also signatories to the Colorado River Compact and are defined as States of the Upper Division by Article II(c) of the Colorado River Compact. (The Colorado River Compact is attached hereto as Appendix A.)

The United States of America was granted leave to intervene in this cause on December 31, 1952 (344 U.S. 919).

The State of Nevada, by order of the Court on June 1, 1954, was also granted leave to intervene.

By further order of the Court on June 1, 1954, I, George I. Haight, was appointed Special Master in this case and "directed to find the facts specially and state separately his conclusions of law thereon, and to submit

the same to this Court with all convenient speed, together with a draft of the decree recommended by him."

An organization meeting was held at Phoenix, Arizona on August 5, 1954, which was attended by the respective counsel for the several parties and by the Special Master. At this meeting, a discussion was had as to means for expediting the hearings in this cause, but it was then thought that hearings on the merits should be delayed until the question as to parties should be determined.

In response to the said Motion made by the California defendants, the following briefs were filed by the parties and by the States sought to be joined:

Briefs opposing the Motion were filed by Arizona on August 13, 1954; by the State of New Mexico on December 27, 1954; by the State of Utah on December 27, 1954; and a joint brief by the States of Colorado and Wyoming on December 27, 1954.

On February 7, 1955, the State of Nevada, intervener, filed its brief supporting the California defendants' Motion.

On February 9, 1955, the California defendants filed a reply brief.

The United States of America, intervener, filed no brief with respect to this Motion.

An order of the Supreme Court, entered on February 28, 1955, referred the joinder Motion of the California defendants to the Special Master, with instructions "to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should be granted." Such hearings were held in the Statehouse, Phoenix, Arizona, on April 12-15, 1955. In attend-

ance at these hearings were the several attorneys representing all the present parties to this cause and the attorneys for those States sought to be joined.

Oral arguments were presented by all parties, except the United States of America. Through counsel the desire was expressed to remain silent on this subject (Tr., p. 356).

The arguments made at these hearings were based upon the pleadings and relevant official public documents. Beyond this, no evidence was taken by the Special Master, as it was his opinion that this was unnecessary and also that it would entail a consideration substantially as extensive as that required for a final hearing on the merits.

The Colorado River is a navigable stream, having a total length of 1293 miles. Its head waters are in Colorado and Wyoming. It flows through Western Colorado and Southeastern Utah, enters Arizona on its northern border, flows through the upper part of that state for 292 miles, then along the southeastern corner of Nevada for 145 miles where it is the boundary between Nevada and Arizona, then in a southerly direction forming for 235 miles the boundary between Arizona and California, and then for 16 miles it marks a boundary between Arizona and Mexico. Its delta is in Mexico at the upper end of the Gulf of California. It may be noted that "Lee Ferry" is on the main stream, located in Arizona near its northern border and above the upper end of the Grand Canyon. (See Arizona's Reply to Defendants' Answer, Appendix No. 1.)

The issues presented by the joinder Motion call for the consideration of the various pleadings of Arizona, of the California parties, of Nevada, and of the United States.

Also, attention needs to be given to the Colorado River Compact (H. Doc. 717, 80th Cong., 2d Sess., p. A17 (1948)), the Boulder Canyon Project Act, Act of December 21, 1928, (45 Stat. 1057), the California Limitation Act, (Calif. Stats. 1929, Ch. 16, p. 38), the Mexican Water Treaty, (U. S. Treaty, Ser. No. 994, 59 Stat. 1219 (1945)), and the Upper Colorado River Basin Compact, (Act of April 6, 1949, 63 Stat. 31); also, the briefs and oral arguments of the parties to the cause; and likewise the briefs and oral arguments of the Upper Basin States: Colorado, Wyoming, New Mexico and Utah.

The Colorado River Compact divides the Colorado River Basin into an Upper and a Lower Basin. As will be explained, the States of Colorado and Wyoming are wholly in the Upper Basin. Nearly all of the parts of New Mexico and of Utah are in the Upper Basin. To a slight extent, these two States are in the Lower Basin. In the Special Master's view, with this respect, separate consideration should be given them. In this report we shall first treat the States of Colorado, Wyoming, New Mexico and Utah as of the Upper Basin. Beginning on page 60 of this Report, we shall consider the status of the two latter States to the extent that they are of the Lower Basin.

The Motion is grounded upon the assertion that each of the four States is a necessary and indispensable party (Motion p. 2).

Reason 1, summarized, is that the four States are parties to the Colorado River Compact and the Compact's meaning is in issue in this cause. (A summary of that controversy is presented in Exhibit A of the Motion.)

Reason II is that New Mexico and Utah are States of the Upper and Lower Basin and are interested in Lower Basin water.

Reason III is that the absent States are interested in the Boulder Canyon Project Act and the California Limitation Act and that the meanings of these are in controversy between the present parties. This is further treated in the summary of said Exhibit A accompanying the Motion.

Reason IV is the contention that the assertion of claims by the United States "as against the parties to this cause" is adverse to rights derived from or controlled by the Colorado River Compact. It is asserted that these claims of the United States affect all the States of the Colorado River Basin. (This is further treated in the summary attached to the joinder Motion of the California parties.)

We shall first consider the joinder Motion in relation to the Colorado River Compact.

2. The Colorado River Compact.

One of the documents of primary importance with respect to the use of waters of the "Colorado River System" is the "Colorado River Compact" (Appendix No. 1 filed May 19, 1953 with the Answer of the California parties; also Appendix A with this Report). It was approved under the Act of Congress of the United States of America August 19, 1921 (42 Statutes at Large, p. 171). It was negotiated by seven Commissioners, each appointed by the Governor of his State, representing, respectively, the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. In the negotiations, under presidential appointment, the United States was represented by Herbert Hoover.

This Compact followed years of controversy between the States involved. It was an act seemingly based upon thorough knowledge by the negotiators. It must have been difficult of accomplishment. It was the product of real statesmanship. Its importance and its effect was widely recognized at the time. It became effective seven years later—in 1929. Of this we shall treat in connection with the Boulder Canyon Project Act (see footnote 1).

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[1] The report by Herbert Hoover, who was Chairman of the Colorado River Commission, was addressed to the Speaker of the House of Representatives (H. Doc. 605, 67th Cong., 4th Sess.) and states the following respecting the Colorado River Compact:

"Frequently in the past just such very serious conflicts have arisen on interstate streams resulting in prolonged and expensive litigation and causing long delays in development. This compact, when approved, will be a settlement of impending interstate controversies and an adjudication of rights to the use of the water in advance of construction, thus eliminating litigation and laying the groundwork for the orderly development of a vast area of desert land, estimated at some 4,000,000 acres; the utilization of river flow now unused in the generation of hydroelectric energy, the possibilities of which are estimated at 6,000,000 horsepower; the construction of dams for the control of floods which annually threaten communities in which over 75,000 American citizens now reside, with property worth more than $100,000,000; the establishment of new homes and new communities, and the creation of a vast amount of new wealth.

The primary purpose of the compact is to make an equitable division and apportionment of the waters of the river. For this purpose the river system is divided into an upper and lower basi[illegible] following:

(1) A natural division- [illegible] two basins varying in topography, and being [illegible] by a thousand miles of deep canyon; and

(2) Economic lines— [illegible]ate, crops, and use of water being different. The lower river has immediate need of works for the control of floods, the development of power, and expansion of irrigation. It has concentrated blocks of irrigable land, while the upper basin,

The Colorado River Compact evidences far seeing practical statesmanship. The division of the Colorado River System waters into Upper and Lower Basins was, and is, one of its most important features. It left to each Basin the solution of the problems of that Basin and did not tie to either Basin the intra-basin problems of the other. The Congressional Record contains many discussions over several years illustrating the importance of the Colorado River Compact. We refer to a part of one of the many, to-wit, the report of the Honorable Carl Hayden, Representative from Arizona, made January 30, 1923, Congressional

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[1] (Continued)
which is the source of water supply, will, because of its colder climate and more scattered acreage, probably be slower of development.

"Due consideration is given to the needs of each basin, and there is apportioned to each seven and one-half million acre-feet annually from the flow of the river in perpetuity, and to the lower basin an additional million feet of annual flow, giving it a total of eight and one-half million acre-feet annually in perpetuity. There is thus allocated about 80 percent of the total natural flow of the river, leaving some 4,000,000 acre-feet unapportioned. While no other waters are definitely allotted by the compact, there is nothing which prevents the States of either basin from using more water than the amount apportioned, any rights to such use being subject to the further apportionment at a later date. This feature is covered by a provision for the creation of a new commission at the end of 40 years, which will have power to make a further apportionment of the water not now dealt with. The compact provides machinery for the settlement, without litigation, of disputes which may arise between the States; it gives agriculture preference over power in the use of the water; it makes navigation subservient to other uses; and it leaves open for international settlement any claims to the use of water in the Republic of Mexico.

Record pages 2710-2713 (see footnote 2), not for the purpose of in any wise construing the terms of that Compact but only to show its importance as of that time. That importance seems to have increased rather than decreased over the years.

Perhaps a precedent for referring to this is found in *Muller* v. *Oregon,* 208 U.S. 412, 419-420, (1908) where, in

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[2] "(a) The commission, upon analysis, found that the causes of present friction and of major future disputes lay between the lower basin States and the upper basin States, and that very little likelihood of friction lay between the States within each basin; that the delays to development at the present time are wholly interbasinal disputes; and that major development is not likely to be impeded by disputes between the States within each basin. And in any event, the compact provides machinery for such settlements."

"(b) The drainage area falls into two basins naturally, from a geographical, hydrographical, and an economic point of view. They are separated by over 500 miles of barren canyon which serves as the neck of the funnel, into which the drainage area comprised in the upper basin pours its waters, and these waters again spread over the lands of the lower basin."

"(c) The climate of the two basins is different: that of the upper basin being, generally speaking, temperate, while that of the lower basin ranges from semitropical to tropical. The growing seasons, the crops, and the quantity of water consumed per acre are therefore different."

"(d) The economic conditions in the two basins are entirely different. The upper basin will be slower of development than the lower basin. The upper basin will secure its waters more by diversion than by storage, whereas the development of the lower basin is practically altogether a storage problem."

"(e) The major friction at the present moment is over the water rights which might be established by the erection of adequate storage in the lower basin, as prejudicing the situation in the upper basin, and regardless of legal rights in either case."

* * *

"The use of the group method of division was therefore adopted both from necessity, as being the only practical one, and from advisability, being dictated by the conditions existing in the entire basin."

analogy to the discussion of the state of the art in a patent case, reference was made to opinions other than judicial sources.

The major purposes of the Compact are recited in Article I thereof, as follows:

> "The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods."

Then follows a highly significant provision—one that provides a guide to the conclusions that must be reached with respect to principal questions involved in the joinder Motion under consideration. It reads:

> "To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made."

We consider this preamble important, as to major purposes. The use of waters is to be equitably divided, as we shall see, between the two basins. This, among other results, is to promote comity and to remove causes of controversy.

The two basins are defined in Article II of the Colorado River Compact, paragraphs (f) and (g). For convenience, we quote Article II in its entirety:

> "As used in this compact:
>
> (a) The term 'Colorado River System' means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term 'Colorado River Basin' means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term 'States of the Upper Division' means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term 'States of the Lower Division' means the States of Arizona, California and Nevada.

(e) The term 'Lee Ferry' means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term 'Upper Basin' means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term 'domestic use' shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power."

The States of the Upper Division, Colorado, Utah, Wyoming and New Mexico, is a designation not wholly identical with the "Upper Basin". All of the "Colorado Sys-

tem" and of the "Colorado River Basin" which is within the State of Wyoming is in the "Upper Basin". With respect to the State of Colorado, all of the "Colorado River System" and all of the "Colorado River Basin" within the state are in the "Upper Basin". The principal parts of Utah and of Wyoming which are in the "Colorado River System" and the "Colorado River Basin" are in the "Upper Basin". A relatively small part in area and of water flowing into the main stream of the Colorado River below "Lee Ferry" of the State of Utah and of the State of New Mexico are in the "Lower Basin". With respect to the State of Arizona, a small part in area and of water therein are in the "Upper Basin". These facts will be considered later herein.

California and Nevada, and nearly all of Arizona, are in the "Lower Basin".

Article III of the Colorado River Compact apportions water from the Colorado River System not between States within a Basin, and not between users in a State, but between the Upper Basin and the Lower Basin. This of itself was a great forward step—perhaps the greatest single one in progressing toward a solution of the many problems of water allocation in the Colorado River Basin.

Article III apportions in perpetuity the exclusive beneficial consumptive use of 7,500,000 acre-feet per annum to the Upper Basin and the same to the Lower Basin (paragraph (a)). In addition, the Lower Basin may increase its beneficial consumptive use one million acre-feet per annum (paragraph (b)).

In addition to these apportionments Article III also

1. provides that the Basins deliver water to Mexico in consequence of international treaties;

2. requires the Upper Basin to deliver a minimum of 75,000,000 acre-feet to Lee Ferry over every ten year period;

3. provides that the Basins shall not withhold water which cannot be used;

4. provides for apportionment of surplus water after October 1, 1963; and

5. provides that two or more signatory States may call a meeting to consider apportioning the surplus waters.

Article IV provides:

1. that water used for navigation is to be subservient to others uses of water; and

2. that water in the Colorado River System may be impounded for the purpose of generating hydro-electric power but that such use shall be subservient to domestic uses.

The provisions of Article IV shall not interfere with State control over any waters within its boundary.

Article V provides for the administration of the provisions of the Compact, with the duty of seeing to it that rights are observed and obligations met, as per the Compact.

Article VI provides that in the case of disputes between signatories to this Compact over the use of waters sought to be regulated by the Compact, two or more States may call a meeting of all the signatories. However, this provision is not to limit the States' right to resort to all other legal means.

Article VII provides that the United States' obligations to Indian tribes are unaffected by this Compact.

Article VIII provides that this Compact shall not impair present perfected rights to water in the Colorado River System.

Article IX reserves the right in the signatory States to use any legal method to enforce the terms of this Compact.

Article X provides that upon unanimous agreement of the signatories, this Compact may be dissolved.

Article XI sets out the conditions precedent to the Compact coming into effect, *i.e.* the approval by the legislatures of each of the seven States.

The Compact did not become effective immediately, because the condition set forth in Article XI was not met. In 1928 the Federal Government provided the stimulus needed to activate the Compact.

3. The Boulder Canyon Project Act.

On December 21, 1928, the Congress of the United States (45 Stat. 1057) enacted the Boulder Canyon Project Act providing for the development of Boulder Canyon in the Colorado River Basin. (Page 9, Appendix to the California parties' Answer, vol. 1.)

The Boulder Canyon Project Act provides for

1. the construction of a reservoir dam in Boulder Canyon with a 20,000,000 acre-feet storage capacity and incidental works; and

2. the construction of the All-American Canal in Southern California if either of the following conditions were met:

   a. that all seven States who were signatories to the Colorado Compact approve said Compact;

b. or that the State of California and any five other signatory States approve the Compact, and California pass a law limiting its use to 4,400,000 acre-feet per annum of Colorado River System water; and also that arrangements be made whereby the cost to the government for constructing these works would be repaid.

The Colorado River Compact, by reference, was made a part of the Boulder Canyon Project Act, by Section 8(b) of the Boulder Canyon Project Act, which section is as follows:

"Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof to the date of such approval and consent by Congress."

4. The California Limitation Act.

On March 4, 1929, California passed the California Limitation Act to become effective on August 14, 1929 if some State, a signatory to the Colorado River Compact, should fail to approve said Compact. The Act provided that California limit its use of Colorado River System waters to 4,400,000 acre-feet per annum of the water apportioned the Lower Basin by Article III(A) of the Colorado River Compact, "plus not more than one-half of any excess or surplus waters unapportioned by said Compact". (Page 30, Appendix to the California parties' Answer, vol. 1.) Within the Act, it was stated that the reason for passing it was to make it possible to construct the works authorized by the Boulder Canyon Project Act. The United States of America and the States of Arizona, Nevada, Utah, New Mexico, Wyoming and Colorado were named in the Act as beneficiaries thereof.

The State of Arizona failed to approve the Colorado River Compact within t'.e time limit set out in the Boulder Canyon Project Act. Thus the California Limitation Act, and the Colorado River Compact became effective when on June 25, 1929 Herbert Hoover, President of the United States, by Presidential Proclamation declared it so (46 Stat. 3000).

5. The Upper Colorado River Basin Compact.

On October 11, 1948, the States of Arizona, Colorado, New Mexico, Utah and Wyoming entered into the "Upper Colorado River Basin Compact". It received the approval of the Congress of the United States on April 7, 1949 (63 Stat. 31). (Page 52, Appendix to the California parties' Answer, vol. 2.)

The Upper Colorado River Basin Compact incorporates the provisions of the Colorado River Compact. Article I provides:

> "(a) The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System, the use of which was apportioned in perpetuity to the Upper Basin by the Colorado River Compact; to establish the obligations of each State of the Upper Division with respect to the deliveries of water required to be made at Lee Ferry by the Colorado River Compact; to promote interstate comity; to remove causes of present and future controversies; to secure the expeditious agricultural and industrial development of the Upper Basin, the storage of water and to protect life and property from floods.
>
> "(b) It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto."

6. The Treaty Between The United States And Mexico.

In 1945, the government of the United States entered into a treaty with the government of Mexico governing the international uses of the Rio Grande and the Colorado Rivers (U. S. Treaty Ser. No. 994, 59 Stat. 1219 (1945)). By virtue of this treaty, the United States is obliged to deliver 1,500,000 acre-feet of Colorado River water per annum to Mexico (Article 10(a)).

II. THE PLEADINGS.*

1. Arizona.

Allegations made by the State of Arizona in its Bill of Complaint and supplemental pleadings are:

1. The California defendants are limited in their use of water from the Colorado River System by virtue of the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act, to 4,400,000 acre-feet per annum (Bill of Complaint, pp. 28-29).

2. Presently, the California defendants are using 5,430,000 acre-feet per annum of water from the Colorado River System (Bill of Complaint, pp. 28-29).

3. The State of Arizona is entitled to use 3,800,000 acre-feet of water from the Colorado River System (Bill of Complaint, p. 26).

4. Due to the California defendants' excessive use of Colorado River System water, the State of Arizona's right to use water of the Colorado River System is being injured (Bill of Complaint, p. 27).

5. That the State of Arizona is a party to the Colorado River Compact and a beneficiary of the California Limitation Act, and may therefore enforce the terms of these and related documents on the California defendants (Bill of Complaint, p. 19).

6. That this case is one in which the United States Supreme Court should recognize the original jurisdiction vested therein (Bill of Complaint, p. 6).

The prayer of Arizona's Complaint seeks the following relief:

1. That the State of Arizona's title to the use of 3,800,000 acre-feet per annum of Colorado River Sys-

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* Under this heading the complete Pleadings are not given. However, the parts to which reference is made are thought sufficient to permit the development of the subject matters involved on the joinder Motion.
The Special Master has carefully studied the pleadings in their entirety.

tem water to be forever quieted (Bill of Complaint, p. 21).

2. That the California defendants' title to Colorado River System waters be declared not to exceed 4,400,000 acre-feet per annum (Bill of Complaint, p. 18).

3. That the California defendants be enjoined from asserting any claims to Colorado River System water which will conflict with the State of Arizona's right to 3,800,000 acre-feet of said water per annum (Bill of Complaint, p. 30).

4. That the respective rights to excess water in the Lower Basin to be declared, and each State within the Lower Basin be decreed entitled to a certain percentage thereof (Bill of Complaint, p. 30).

5. That beneficial consumptive use be measured in terms of main stream depletion (Bill of Complaint, pp. 30-31).

6. That evaporation losses in main stream reservoir to be charged against the apportionment of each State in the same proportion that the State uses water in the Lower Basin (Bill of Complaint, p. 31).

7. Any further relief which may be proper (Bill of Complaint, p. 31).

2. California Parties.

In its answer to the Bill of Complaint filed by the State of Arizona, the California defendants present four affirmative defenses. They are as follows:

The first affirmative defense is:

"Defendants Have the Right to the Beneficial Consumptive Use of 5,362,000 Acre-feet per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and

California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto." (California parties' Answer, p. 1)

The second affirmative defense is as follows:

"Arizona Is Estopped and Precluded From Asserting the Interpretations of the Colorado River Compact, the Statutory Compact, and the Defendants' Contracts Alleged in the Bill of Complaint." (California parties' Answer, p. 39)

The third affirmative defense is:

"Defendants Have Appropriative Rights to the Beneficial Consumptive Use of Not Less Than 5,362,000 Acre-feet of Colorado River System Water per Annum, Senior to the Claims Made by Arizona in the Bill of Complaint." (California parties' Answer, p. 46)

The fourth affirmative defense is:

"The United States Is an Indispensable Party." (California parties' Answer, p. 54).

This fourth defense is now withdrawn since the United States was given leave to intervene and will be bound by any decree or judgment which the Court renders herein.

A traverse is made admitting, denying and alleging, as set forth on pages 55 to 70 of the Answer.

The prayer is found on page 80 of the Answer. The California parties filed no cross bill.

3. The United States.

The United States of America, in its Petition for Intervention, made the following allegations:

1. The United States of America has a right to the use of an undetermined amount of Colorado River System water by virtue of:

a. Its guardianship over Indian tribes entitled to waters (Petition for Intervention, p. 23).

b. Its interest in fish, wildlife, flood control and navigation in the Colorado River (Petition for Intervention, p. 24).

c. The need of National Parks and other governmental departments (Petition for Intervention, p. 11).

d. The duties it has under international treaties to deliver Colorado River System waters (Petition for Intervention, p. 12).

2. That the United States of America's right to the use of Colorado River System waters may be impaired by rights asserted by the parties to this cause.

The United States prays that its interests and rights be declared, and that the parties to this cause have their rights declared so that the conflicting rights do not impair one another.

It should be noted at this juncture that it is the opinion of the Master that the claims made by the United States should be concisely developed and for this reason it will be necessary for the Master to conduct a pre-trial conference, at which time this and other helpful specificities may be set forth for the purpose of expediting the consideration on the merits.

4. Nevada.

The State of Nevada, in its Petition for Intervention, made the following allegations:

1. That at the present time, the States of the Lower Basin, as defined by the Colorado River Compact, are entitled to use only the 7,500,000 acre-feet per annum apportioned to the Lower Basin by Article III(a) of the Colorado River Compact (Petition for Intervention, pp. 13-14).

2. The State of Nevada is presently entitled to use 539,000 acre-feet per annum of the waters allocated

the Lower Basin by Article III(a) of the Colorado River Compact (Petition for Intervention, p. 10).

3. In 1963, when the Lower Basin shall become entitled to use the 1,000,000 acre-feet per annum apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, Nevada will have the right to use 900,000 acre-feet per annum of Colorado River System water (Petition for Intervention, p. 13).

III. THE LAW APPLICABLE.

The resolution of this question of whether or not the absent States should be joined to this cause depends upon whether or not they are "necessary parties".

By virtue of the pleadings on the merits of this cause, the areas of controversy have been drawn. The Special Master, it should be noted, makes no determination of facts. Such determinations are unnecessary on this joinder Motion. To undertake them on the Motion would be time consuming for all. Some of the principal matters to be considered on this joinder motion include:

1. The Colorado River Compact.
   (a) Is Arizona a party thereto?
   (b) The interpretation of certain terms, and provisions of said Compact.
2. The Boulder Canyon Project Act.
3. The claims of the United States of America, Intervener.
4. The status of the States of New Mexico and Utah as States of the Lower Basin as well as of the Upper Basin.
5. The California Limitation Act.

1. The General Rules Regarding Necessary Parties.

The California defendants, to support their contention that the Upper Basin States are necessary parties, say that the case of *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) is applicable. In that case, the court, at page 139, set forth this definition of parties:

> "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. *Persons having an interest in the controversy,* and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (Emphasis added)

The reasons urged by the proponents of the Motion to find the absent States necessary or indispensable parties under these definitions in test are:

1. Rule 9(2) of the Revised Rules of the Supreme Court makes the Federal Rules of Civil Procedure applicable to cases of original jurisdiction of this Court. Rule 9(2) says:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appro-

priate, may be taken as a guide to procedure in original actions in this court."

2. Rule 19 of the Federal Rules of Civil Procedure adopts the test of necessary parties set forth in *Shields* v. *Barrow* (quoted *supra* at page 23). Rule 19 says:

> "*Necessary Joinder of Parties.*—(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.
>
> "(c) *Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

Rule 9(2) provides first that "the *form* of pleadings and motions in original actions shall be governed as far as may be by the Federal Rules of Civil Procedure". There has been no variance from this broad advice in the instant proceeding. The remaining part of the rule provides "in other respects these rules, *where their application is appropriate, may be taken as a guide* to procedure in original actions in this Court" (Emphasis added). In this we find no intent to abandon, to limit, or to vary the general principle applied by this Court, beginning at least as early as the case of *Louisiana* v. *Texas,* 176 U.S. 1 (1900), to the effect that parties must not only have a real interest in the subject matter of a dispute involving sovereign States, but also that the dispute must concern a presently "justiciable controversy." Of the long line of this Court's opinions adhering to this principle, we shall select a few for comment later in this report. It is quite unnecessary to comment on the reasons for committing controversies between States to the Supreme Court by the Constitutional Convention. However, the statement in *Missouri* v. *Illinois,* 180 U.S. 208, 241 (1900), that it is a substitute for war is amply supported by that history.

As to Rule 19 of the Rules of Civil Procedure, it is not made applicable by Rule 9(2) if it conflicts with the principles governing controversies between States to which reference is made above. Also, we comment, that, as pointed out later in this Report, the States of the Upper Division, in respect to the Upper Basin, have no joint interest with the present parties in the subject matter—to-wit, the allocation of the waters of the Lower Basin; and also, complete relief to the present parties can be given without the presence of the States of the Upper Basin, as Upper Basin States.

The opponents of this Motion say that in this case a proper test as to who are necessary parties is whether or not as to them is there a "present justiciable controversy". The opponents maintain that this is true as a policy on the basis of past decisions rendered by this Court in interstate litigation, a number of which are cited in the Briefs and Arguments in the joinder Motion. Indicative of this rule is the following quotation from *Colorado* v. *Kansas,* 320 U. S. 383 (1943) at pages 393-4:

> "In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

IV. THE APPLICATION OF THE GENERAL RULE TO THIS CASE.

1. The Colorado River Compact.

The California defendants maintain that the following rules apply to litigation in which a contract is the subject of litigation, and that these rules apply in this case because an interstate compact is no more than a contract between States. The rules and their authorities are:

(a) All parties to a compact must be joined. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254

U.S. 77 (1920); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *National Licorice Co.* v. *N.L.R.B.,* 309 U.S. 350 (1940); *Gauss* v. *Kirk,* 198 F. (2d) 83 (CA DC, 1952).

(b) Parties having interdependent rights and obligations under a compact must be joined. *Commonwealth Trust Company of Pittsburgh* v. *Smith,* 266 U.S. 152 (1924); *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 269 U.S. 459 (1926); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. (2d) 481 (1948), cert. denied 336 U.S. 945 (1949) and others.

(c) All parties having interests in water from a river common to them all must be joined. *Arizona* v. *California et al.,* 283 U.S. 423 (1931); *Arizona* v. *California et al.,* 292 U.S. 341 (1934); *Arizona* v. *California et al.,* 298 U.S. 558 (1936); *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Railroad Company* v. *Orr,* 18 Wall. 471 (U.S. 1873).

The California defendants say that these rules are applicable because (1) a construction of the Compact will be necessary for a determination on the merits of this cause; (2) the absent States' rights and obligations are defined in the same article in the Compact (Article III (a), (b), (c), (d), (f) and (g)) as the rights and obligations of the present parties; and (3) the Compact deals with the Colorado River System in which all the parties are interested, and in order to make any determination of rights to Colorado River System water which will be effective, all the parties having an interest therein must be joined.

The opponents to this Motion argue that to join the Upper Basin States would be to disregard long established

precepts of this Court which have been laid down in prior interstate litigation. These precepts and their authorities are:

(a) The test with respect to joinder of parties in interstate litigation set forth in *Colorado* v. *Kansas,* 320 U.S. 383 (1943) (quoted *supra* at page 26).

(b) Before the Court will grant relief against a State the complaining State must show an existing or presently threatened injury of serious magnitude. *Missouri* v. *Illinois,* 200 U.S. 496 (1906); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931) and others.

(c) A potential threat of injury is insufficient to justify an affirmative decree against a State. *Alabama* v. *Arizona,* 291 U.S. 286 (1934).

(d) The judicial power does not extend to the determination of abstract questions. *New York* v. *Illinois,* 274 U.S. 488 (1927); *United States* v. *West Virginia,* 295 U.S. 463 (1935).

(e) The Court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity. *Arizona* v. *California et al.,* 283 U.S. 423 (1931); *United States* v. *West Virginia, supra; Massachusetts* v. *Missouri,* 308 U.S. 1 (1939).

(f) It is beyond the judicial function to predetermine the rights of sovereignties pregnant with future controversies. The courts deal with concrete legal issues, not abstractions. *United States* v. *Appalachian Electric Power Company,* 311 U.S. 377 (1941).

The opponents to this Motion submit that these rules are a bar to the joinder of the Upper Basin States be-

cause (1) there is no relief sought from the Upper Basin; (2) there is no allegation that the Upper Basin is not abiding by the terms of the Compact; and (3) the interpretations of these various Articles can have no effect on the Upper Basin because they are not presently using their entire appropriation of water under Article III(a). The division of the Basins made by Article I of the Compact insulates the Upper Basin States from any interest in the division of Lower Basin water.

It is the Master's opinion, after thorough consideration of the complete, and able briefs and oral arguments heard upon this Motion, that in coming to a conclusion there must be kept in view the questions as to what, if any, legal interest the Upper Basin States have in the present litigation and whether or not as to them any justiciable controversy exists.

In considering the many authorities cited by the parties and by the States sought to be joined, we have endeavored to keep in mind the admonition of Chief Justice Marshall given in the case of *Cohens* v. *West Virginia,* 6 Wheat. 264 (U.S. 1821) at pages 399-400:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The Colorado River Compact is a controlling feature in this case. It is a long established rule that in construing any instrument it must be considered as a whole, (*Neilson* v. *Lagow*, 53 U.S. 98 (1851)). Also, it is an oft-quoted rule that several writings executed by the same parties relating to the same subject matter may be read together as parts of one transaction (*Bailey* v. *Hannibal & St. Joseph Railway Co.*, 84 U.S. 96 (1872)). For these reasons, the Colorado River Compact and all the documents which incorporate its provisions may be considered in determining the question of the interest herein of the Upper Basin States and whether or not as to them a justiciable controversy exists.

Article I of the Colorado River Compact provides:

> "The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; *to promote interstate comity; to remove causes of present and future controversies;* and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. *To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.*" (Emphasis added)

From a reading of this Article, together with all other relevant documents, it must be considered that it was the intent of those relying thereon to avoid litigation if possible.

The proponents of this Motion rely on many cases to substantiate their argument. All of these have been considered.

The case of *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) is the basis for their argument as to the rule of law which must be followed in deciding whether or not these absent States must be joined to this action. It was a case in which private parties were the litigants.

The proponents cite cases in which the doctrine of *Shields* v. *Barrow* has been followed.

The *Shields* case on page 139 gives a definition of necessary parties:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the Court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties. . . ."

The proponents of this Motion cite the following cases: *Railroad Company* v. *Orr,* 18 Wall. 471 (U.S. 1873); *McArthur* v. *Scott,* 113 U.S. 340 (1885); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *Commonwealth Trust Company of Pittsburgh* v. *Smith,* 266 U.S. 152 (1924); and *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895). With the exception of one, each of these cases did not involve a State as a party. In the case of *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895), the Court dismissed the Bill of Complaint because this was not a cause within its original jurisdiction, saying on pp. 261-262:

> "It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court (*Marbury* v. *Madison*), 5 U.S. 1 Cranch, 137, 173, 174 [2:60, 72] and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may

> have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the state is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state."

Next are cited cases in which the definition of indispensable parties set out in *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) at page 139 was followed, that definition being:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

These cases are *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77 (1920); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Barney* v. *Baltimore,* 6 Wall. 280 (U.S. 1868) and *Arizona* v. *California,* 298 U.S. 558 (1936).

Arizona v. *California,* 298 U.S. 558 (1936) was a suit in which Arizona sought to have its rights to water in the Colorado River System declared. This Court denied the petition to file the Bill of Complaint for two reasons. They were (1) because Arizona's Bill of Complaint set forth no justiciable controversy, and (2) the United States was an indispensable party and had not been joined, and could not be joined without its consent. This case supports the doctrine that in litigation between States a justiciable controversy must exist to induce this Court to take it under its original jurisdiction. In the instant case, the necessary parties have been joined.

Niles-Bement-Pond Co. v. *Iron Moulders Union,* 254 U.S. 77 (1920) was a case involving private parties. This case followed the *Shields* case test of indispensability. However, at page 80 of the opinion, the Court said:

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not. . . ."

This indicates that judgment must be used in applying the rules respecting who are necessary or indispensable parties in controversies between Sovereign States.

The proponents of this Motion cite cases in which the rule of *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) was followed, and in which it has been said that all parties to a contract must be joined in litigation dealing with the contract if an effective decree is to be entered. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77 (1920); *Gregory* v. *Statson,* 133 U.S. 579 (1890). It is urged that this rule can be logically followed to the conclusion that all parties to a Compact must be joined when that Compact is in litigation, because of the statement in *Green* v. *Biddle,* 8 Wheat. 1 (U.S. 1823) that a Compact is no more than a contract between States.

Although a Compact may be no more than a contract between States, it does not follow that all the parties to the Colorado River Compact must be parties here.

The Compact, by its terms, provides two separate groups in the Colorado River Basin. Each of these is independent in its sphere. The members of each group make the determinations respecting that group's problems. To destroy this arrangement made by the Colorado River Compact and to make the members of one group parties to the controversies of another group would be to deny the arrangement to keep the two groups separate and apart. The many

cases which have been cited in support of the Motion do not bear upon this plain fundamental consideration. Save for some justiciable controversy existing between these two groups or between members of one group in respect to members of another group, there can be no sound reason for joining in a controversy within one group members of another group on the ground that in the making of the separation by the Colorado River Compact the members of both groups were parties thereto.

By Article I of the Colorado River Compact, the Upper and Lower Basins are separated for the purposes stated, one of them being that of avoiding litigation. One cannot rely upon an instrument such as the Colorado River Compact and avoid its terms. The proponents of the Motion rely upon the Colorado River Compact and say that the Upper Basin States should be joined because they were parties to it. It cannot be that this may be done when the instrument itself forbids it. Later in this report it will be observed that there are small parts, respectively, of Utah and New Mexico that are within the Lower Basin. As to these, we give special attention, beginning on page 60 of this report.

The cases of *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 269 U.S. 459 (1926); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. (2d) 481 (CCA 7, 1948), cert. denied 336 U.S. 945 (1949); *Franz* v. *Buder,* 11 F. (2d) 854 (CCA 8, 1926), cert. denied 273 U.S. 756 (1927) have been cited for the proposition that parties having interdependent rights and obligations under a compact must be joined.

These were not cases between States falling under the original jurisdiction of this Court. There was no such

relationship of the parties as we find in the instant cause. As far as we know, the situation here is unique with respect to the fact that the entire Colorado River System is divided into two independent Basins. It may be compared to a case where four sovereigns make an agreement with three other sovereigns under which a division between the two groups is made of territory common to all, with provision made for the settlement of problems arising in one group to be settled by that group. It is because this Colorado River Compact seems so important to the attainment of allocations with respect to Colorado River waters that for convenience we have attached to this report the complete text of said Compact (Appendix A).

The cases of *Arizona* v. *California,* 283 U.S. 423 (1931); *Arizona* v. *California,* 292 U.S. 341 (1934); *Arizona* v. *California,* 298 U.S. 558 (1936) and *Railroad Company* v. *Orr,* 18 Wall. 471 (U.S. 1873) are cited to substantiate the proposition that all parties having an interest in the subject matter of the litigation must be joined. This rule cannot apply to this cause, because by Article III of the Colorado River Compact there was apportioned to each basin a given amount of water, and it is impossible for the Upper Basin States to have any interest in water allocated to the Lower Basin States, which is the subject matter of this litigation.

This cause was initiated by Arizona, as a Lower Basin State to quiet its title to waters of that Basin.

The caution with which the Supreme Court approaches interstate litigation, is illustrated by a long line of opinions given over many years.

In *New York* v. *New Jersey,* 256 U. S. 296 (1921), the State of New York sought to permanently enjoin the

State of New Jersey from discharging sewage into New York harbor. The opinion written for the Court by Mr. Justice Clarke contains the following observations with respect to the exercise of the Court's original jurisdiction in interstate litigation (p. 309):

> "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence."

The case of *Alabama* v. *Arizona,* 291 U. S. 286 (1934) considered an application by Alabama for leave to file a Bill of Complaint in this Court against the State of Arizona. That Complaint sought to have a statute of the State of Arizona which prohibited the sale of goods produced by convict labor declared unconstitutional.

In denying leave to file, this Court, in an opinion written for it by Mr. Justice Butler, made the following pronouncements with respect to the circumstances under which it will exercise its original jurisdiction in interstate litigation (pp. 291-292):

> "This court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States,* 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250; *Willing* v. *Chicago Auditorium Asso.* 277 U. S. 274, 288, 72 L. ed. 880, 884, 48 S. Ct. 507, and cases cited; *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 261, 262, 77 L. ed. 730, 734, 735, 53 S. Ct. 345, 87 A. L. R. 1191. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana* v. *Texas,* 176 U. S. 1, 15, 44 L. ed. 347, 353, 20 S. Ct. 251. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call

for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois,* 200 U. S. 496, 520, 521, 50 L. ed. 572, 578, 579, 26 S. Ct. 268; *New York* v. *New Jersey,* 256 U. S. 296, 309, 65 L. ed. 937, 943, 41 S. Ct. 492; *North Dakota* v. *Minnesota,* 263 U. S. 365, 374, 68 L. ed. 342, 345, 44 S. Ct. 138. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent."

In the case of *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931), Connecticut instituted suit to enjoin the State of Massachusetts from diverting water from the watershed of the Connecticut River. This Court, in an opinion written by Mr. Justice Butler, pointed out some of the circumstances under which the Court will not exercise its original jurisdiction in interstate litigation. On page 669 it is said:

"The governing rule is that this court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York* v. *New Jersey,* 256 U. S. 296, 309, 65 L. ed. 937, 943, 41 S. Ct. 492; *Missouri* v. *Illinois,* 200 U. S. 496, 521, 50 L. ed. 572, 579, 26 S. Ct. 268. The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties."

In the case of *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939) there was considered a Motion for leave to file a Bill of Complaint by Massachusetts which sought to have determined which State, Massachusetts or Missouri, had

the right to levy an inheritance tax upon the estate of a Massachusetts resident whose estate was situated in the State of Missouri.

This Court, in an opinion written for it by Chief Justice Hughes, denied the motion. The first reason given for the refusal is as follows (p. 15):

> "The proposed bill of complaint does not present a justiciable controversy between the States. To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."

The Supreme Court of the United States long has been circumspect in taking cases in which sovereign states are the parties, as was expressed by *Colorado* v. *Kansas,* 320 U. S. 383 (1943), quoted *supra* at page 26; *New York* v. *New Jersey,* 256 U.S. 296 (1921); *Missouri* v. *Illinois,* 200 U.S. 496 (1906); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931); and many others.

On the joinder Motion before us, both sides place reliance upon the Nebraska-Wyoming-Colorado litigation. They arrive at different conclusions respecting this Court's opinions and action thereon. The Nebraska-Wyoming-Colorado litigation involves three cases, to-wit: *Nebraska* v. *Wyoming,* 295 U. S. 40 (1935); *Nebraska* v. *Wyoming,* 296 U. S. 553 (1935); and *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945). The parties have thoroughly treated these in oral arguments and briefs. Nebraska, with leave, filed a Bill of Complaint in this Court seeking to quiet its rights to waters of the North Platte River. It joined

Wyoming as the sole defendant. Wyoming moved to dismiss the Bill of Complaint. One of the reasons submitted was the fact that the North Platte River was common not only to Nebraska and Wyoming, but also to Colorado. For this reason, Colorado was said by Wyoming to be a necessary party.

The Court considered this argument in *Nebraska* v. *Wyoming,* 295 U. S. 40 (1935). The opinion states (p. 43):

> "Colorado is said to be an indispensable party, because the bill discloses that the North Platte rises in that state and drains a considerable area therein. The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

Wyoming's motion to dismiss was denied.

Wyoming then filed an Amended and Supplemental Answer, which charged contemplated and threatened diversions by Colorado of waters from the North Platte River, which was the subject matter of the controversy. Indicative of the allegations made by Wyoming is the following quotation from the Twentieth Count of its Amended and Supplemental Answer:

> "* * * Defendant says the respective rights of Colorado and Wyoming to the use of the waters of the North Platte River have never been determined as between said states, and that the State of Colorado

and its citizens *now contemplate and for a long time have contemplated and threatened and now threaten* the diversion and use in Colorado of waters of the North Platte River, which diversion and use would have the effect of taking from the North Platte River a large quantity of water, to wit, upwards of 250,000 acre feet per annum, all of which water now flows in the Channel of the North Platte River into the State of Wyoming, and will of necessity be the subject matter *pro tanto* of the determination of the rights in this action of the present parties." (Emphasis added)

The Amended and Supplemental Answer averred not only that Colorado was then threatening to divert upwards of 250,000 acre-feet per annum of waters of the North Platte River, to which the States of Nebraska and Wyoming asserted rights, but also pleaded that the sum of the claims asserted to North Platte River waters by the States of Nebraska and Wyoming, plus the present and threatened diversions by the State of Colorado, were greatly in excess of the total supply of water available in the North Platte River to meet the claims and diversions.

After the filing of Wyoming's Amended and Supplemental Answer, this Court, in a memorandum decision, joined the State of Colorado as a party to the cause (*Nebraska* v. *Wyoming,* 296 U. S. 553 (1935)). This joining of the State of Colorado indicates no reversal of the Court's position, respecting the legal principles on which the first decision was grounded. Rather, the Court, when making the decision to join the State of Colorado, was considering a new set of allegations—allegations which disclosed a present justiciable controversy existing between the State of Wyoming and Nebraska and the State of Colorado.

In the instant case, we do not have a situation paralleling that which was considered by the Court when it

joined Colorado as a party because (1) by the division into the Upper and the Lower Basins made by Article I and the apportionments made by Article III, the Upper Basin States are foreclosed from asserting any claim to water available to the present (Lower Basin) parties; (2) there is no allegation here that the Upper Basin States are threatening to infringe any rights to the use of water which the present parties now possess; and (3) there is no allegation in any pleading that the Upper Basin States are failing to meet, or are threatening not to meet, the delivery obligations to the Lower Basin States. For these reasons, the facts as presented in this cause are similar to those presented to the Court when it declared Colorado not to be a necessary party. In the cause before us, the Upper Basin States in their Upper Basin capacities should not be joined. This is because of lack of interest in the Lower Basin waters and because no justiciable controversy exists.

In *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), this Court made a determination on the merits of the Nebraska-Wyoming-Colorado litigation. In this opinion, the Court confirmed the view that when Colorado was made a party to the cause, it was because the Court then found a present justiciable controversy existing between the State of Colorado and the States of Nebraska and Wyoming. As evidence of this finding, the following is quoted from that opinion at page 610:

> "But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction."

2. Prior Arizona v. California Litigation.

The California defendants seek to support their view that these absent States should be joined by pointing out that prior to this case, Arizona had started three other suits involving the Colorado River Compact, and in each of them all of the parties to the Compact were named as defendants.

The suits were:

1. *Arizona* v. *California et al.*, 283 U. S. 423 (1931) to enjoin construction of Hoover Dam and the All-American Canal, to invalidate the Colorado River Compact, and to declare unconstitutional the Boulder Canyon Project Act. On defendants' Motion, the Bill of Complaint was dismissed.

2. *Arizona* v. *California et al.*, 292 U. S. 341 (1934) to perpetuate the testimony of the negotiators of the Colorado River Compact. The Motion for leave to file the Bill was denied.

3. *Arizona* v. *California et al.*, 298 U. S. 558 (1936) for a Motion for leave to file a Bill of Complaint against the parties of the Colorado River Compact seeking an equitable apportionment of Colorado River System water.

In the foregoing cases, Arizona joined the other six States who are members of the Colorado River Compact. In this we find nothing in the nature of a *quasi estoppel* against the complainant here, and nothing controlling with respect to who are necessary or indispensable parties in the instant cause. Also, none of the suits progressed far enough for the named defendants to question the propriety of their joinder. The question here is—are the Upper Basin States necessary parties in the cause before us?

The California defendants contend that the Upper Basin States are necessary parties to this cause because the Colorado River Compact, to which they are parties, will be necessarily construed in the consideration of the merits of this cause. With respect to this contention the case of *Hinderlider* v. *La Plata River & Cherry Creek Ditch Company*, 304 U.S. 92 (1938) is of interest. In that case, the States of Colorado and New Mexico entered into a Compact, approved by the United States, apportioning the use of waters of the La Plata River. Under the terms of the Compact, the State Engineer of each State was given the duty of administering the water so apportioned within the boundaries of his own State.

The La Plata River & Cherry Creek Ditch Company, a water user in Colorado, sued Hinderlider, the State Engineer of Colorado, for unlawfully depriving the Ditch Company of water. The suit was instituted in the District Court of Colorado. Hinderlider's defense was the Compact. The trial court held the Compact unconstitutional and void. This decision was affirmed by the Supreme Court of Colorado.

The case came to the United States Supreme Court for review of the ruling of the Colorado Supreme Court (101 Col. 73, 70 P. (2d) 849).

This Court, on pages 110-111, had the following to say about the necessity that the two States, who were the parties to the Compact, be parties to the cause because the validity and effect of the Compact were being considered:

> "It has been suggested that this Court lacks jurisdiction to determine the validity and effect of the Compact because Colorado and New Mexico, the parties to it, are not parties to this suit and cannot be made so. The contention is unsound. The cases are

many where title to land dependent upon the boundary between States has been passed upon by this Court upon review of judgments of federal and of State courts in suits between private litigants."

3. Claims Of The United States Of America, Intervener.

The California defendants urge the view that the United States of America, as an intervener in this cause, has the same rights as an original party to determine the scope of the controversy. It is the Master's view that there is no need to answer this, because even were it so, this is disposed of by the fact that the United States here asserts no rights against the Upper Basin States as to Upper Basin waters.

We find that the United States, as an intervener, does not attempt, even were it allowable so to do, to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition of Intervention sets forth the following (p. 25):

> "General Claims of the United States of America in the Colorado River System *in the Lower Basin*
>
> "The United States of America asserts claims, *as against the parties to this cause,* of *rights to the use of water in the Colorado River* and its tributaries. . . . " (Emphasis added)

The parties were and are Lower Basin States.

4. The California Limitation Act.

The California defendants urge that the joinder of these Upper Basin States may be premised upon the fact that these absent parties are co-beneficiaries of the California Limitation Act. The Master here relies upon what already has been said about the Colorado River Compact

and the circumstances under which it was enacted. These are set out above in Sec. 13(a) of the Boulder Canyon Project Act, quoted *infra*, on page 47, and Article I of the Colorado River Compact, quoted on page 30. From these, it will be seen that these Upper Basin States could not sue as beneficiaries of the California Limitation Act, due to the separation of basins made by Article I of the Colorado River Compact, whereby the Upper Basin States, after making delivery at Lee Ferry, have no further interest in the water, and how or by whom it is utilized in the Lower Basin. This view is enforced by the fact that California gets its waters from the Lower Basin, and obviously the limitation which it is under with respect to waters from the Colorado River System are waters of the Lower Basin. As heretofore pointed out, no claim is made that the Upper Basin is not performing its obligations with respect to the delivery of waters to the Lower Basin.

5. Considerations Of The Colorado River Compact, Which Are Claimed By The Proponents Of The Motion To Be Sufficient To Require The Joinder Of The Upper Basin States, Present The Question: Is The State Of Arizona A Member Of The Colorado River Compact?

This question is raised by the pleadings of this cause. (California defendants' Answer, p. 40). Arizona did not ratify the Compact within the time prescribed by Sections 4 and 13(a) of the Boulder Canyon Project Act. Due to Arizona's failure to ratify, the California Limitation Act became effective, as did the Colorado River Compact. In 1944, the Arizona Legislature passed an act ratifying the Compact (Ch. 5, 17th Legislature; Session Laws of Arizona, 1944, pp. 427-428). This question is one

which arises and is supplemented to two main questions on the merits: (1) If Arizona is not a party to the Colorado River Compact, may she now enforce it, or allege any interpretation thereof? (2) If Arizona is now a party to the Compact, does this revoke the California Limitation Act?

The California defendants maintain that this question raises a justiciable controversy between the present parties and the four absent States, because (1) the absent States are members of the Compact, (2) a Compact is no more than a contract, and (3) parties to a contract cannot have new parties added to that contract, anymore than could new provisions be added to it, in litigation to which they are not parties.

The Upper Basin opponents to this Motion are parties to the Compact, but deny that the question of Arizona's status respecting the Colorado River Compact is sufficient to grant the joinder motion because (1) to them it is immaterial whether or not Arizona is a party, and (2) their obligations and rights will not be affected regardless of the determination of this question since they are controlled by the Compact.

Arizona pleads that it is a party to the Compact. The proponents of the Motion deny this. No one has questioned the membership of the Upper Basin States in the Colorado River Compact or their rights and obligations thereunder. No one charges them with any failures of performance. How the waters of the Lower Basin are apportioned and whether in that apportionment Arizona technically or in equity is a party to the Colorado River Compact can be of no interest to them as Upper Basin States. The Court can do complete justice between the present parties without affecting the rights of the Upper Division States with

regard to the waters of the Upper Basin. Further, we cail attention to the provisions of Articles VIII and IX of the Compact and Section 13(a) of the Boulder Canyon Project Act following:

> "Article VIII. *Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact.* Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.
>
> All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate." (Emphasis added)
>
> "Article IX. Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions."

Section 13(a) of the Boulder Canyon Project Act provides:

> "The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled 'An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes,' is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact

binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided."

The joinder of these Upper Basin States is not necessary when based upon an assertion of the existence of controversy among the Lower Basin States as to Arizona's status in relation to the Compact because (1) this is a suit by a State to quiet title to water of the Lower Basin; (2) the Compact does not apportion water among the States—but only between the Basins; (3) by considering Article VIII of the Compact it is clear that, regardless of how this question is resolved, it will not determine Arizona's right to waters of the Colorado River System. The only part of the Colorado River System involved here in which it has an interest is the Lower Basin; (4) the Compact does not provide for any change in the Upper Basin's rights or obligations whether or not Arizona becomes a party to said Compact; (5) should resolution of this question have a bearing on whether or not Arizona becomes a party to said Compact; or not, is a matter of concern to water users in the Lower Basin only.

6. Is There A Direct Relationship Between The Provisions Of Article III(d) That The States Of The Upper Basin Shall Not Deplete The Flow Of Water At Lee Ferry Below 75,000,000 Acre-Feet In Each Ten Year Period, And The Apportionment Of 7,500,000 Acre-Feet Per Annum To The Lower Basin By Article III(a)?

This question is raised by the pleadings. It has a relation to the question of whether or not the use of Gila

River water by Arizona is to be charged to the 7,500,000 acre-feet per annum apportioned to the Lower Basin by Article III(a), or the 1,000,000 acre-feet per annum given the Lower Basin by Article III(b).

The California defendants say that this question, by virtue of the fact that it must be resolved in a determination of the merits, forms a justiciable controversy between the present parties and the Upper Basin States. The reasoning advanced by the California parties is, that if Arizona's view is followed, the use of Gila River waters will be charged to the apportionment made by Article III(b). Arizona also claims right to 2,800,000 acre-feet per annum from the main stream. Thus, if Arizona gets 2,800,000 acre-feet per annum from the main stream, California 4,400,000 acre-feet per annum from the main stream, and Nevada 300,000 acre-feet from the main stream, it will use the entire 75,000,000 acre-feet the Upper Basin delivers at Lee Ferry over every ten year period. The effect of this will be that in order for the Lower Basin States to use the 7,500,000 acre-feet per annum to which they are entitled by Article III(a) of the Colorado River Compact, the Upper Basin must deliver 7,500,000 acre-feet per year at Lee Ferry. The California defendants contend that this is different than the 75,000,000 acre-feet the Upper Basin is obliged to deliver at Lee Ferry in each ten year period, as per Article III (d) of the Compact and that should Arizona's view be followed on a decision on the merits, it would increase the Upper Basin's delivery burden.

The Upper Basin States, and Arizona say that this question does not now constitute a justiciable controversy, and therefore is not a basis for joining these absent States because (1) the Upper Basin, as stated by counsel, is not

now using more than one-third of the 7,500,000 acre feet per annum apportioned to it by Article III(a) of the Compact, and there is no indication that the uses shall increase in the near future; also there is no averment that the Upper Basin is using more than its share; (2) so long as the Upper Basin does not use its entire apportionment or more than its share, there will be more than enough water delivered at Lee Ferry to meet all needs; and (3) there is no need at present to decide this question.

Of course, there is a possibility that the question may arise in the future. That future is likely to be a distant one.

This question does not now raise a justiciable controversy between present parties and the Upper Basin States because (1) it is clear from Article VIII of the Colorado River Compact that the Upper Basin States, by virtue of the erection of the Hoover Dam are "insulated" from further claims by Lower Basin States; (2) Article III(c) of the Compact makes it apparent that the Mexican supply shall come from surplus waters of the Lower Basin and there is no allegation that such surplus does not exist; (3) there is no present foundation for the question "How shall Mexican commitments be made up in case a surplus fails to exist?"; (4) it is clear that in any instance the Upper Basin cannot use more than 7,500,000 acre-feet per annum (Article III(a) of the Compact) and they cannot withhold water not used (Article III(e) of the Compact) and therefore the provision of Article III(d) would come into effect only in time of drought; and (5) it will be noted upon Plate 1 of the California defendants' Appendixes to their Answer that there are more sources of supply of water to the Lower Basin than the Gila River and the water delivered at Lee Ferry by the Upper Basin. There is no problem in the relationship so long as all parties' rights are satisfied.

There follows a series of questions raised by the pleadings on the merits of this cause which pertains to rights, and conversely, to obligations. These questions should be resolved on final hearing.

7. Does The Provision Of Article VIII Of The Compact That "Present Perfected Rights Are Unimpaired By This Compact" Mean Unimpaired Both As To Quantity And Quality, Or Quantity Alone?

The California defendants state that this question presents a basis for joining the Upper Basin States because it will affect their delivery obligations.

This does not now raise a justifiable controversy because there is no allegation anywhere that the quality of the water delivered at Lee Ferry by the Upper Basin States, if material, is unsuitable for the uses mentioned in Article IV of the Compact. Until such time, if ever, that such fact exists, there is no question calling for decision.

8. How Shall "Beneficial Consumptive Use" (Article II Of The Compact) Be Measured?

The California defendants say the resolution of this question requires the joinder of the Upper Basin States because (1) how can we be sure that they are not using their entire apportionment unless the term is defined; (2) the total flowage in terms of the entire Colorado River System cannot be determined in terms of "beneficial consumptive use" unless these absent parties are joined; and (3) the same interpretation of this term must be followed throughout the entire Colorado River System.

The opponents of the Motion say that this question does not form a basis for joining them because (1) they are not presently using their entire apportionment, as per Article III(a) of this Compact, and do not plan to do so in the

immediate future; and (2) whatever decision is made of this problem the Upper Basin States will follow it.

We find no warrant in this for joining the Upper Basin States, with respect to that Basin because (1) how "beneficial consumptive use" shall be measured in each Basin is a question for each Basin to determine so long as the Colorado River Compact endures. The quantities of water for the Upper Basin and its obligations to deliver are fixed by the Colorado River Compact; (2) what matter how the individual Basins measure "beneficial consumptive use" so long as it is possible to interpolate the two methods; and (3) as long as the Upper Basin is not using its entire apportionment (here no party alleges that it is), how can it be said that they are interested in the system used in the Lower Basin?

9. How Shall Evaporation Losses In Reservoirs Be Charged?

With respect to evaporation, the water delivered at Lee Ferry to the Lower Basin has been specified as to quantities and relates to the 7,500,000 acre-feet per annum or unused waters of the Upper Basin, or waters to meet any possible deficiency in the supply to the Republic of Mexico. This permits of no question of evaporation before Upper Basin waters reach the point of delivery at Lee Ferry, and the Upper Basin cannot be charged with evaporations occurring in the Lower Basin after that delivery.

The Upper Basin States, with respect to the waters of the Upper Basin, are privileged under the Colorado River Compact to make allocations of the beneficial use of water among the States or users in that Basin. They have done this by the Upper Colorado River Basin Compact of April 7, 1949. The States having rights to water of the Lower Basin have had this same opportunity and have not arrived at an allocation of waters by agreement. The Upper

Colorado River Basin Compact settles many matters that might have been controversial among the Upper Basin interests, and to now disregard this action and other actions that may follow under the Upper Colorado River Basin Compact, unless wholly necessary under sound legal and equitable principles, would be an act that plainly, under oft announced policies of this Court, should not be taken. These observations are also pertinent to the next question respecting the allocation of water to Indians, the wards of the United States.

The question of how Lower Basin waters shall be divided among the Lower Basin States is one for final hearing.

10. Shall The Use Of Colorado River System Waters By Indians Be Charged To The States In Which Such Uses Are Situated?

This question is a question to be resolved in each Basin. How it is done in one Basin has no relationship to how it is done in the other.

Article VII of the Colorado River Compact provides—

> "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

Article VIII of said Compact bears upon this. It provides that "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." It also provides that when "storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III."

After these provisions, Article VIII also provides that "all other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

From this, it appears that the rights of the Indian tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin.

The question of how Lower Basin waters shall be divided among the Lower Basin States is one for final hearing.

11. Does The Term "Per Annum", As It Is Used In Article III(a) And (b) Of The Compact Mean "Each Year", Or An Average Over A Period Of Years?

This question arises over Arizona's contention, denied by the California defendants, that use "per annum" should be averaged over a number of years.

The California defendants state that should Arizona's interpretation of the term be held to be the correct interpretation on the decision on the merits, the Upper Basin States would have a right to use excess waters in coming years to make up for that part of their apportionment not now used by them, thus diminishing the supply available to the Lower Basin. For this reason, the California defendants state that a justiciable controversy between the present parties and the absent parties does exist and they should be joined.

The opponents to this Motion point out that (1) the Upper Basin States are not presently using more than one-third of the apportionment made to them by Article III(a) of the Compact; (2) it is uncertain when, if ever, the States of the Upper Basin will use their entire apportionment; (3) only when the Upper Basin is using its entire apportionment will this question arise there; and (4)

it is not feasible to determine a question when facts do not exist from which the question is raised.

In interpreting the provision of the Colorado River Compact respecting the delivery by the Upper Basin of 7,500,000 acre-feet of water per annum (Article III(a)) and the other provision found therein respecting the requirement to deliver 75,000,000 acre-feet in a 10 year period commencing after the October 1st following the effective date of the Compact (Article III(d)), these must be considered together, and when so considered, they are not in opposition. The obvious meaning would seem to be that in referring to the 7,500,000 acre-feet per annum, and bearing in mind possible droughts, this requirement would be met by an average delivery over the 10 year period of 75,000,000 acre-feet. There is nothing necessary to be now decided on this Motion that will make any difference if some other interpretation is given, because on any interpretation there is no charge made by anyone that the Upper Basin is not fully performing.

12. Is The Apportionment Made By Article III(b) To The Lower Basin Made In Perpetuity, Or Is It Dependent Upon Appropriation And Use?

The State of Arizona contends that this is an apportionment in perpetuity to cover its uses of Gila River water. The California parties maintain that the use of this water is subject to apportionment and use. The State of Nevada maintains that this water may not be used until 1963. The California defendants maintain that the Upper Basin States should be joined to this action because of the interest they have in this water which, depending upon how this question is resolved, may or may not be available to them in the future.

The opponents to this joinder Motion say that this is insufficient upon which to base joinder, because the

argument is grounded on speculation and conjecture due to the fact that the conditions that would have to exist before the Upper Basin States would derive any benefit from the determination of this question do not now exist, and in any event, could not exist prior to October 1, 1963, as per Article III(f) of the Compact.

The Upper Basin States should not be joined on account of the question here presented because (1) insofar as it relates to the Upper Basin States it is a question of intra-basin apportionment of waters within the Upper Basin, a problem not involved in this litigation; (2) inter-basin apportionment is to be considered in 1963, at the earliest; it is not feasible to decide questions before they arise; and (3) regardless of whether or not this apportionment by Article III(b) is one in perpetuity or solely dependent upon apportionment and use, as is contended by the California defendants, the absent States have no present interest in it, and as to them no justiciable controversy now exists.

13. How Shall "Salvaged Water" Be Charged Under The Colorado River Compact?

The present parties of Nevada, Arizona and the California defendants all express different ideas on this question, with Arizona saying that such uses shall not be charged, Nevada saying such uses are chargeable in certain areas, and the California defendants saying that all such uses are chargeable.

The California defendants state that the Upper Basin States are interested in this in two respects: (1) The determination will involve the interpretation of "beneficial consumptive use" which must be uniform throughout the entire Colorado River System, and (2) Whether or not such uses are to be charged will affect the amount of surplus water available, thus affecting the Upper Basin's delivery obligations for the Mexican supply.

The absent parties say that this question should not necessitate their joinder in this cause because (1) this is solely a Lower Basin dispute; (2) when the uses in the Upper Basin necessitate resolution of this question, it can be done then; (3) this question is at present an intra-basin, not an inter-basin controversy; and (4) regardless of how "salvaged water" shall be charged, the Upper Basin is not using its entire apportionment.

The raising of this question does not require the joining of the absent States because (1) insofar as Upper Basin States are concerned, this will not be germane to them until they are using their entire apportionment, which is not within the foreseeable future; there is no charge that they are using their share of water; (2) by Article III(b)(1) of the Upper Colorado River Basin Compact these States have resolved this question for themselves; and (3) there is no requirement or necessity for having the same definitions of "salvaged water" or of "beneficial consumptive use" in both Basins, and there is nothing to show that such definitions are in any wise preventing the full performance by the Upper Basin States of their inter-basin obligations.

14. Arguments Relating To The California Limitation Act.

On the hearing on the merits, the effect of the California Limitation Act necessarily will be considered.

The California defendants urge that since the Act must be construed, it is necessary to join the four absent States because they, as co-beneficiaries of this Act, may at any time seek to enforce this Limitation Act. It is also urged that to save the California defendants from multiple and vexatious litigation, the absent States should be joined. It is argued, too, that the absent States have an interest in

the Limitation Act because it restrains the California defendants from extending their use of Colorado River System water past 4,400,000 acre-feet per annum.

Opponents of the Motion traverse these views. We find that there is nothing in the California Limitation Act to warrant the joining of the four absent States. This is because:

(1) The Colorado River Compact makes an apportionment of the uses of water between Upper and Lower Basins. Since these absent Upper Basin States have no interest in the allocation of Lower Basin water in which California shares, there is no reason to fear that they may institute an action based on the California Limitation Act.

(2) These absent States have not sought to give an interpretation of the California Limitation Act relevant to or affecting California's interest in Lower Basin water. The Upper Basin water which flows to Lee Ferry is wholly lost to the Upper Basin States when it passes Lee Ferry.

(3) Regardless of what interpretation is given to the California Limitation Act, it cannot affect the Upper Basin's delivery obligations since those are fixed as set forth in the Colorado River Compact.

(4) The California Limitation Act relates to Lower Basin water. There is no allegation or claim by any party that the Upper Basin States have failed, or that they threaten to fail, or ever will fail, to deliver to the Lower Basin all of the water they are committed to deliver under the Colorado River Compact.

15. Arguments Based Upon The Pleading And Prayer Of The United States Of America, Intervener, On The Merits Of The Cause.

The California defendants, in a view to which the State of Nevada, Intervener, subscribes, contend that the United States of America, in its Petition for Intervention, asserts claims to Colorado River System water, and that this is a basis for joining the absent States because the rights of the absent States will be affected by any decree in which the United States is granted title to the use of any Colorado River System water.

The opponents of the Motion submit that the claims made by the United States of America, in its Petition for Intervention, are insufficient on which to base joinder because (1) the United States is asserting rights only in the Lower Basin, and (2) that the Upper Basin States are not using all the water to which they are entitled and it therefore will not affect them in any way. However this may be, it is not alleged by anyone that the Upper Basin States are taking more than their share.

We find that the United States, as an intervener, even were it allowable so to do, does not attempt to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition for Intervention sets forth the following (p. 25):

> "GENERAL CLAIMS OF THE UNITED STATES OF AMERICA IN THE COLORADO RIVER SYSTEM *IN THE LOWER BASIN.*
>
> "The United States of America asserts claims, *as against the parties to this cause,* of *rights to the use of water in the Colorado River* and its tributaries. . . ." (Emphasis added)

The parties to this cause were and are Lower Basin States.

The Upper Colorado River Basin Compact, to which all these absent States are parties, as is the United States, specifically provides for the use of water by the United States in the Upper Basin by Articles VII and XIX.

We find that the claims of the United States to Lower Basin waters made in this cause furnish no ground for joining the absent States.

This report, in the foregoing pages, has treated the States of Wyoming, Colorado, Utah and New Mexico in their capacities as Upper Basin States. We now turn to the question of whether or not Utah and New Mexico should be joined as parties to the instant litigation in their capacities as and to the extent that they are Lower Basin States.

V. UTAH AND NEW MEXICO IN THEIR CAPACITIES AS LOWER BASIN STATES AND WITH RESPECT TO LOWER BASIN WATERS.

It has been said in some of the briefs and arguments that this is a suit upon the Colorado River Compact. In our view, it is a suit filed to quiet Arizona's title to the use of a certain part of Lower Basin water. The share claimed is set forth in the Complaint. To conclude what Arizona's rights may be involves a consideration of equities; of the Colorado River Compact; of water rights to which the Compact is subservient; of rights subservient to said Act; of the California Limitation Act; of the powers and actions of the Secretary of the Interior of the United States, including contracts made by said Secretary; and other matters relevant. It will require a consideration not only of Arizona's rights but of those of the California parties, and of Nevada and the United States of America, the two interveners. Arizona's Bill of Complaint includes specific prayers and a prayer for general relief, which,

of course, should not be overlooked. The California parties ask to be protected in what they urge and set forth as their equitable share to the use of the waters involved. Nevada, a Lower Basin State, is similarly interested. It seeks a determination of what it deems to be its equitable shares of Lower Basin waters. The United States of America seeks a determination of the extent of its rights so that it may meet its obligation with respect to Indian tribes, and with respect to other responsibilities which it bears.

As it has been pointed out above in this report, these controversies relate to the use of waters of the Lower Basin. That New Mexico and Utah each has an interest in such waters is averred by California (Defendants' Answer, page 23), by Arizona (Bill of Complaint, page 20), and by Nevada (Petition of Intervention on Behalf of Nevada for Leave to Intervene, page 15). It cannot be gainsaid that such interests exist in these two States in their respective capacities as States of the Lower Basin. How much Lower Basin water is there to be allocated among the several claimants? Who can now finally answer this? Under the Colorado River Compact, the Upper Basin is given its part—7,500,000 acre-feet per annum. That basin has the duty of delivering to the Lower Basin 7,500,000 acre-feet per annum, which duty presumably can be done by providing at least 75,000,000 acre-feet in 10 year periods. Thus recognition of annual averages reconciles these provisions, as they should be reconciled to give meaning to all provisions. If correct the Upper Basin must not withhold water not consumptively used by it. The Upper Basin is said to use at present only 2,500,000 acre-feet of its 7,500,000 acre-feet share. The remainder passes on to the Lower Basin. The Lower Basin aiso has water that flows from within that Basin to the Colorado

River below Lee Ferry. To learn how much, will require evidence which it is hoped may be based on reasonably accurate measurements, and perhaps there may be offered some well-grounded opinion evidence.

The Colorado River Compact provides that the Upper Basin and the Lower Basin are each to receive 7,500,000 acre-feet annually in perpetuity. A minimum of 1,500,000 acre-feet goes to the Republic of Mexico under its treaty with the United States of America (U. S. Treaty, Ser. No. 994, 59 Stat. 1219 (1945) Article 10(a)). At the time the Colorado River Compact was agreed upon by the Commissioners representing the seven Colorado River States and the United States but before it became effective, the quantity of water available was considered sufficient to meet all of the then fixed demands and requirements, with a surplus of 4,000,000 to 6,000,000 acre-feet per annum. (See the Report by Herbert Hoover, Chairman of the Colorado River Commission, addressed to the Speaker of the House of Representatives, H. Doc. 605, 67th Cong., 4th Sess.) The estimate used was a compromise between these two extremes—5,000,000 acre-feet. The Mexican Treaty, made afterwards, reduced the surplus over the fixed requirements to 3,500,000 acre-feet per annum. When, at the hearing on the merits in the instant case, the then presently available data is presented as to the volume of waters in the Lower Basin, we shall be confronted with the question, shall only the allocations to the United States, to Arizona, to California, and to Nevada be made? Shall the extent of the rights of Utah and New Mexico to Lower Basin waters be reserved for consideration in some other future proceeding or shall we wait until the Lower Basin allocations of water to New Mexico and Utah are made (if ever) by agreement of the Lower Basin parties? If

such delaying program were undertaken, what shall be the reservations of water for these two States in their Lower Basin capacities in terms of quantity? Such a delaying course will prevent final allocations of water to the present parties. As a practical matter, we are of the opinion that these allocations of Lower Basin water to New Mexico and Utah should be made in this presently pending cause. However, do we find here a justiciable controversy involving Utah and New Mexico as Lower Basin States? Obviously, these interests of Utah and New Mexico in an allocation of the waters involved are adverse to the interests of the present parties. Plainly, if allocations of water are made among the present parties, and if allowances are made to these two States without the presence of both or without the agreement of each, the decree will be invalid because of the absence of Utah and New Mexico. There is a now pending controversy involving a division or allocation of the waters that come to or are otherwise in the Lower Basin. There can be no final valid determination of the rights of the present parties to Lower Basin water without determining the equitable shares to which New Mexico and Utah are entitled. They should be joined herein.

Counsel for New Mexico, in speaking of New Mexico's interests in Lower Basin water, stated (Tr., p. 326):

> "The acreage presently being irrigated is less than 10,000 acres, a figure which is infinitesimal compared to the claims of Arizona and California . . . not including the Indians, so, as I understand it, the Indians have about 6,000, so that would be the full extent of the present uses as I am informed by my engineers of use made on the Gila and its tributaries in New Mexico."

It was also urged that there was no justification to bring a State like New Mexico into this litigation when no alle-

gation has been made as to any interference with anybody's rights who are parties to the suit, including the United States. The full facts should be given on the taking of evidence. It is likely that they can be quickly adduced.

On p. 327 of the transcript it was said, in regard to San Juan County, that water from the San Juan River was allocated to New Mexico. This relates to Upper Basin waters and refers to the Upper Colorado River Compact.

On p. 353 of the transcript, counsel for Utah stated, in presenting the *de minimis* point urged by both Utah and New Mexico, that he did not wish to leave the impression that the 52,000 acre-feet of Lower Basin water now used in Utah is not important. It was stated that "It is all important to the people that live in that section of Utah, and we will fight for that water and our rights to it to the last ditch; but compared with the lawsuit which has evolved between Arizona and California, it means nothing." New Mexico, with equal propriety, has not undertaken to yield its rights.

It was pointed out that Arizona, in its Complaint, has recognized the rights of Utah and New Mexico to their equitable share, whatever they may be, and also said that "Arizona doesn't know what it might be, Utah doesn't know what it might be, New Mexico doesn't know what it might be; but they recognize it." (Tr., p. 353). It is also said that "California recognizes it." We wish to say that counsel for Utah and New Mexico were each commendably frank and helpful on this question. But it is plain that to proceed to a final determination of the present suit, Utah and New Mexico must come in and be bound regarding the allocations to them, respectively, of waters of the Lower Basin if a valid decree as to the

present parties is expected. We are of the opinion that this is, of necessity, a justiciable controversy involving rights of both Utah and New Mexico, and though relatively small volumes of water are involved, as has been stated, nevertheless for the New Mexico dwellers in their area and the Utah dwellers in theirs, it is a matter of high importance. We find Utah and New Mexico but solely with respect to Lower Basin waters each to be an indispensable and necessary party.

It is recognized that Utah has an area of 82,346 square miles, with a population, according to the last census, of 688,862; and that New Mexico has an area of 121,511 square miles, with a population, according to the last census, of 681,187. Bringing these states into this litigation will plainly be a burden upon them that they would like to escape. The Special Master does not overlook this. There have been some endeavors, according to the pleadings and the oral argument, to negotiate Lower Basin settlements in respect to the interests of Utah and Colorado. It is hoped, but not urged, that these continue, and if successful, during the time that final hearings are on they can be made a part of and effective in the decree to be recommended.

We also suggest that if this does not eventuate, the Master will set a special time during the hearing for proofs to be devoted entirely to considerations relating to the rights of New Mexico and Utah as Lower Basin States. If this is done, the representatives of such States may find it agreeable to attend only the hearings of direct interest to them, and of course, such others as they may wish. The details of such arrangements can be worked out at a pretrial conference which, in view of the many complexities involved, the Master proposes to hold sometime early this fall. It is thought that these two States as Lower Basin

States can adduce the relevant and material evidence necessary to protect their interests in a very short time. Since the present parties to this cause recognize that these two States have rights in the Lower Basin, it is thought that they may aid in carrying out one or the other of the foregoing suggestions.

VI. CONCLUSIONS.

I conclude as follows:

1. No original party to the cause and no intervener charges any wrongful acts of commission or omission against the Upper Basin States, or presents any prayer for relief against them.

2. The Colorado River Compact divided the Colorado River System into two separate and distinct Basins.

3. By the Colorado River Compact, each Basin was left to make its own intra-basin allocations of the use of its waters.

4. In 1949 the Upper Basin States entered into a Compact, the "Upper Colorado River Basin Compact", which was approved by the Congress of the United States.

5. The Upper Basin States have since been and now are operating under that Compact.

6. By that Compact, they settled among themselves the inter-basin rights to the use of its waters, and also settled among themselves several Upper Basin questions which in the Lower Basin and in respect to its waters are now in controversy in this cause.

7. There is presently no legal or equitable reason for this Court to disturb the operation of the Upper Colorado

River Basin Compact, which result might come by joining these Upper Basin States as parties to this cause.

8. The States of the Upper Basin do not wish to join as parties in the instant cause. They resist the Motion to join them.

9. To join them would be a backward and retarding step with respect to the solution of problems relating to the Colorado River System.

10. To now join the Upper Basin States in this cause with respect to Upper Basin Waters would not tend to avoid litigation but would presently promote it.

11. The Upper Basin States in their capacities as such presently have no legal or equitable interest in the instant cause.

12. As to the Upper Basin States as such, there is no existent justiciable controversy between them and the present parties to this cause.

13. The United States, as Intervener, has not enlarged the scope of the instant cause.

14. The interest of the United States in this proceeding is confined to its rights relating to waters of the Lower Basin.

15. Whatever the possibility of future controversy may be, there exists in such possibility no sound equitable reason for now joining the Upper Basin States as such in the instant litigation.

16. A decree can be soundly entered in this cause that will not affect the Upper Basin States with respect to rights to water or the use of waters in the Upper Basin.

17. The Motion filed herein on July 15, 1954 by the California defendants to join Upper Basin States as parties ought to be denied as to Colorado and Wyoming, and denied as to Utah and New Mexico in their capacities as Upper Basin States.

18. Utah and New Mexico each has interests in the Lower Basin. These interests are small in comparison to the interests in Lower Basin water of the Lower Basin States, particularly California and Arizona. However small, they are substantial and important to Utah and to New Mexico, and likely will be so considered by dwellers in the areas having use and need for Colorado River water.

19. In the equitable allocation of the waters of the Lower Basin, the decree should not overlook these relatively small, but nevertheless substantial, interests.

20. The respective interests of Utah and New Mexico in Lower Basin waters are adverse to the interests of California, Nevada, Arizona and the United States in Lower Basin waters. A justiciable controversy presently exists respecting these Lower Basin waters which involves substantial interests of Utah and New Mexico therein. In order to make equitable allocations of the use of Lower Basin waters in this case, New Mexico and Utah are necessary and indispensable parties.

21. With respect to Utah and New Mexico in their capacities as Lower Basin States, and only to the extent of their respective interests in Lower Basin waters, the Motion should be allowed, and allowed separately as to each of them.

VII. RECOMMENDATION.

Accordingly, it is recommended that the Motion of the California parties to join the States of Colorado, Wyoming, Utah and New Mexico as parties to this cause, in their capacities as Upper Basin States and in respect to Upper Basin waters be denied. It is a further recommendation that as to each of the States Utah and New Mexico in their capacities as Lower Basin States and in relation to their respective Lower Basin waters only that the said Motion be allowed.

Respectfully submitted,

GEORGE I. HAIGHT
Special Master

Chicago, Illinois

July 11, 1955.

APPENDIX A.

THE COLORADO RIVER COMPACT.

November 24, 1922

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact under the Act of Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, Page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel	for the State of Arizona
W. F. McClure	for the State of California
Delph E. Carpenter	for the State of Colorado
J. G. Scrugham	for the State of Nevada
Stephen B. Davis, Jr.	for the State of New Mexico
R. E. Caldwell	for the State of Utah
Frank C. Emerson	for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I.

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado

River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II.

As used in this compact:—

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III.

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and when-

ever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as

mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV.

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE V.

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consump-

tion and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI.

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII.

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII.

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX.

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X.

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI.

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President

of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL
(Signed) W. F. MCCLURE
(Signed) DELPH E. CARPENTER
(Signed) J. G. SCRUGHAM
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL
(Signed) FRANK C. EMERSON

APPROVED:
(Signed) HERBERT HOOVER.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 10 Original

STATE OF ARIZONA, *Complainant*,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants*.

UNITED STATES OF AMERICA, *Intervener*.

STATE OF NEVADA, *Intervener*.

EXCEPTIONS OF INTERVENING STATE OF NEVADA TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER CONCERNING CALIFORNIA'S MOTION TO JOIN COLORADO, NEW MEXICO, UTAH AND WYOMING

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STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

EXCEPTIONS OF INTERVENING STATE OF NEVADA TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER CONCERNING CALIFORNIA'S MOTION TO JOIN COLORADO, NEW MEXICO, UTAH AND WYOMING:

EXCEPTIONS TO THE REPORT:

Comes now the Intervening State of Nevada and herein excepts to the Report and Recommendations of the Special Master, wherein he recommended the denial of the motion to join as parties in the cause the States of Colorado and Wyoming, and granted the motion insofar as it related to the States of New Mexico and Utah in their capacities as Lower Basin States, and only to the extent of their respective interest in Lower Basin Waters.

I

Nevada excepts to the Conclusions of the Special Master as enumerated at Pages 66-68 of the report.

1. Nevada agrees that Conclusions Numbers 1 to 6, inclusive, would be correct if qualified by the Statement that the right to the beneficial consumptive use of the waters apportioned by the Colorado River Compact to the Upper and Lower Basins respectively, was and is a right to the said use of such waters that was and will continue to be interrelated and interdependent as between said basins and controlled in its entirety by the provisions of the Colorado River Compact of 1922, to which said Compact, the Upper Colorado River Basin Compact of 1948 is not tantamount but made subservient and subject thereto in the following language—

> "It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto." Art. I(b) Upper Colorado River Basin Compact.

2. Nevada excepts to Conclusions Numbers 7 to 12, inclusive, and to Conclusions Numbers 15 and 16 upon the following grounds:

The Colorado River Compact of 1922 was approved and ratified by each of the signatory states thereto excepting Arizona, as a six state compact, and later in 1944 ratified by Arizona thus completing the full seven state ratification. By such ratification each signatory state became and is now, and was at the time of the institution of the instant case bound by the terms of the Compact.

Such Compact provides, inter alia, First, the apportionment to the Upper Basin and to the Lower Basin, respectively the beneficial consumptive use in perpetuity of 7,500,000 acre feet of water per annum from the Colorado river stream system. Art. III (a).

Second, In addition to said apportionment provided in Article III (a) the Lower Basin was and is given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum. Art. III (b).

Third, Article III (d) of said Compact provides that the States of the Upper Division, i.e., Colorado, New Mexico, Utah and Wyoming, will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of the Compact.

Fourth, Arizona's claim of the right to beneficial consumptive use of the Colorado River water is 3,800,000 acre feet per annum, Prayer, Arizona Bill of Complaint, page 30. California's minimum claim of its right to the beneficial consumptive use of said water is alleged as 5,362,000 acre feet—California's answer to Bill of Complaint, page 1. Nevada's claim of the right to the beneficial consumptive use of said waters is 539,000 acre feet of Article III (a) water plus an equitable share of Article III (b) water, Prayer, Nevada petition of Intervention, page 25. Thus the total of the amount of water subject to the right of beneficial consumptive use in and by Arizona, California and Nevada and concerning which the issues are clearly pleaded is 9,701,000 acre feet.

Fifth, Article III (f) of the Compact provides for further equitable apportionment of the beneficial uses of the waters of the Colorado River System Unapportioned by paragraphs (a), (b) and (c) of said Article may be made at any time after October 1st, 1963, if and when either basin shall have reached its beneficial consumptive use as set forth in paragraphs (a) and (b).

Article III (b) of the Compact in clear and unambiguous language apportions to the Lower Basin one million acre feet of water for beneficial consumptive uses in addition

to the 7,500,000 acre feet apportioned by Article III (a), and this apportionment is due for such use in the Lower Basin immediately upon the showing of the consumptive uses of all of the III (a) water. The Compact does not intend nor require that the use of III (b) water must await the year 1963.

Nevada has heretofore in its Motion to Intervene and Petition of Intervention, which said Motion was granted June 1st, 1954, directed attention to this important phase of the case in paragraphs VIII, XIII, and XIV of its said petition. It is conceded by all the states signatory to the Colorado Compact that the law of appropriation of beneficial uses of water as applied in and sanctioned by the Western States governs with respect to apportionments under the Compact and that the rights to such use should be and of necessity must be determined in advance. The doctrine was well sanctioned by this Court in the case of *Pacific Livestock Company* vs. *Oregon Water Board,* 241 U.S. 440, which case was submitted to the Special Master by Nevada in oral argument at Phoenix, Arizona, during the submission of the Motion to join the Upper Division States. Pages 122 et seq., Vol. 1, Transcript of Oral Arguments, now of record in the Court.

The issue then and now in this respect has not changed. The beneficial consumptive use of the waters has been apportioned to the Upper and Lower Basins in definitely stated amounts. In addition thereto the Lower Basin was apportioned and now is entitled to an increased beneficial consumptive use of one million acre feet of water per annum. It is not denominated in the Compact or elsewhere as surplus water. Its source is the Colorado River System as defined in Article II and Article III of the Compact, and it is submitted so recognized in the case of *Arizona* vs. *California et al.,* 292 U.S. 341.

Most certainly the Lower Basin, a basin composed of states of extreme aridity, once establishing its right to the

beneficial consumptive use of 8,500,000 acre feet of water per annum as apportioned by Article III (a) and (b) of the Compact will then and there have drawn in question an issue at once involving the right of the states of the Upper Basin to withhold water and deplete the flow of the river to the aforesaid aggregate of 75,000,000 acre feet. In brief a determination must be made of the paramount force and effect of Article III (b) and III (d) as to which provision shall govern. It is submitted that this issue alone warrants the joinder of all the States of the Upper Division, in order to fix and determine long prior to 1963 the right to the beneficial consumptive use of Article III (b) water. To enter a decree so determining this right without the States of the Upper Basin being parties thereto would not be consistent with equity and good conscience, for the reason that the waters of the Colorado River stream system constitute the common fund in which the Upper and Lower Basins are apportioned by mutual consent certain designated rights therein. Rights that are so interrelated and interdependent that any adjudication and determination of any one right is bound to seriously affect every other right and interest therein of either the Upper or Lower Basin.

It is therefore Nevada's contention that the Special Master's Conclusions Numbers 7 to 12, inclusive, and Conclusions Numbers 15 and 16 are in error.

II

The Interest of the United States, Special Master's Conclusions Numbers 13 and 14.

The Special Master concluded that the United States, as Intervener has not enlarged the scope of the case, and further, that its interest is confined to its rights relating to waters of the Lower Basin.

Nevada is not in agreement therewith and respectfully submits such conclusions are in error for the following reasons:

1. The Colorado River Compact of 1922, with respect to the rights of the United States provided in Article VII that "Nothing in this Compact shall be construed as affecting the obligations of the United States to Indian tribes," and in Article IV provided that if Congress did not consent to the use of waters for navigation being made subservient to domestic, agricultural and power purposes, nevertheless the other provisions of the compact shall remain binding.

2. It is also clear that Congress in the enactment of the Boulder Canyon Project Adjustment Act, approved December 21, 1928, 45 Stat. 1057, did not enlarge the powers of the United States or any department thereof to depart from nor encroach upon the binding effect of the Compact, but to the contrary expressly provided that the United States, its permittees, licensees, contractees, users and appropriators of water and the rights thereof, however claimed or acquired "shall be subject to and controlled by said Colorado River Compact". Sections 8 and 13, Project Act.

3. The Petition in Intervention of the United States alleges claims for the use of waters of the Colorado River in the Lower Basin totalling not less than 1,823,250 acre feet per annum exclusive of flood control and navigation, as follows:

Indian Claims—1,747,250 acre feet,
Ultimate use—Paragraph XXVII, and
Appendix II A. Petition of United States.
Fish and Wild Life—76,000 acre feet—
Paragraph XXVIII—Appendix III, Petition of United States.

4. Further, it is alleged in Paragraph XXX, pages 25-27 of the Petition of the United States that the foregoing claims of the United States are jeopardized because the present claims of the parties to the cause far exceed the quantity of water apportioned to the Lower Basin by the Colorado River Compact, and that—

"The United States of America also has claims throughout the States of Arizona and California in connection with the Colorado River and its tributaries for the use of the National Park Services and the Bureau of Land Management of the Department of the Interior, and the Forest Service of the Department of the Interior, and the Forest Service of the Department of Agriculture. In the event these claims are in any way put in issue or jeopardized in this litigation, the United States reserves the right to assert them."

"Due to the insufficient supply of water to the Lower Basin by the Colorado River Compact to meet the aggregate of the adverse claims of all the parties to this cause, this is a pressing need for a decree by this Court declaring, confirming and quieting the title of all parties to their respective rights and interest in and to the waters of the Colorado River, absent such a decree by this Court, the protracted conflict giving rise to this cause will continue to the detriment of all parties."

5. The United States alleges in Paragraph XIII, page 12 of its Petition that it has an international obligation arising from its Treaty with the United Mexican States of 1944, ratified by Congress and approved by the President in 1945, 59 Stats. 1219, whereby the United States guaranteed to furnish Mexico with an annual quantity of 1,500,000 acre feet of the waters of the Colorado River from any and all sources thereof. Section 10 (a) Treaty. Paragraph 6, Page 17, Master's Report.

Article III (c) of the Compact provides, in effect that if the United States shall recognize the right of Mexico to any of the waters of the Colorado River, that such waters shall be supplied first from waters that are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b), and if such surplus is insufficient then the burden of the deficiency shall be equally borne by the Upper Basin and Lower Basin. Such is the effect of Section 4 of the Boulder Canyon Project Act.

In view of this allocation of the waters in question the issue at once arises, it is submitted, that now requires the determination construing and reconciling the effect of Articles III (b), (c) and (d) of the Compact and Section 4 of the Project Act.

It is clearly apparent that if the rights of the United States are granted even in part that the scope of the case is so broadened that in order to satisfy such rights that even the increased beneficial consumptive use of the additional one million acre feet of water apportioned the Lower Basin by Article III (b) of the Compact will not be sufficient to even satisfy said rights and obligations of the United States in the Lower Basin. It cannot well be doubted but that the Upper Basin's rights will be materially affected by the demands of the United States.

III

Special Master's Report Re Article III(b) of Compact:

Nevada regretfully excepts to the statements of the Special Master interpreting Nevada's contention concerning the waters referred to in Articles III (b) and III (f) of the Colorado River Compact. Such statements appear in the report as follows:

> At page 22, lines 3-8, "(3) In 1963, when the Lower Basin shall become entitled to use the 1,000,000 acre feet per annum apportioned to the Lower Basin by Article III (a) of the Colorado River Compact, Nevada will have the right to use 900,000 acre feet per annum of Colorado River System Water. (Petition for Intervention, P. 13)"
>
> At page 55, lines 26-28, the statement, "The State of Nevada maintains that this water may not be used until 1963." Referring to Article III (b) water.
>
> And the further statement contained in lines 7-18, inclusive, page 56, to the effect that the Upper Basin States should not be joined "because (1) insofar as it relates to the Upper Basin States it is a question of

intra-basin apportionment of waters within the Upper Basin, a problem not involved in this litigation; (2) inter-basin apportionment is to be considered in 1963 at the earliest; it is not feasible to decide questions before they arise; and (3) regardless of whether or not this apportionment by Article III (b) is one in perpetuity or solely dependent upon apportionment and use, as is contended by the California defendants, the absent States have no present interest in it, and as to them no justiciable controversy now exists".

Nevada respectfully submits, as heretofore shown in Subdivision II of these exceptions to the report that with all due respect to the Special Master's Report and the Conclusions therein found, such conclusions with respect to Nevada's contentions as to the timely apportionment to the Lower Basin of Article III (b) water beyond question now presents a justiciable issue wherein the Upper Basin States, including Colorado and Wyoming are directly interested, and by reason thereof the Special Master's Report is in error thereon.

Conclusion:

Nevada respectfully represents to the Court that heretofore it submitted to the Special Master and in addition thereto lodged in the Court the BRIEF OF THE STATE OF NEVADA, INTERVENER, IN RE MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING, and therein stated its position with respect to such joinder based upon the same premise as herein set forth to the end that New Mexico and Utah are indispensable parties and that Colorado and Wyoming at the very least are necessary parties. Nevada in such brief relied upon the rule as to the joinder of necessary parties as held in the case of *Washington* vs. *United States,* C.A.A. 9, 87 F. (2d) 421, followed with approval in *Pioche Mines Consolidated Inc.,* vs. *Fidelity-Philadelphia Trust Co.* C.A.A. 9, 202 F. (2d) 944, which said cases were and are based upon the case of *Shields* vs. *Barrow,* 17 How. 130, 15

L. Ed. 158 and *Mallow* vs. *Hinde*, 12 Wheat 193, 6 L. Ed. 599. The *State of Washington* vs. *United States* dealt with the right of the States of Washington and Oregon to intervene in a suit by the *United States* vs. *Columbia Packers Association*. The States were granted the right.

Nevada here refers to its said brief and adopts the same as its brief in support of its foregoing exceptions.

Respectfully submitted,

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Attorney General

W. T. MATHEWS
WM. J. KANE
Special Assistant Attorneys General
Counsel for State of Nevada

Certificate of Service:

I, W. T. Mathews, one of the attorneys of record for the State of Nevada, an Intervener in the above entitled cause, and a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 12th day of October, 1955, I served copies of the foregoing exceptions to the Report of the Special Master on the several parties thereto, as follows:

1. On the Solicitor General of the United States, Department of Justice, Washington 25, D. C., by mailing a copy in a duly addressed envelope with airmail postage prepaid.
2. On J. H. Moeur, Chief Counsel for the Complainant State of Arizona, Heard Building, Phoenix, Arizona, by mailing a copy in a duly addressed envelope with airmail postage prepaid.
3. On Gilbert F. Nelson, Assistant Attorney General of California, and one of Counsel for defendants, 909 South Broadway, Los Angeles 15, California.
4. On Duke W. Dunbar, Attorney General of and Counsel for the State of Colorado, State Capitol Bldg., Denver, Colorado, by mailing a copy in a duly addressed envelope with air mail postage prepaid.
5. On Richard Robinson, Attorney General of and Counsel for New Mexico, State Capitol Building, Santa Fe, New Mexico, by mailing a copy in a duly addressed envelope with airmail postage prepaid.
6. On E. R. Callister, Attorney General of and Counsel for the State of Utah, State Capitol Building, Salt Lake City, Utah, by mailing a copy in a duly addressed envelope with airmail postage prepaid.
7. On George F. Guy, Attorney General of and Counsel for the State of Wyoming, State Capitol Building, Cheyenne, Wyoming, by mailing a copy in a duly addressed envelope with airmail postage prepaid.

W. T. Mathews
Special Assistant Attorney General Nevada

HAROLD B. WILLEY, C

No. 8 Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, [redacted]9 1961

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

MOTION OF THE UNITED STATES OF AMERICA FOR DETERMINATION OF QUESTIONS OF LAW PRESENTED BY THE PLEADINGS IN THE CAUSE AND THE REPORT OF THE SPECIAL MASTER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 10 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

MOTION OF THE UNITED STATES OF AMERICA FOR DETERMINATION OF QUESTIONS OF LAW PRESENTED BY THE PLEADINGS IN THE CAUSE AND THE REPORT OF THE SPECIAL MASTER

The State of California [1] moved this Court to join as defendants the States of New Mexico, Utah, Colorado and Wyoming. The matter was duly referred by this Court to the Special Master with instructions "to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should

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1/ References to the "State of California" or "California" throughout this Motion include all of the California defendants listed in the caption.

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be granted." Pursuant to that instruction there was filed on July 18, 1955, the "Special Master's Report on the Motion of the California Defendants to Join as Parties the States of New Mexico, Utah, Colorado and Wyoming." This Court allowed until October 20, 1955, for the filing of exceptions to that Report. As of this date exceptions have been filed by the State of Nevada and it is understood that exceptions will be filed by the State of California.

There are presented to the United States of America by the Report of the Special Master problems of great import. Absent rulings by this Court upon basic and fundamental questions of law stemming from the pleadings now before it, and the Report of the Special Master, the United States of America cannot properly agree or disagree with the Report. Reference in that regard is had to the analysis by the Special Master of the character of the cause in question. There it is declared that "In our view, it is a suit filed to quiet Arizona's title to the use of a certain part of Lower Basin water. The share claimed is set forth in the Complaint. To conclude what Arizona's rights may be involves a consideration of equities; of the Colorado River Compact; of water rights to which the Compact is subservient; of rights subservient to said Act; of the California Limitation Act; of the powers and actions of the Secretary of the Interior of the United States, including contracts made by said Secretary; and other matters relevant." 2/

2/ Special Master's Report on the Motion of the California Defendants to Join as Parties the States of New Mexico, Utah, Colorado and Wyoming, page 60, subdivision V.

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Issue is not taken with the Special Master's conclusion that this is a proceeding to quiet title. Attendant upon that conclusion, however, are correlative propositions of law the resolution of which is essential to any determination as to the need for the joinder of the sovereign States of Colorado, New Mexico, Utah and Wyoming. There follows a review of those fundamental questions of law.

I.

The State of Arizona in its Bill of Complaint, seeking to have quieted its title to rights to the use of water in the Colorado River System, petitions among other things that the Colorado River Compact, the Boulder Canyon Project Act, related laws, contracts and documents be construed. California, however, denies that the State of Arizona ratified the Colorado River Compact; denies that Arizona is entitled at this date to claim rights pursuant to that Compact.[3/] There is thus presented for resolution the basic question of whether Arizona is entitled to participate as a party to the Compact; a question referred to by the Special Master but which remains unresolved. Necessarily if it is ultimately determined that Arizona is not a party to the Colorado River Compact, its status in the proceedings is materially changed. Similarly the status of the United States of America will be changed as will be subsequently

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3/ Answer of California Defendants to Petition of Intervention on Behalf of the United States of America and Summary of the Controversy, (Exhibit A) page 34, paragraph 24. See in that connection Answer of Defendants to Bill of Complaint, Second Affirmative Defense, pages 39 et seq.

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emphasized. Moreover, a protracted trial involving complex factual questions might be abortive with present parties if California should be sustained in its position respecting the State of Arizona in relation to the Colorado River Compact. It is difficult to assess the change that would transpire in this case if Arizona were declared not to be a party to the Colorado River Compact. It cannot be fairly assumed, however, that if it is declared that Arizona is not in fact a member of the Compact, it will abandon any claim to the waters of the Colorado River System. Rather it must be presumed that Arizona will assert a claim against the River System as a whole. Under those circumstances there could be no final relief awarded in this action without having all of the States of the Colorado River System, without regard to the Compact, before this Court.

II.

Arizona in its Complaint requests an interpretation of the Colorado River Compact in connection with these matters: 4/

> "(1) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water? * * *
>
> "(2) How is beneficial consumptive use to be measured? Article III of the Compact does not apportion water. Rather it apportions the beneficial consumptive use of water. The Compact contains no definition of beneficial consumptive use and does not establish any method of measuring beneficial consumptive use. * * *"

4/ Bill of Complaint, State of Arizona, page 25, Article XXII.

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Should it ultimately be declared by this Court that Arizona is not a party to the Compact, there necessarily arises for consideration the matter of the propriety of presenting for resolution the matters set forth above. Quite possibly under those circumstances Arizona would claim rights on the theory of an equitable apportionment of the stream system in its entirety as distinguished from a claimant in the Lower Basin under the Colorado River Compact. 5/

III.

If this Court should declare that Arizona is not a party to the Colorado River Compact the United States of America has an immediate concern respecting its international obligations to deliver water arising in connection with its treaty with the United Mexican States. 6/ Those international obligations, the Colorado River Compact provides are to be "supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, * * *." 7/ It is clear that if Arizona is not a party to the Compact the provision made for delivery of water to Mexico is radically changed presenting for determination in that connection the obligation of Arizona and all of the other States of the Colorado River System.

5/ Arizona v. California, et al., 298 U. S. 558 (1936).

6/ See Petition of Intervention on Behalf of the United States of America, page 12, Article XIII.

7/ Colorado River Compact, Article III.

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IV.

Correlative to the questions presented in paragraphs I, II and III above, arising from the status of Arizona under the Colorado River Compact, is another of extreme importance to the United States. It has entered into contracts with the State of Arizona for the delivery to it of 2,800,000 acre-feet of water from the Colorado River.[8] California asserts that its contracts with the United States of America are severally and collectively senior in time to the Arizona contracts.[9] It is patent that if the contracts between the United States of America and the State of Arizona should fall by reason of the determination that Arizona is not a party to the Colorado River Compact, its claimed rights to the water in the Colorado River would be materially changed very probably presenting issues that could not be resolved without the presence of the parties California seeks to join.[10]

V.

Another fundamental question of law is presented by the Report of the Special Master. It is provided by Article VII of the Colorado River Compact,[11] that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Alluding to that quoted provision of

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8/ Bill of Complaint, State of Arizona, Article XIII

9/ Answer of Defendants to Bill of Complaint, page 38.

10/ Answer of Defendants to Bill of Complaint, paragraph X, page 38.

11/ Special Master's Report on the Motion of the California Defendants to Join as Parties the States of New Mexico, Utah, Colorado and Wyoming, Appendix A, page 6a.

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the Compact and related matters, the Special Master declares: "From this, it appears that the rights of the Indian tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin." 12/ Noteworthy in regard to the claims to rights to the use of water asserted by the United States of America on behalf of the Indians is the fact that they represent one of the largest claims to water from the stream system in question. 13/ It will be observed that the Special Master has not finally ruled on the question of law as to whether the claims of the Indians are to be satisfied from the Lower Basin or whether they are to be satisfied from the entire Colorado River Stream System. It must be assumed that the Special Master did not intend to declare as a matter of law that the rights of the Indians are subject to the Colorado River Compact. However, if the statement by the Special Master is interpreted to be a declaration that the Indians are subject to the Colorado River Compact irrespective of the explicit language of that document, there is presented for

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12/ Special Master's Report on the Motion of the California Defendants to Join as Parties the States of New Mexico, Utah, Colorado and Wyoming, page 54.

13/ Petition of Intervention on Behalf of the United States of America, pages 56 and 57.

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consideration the question of whether this Court will adopt that conclusion as a matter of law. In either event, it is essential before the United States of America can agree or disagree with the language of the Special Master regarding the Indian claims, that there be a definitive ruling on that very important issue.

If the Indian claims are held to be "against the river" as distinguished from the Lower Basin as defined by the Colorado River Compact, that conclusion would have far-reaching effect upon the interests of all of the States in the Colorado River Stream System. Thus there is directly involved the construction of the above quoted Article VII of the Colorado River Compact and all that is implicit in such a construction. If Arizona is declared not to be a party to the Compact, the questions presented become even more pertinent.

VI.

These fundamental questions are of transcendent importance in regard to all of the relief which has been sought in this cause by the United States of America. In this complex case there are necessarily other questions related to and independent of those herein set forth. However, whether complete relief can be had in this action on the basis of the parties presently before the Court can be resolved only by the ultimate determination of the legal questions which are here presented.

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WHEREFORE, the United States of America respectfully moves this Court to consider the questions here presented and to order briefs filed in connection with them and to declare the legal principles which will govern in regard to them prior to a determination as to whether the States of Colorado, New Mexico, Utah and Wyoming should or should not be joined as parties to this cause.

S/ Herbert Brownell, Jr.

HERBERT BROWNELL, Jr.

Attorney General

October, 1955.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Exceptions of the California Defendants to the Report and Recommendations of the Special Master With Respect to Their Motion to Join the States of Colorado, New Mexico, Utah and Wyoming

and

Brief in Support of Exceptions

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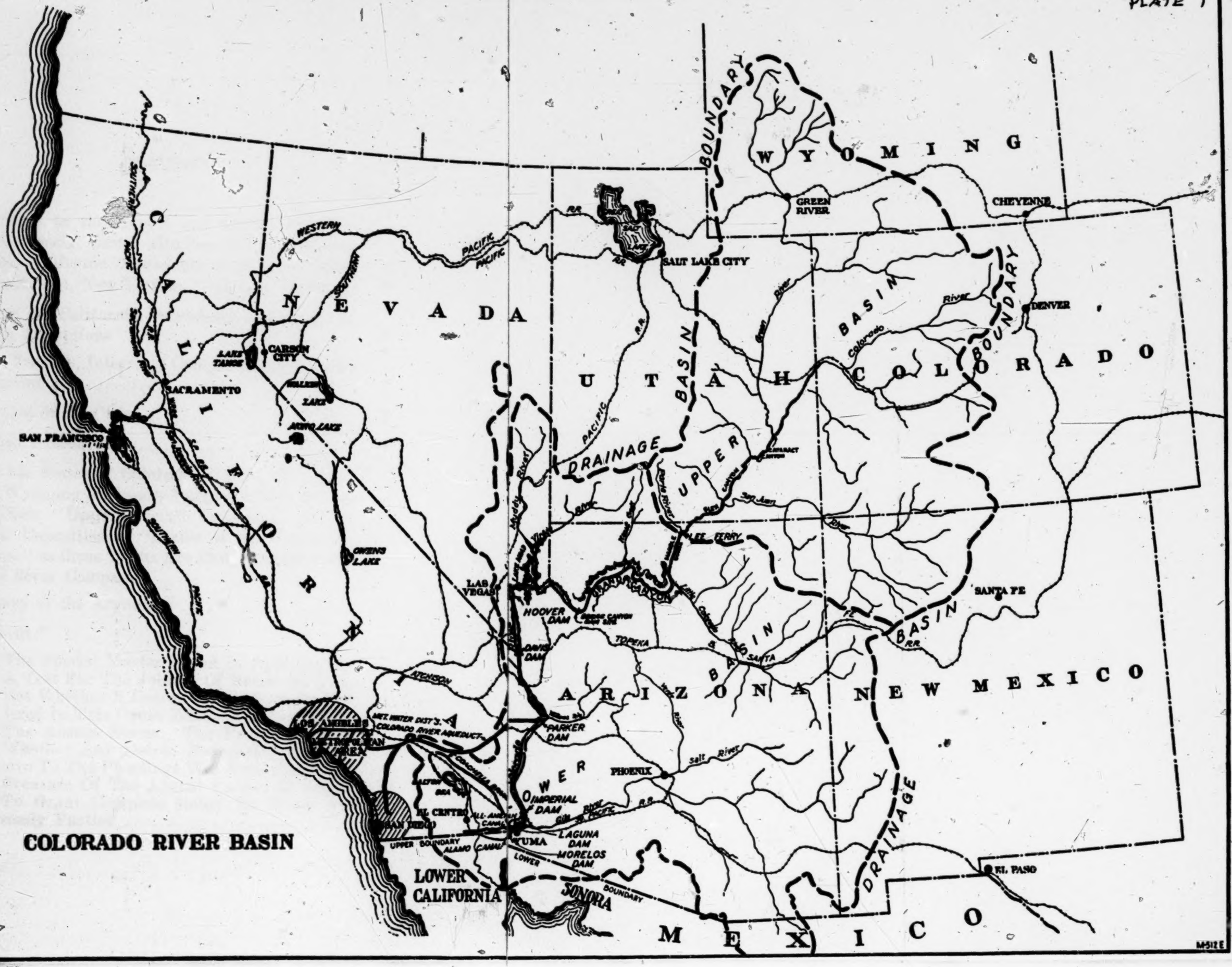
PLATE 1

COLORADO RIVER BASIN



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IN THE

Supreme Court of the United States

October Term, 1955

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Exceptions of the California Defendants to the Report and Recommendations of the Special Master With Respect to Their Motion to Join the States of Colorado, New Mexico, Utah and Wyoming

and

Brief in Support of Exceptions

EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER WITH RESPECT TO THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

The recommendation of the Special Master is that the motion of the California defendants to join, as parties, the States of Colorado, New Mexico, Utah and Wyoming, be denied with respect to the four States in their "Upper Basin" capacities, but that it be granted as to Utah and New Mexico in their "Lower Basin" capacities and as to Lower Basin waters. The California defendants except to so much of the Special Master's Report as relates to denial of the motion, and respectfully request to be heard in oral argument.

Exceptions I through IV are based on grounds that the rights and obligations of the present parties, those whom the Special Master proposes to join, and those of the remaining States of the Colorado River Basin, are so interdependent that the absent States "ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . ." *Shields* v. *Barrow,* 17 How. 130, 139 (U.S. 1855). Exception V is based on the ground that California, sued here as a sovereign, is entitled to invoke this rule as against her sister sovereigns in the circumstances of this case, because those States "not only have an inter-

est in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (*Id.*, p. 139.)

If the absent States were without the Court's jurisdiction, the case should be dismissed because of the absence of indispensable parties. Since they are within the Court's jurisdiction, they should be joined as necessary parties, and the Special Master, in ruling otherwise, erred in the following particulars:

I.

General Exception

The Special Master erred in assuming how substantive issues will be decided after the trial, and in testing the necessity for joinder of the absent States by the effect upon them of a decree conforming to those assumptions. The proper test is whether any decree reasonably responsive to the pleadings will necessitate the presence of the absent parties in order to afford complete relief to those who are already parties.

II.

Exceptions Relating to the Claims of the United States

The Special Master erred in failing to find that the four States of Colorado, New Mexico, Utah and Wyoming are necessary parties to the adjudication of the claims of the United States to the waters of the Colorado River System.

III.

Exceptions Relating to the Issues of Whether Arizona Is a Party to the Colorado River Compact, Whether the Statutory Compact Created by the Boulder Canyon Project Act and the California Limitation Act Remains in Effect, and the Interpretation of That Statutory Compact

A. The Special Master erred in finding that Colorado, New Mexico, Utah and Wyoming are not necessary parties to a suit that will determine whether Arizona is a party to the Colorado River Compact.

B. He erred in finding that the four States are not necessary parties to a suit that may determine the continued existence and interpretation of California's obligations to all six of her sister Colorado River Basin States under the California Limitation Act.

IV.

Exceptions Relating to the Colorado River Compact

The four States of Colorado, New Mexico, Utah and Wyoming are necessary parties to this action because complete relief cannot be afforded among the present parties without a determination of (A) the rights of the absent States under the Colorado River Compact to the use of waters of the Colorado River System available to the "Upper Basin," (B) their obligations under that Compact as "States of the Upper Division" to deliver water to the Lower Basin, and (C) their interests in the waters of the Colorado River Sys-

tem which are not covered by the Colorado River Compact. The Special Master erred in ruling to the contrary.

The Special Master erred in finding that the Colorado River Compact, in terms, prohibits the joinder of the States of the Upper Division in this action.

V.

Exceptions Relating to Justiciability, the Sovereign Status of the Parties, and Rules of Joinder

A. The Special Master erred in determining that the absent Upper States, whose rights and obligations are vitally and inseparably affected by the present controversy to quiet title to certain waters of the Colorado River System, may not be joined for lack of a controversy independently justiciable as to them.

B. The Special Master erred in recommending that the motion be denied because a present breach of obligation against the absent States has not been alleged. Despite the absence of a present breach of obligation or a present physical invasion of a claimed right, a suit brought by Arizona or by the United States to quiet title against the absent States alleging the identical titles here asserted by them would state a justiciable controversy within the constitutional power of this Court to decide. *A fortiori,* such a breach of obligation or invasion of right is not necessary where the joinder of the absent States is required in order to accord com-

plete relief in the existing quiet title suits brought by Arizona and by the United States.

C. The Special Master's conclusion that no justiciable controversy is stated between the present parties and the absent States is based on assumed facts as to water supply and water use which have no foundation in the record, and which, since they are the subject of dispute among qualified engineers, are not proper subjects of judicial notice. Moreover, the assumptions are contrary to what evidence would establish as the actual facts.

D. The Special Master's recommendation that California, sued as a sovereign, be denied the right to join Colorado, New Mexico, Utah and Wyoming because they are also sovereigns is without support either in reason or in judicial precedent.

BRIEF OF THE CALIFORNIA DEFENDANTS IN SUPPORT OF THEIR EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER UPON THEIR MOTION TO JOIN, AS PARTIES, THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

RULES, TREATIES, INTERSTATE COMPACTS AND STATUTES INVOLVED

These are cited in our opening brief on this Motion, filed October 7, 1954, pp. 2-4. Their text appears in two volumes of Appendixes to our Answer to Arizona. The Statement of Jurisdiction appears at page 1 of our opening brief.

STATEMENT OF THE CASE

The facts are summarized in our opening brief, filed October 7, 1954, pages 4-25. A "Summary of the Controversy" is annexed to this Motion filed July 15, 1954, page 7.

QUESTION PRESENTED

The question presented upon these exceptions is:

Are the States of Colorado, New Mexico, Utah and Wyoming necessary parties to this action, in their "Upper Basin" capacities, and in their capacities as "States of the Upper Division," as those terms are defined in the Colorado River Compact?

SUMMARY OF THE ARGUMENT

I.

Whether additional parties are necessary to grant complete relief to the present parties requires a determination of whether issues in the controversy, however resolved, will affect the interests of those parties. No particular resolution of them can be assumed. The Special Master has departed from this rule, and has made substantive determinations without evidence on the merits of the issues determined.

II.

The four absent States are necessary parties to an adjudication of the claims asserted by the United States to the waters of the Colorado River System.

The United States' claims include: (1) water to supply the existing water delivery and electrical energy contracts of the United States in the Lower Basin; (2) water to satisfy the international obligations of the United States, including the Mexican Water Treaty; (3) water to fulfill obligations of the United States to Indians and Indian Tribes in Arizona and California; (4) water to supply the full capacity of the various structures owned by the United States in the Lower Basin; (5) water to supply the needs of the National Park Service, the Bureau of Land Management and the Forest Service in Arizona and California should these needs be jeopardized in this suit; and (6)

water to protect the interests of the United States in flood control and navigation. Specific claims in the first three categories aggregate 11,785,250 acre-feet per annum—far in excess of the 8,500,000 acre-foot aggregate of uses for the Lower Basin specified under Articles III(a) and III(b) of the Colorado River Compact.

The Special Master has erred in not recognizing the impact of these claims, if they are sustained, upon the interests of the absent States. He has confused the place where water is used, or delivered to Mexico (*i.e.*, the Lower Basin or the international boundary), with the place from which the water must be supplied.

The United States denies that all its rights are subjected by the Boulder Canyon Project Act to the Colorado River Compact. It expressly asserts that its claims on behalf of Indians are in no way subject to or affected by the Colorado River Compact and, contrary to the Special Master's determination, are not chargeable under the Compact to the Basin and State in which they are situated. The Mexican Water Treaty obligation, in terms, is to supply a guaranteed quantity from "any and all sources." Thus, the United States' claims are asserted to be independent of the Compact. It would be grossly inequitable either to saddle the Lower Basin with federal claims which are claims to the waters of the whole river system, or to leave in doubt the obligation of the absent States to contribute to the satisfaction of those claims.

Clearly, the magnitude of the Upper Division responsibility to deliver water is placed directly in issue by the prayer of the United States to quiet title to water to serve the Mexican treaty, and to quiet title to water for all purposes and from all sources in an aggregate amount greater than that which can be found in the Lower Basin.

The United States will be bound, throughout the entire Colorado River Basin, by the decree of this Court determining its rights under the Boulder Canyon Project Act and the Colorado River Compact. To subject the United States in the operation of federal works in the Upper Basin to one interpretation of the Compact, leaving the Upper Basin beneficiaries of those works free to assert a contrary interpretation, would produce hopeless chaos.

III.

Two of the issues in this litigation are (1) whether Arizona effectively ratified the Colorado River Compact in 1944, and (2) whether, if Arizona's purported ratification was effective, California's obligation to all her sister Colorado River Basin States under the California Limitation Act continues to be binding. California denies that Arizona effectively ratified the Colorado River Compact, and further asserts that a seven-State Colorado River Compact (*i.e.*, with Arizona a party) and the California Limitation Act are mutually exclusive.

The Special Master disposes of the first issue, as it affects the absent States, by determining that

the absent States are protected against Arizona appropriations by the Colorado River Compact regardless of whether Arizona is a party to that agreement. His conclusion is contrary to the decision in *Arizona* v. *California,* 283 U.S. 423 (1931), which held that Arizona, because not a party to the Compact, could appropriate all unappropriated water in the Colorado River System. That decision is *res judicata* in this litigation.

The Special Master disposes of the second issue, as it affects the absent States, by determining that those four States have no legal rights under and no interest in the California Limitation Act. This decision is contrary to the words of the Limitation Act and the Boulder Canyon Project Act, which prescribed the Limitation Act's terms expressly making the absent States beneficiaries, and is contrary to the legislative history of the Project Act. The Special Master's determination with respect to the Limitation Act has been neither urged nor acquiesced in by the absent States.

IV.

A fundamental misconception of the Special Master is that the Colorado River Compact divides the Colorado River System into two separate and independent parts, as geographical territory might be divided between two States. This misconception is the basis of his failure to understand the nature of the suit.

Arizona's suit merges three objectives, each involving the rights and obligations of all of the

other Colorado River Basin States under the Colorado River Compact:

1. *Relief essentially declaratory in character.*

Arizona asks:

(a) a declaration of the meaning of the term "beneficial consumptive use," appearing in Articles III(a) and III(b) of the Colorado River Compact. These Articles relate only to *inter*-basin rights. A declaration of their meaning affects both Basins. Arizona's allegation that "the use of water salvaged by man is not a beneficial consumptive use" would enable her to encroach, without charge, to the extent of more than 1,000,000 acre-feet upon the unapportioned surplus above the quantities specified in Articles III(a) and III(b) in which all seven States have undivided common interests.

(b) a declaration that the waters referred to in Article III(b) of the Compact are "apportioned," *i.e.*, apportioned not only to Arizona but to the Lower Basin against the Upper Basin.

(c) a declaration that reservoir losses shall be charged as beneficial consumptive uses against the apportionment made by Article III(a) to the Lower Basin. Nevada, intervening, insists that such losses be charged to the "surplus" in which the absent States have an undivided interest.

2. *A suit to quiet title.*

Arizona asks that her title be forever quieted to beneficial consumptive uses (measured in terms

of main stream depletion, with no charge for the use of "salvaged" water) as follows:

(a) 1,000,000 acre-feet per annum of the increase of use permitted to the Lower Basin by Article III(b), all to be taken from the Gila River System.

(b) 2,800,000 acre-feet per annum of the 7,500,000 acre-feet per annum of beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, all from the main stream (except to the extent that uses on the Gila exceed 1,000,000 acre-feet per annum), subject to equitable shares for New Mexico and Utah. The 2,800,000 claimed by Arizona is the "residue" of the Lower Basin's Article III(a) apportionment after deducting the quantities of Article III(a) uses she concedes to California and Nevada from the main stream, *i.e.*, 4,400,000 acre-feet to California, and 300,000 to Nevada. Arizona identifies the apportionment made by Article III(a) to the Lower Basin with the obligation imposed by Article III(d) on the States of the Upper Division to deliver 75,000,000 acre-feet at Lee Ferry in each decade. Thus, to quiet title in Arizona to 2,800,000 acre-feet of Article III(a) uses from the main stream, Arizona must quiet title in the Lower Basin, as against the Upper Division to all of the 75,000,000 acre-feet of Article III(d) deliveries as water the use of which is "apportioned" by Article III(a). The Special Master apparently agrees with Arizona's contention.

This is a fundamental revision of the Compact, converting it from a system-wide Compact into what would be essentially a main stream agreement, and from an allocation of beneficial consumptive uses to an allocation of the flow of the main stream. Such a revision could not be effected without the concurrence of the four States of the Upper Division. Article III(a), as written, is an apportionment "from the Colorado River System," defined in Article II(a) as "the Colorado River and its tributaries." That apportionment includes "all water necessary for the supply of any rights which may now exist," *i.e.*, rights to uses on the tributaries as well as on the main stream. The Lower Basin thus cannot claim all of its Article III(a) apportionment from the main stream. Accordingly the obligation of the States of the Upper Division under Article III(d) to deliver 75,000,000 acre-feet in each decade to the Lower Basin is not identical with the Article III(a) apportionment to the Lower Basin, but contains water available for Mexico, to which the Lower Basin has no title. If the 75,000,000 acre-feet per decade were decreed to the Lower Basin as its Article III(a) apportionment, Article III(c) would require the States of the Upper Division to increase their deliveries to supply water to Mexico, since, upon Arizona's measurement of "consumptive use," there is no "surplus" in the 75,000,000 acre-feet out of which the Mexican burden can be met. Statistics published by the State of Colorado show that if a minimum of

75,000,000 acre-feet per decade were delivered by the States of the Upper Division during a period like that of 1930-52, the Upper Basin would have available no more than 6,200,000 acre-feet per year of its apportioned consumptive use of 7,500,000 acre-feet, and at that these statistics do not provide for the Mexican burden. The Special Master's contrary assumptions as to water supply are not supported by any record.

If title cannot be quieted in the Lower Basin to 7,500,000 acre-feet per annum in the main stream as apportioned by Article III(a), title cannot be quieted in Arizona to 2,800,000 acre-feet of main stream Article III(a) uses, for she concedes 4,700,000 acre-feet to Nevada and California.

3. *A suit for injunctive relief.*

Arizona asks an injunction against the assertion by California of any right in the excess or surplus waters not covered by Articles III(a) and III(b) of the Compact, unless and until a new compact, made after 1963, apportions such waters to the Lower Basin. This presupposes that neither Basin can acquire appropriative rights in such waters except by a new compact, *i.e.*, with Arizona's concurrence. California asserts that either Basin may validly appropriate unapportioned waters, subject only to divestiture by a new compact or by the superior requirements of the Mexican Water Treaty. Inasmuch as the unapportioned surplus is a common fund of water in which the absent States have undivided and

undetermined interests in common with the present parties, the questions both of how rights in that common fund shall be established and what rights have been established cannot be determined in their absence. The magnitude of that common fund is affected by the question of whether Arizona may encroach upon it by avoiding any charge under Articles III(a) or III(b) for the use of "salvaged water."

V.

The Special Master expressly concedes that the resolution of some of the issues in the present litigation may ultimately affect the interests of the absent States. He nevertheless finds that their joinder is not appropriate at this time. The Special Master bases this conclusion on two legal premises that are in fundamental error. The first is that an independently justiciable controversy, which could provide the basis for a separate lawsuit by or against absent parties, must be stated before they can be joined. The second erroneous premise is that a present breach of obligation or a present physical invasion of a claimed right is required as an element of a justiciable controversy when suit is brought to quiet title. He combines with these legal premises an assumption, contrary to the pleadings and based neither on evidence nor on a proper exercise of judicial notice, that water supply exceeds all the claims against it, and that this condition will continue into the indefinite future. Thus, he concludes, requirements for a

justiciable controversy forbid joining the absent States, a conclusion he reinforces by an erroneous postulate that the sovereign status of the absent parties precludes the application of the usual rules of joinder.

The legal premises are in error. If a controversy is "justiciable" among present parties—and the Special Master expressly finds that it is—there is no further question of justiciability on the joinder motion. This Court has constitutional power to dispose fully and effectively of all disputes which are properly before it. The power to join as parties those who are necessary in order to accord complete relief to those already parties is a familiar application of this power. If a finding of justiciability is necessary with respect to the absent States sought to be joined, the joinder rules themselves satisfy the justiciability standards set by this Court in that the resolution of issues in the existing controversy vitally affects the rights and interests of the absent States, thereby constituting an immediate invasion of their present rights.

Even if this were not true, the Special Master's conception of a justiciable controversy as a dispute based on a present breach of obligation or present physical invasion of a claimed right is too restrictive. In the absence of such a breach of obligation or invasion of right, a suit to quiet title by Arizona or the United States against the absent States alleging the identical title here asserted

would clearly state a justiciable controversy within the constitutional power of this Court to decide. *A fortiori,* such a breach or invasion is not required in order to accord complete relief in the existing quiet title suits brought by Arizona and the United States.

Even if the Special Master's concept of justiciability were correct, both as related to joinder and as related to suits to quiet title, there is no basis to apply that concept in this case. There is no basis in the evidence (none having been taken) and there can be no basis in judicial notice (the facts being controversial) for the Special Master's assumptions as to water supply and water use. Evidence, if taken, would show the true facts to be contrary to those he has assumed.

Finally, the Special Master's recommendation that California, sued as a sovereign, be denied the right to join the absent States, is without support either in reason or in judicial precedent. This Court has been consistently careful to respect the quasi-sovereign status of states sued as defendants. A defendant state is entitled to at least as much consideration as a non-sovereign defendant. California, a sovereign defendant in this case, is sued on her obligation stated in the California Limitation Act. That obligation runs to six States named as beneficiaries. California is entitled to the same protection that would be accorded a non-sovereign obligor—namely, joinder of all joint obligees or dismissal of the suit. Sued for a declaration of rights and obligations under the

Colorado River Compact, California is entitled to the same protection that would be accorded a non-sovereign party similarly sued—namely, joinder of all the States among whom the rights and obligations of the Compact run. Sued by the United States, California is entitled to the joinder of her sister sovereigns, who by virtue of their common agreement and equal status, must share the burden of the Federal claims.

ARGUMENT

I.

GENERAL EXCEPTION

THE SPECIAL MASTER ERRED IN APPLYING AS A TEST FOR THE JOINDER OF NECESSARY PARTIES WHETHER A DECREE CAN BE SOUNDLY ENTERED IN THIS CAUSE WHICH WILL NOT AFFECT THE ABSENT STATES. THE PROPER TEST IS WHETHER ANY DECREE REASONABLY RESPONSIVE TO THE PLEADINGS WILL NECESSITATE THE PRESENCE OF THE ABSENT PARTIES IN ORDER TO GRANT COMPLETE RELIEF TO THOSE ALREADY PARTIES*

The Special Master's conclusions that the absent States "presently have no legal or equitable interest in the instant cause" and that "a decree can be soundly entered in this cause that will not affect the Upper Basin States with respect to rights to water or the uses of waters in the Upper Basin" (Report, p. 67, conclusions 11, 16) depend upon a number of substantive determinations of both fact and law which he has made. Such substantive determinations are improper at this stage of the litigation because:

(a) They have been made without taking evidence, without information as to the legislative history of the laws he interprets, and without a full hearing on the issues decided.

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* Rule 19 of the Federal Rules of Civil Procedure and the case authority on joinder of parties are analyzed in the California Defendants' Initial Brief, pp. 26-31, and their Reply Brief, pp. 7-19. The applicability of this rule to interstate cases is discussed in Part V, Section D of this Brief.

(b) Most of the determinations adversely affect the absent States even as decided by the Special Master. Even where the Special Master's determination does not adversely affect the absent States, a different decision which can reasonably be reached under the pleadings would so affect them.

(c) The Special Master's substantive determinations can properly be made only in a judicial proceeding to which the absent States are parties, clearly bound by the decisions so made. If determinations different from those of the Special Master are reached on the merits, joinder of the absent States will be compelled later in the suit when their joinder will greatly prolong the litigation.

Whether the Special Master was right or wrong in his substantive determinations, we do not ask the Court at this time to decide. A number of the determinations in our view are erroneous, and will not be sustained on the merits. At least one determination (that Indian uses are to be charged to the State and Basin where they take place) we believe to be correct, and should be reflected in the Court's final decree. In this and in every other instance here discussed, however, the Special Master's determination is a matter which properly can be decided only after trial at which the facts have been developed. They relate to issues which cannot be decided now.

If this case presented the problem of indispensable parties, whose joinder would destroy the

Court's jurisdiction, it might be desirable to try certain issues to find whether a decree can be fashioned to permit retaining jurisdiction. That, however, would require a full hearing and trial on the matters decided.*

In this case, however, the issue of indispensability is not involved, and, on any view, one hearing on the merits is enough. In necessary party cases no particular decision of contested issues can be assumed but must await hearing on the merits. This standard has been applied even in indispensable party cases.**

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* "[N]o evidence was taken by the Special Master, as it was his opinion that this was unnecessary and also that it would entail a consideration substantially as extensive as that required for a final hearing on the merits." (Report, p. 4.)

** ". . . The fact that their [indispensable parties'] interests may not have been prejudicially affected by the final judgment below, which was rendered after a trial on the merits, is not controlling, because the question of indispensable parties, and particularly of diversity jurisdiction, does not depend upon the result of the suit. The true test is the situation that existed before and not after entry of the final judgment." *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 218 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946).

"The slightest consideration will show that if appellee were right in the view he takes, that the relief granted, rather than that asked, determines indispensability, the whole doctrine and the equitable basis on which it rests would be gone by the board." *Young* v. *Powell*, 179 F.2d 147, 152 (5th Cir.), *cert. denied*, 339 U.S. 948 (1950).

"The interest of absent parties must be determined by the issues presented by the pleadings and the evidence and not by the final decision in the case. The mere fact that the court decides the issues in such a way that the absent parties

Issues which are frivolous, immaterial, or otherwise lacking in substance can, of course, be disposed of summarily. *Cf. Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936) (indispensability of United States need not be decided where complaint fails to state cause of action against defendant). However, this is not true of the issues dealt with by the Special Master. Some of the issues which he has decided go to the very heart of the controversy. To decide them at this stage of the litigation is virtually to decide the case itself without trial.

To these issues we now turn.

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would have no interest in the subject matter of the suit does not control." *Oglesby* v. *Springfield Marine Bank*, 385 Ill. 414, 426, 52 N.E. 2d 1000, 1005 (1944).

"In determining who are necessary parties we cannot speculate as to how the case might be decided." *Lewis* v. *Hanson*, 124 Mont. 492, 499, 227 P.2d 70, 73 (1951).

II.

THE SPECIAL MASTER HAS ERRED IN FINDING THAT THE FOUR ABSENT STATES ARE NOT NECESSARY PARTIES TO AN EFFECTIVE ADJUDICATION OF THE CLAIMS ASSERTED BY THE UNITED STATES TO THE WATERS OF THE COLORADO RIVER SYSTEM

In its Petition of Intervention, the United States prays this Court "To quiet the title of the United States of America in and to each and every right to the use of water claimed and exercised by it, all as asserted in this Petition, ..." (Petition of Intervention, par. XXXIX, p. 42.) These claims include rights:

(1) To the use of Colorado River System water to fulfill its obligations arising from water delivery contracts aggregating 8,462,000 acre-feet of the water stored in Lake Mead behind Hoover Dam and from contracts to generate electrical energy in the Lower Basin,* (*Id.*, par. XX, p. 18.) The United States alleges "that each and every contract entered into by the United States of America involving the use and delivery of water or electric power . . . are valid, binding covenants constituting the measure of the rights of the parties

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* With the average head January through September, 1955, of 450 feet at Hoover Dam, 11,300,000 acre-feet of water per year must pass through the turbines to generate contract firm energy.

to the extent that they are reflected by those covenants." (*Id.*, par. XXXI, pp. 27-28.)*

(2) To the use of water in sufficient quantity to fulfill its obligations arising from international treaties and conventions. (*Id.*, par. XIII, pp. 12-13; par. XXVIII, p. 24.) This claim includes 1,500,000 acre-feet of water per annum, measured at the international boundary, required to satisfy the Mexican Water Treaty. Delivery at the international boundary requires much more water at Lee Ferry because of channel losses and evaporation in transit. In addition, this claim includes 76,000 acre-feet per annum for specified fish and wildlife projects stemming from international conventions with Great Britain and Mexico.

(3) To the use of water to satisfy its obligations to Indians and Indian tribes in California and Arizona. (*Id.*, pars. XXV-XXVII, pp. 22-23.) This claim totals 1,747,250 acre-feet of annual diversions (not beneficial consumptive use).

(4) To the use of water in sufficient quantities "to satisfy the maximum legal demands for . . . the various projects . . . to the full capacity of the diversion, carrying, and storage structures described in this Petition and its appendixes; . . . ." (*Id.*, par. XXX, p. 25.) The quantity of water included in this claim is unspecified, but presumably

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* In listing the allegations of the United States (Report, pp. 20, 21), the Special Master omits any reference to this claim, despite the fact that it is the largest single claim asserted by the United States.

includes the full capacity of all structures owned by the United States in the Lower Basin.*

(5) To the use of water in unspecified quantities for the satisfaction of the needs in Arizona and California of the National Park Service, the Bureau of Land Management and the Forest Service should these needs be jeopardized in this suit. (*Id.*, par. XXX, p. 26.)

(6) To the use of water in unspecified quantity to protect the interests of the United States in flood control and navigation. (*Id.*, par. XXIX, pp. 24-25.)

The United States' claims are urged to be independent of the Colorado River Compact. (Petition of Intervention, pars. XXXIV and XXXVII, pp. 34, 38.) If so held, they necessarily become claims and rights against the waters of the entire Colorado River System. The specified United States claims total 11,785,250 acre-feet of water per annum.** Manifestly, this amount

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* This claim is not mentioned by the Special Master in his listing of the United States' claims. (Report, pp. 20-21.)

Some of the major Lower Basin structures listed by the United States (Petition of Intervention, Appendixes I, II, pp. 43-58), with stated storage capacities, under this category are:

Hoover Dam (32,359,000 acre-feet)
Davis Dam (1,820,000 acre-feet)
Parker Dam (717,000 acre-feet)
Roosevelt Dam (1,398,430 acre-feet)
Other federal dams on Salt River and other tributaries in Arizona (631,135 acre-feet)
Coolidge Dam (1,285,000 acre-feet)

** Some of these claims are stated in terms of beneficial consumptive uses, and some in terms of diversions. Of course, 11,785,250 acre-feet of diversions will support a lesser total

cannot be decreed from the 8,500,000 acre-feet of beneficial consumptive uses per annum allocated to the Lower Basin by Articles III(a) and III(b) of the Colorado River Compact. Therefore, a minimum of over 3,000,000 acre-feet of water per annum could be decreed only from the waters of the entire System—either surplus or the water apportioned to the Upper Basin by Article III(a) of the Compact. The interest of the absent States in such a resolution of the United States' claims is obvious. Equally obvious is the interest of the defendants in having these claims adjudicated only in a suit to which all seven Colorado River Basin States are parties.

In finding that these United States claims do not materially affect the absent States, the Special Master:

(1) Determines that "rights of the Indian tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian tribes in the Lower Basin shall be satis-

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quantity of beneficial consumptive uses. And, conversely, to the extent that claims are for beneficial consumptive use, considerably more than 11,785,250 acre-feet of water would be required. The California and Arizona contracts, which are included in this figure, call for the delivery of water from storage in quantities to provide 8,162,000 acre-feet of beneficial consumptive uses. The remainder of the specified United States claims, including the water for the Nevada Water Delivery Contract, relate to "wet" water, *i.e.*, diversions or physical deliveries. In addition the United States claims water for certain large projects for which it gives acreages but not the requirements in acre-feet of water; *e.g.*, Salt River Project, 243,000 acres. (Petition of Intervention, p. 56.)

fied solely from water appropriated [*sic*] to that Basin." (Report, p. 54.)

(2) Finds that "the interest of the United States in this proceeding is confined to its rights relating to waters of the Lower Basin" (Report, p. 67, conclusion 14), and that the United States' claims do not "enlarge the scope of this cause." (Report, pp. 44, 59, 67.)

(3) Finds that the "United States here asserts no rights against the Upper Basin States as to Upper Basin waters." (Report, p. 44.)

(4) Determines that, since the United States' claims are asserted only "against parties to this cause," the absent States cannot be affected by the claims. (Report, p. 59.)

Each of these conclusions misconstrues the Government's pleading; each is premature in determining a substantial issue on the merits; each is wrong in its assumption that the issue does not affect the absent States.

The Special Master's determination that Indian rights are chargeable to the Basin in which they are situated flatly contradicts the position of the United States that "the rights to the use of water of the Indians and Indian Tribes *are in no way subject to or affected by the Colorado River Compact.*" (Emphasis supplied.) (Petition of Intervention, par. XXXVII, p. 38.). Moreover, the United States specifically denies that Indian rights are chargeable to the Basin and State in which they

are located.* On the merits, a conclusion contrary to that of the Special Master is entirely possible under the pleadings and would affect the absent States profoundly.

The United States relies on Article VII of the Colorado River Compact, which provides:

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*The United States "denies each and every allegation of the paragraphs of the pleadings of the parties to which reference has here been made" including expressly the "counter allegation of the defendants . . . declaring that all beneficial consumptive uses of water by Indian Tribes pursuant to obligations of the United States to such Tribes are chargeable to the beneficial consumptive uses available to the Basin under the Compact, and to the State in which such uses are situated, ..." (Petition of Intervention, par. XXXVII, pp. 37, 38.)

The United States has taken the same position in a meeting with the Special Master and other counsel. The following colloquy beween the Special Master and Assistant United States Attorney General J. Lee Rankin, which took place at the Special Master's first meeting with counsel in August 1954, is instructive:

> "THE MASTER: [referring to whether claims for Indians are to be embraced within whatever share Arizona is claiming or in addition to it] Do you think before the time we get to the actual hearing you can know what the specificities are in that regard?
>
> "MR. RANKIN: Yes, but in regard to the claims, you are going to have to determine before this case is over whether or not the Indian claims as will finally be determined are charges on the whole river or charges against each state in which they are or what the rights of the Indians are in that regard from a legal standpoint.
>
> "THE MASTER: I see.
>
> "Mr. RANKIN: And I don't think you will be able to decide that until you have seen the whole picture about the entire controversy." (Transcript of Organizational Meeting, August 5, 1954, pp. 96-97.)

> "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

Before the Colorado River Compact became effective the rights of the Indian tribes were clearly rights against the entire Colorado River System. Now, under the Special Master's view, they are rights only against the waters available to each Basin. Whatever the ultimate conclusion may be, it is clear that the problem is a substantial one and should not be decided in advance of trial.

The Special Master's second conclusion—that the United States' claims do not affect the absent States because the claims are limited to the use of water in the Lower Basin and therefore the United States has not attempted to "enlarge the scope of this cause"—is equally in error.* At

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* The Special Master twice raises a question, which he finds unnecessary to decide, whether an intervener can enlarge the scope of the controversy. (Report, pp. 44, 59.) This Court, in *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922), held that the United States as an intervener in an original action can enlarge the scope of the suit:

> "Under the Constitution our original jurisdiction extends to suits by one state against another, and to suits by the United States against a state. [Citing cases.] In its first stage this was a suit by one state against another. When the United States intervened it became also a suit by the United States against those states. *In its enlarged phase,* it presents in appropriate form the conflicting claims of the two states and the United States to the river bed, and calls for their adjudication." (Emphasis added.)

See earlier opinion, *Oklahoma* v. *Texas*, 252 U.S. 372, 376 (1920).

See also 4 MOORE, FEDERAL PRACTICE ¶¶ 24.16, 24.17 (2d ed. 1950).

several points in his report, the Special Master characterizes "the subject matter of this suit" as the "water allocated to the Lower Basin States."* (*E.g.*, Report, p. 35.) It appears that the Special Master views this litigation as confined in scope to 8,500,000 acre-feet of beneficial consumptive use per annum.** The Special Master is obviously wrong because the specific claims of the United States total 11,785,250 acre-feet.

The Special Master, in his third conclusion with respect to the United States' claims (Report, p.

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* One ground for the Special Master's conclusion is that the Upper Colorado River Basin Compact in Articles VII and XIX specifically provides for use of waters in the Upper Basin by the United States, and the United States is a party to that Compact. (Report, p. 60.) Although the United States consented to the Upper Basin Compact, the Special Master is in error in stating that the United States thereby became a party. The legislative history makes this clear. The House Committee on Public Lands, in reporting legislation to give this consent, declared:

> ". . . It is recognized that the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto . . . . It is further recognized that Congress, by giving its consent to the Upper Colorado River Basin Compact, does not commit the United States to any interpretation of the Colorado River Compact expressed in, or implied from, the Upper Colorado River Basin Compact, and expresses neither agreement nor disagreement with any such interpretation." H.R. Rep. No. 270 on H. R. 2325, 81st Cong., 1st Sess. (1949).

** However, the Special Master recognizes the evidence must be received at the trial on the merits to determine the total quantity of water, including surplus, physically available to the Lower Basin. (Report, pp. 61-62.)

44) says that the "United States here asserts no rights against the Upper Basin States as to Upper Basin waters." (*Ibid.*) While the United States' claims relate to uses located in the Lower Basin, they constitute claims upon the unappropriated waters of the entire system, thus reaching to the unappropriated portion of the water apportioned to the Upper Basin by Article III(a) of the Compact. The Special Master confuses the site of use with the source of water to satisfy the use.

In his fourth conclusion, the Special Master attaches additional significance to the fact that the United States asserts its claims only "against the parties to this cause." (Report, pp. 44, 59.) He holds that since "the parties to this cause were and are Lower Basin States," the absent States cannot be affected by the United States' claims. (*Ibid.*) If this standard had been applied in *Texas* v. *New Mexico,* No. 9 Original, 1955, it would have been unnecessary to refer the question of indispensability of the United States to the Special Master (348 U.S. 805 (1954)), since Texas did not name the United States in her complaint. *Cf. Arizona* v. *California,* 298 U.S. 558 (1936), in which the United States was held indispensable although Arizona alleged no claims against the Government. Obviously, the Special Master's reasoning would simplify to the point of extinction all rules to determine necessary parties.

In each of his above four conclusions, the Special Master erred in finding that claims of the United States do not affect the absent States.

Some of the ways in which they are necessarily affected are:

(1) The United States "denies that Section 8 and Section 13(b), (c) and (d) of the Boulder Canyon Project Act subject all of its rights to the provisions of the Colorado River Compact . . . ." (Petition of Intervention, par. XXXIV, p. 34.)* These sections provide that the United States and those claiming under it shall be subject to and controlled by the Colorado River Compact, and also (Section 8(b)) by a compact authorized among Arizona, California, and Nevada, or any two of them, which was never in fact consummated.** The references in the Project Act to the Colorado River Compact must be read in the light of the fact that the Compact has escape clauses for navigation (Article IV(a)), Indian

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* This denial of the United States is a negative pregnant with the affirmative implication that some of the rights of the United States are subjected by the Project Act to the Colorado River Compact. Uncertainty over which rights are claimed by the United States to be governed by the Compact should have been resolved before deciding the joinder motion.

At the hearing on this motion before the Special Master, the California defendants sought such clarification. However, the Special Master refused to address the relevant inquiries to counsel for the United States. (Transcript, pp. 355-56, 419.)

** The Special Master says that "The Colorado River Compact, by reference, was made a part of the Boulder Canyon Project Act, by Section 8(b) . . . ." the text of which he then quotes. (Report, p. 15.) Section 8(b) does not refer to the Colorado River Compact but to the proposed tri-state compact. Sections 8(a) and 13(b),(c),(d) cover the relationship between the Colorado River Compact and the rights of the United States.

rights (Article VII), obligations to Mexico (Article III(c)), and "present perfected rights" (Article VIII). Moreover, the Compact, as Articles I and VI expressly recognize, covers only a part of the waters of the Colorado River System. If any of the claims of the United States are held to be independent of and unaffected by the Colorado River Compact, the apportionment to the absent States of 7,500,000 acre-feet of beneficial consumptive use per annum in perpetuity would provide no effective insulation against appropriations by the United States.

(2) To the extent that the United States' claims, other than those relating to the Mexican Water Treaty, are satisfied from surplus over the quantities specified in Articles III(a) and III(b) of the Compact, these claims reduce or eliminate the "buffer" of surplus which protects the Upper Division States from the obligation imposed by Article III(c) to deliver additional water in satisfaction of any Mexican Treaty deficiencies. The absent States must necessarily be affected by any determination that permits reduction in, if not complete exhaustion of, the amount of surplus available to satisfy the Mexican Treaty.

(3) To the extent that the United States' claims are satisfied from this surplus, they reduce the surplus water to which, in California's view, the absent States could otherwise secure rights by priority of appropriation and which would otherwise be subject to further apportionment after 1963 under Articles III(f) and III(g).

(4) Since the United States seeks to quiet title to 1,500,000 acre-feet of water at the international boundary for the Mexican Treaty, the absent States are affected by the type of decreed rights the United States may secure in this regard. The United States does not confine her claim under the Mexican Treaty to "surplus" water. The Treaty obligation, by Article 10, is a first call on all water "from any and all sources," not merely a claim against "surplus." Indeed, as Arizona alleges in her Complaint, "It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico." (Complaint, par. XVI, p. 21.) Clear title in the United States requires a determination of the magnitude of the respective obligations of all of the Colorado River Basin States to satisfy Mexican Treaty deficiencies under Article III(c).

The Special Master obviously contemplates a decree in this case which will bind the United States with respect to its Lower Basin rights only. It is doubtful that the binding effect of the Court's decree can be so limited.* The United States will

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* The United States would be bound, under the doctrine of collateral estoppel, in any future litigation involving exclusively Upper Basin States. Three Upper Basin States (Arizona, New Mexico and Utah) will be parties if the Special Master's recommendation is followed, and those three will also be bound.

A precise parallel is *Oklahoma* v. *Texas*, 256 U.S. 70 (1921). That case held that an earlier suit, *United States* v. *Texas*, 162 U.S. 1 (1896), conclusively determined that the Texas-

be bound by the decree in this case. It must operate its reservoirs and works in the Upper Basin, which control supply to both Upper and Lower Basins, in conformity with the decree. For example, if the contention of the United States that its rights are not subjected by Sections 13(b), (c) and (d) of the Boulder Canyon Project Act* to the Colorado River Compact is sustained by the decree in this case, the United States would be free of the Compact in its operations throughout the Colorado River Basin.** Similarly, should the decree determine that rights can and have been acquired in surplus water by present parties (as

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Oklahoma border, first delineated in a treaty with Spain in 1819, is the south bank of the Red River, and not the center of the channel. The earlier case was conclusive despite the fact that it had involved only a small segment of the boundary in dispute in the later suit. The Colorado River Compact, even more than the Spanish Treaty, is indivisible. It cannot mean one thing in California, Nevada, parts of Arizona, New Mexico, and Utah, and something else in Colorado, Wyoming, and other parts of Arizona, New Mexico and Utah.

* These sections of the Project Act, if effective at all, operate with respect to claims of the United States throughout both basins. Their operation is not limited to the Lower Basin.

** This is not an academic matter to the Upper Basin. In the pending case of *United States* v. *Northern Colorado Water Conservancy District*, Civil No. 2782 (D. Colo. 1955), the decree recently entered reserves for future judicial determination the issue of the extent to which the United States, by virtue of Section 13 of the Project Act, subjected its rights in the *Upper* Basin to Article IV of the Colorado River Compact. An expanded domestic water supply for the City and County of Denver and the City of Colorado Springs may turn on the ultimate resolution of this issue.

the California defendants contend), the United States cannot be permitted to impound and withhold surplus in Upper Basin reservoirs on the theory that no rights in surplus can be secured prior to a 1963 compact. To confine the binding effect of the decree upon the United States to its Lower Basin operations only would create a bifurcated sovereign whose Upper and Lower Basin responsibilities would be administered without reference to each other. Such a result would produce hopeless confusion.

Moreover, if the federal works in the Upper Basin are controlled by the Colorado River Compact as construed by a decree in this case, to which the United States is a party, but the beneficiaries of those works in the Upper Basin are free to assert contrary interpretations because they are not parties to the decree, confusion will be converted into chaos.

III.

THE SPECIAL MASTER ERRED IN NOT RECOMMENDING JOINDER OF THE ABSENT STATES BY VIRTUE OF THEIR INTEREST IN THE RESOLUTION OF THE ISSUES OF WHETHER ARIZONA IS A PARTY TO THE COLORADO RIVER COMPACT, WHETHER THE STATUTORY COMPACT CONTAINED IN THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT REMAINS IN EFFECT, AND THE INTERPRETATION OF THAT STATUTORY COMPACT

The Boulder Canyon Project Act, by which Congress consented to the Colorado River Compact, was specified to become effective on one of two alternatives stated in the first paragraph of section 4(a):

(1) ratification by all seven signatory States within six months and proclamation by the President;

(2) in default of seven-State ratification within six months, ratification by six States including California (the six States waiving the Compact requirement for seven-State ratification) and the enactment by the California Legislature of a Limitation Act in terms prescribed by the Project Act, and proclamation by the President.

The Boulder Canyon Project Act and the Colorado River Compact became effective June 25, 1929, upon the President's Proclamation that the first alternative had failed and the second alterna-

tive had been accomplished. (46 STAT. 3000 (1929), Appendix 4 to California Answer.)

California contends that a seven-State Colorado River Compact and a six-State Colorado River Compact plus the California Limitation Act are mutually exclusive alternatives. Arizona sues here, however, relying both upon asserted rights as a party to the Colorado River Compact and as a beneficiary of the California Limitation Act. The Special Master finds that the absent States are not affected by this issue because (1) the protection afforded the Upper States by the Colorado River Compact is effective against Arizona even if Arizona is not a party, and (2) the absent States have no rights under and no interest in the California Limitation Act. (Report, pp. 45, 58.)

A. The Special Master's determination that the protection afforded the Upper Basin States by the Colorado River Compact is effective against Arizona even if Arizona is not a party to the Compact (Report, pp. 48, 50) is patently erroneous, and deeply affects the absent States

Arizona contends that in 1944 she effectively ratified the Colorado River Compact. California denies that Arizona's ratification was effective. In 1934, this Court determined that Arizona, because she was not a party to the Compact, lacked standing to litigate against the six other Colorado River Basin States interpretations of the Com-

pact which she again asserts in this suit.* The 1934 decision upon that point is *res judicata* in this suit. If the Court determines that Arizona is not a party to the Compact, Arizona still lacks standing to seek some and possibly all of the relief she asks.

On the merits of whether Arizona is now a party to the Compact, the Special Master makes no determination. Indeed, he could not, because many factual matters are involved, and no evidence has been taken. However, he finds that the issue "is a matter of concern to water users in the Lower Basin only." (Report, p. 48.) "The only part of the Colorado River System involved here in which it [Arizona] has an interest is the Lower Basin; . . . ." (*Ibid.*)

The effect of this determination on the absent States is clear from the decision of this Court in *Arizona* v. *California,* 283 U.S. 423 (1931). If not a party to the Compact, Arizona is entitled to appropriate all the unappropriated water in the Colorado River System, including any unappro-

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* *Arizona* v. *California,* 292 U.S. 341 (1934). Arizona's bill against the Secretary of Interior and the six other States sought to perpetuate testimony of the Compact negotiators that uses permitted the Lower Basin by Article III(b) are "for the sole and exclusive use and benefit of the State of Arizona." Arizona makes the same claim in this suit. The Court denied leave to file the bill in the earlier suit, on the ground, *inter alia,* that ". . . the meaning of the Compact, considered merely as a contract, can never be material in the contemplated litigation, since Arizona refused to ratify the Compact." 292 U.S. at 356-57.

priated part of the water necessary to satisfy beneficial consumptive uses apportioned to the Upper Basin by Article III(a).* If a party to the Colorado River Compact, she is obligated to respect the apportionment, insulated from the law of prior appropriation, which the Compact makes to the Upper Basin. The 1931 decision is *res judicata* as to that determination in this suit.**

Moreover, if Arizona's view that rights cannot be acquired in surplus should prevail, and if she is held to be a party to the Compact, she may not appropriate any surplus water which is subject, under Articles III(f) and III(g), to apportionment between the two Basins by a compact

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* 283 U.S. at 463, n.15: "It is also argued that of the 7,500,000 acre-feet allotted by the compact to the upper basin states, only 2,500,000 have already been appropriated, and that thus the presently unused surplus of 5,000,000 acre-feet cannot be appropriated in Arizona. But Arizona is not bound by the compact as it has withheld ratification. If and when withdrawals pursuant to the compact by the upper basin states diminish the amount of water actually available for use in Arizona, appropriate action may then be brought."

** In the 1931 suit, as in two later suits, Arizona joined all six States of the Colorado River System, *Arizona* v. *California*, 292 U.S. 341 (1934); *Arizona* v. *California*, 298 U.S. 558 (1936). The Special Master finds nothing in the nature of a "*quasi estoppel*" in this fact which would compel Arizona to join the absent States in this action. (Report, p. 42.) The proponents of the joinder motion have not urged estoppel as a basis for joinder, but have called attention to the parties in the prior cases to show the unquestioned recognition of the fact that issues in those cases, which are also issues in the present litigation, could not be decided without the presence of all the Colorado River Basin States.

negotiated sometime after October 1, 1963. But if Arizona is not a party to the Colorado River Compact, and her view as to surplus (also urged by Nevada) is followed by the Court, Arizona alone among the Colorado River Basin States is entitled to appropriate all of the unapportioned water otherwise subject to apportionment by a post-1963 compact. The other States in the Colorado River Basin, since they are bound by the Compact, could not even compete with Arizona in the appropriation of this surplus water.

The Special Master attributes to the absent States the position that the issue of Arizona's status under the Compact does not require joinder "because (1) to them it is immaterial whether or not Arizona is a party, and (2) their obligations and rights will not be affected regardless of the determination of this question since they are controlled by the Compact." (Report, p. 46.)

The fact is that neither in their briefs nor in their oral argument did the absent States take either of the two positions the Special Master ascribes to them. Arizona's status under the Compact has long been a matter of pressing concern to all four States. More than once their official representatives have opposed any development in Arizona which would enable her to use more water unless and until, either by supplementary compact among all seven States or by a

contractual limitation act, Arizona should accept the obligations of the Colorado River Compact.*

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*See "Protest Of The States of Colorado, New Mexico, Utah and Wyoming Against The Proposed Gila Valley Irrigation Project In Arizona And The Proposed Pilot Knob Power Plant In California, By the Representatives of the States in Interstate Conference at Denver, February 5th, 1936." This document was signed by the Attorneys General for Colorado, New Mexico, and Wyoming and by Special Counsel for Utah. This Protest stated:

"One of the principal purposes of the Compact is to protect the protesting States in respect to their present and future allocations against the acquisition of priorities that might be asserted against their basinal allocation by the States of the Lower Basin. It contemplates that Arizona, like California and Nevada, shall take her water, not out of the allocations made and to be made under the Compact to the Upper Basin, but out of those to the Lower Basin in which she belongs. Arizona, by not ratifying the Compact, denies and repudiates the inter-basinal division of the water made by the Compact and thereby questions the legal effect of water appropriations made and to be made in the protesting States of the Upper Basin, as against water appropriations made and to be made within her own limits. (p. 6.)

". . . .

". . . [T]hese protesting States would have no objection to Federal aid to water projects in Arizona if, as a condition precedent to the operative effect of such aid, that State, with the consent of the Congress which is now in session, would enter into an inter-state agreement with the other six States whereby she would become a signatory to the Compact, or, if, with the consent of the Congress, she were to enact a Self Limitation Act whereby she would contract with the United States for the benefit of the other Colorado River States, and each thereof, that her interests and rights in the Colorado River System should be bound by the Compact. . . ." (p. 10.)

For further protest by Upper Basin Representatives see 80 CONG. REC. 9388-89 (1936) and testimony of official representatives from Colorado, New Mexico, Utah, and Wyoming, before Subcommittee of House Committee on Appropriations, on Interior Department Appropriation Bill for 1938, Hearings, Part II, pp. 1807-43 (1937).

Even were it not for the 1931 decision, there could be no colorable argument for the proposition that the Compact's rights or obligations run to a non-signatory State. If the Compact protects the Upper Basin's apportionment against Arizona's appropriations, although Arizona is not a party, it could do so also against appropriations by California and Nevada if neither State had ratified the Compact. The Upper Basin could have negotiated an effective compact for the Colorado River Basin without the concurrence of any Lower Basin State.

Were the Colorado River Compact a contract between individuals, it is clear that all six original parties would be necessary to any decision as to whether a seventh had been added. (See California Defendants' Reply Brief, pp. 32-4.) If the curious anomaly of a six-state compact in the Lower Basin, a seven-state compact in the Upper Basin, and a six-and-one-half state compact for New Mexico and Utah is to be avoided, all the signatory States are necessary parties in a suit which must decide this issue.

B. The Special Master's determination that the "Upper Basin States could not sue as beneficiaries of the California Limitation Act," is patently erroneous and deeply affects the absent States as well as California (Report, p. 45)

The California Limitation Act, in conformity with the first paragraph of Section 4(a) of the Boulder Canyon Project Act, in express terms recites that the State of California "agrees irrevocably and unconditionally with the United States

and for the benefit of the States of Arizona, *Colorado,* Nevada, *New Mexico, Utah,* and *Wyoming* as an express covenant and in consideration of the passage of the said 'Boulder canyon project act' [emphasis supplied]" to limit her uses in California of Colorado River System water. The Limitation Act and the Boulder Canyon Project Act thus constitute a compact between California and the United States. Precedent for such a compact between a state and the United States, embodied in reciprocal legislation, is ample.* *Stearns* v. *Minnesota,* 179 U.S. 223, 248 (1900); *Neil, Moore & Co.* v. *Ohio,* 3 How. 720 (U.S. 1845); *Searight* v. *Stokes,* 3 How. 151 (U.S. 1845). See THURSBY, INTERSTATE COOPERATION 51 (1953). To distinguish this compact from the Colorado River Compact the California defendants have referred to it in their briefs and pleadings as the Statutory Compact.

Arizona sues California on an alleged breach of the Statutory Compact and to enforce her claimed rights thereunder. (Arizona Complaint, pars. XXVI, XXVII, pp. 28-29.) The California defendants deny any breach of that Compact, and further assert that if the Colorado River Compact has been effectively ratified by Arizona (as Arizona contends) all obligations to the six beneficiary States under the Statutory Compact are at an end. A seven-State Colorado River Compact, or a six-State Colorado River Compact plus the

* The Colorado River Compact also became effective through reciprocal legislation modifying Article XI which calls for seven-State ratification.

California Limitation Act, we contend, are mutually exclusive alternatives.

On every principle of necessary parties, this issue requires joinder of the absent States. If California's obligation under the Limitation Act is broken as to one State, it is broken as to all. If Arizona's ratification of the Colorado River Compact terminated California's obligation under the Limitation Act, that obligation is terminated as to every state in the Colorado River Basin. The reason for the rule which universally makes joint obligees necessary (and, where relevant, indispensable) parties is to protect obligors from the harassment of multiple suits and possible inconsistent decrees. The difficulties of interstate litigation provide even more reason for affording the protection of this rule to a state sued by one of several joint obligees than to a private party who might be similarly sued on such an obligation.

The Special Master denies neither the statement of the rule nor its application to states. Rather, he reads four of the six joint obligees out of the Statutory Compact by finding that they cannot sue on California's obligation. Never before, so far as we know—and certainly not in this litigation—has such a proposition been asserted.* The

* Even the Special Master wavers in adhering to his determination that the absent States *cannot* sue when he asserts, later in his Report, that "there is no reason to fear that they may institute an action based on the California Limitation Act." (Report, p. 58.) As we shall demonstrate later in this portion of the brief, this latter assertion is equally incorrect.

Special Master's determination of itself adversely and materially affects the absent States. Moreover, we believe it is patently erroneous.

Doubt that the Special Master's determination will be sustained, either in this suit or later litigation, is based on the following reasons:

(1) Considered as a contract, the Statutory Compact bears on its face the clear and unmistakable evidence of an intent to confer rights on the States as third-party beneficiaries.

(2) Considered as a federal and a state statute, the Statutory Compact should be construed, if possible, to give some meaning and operative effect to every term.* The conclusion that the absent States have no rights under the Statutory Compact renders meaningless terms in that Compact which name the "states of Arizona, *Colorado,* Nevada, *New Mexico, Utah,* and *Wyoming,*" as beneficiaries of its covenants [emphasis supplied].

(3) The provision of the Statutory Compact which limits California to the use of one-half the "excess or surplus" waters unapportioned by the Colorado River Compact concerns the absent

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*". . . No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' [citation.]" Ex parte *Public National Bank,* 278 U.S. 101, 104 (1928).

States. Such "excess or surplus" includes the surplus subject, under Articles III(f) and III(g), to apportionment by a post-1963 compact if all the present signatory states are able to agree.* This surplus is, in the words of Article VI of the Colorado River Compact, "waters of the Colorado River System not covered by the terms of this compact." Subject to a possible later compact, the Colorado River Compact, we contend, left these waters available to appropriation and use by any of the Colorado River Basin States. As to this surplus water, "separation of basins made by Article I of the Colorado River Compact," to which the Special Master refers (Report, p. 45), has never taken place.

Apparently the Special Master's conclusion that the absent States cannot sue on the Limitation Act is based on inadvertence in overlooking the provision of the Limitation Act which applies to "excess or surplus."

The probability that the Special Master overlooked this second part of the Limitation Act is

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* Article III(c) of the Colorado River Compact defines surplus which is available for Mexico as water "over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III. California contends that the "*excess or surplus* waters unapportioned by said [Colorado River] compact" to which California is entitled under the Statutory Compact includes but is not limited to Article III(c) "*surplus*," and that the balance of such "*excess* or surplus waters" is that referred to by Article III(b). California has a right to use, not one-half of each component, but one-half of the aggregate of both components of "excess or surplus."

strongly suggested by his misreading contentions of the California defendants:

> "It is argued, too [by the California defendants], that the absent States have an interest in the Limitation Act because it restrains the California defendants from extending their use of Colorado River System water past 4,400,000 acre-feet per annum." (Report, pp. 57-58.)

The California defendants have made no such argument. In affirmative defenses California has asserted rights to use not less than 5,362,000 acre-feet per annum, all within the Limitation Act.

(4) The legislative history of the Boulder Canyon Project Act makes abundantly clear that the California Limitation Act provision was inserted in the Project Act at the insistence of representatives of the absent States.* The express purpose

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* S. REP. No. 592, 70th Cong., 1st Sess. at p. 4 (1928), majority report to accompany S. 728 (Boulder Canyon Project Bill), contains this explanation of the first version of the provision which gave rise to the Statutory Compact:

> "The amendment on page 6, line 9, provides that the Secretary shall not make contracts for use in California for an aggregate amount of water exceeding 4,600,000 acre-feet per year, and one-half of the surplus or excess water. This amendment, like numerous other provisions of the bill, is designed to give further assurances to the various States, particularly those in the upper basin, against any undue advantages or rights to California."

For the full legislative history of Section 4(a), see H. Doc. No. 717, 80th Cong., 2d Sess., p. 55, n.14 (1948).

was to protect those States against the possibility that California would appropriate all the water permitted the Lower Basin under the Compact, and that Arizona, not a party to the Compact, would invade the Upper Basin's apportionment, as this Court held in *Arizona* v. *California,* 283 U.S. 423 (1931), she was free to do. If Arizona is held in this suit not to be a party to the Compact, the situation is no different in this respect today from that which was contemplated when the Boulder Canyon Project Act was passed. To hold that the absent States have no rights under the Statutory Compact would thwart the legislative purpose that brought it into existence.

In the light of the legislative history of the Statutory Compact, in the light of its purpose, and in the light of its unambiguous and unmistakable language, we feel that the Special Master's determination that it gives the absent States no rights is clearly wrong. That, however, is not the issue posed by these exceptions. Unless the Special Master is so clearly right in his determination that no other view merits a hearing, issues under the Statutory Compact clearly compel joinder of the absent States.

IV.

THE SPECIAL MASTER ERRED IN FAILING TO RECOMMEND JOINDER OF THE FOUR STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING AS NECESSARY PARTIES TO THIS SUIT BECAUSE COMPLETE RELIEF CANNOT BE AFFORDED AMONG THE PRESENT PARTIES WITHOUT A DETERMINATION OF

(A) THE RIGHTS OF THE ABSENT STATES UNDER THE COLORADO RIVER COMPACT TO THE USE OF WATERS OF THE COLORADO RIVER SYSTEM AVAILABLE TO THE "UPPER BASIN;"

(B) THEIR OBLIGATIONS UNDER THAT COMPACT AS "STATES OF THE UPPER DIVISION;" AND

(C) THEIR INTERESTS IN THE WATERS OF THE COLORADO RIVER SYSTEM WHICH ARE NOT COVERED BY THE COLORADO RIVER COMPACT

THE SPECIAL MASTER ERRED IN FINDING THAT THE COLORADO RIVER COMPACT, IN TERMS, PROHIBITS THE JOINDER OF THE STATES OF THE UPPER DIVISION IN THIS SUIT

The Special Master has erred in his fundamental conception that the Colorado River Compact divides the Colorado River System into two parts as a political boundary might be drawn between two states. This leads to the erroneous conclusion that the present controversy relates exclusively to "water allocated to the Lower Basin" (Report, p. 35), a phrase impossible even to define without resolving issues of construction of the Colorado River Compact.

The Special Master apparently believes that the Colorado River System can be, and, by the Colorado River Compact has been, divided into

two unrelated and "independent" parts, that is, an Upper Basin and a Lower Basin, so that the determination of rights and obligations of water users in one basin can be made without affecting the rights and obligations of the water users in the other. In fact, the Special Master compares the situation to that in which territories are divided between sovereigns. (Report, p. 35.) On this premise, he concludes that "The only part of the Colorado River System involved here . . . is the Lower Basin," for the Compact "apportioned to each basin a given amount of water, and it is impossible for the Upper Basin States to have any interest in water allocated to the Lower Basin States, which is the subject matter of this litigation." (Report, pp. 48, 35.) This concept of a complete separation, as though these were separate river systems, is a fundamental error running through the entire report.*

Even were the Special Master correct in treating the Colorado River Compact like a division of territory, he is in error that this precludes joinder, since the controversy among present parties centers on the size or amount of "territory"

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* At page 9 of his Report the Special Master quotes a statement on the "division into two Basins" which he attributes to Hon. Carl Hayden, Representative from Arizona. It is in fact part of a reply by Hon. Herbert Hoover to a questionnaire submitted by Mr. Hayden. See 64 CONG. REC. 2710-13 (1923) reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., pp. A31-A43 (1948). The paragraphs quoted by the Special Master should be read in relation to the other twenty-five questions which Mr. Hoover was answering.

allocated to present parties as against the Upper States. For example, in a suit over a boundary described as the "center of the river" it would be impossible to say that the meaning of "center of the river" is for the state on each side of the river to determine for itself, as the Special Master says of the issue over meaning of "beneficial consumptive use" in the Colorado River Compact. (Report, p. 52.) Territorial dispositions are the frequent subject of controversy, as the interstate boundary cases in this Court show. See cases collected, Annot., 74 L. Ed. 784, 786-87 (1930). The fact, however, is that the Special Master erred in treating the Colorado River Compact as an instrument which divides geographical territory.

A related error, which reappears through the report, is the confusion between *flow* and *consumptive use* of water; *e.g.*, between the obligations of the States of the Upper Division, stated in Article III(d), not to deplete the *flow* at Lee Ferry below 75,000,000 acre-feet in each decade, and the apportionment of the beneficial consumptive *use* made by Article III(a) to the Lower Basin from the Colorado River System, which includes, by definition, the tributaries. He treats flow and use as identical. (Report, pp. 55, 61.) This is a fundamental misinterpretation of the Compact, as demonstrated in Part IV, Section A, page 56.

The confusion between flow and use also involves confusing Basins and Divisions. States of the

Upper Division are Colorado, New Mexico, Utah and Wyoming (Article II(c)). States of the Lower Division are Arizona, California and Nevada (Article II(d)). Colorado and Wyoming have areas in the Upper Basin only (Article II(f)). California and Nevada have areas in the Lower Basin only (Article II(g)). Arizona, New Mexico and Utah have areas in both Upper and Lower Basins. (See map (Plate I) inside front cover.) Delivery obligations and obligations not to withhold water are imposed by the Compact exclusively on the States of the Upper Division (Articles III(c), III(d), and III(e)). Rights to beneficial consumptive use are conferred exclusively on Basins (Articles III(a) and III(b)). Flow and use of water cannot be treated as equivalent without ignoring this distinction between Basins and Divisions as the Special Master does in twelve different places at which he refers to Basins delivering or withholding water. (Report, pp. 12, 13 (two places), 41, 45, 49 (two places), 50, 55, 56, 58, 61.) We submit that this confusion reflects not inadvertent inaccuracy of expression, but a failure to grasp the fundamental nature of the Compact.

Rights to the use of water flowing in a stream system must be distinguished from rights to land which may be subject to a territorial division by agreement on a boundary line. Under the law of prior appropriation generally applicable among the Western States, a prior appropriation on the lower reaches of a stream constitutes a valid right

to the use of water from the stream as against junior appropriators upstream. *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), which accentuated the demand of the States of the upper Colorado River for a compact because of expanding uses in California and Arizona on the lower river, applied this doctrine of "first in time, first in right" on an interstate stream regardless of state lines. This law of prior appropriation, except to the extent superseded by the Compact, still governs. Hence, with respect to waters not covered by the Compact, it is clear that there can be no "boundary line" territorial division of the river system, for the waters originating in the upper River are directly affected by rights established by Lower Basin uses.

The Special Master correctly perceived that the Colorado River Compact, to the extent of the use of the water covered thereby, cut across the principle of priority of appropriation and preserved to the Upper Basin and the Lower Basin respectively rights in perpetuity to make future appropriations and use of water valid as against appropriations and uses which otherwise would be prior in time, and hence prior in right, in the other Basin. The Special Master erred, however, in failing to see that the heart of the present controversy concerns (a) the extent and amount of rights the Lower Basin acquired against the Upper under the Compact; (b) the amount of water the Upper Division States are obligated to deliver to the Lower Basin at Lee Ferry; and (c) rights

to the use of water not covered by the Compact. An analysis of these issues in controversy demonstrates the impossibility of dividing the present River System under the Compact into two separate and unrelated parts.*

A. The relief, essentially declaratory in nature, which Arizona asks with respect to three interpretations of the Colorado River Compact, affects the rights of the absent States under the Colorado River Compact

Arizona's Complaint (Par. XXII, pp. 25-26) poses three questions of interpretation of the Compact upon which, in effect, she asks declaratory relief. They are:

> "How is beneficial consumptive use to be measured?"
>
> "Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?"
>
> "How are evaporation losses from Lower Basin main stream storage reservoirs to be charged?"

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* The physical facts alone indicate the interrelationship of the Basins. Water physically available to the Lower Basin and Mexico originates in large part (80%) in the Upper Basin. Most of the water passing the division point will ultimately be return flow of water which has been diverted and re-diverted at several thousand points of diversion on the main stream and tributaries in the Upper Basin. R. J. Tipton, Report on Water Supply of Colorado and Allied Matters to the Upper Colorado River Basin Committee 25 (1938), excerpt reprinted in *Hearings Before a Subcommittee on Irrigation and Reclamation of the House Committee on Public Lands on H.R. 934 and H.R. 935,* 81st Cong., 1st Sess. at 1175 (1949).

The Special Master ruled, in effect, that however these questions may be answered in the final decree, the answer will not affect the Upper States. We think he is in error, for the reasons stated below.

1. *The definition of "beneficial consumptive use" under the Compact vitally affects the absent Upper Basin States.*

The Colorado River Compact uses the phrase "beneficial consumptive use" in two places and only two: in Article III(a) to apportion in perpetuity the beneficial consumptive use of 7,500,000 acre-feet of water per annum respectively to the two Basins, and in Article III(b) to permit the Lower Basin to increase its beneficial consumptive use by 1,000,000 acre-feet of water per annum. Thus, under the Compact, the sole significance of the term "beneficial consumptive use" is to establish *inter*-basin rights of the two Basins with respect to each other.

Arizona in the fifth paragraph of her prayer for relief asks that

> "A decree be entered herein recognizing, confirming and establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of stream depletion." (Complaint, pp. 30-31.)

Arizona asserts (Complaint, par. XXII, p. 26) that under the Colorado River Compact, "bene-

ficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man. . . . Water salvaged by man is not chargeable as a beneficial consumptive use."

California alleges (Answer to Arizona's Complaint, par. 8, pp. 11-12) to the contrary that "beneficial consumptive use" means the quantity of water actually consumed, at place of use, as defined in Section 4(a) of the Boulder Canyon Project Act ("diversions less returns to the river"), and in Article 1(j) of the Mexican Water Treaty (" 'Consumptive use' means the use of water by evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream.").

This treaty definition has basin-wide application. Article 10 of the treaty authorizes reductions in the guaranteed delivery to Mexico, in the event of extraordinary drought or serious accident, "in the same proportion as consumptive uses in the United States are reduced."

Nevada says (Petition of Intervention, par. XVIII, p. 20) in substance, that the rule of "diversion less return flow" applies generally subject to an exception in favor of the "main stream depletion theory" on certain tributaries, and that no

debit should be made for the use of salvaged water on the main stream in the Lower Basin.*

The Special Master finds that this issue does not warrant joining the Upper Basin States because:

> "(1) how 'beneficial consumptive use' shall be measured in each Basin is a question for each Basin to determine so long as the Colorado River Compact endures. The quantities of water for the Upper Basin and its obligations to deliver are fixed by the Colorado River Compact; (2) what matter how the individual Basins measure 'beneficial consumptive use' so long as it is possible to interpolate the two methods; . . . ." (Report, p. 52.)

These findings by the Special Master show a fundamental misconception of the controversy before the Court.

A decree determining how beneficial consumptive use shall be measured, limited to the Lower Basin,

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* The four absent States, in the Upper Colorado River Basin Compact, have provisionally agreed upon a fourth method whereby "beneficial consumptive use" under Article III(a) of the Compact is measured by the "inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry." But they reserve the right to change this method by unanimous agreement of their Upper Basin Compact Commission (Article VI). Arizona is a party to that Compact but is not represented on that Commission (Article VIII). The decree here sought by Arizona would "freeze" the definition of consumptive use throughout the Colorado River Basin.

is not the relief Arizona asks, and is not the issue in this suit. Rather, Arizona asks for a determination of the method of measurement under the Colorado River Compact, and the Compact uses the term only in establishing rights *between* Basins.

The heart of the dispute is not how to divide up a "known" quantity of water available to the Lower Basin under the Compact, as the Special Master assumes, but the more basic question of how much water the Lower Basin is entitled to under Articles III(a) and III(b), against the Upper Basin. The Court must determine how much water is legally available to the Lower Basin before it can decide the rights of the individual States in that water.

The issue is somewhat as though a syndicate of buyers bought 7,500,000 tons of ore from a syndicate of sellers, to be delivered over a period of time, but without defining the word "ton." As the ore begins to arrive, one of the buyers demands his share from the other buyers in long tons of 2240 pounds; the other buyers object, saying the seller's obligation is in short tons of 2000 pounds, and that the buyers' shares are to be computed in short tons. The discontented buyer sues his partners, asking that the term "ton," in their contract of purchase from the sellers, be defined as a "long ton of 2240 pounds," but he fails to join the sellers in the suit. Of course, the weight of a long ton and of a short ton can be "interpolated," but that is not the question. The question is, what is the sellers' obligation to the buyers: 7,500,000 long tons or 7,500,000

short tons? And how can this be determined in a suit among the buyers alone? Moreover, suppose that without such a determination of the term between buyer and seller, the discontented buyer persuades the court that a decree can be entered quieting title in one of them to 2,800,000 *long* tons, but in a later suit, the sellers establish that their obligation is in short tons? Is this an equitable position in which to leave the buyers, as among themselves?

Even this analogy vastly oversimplifies the problem involved in this suit. Long tons and short tons can be "interpolated." Beneficial consumptive use under the various methods urged by the present parties, and the provisional method used by the Upper Basin, cannot be "interpolated." There is fundamental disagreement not merely over method of measurement, but over what is to be measured. By no conceivable mathematical formula can the various methods, or any two of them, be translated one to the other. California contends that beneficial consumptive use means consumption at the site of use, and is there measured. The other three formulas involve computing the depletion of the estimated "virgin flow" of the main stream caused by the use in question. But water uses from different tributaries deplete the main stream in different proportions, depending on the tributary, its flow, and the season at the time uses are made. Uses from a single tributary affect the main stream differently depending on whether they take place near the headwaters of the tributary or near the main stream.

Arizona prays that "Its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact* be forever confirmed and quieted . . . ." (Complaint, p. 30.) But these same uses by these same farms and cities, measured at the site of use, exceed 5,000,000 acre-feet. The measurement by "stream depletion" of the 8,500,000 acre-feet per annum allocated by the Compact to the Lower Basin by Articles III(a) and III(b) would enable the Lower Basin to balloon its right to over 10,500,000 acre-feet of true consumptive use, measured by actual consumption at the site of use. This is the result of Arizona's contention that no accounting need be made for the use of waters salvaged by the activities of man, if such waters would be lost in a state of nature.

To which of these quantities is the Lower Basin entitled, as against the Upper?

Irrespective of the inherent unworkability of the Special Master's ruling that allows each Basin to determine the amount of its rights against the other Basin under Article III(a) through its own method of measurement, the Upper States are directly affected by the resolution of the issue in

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* Alleged, in par. XVII, p. 21 of the Complaint, to consist of 2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned by Article III(a) and 1,000,000 acre-feet "apportioned" by Article III(b), the former being identified with the main stream and the latter (Reply, par. 8, p. 17) being identified with the Gila River.

the Lower Basin alone. For if Arizona's method of measurement prevails, and the Court grants the fifth paragraph of her prayer (Complaint, pp. 30-31), approximately 1,000,000 acre-feet of the over 2,000,000 acre-feet of uses on the Gila, even though they may be "rights which may now exist" within the meaning of Article III(a), will not be chargeable under the Compact to the Lower Basin's allocations. This directly affects the Upper Basin States, for if the Lower Basin may use water without a corresponding charge against the Basin allocation, the total surplus waters of the River System, available in part for satisfaction of the Mexican obligation of both Basins under Article III(c), and the subject of a future apportionment by an interstate compact after 1963 among all the States under Articles III(f) and III(g), are thereby directly reduced in a corresponding amount.

The Upper States are sensitive to this effect upon the "surplus," and hence upon their obligations under Article III(c). The statement of W. J. Wehrli, then Special Counsel for Wyoming (2 Official Record, UPPER COLORADO RIVER BASIN COMPACT COMMISSION, Proceedings of July 8, 1948, pp. 58-60), is illustrative:

> ". . . I believe no one can assume that you can construe the term, 'beneficial consumptive use', in Article III(a) of this Compact as meaning depletion at Lee Ferry for the Upper Basin without at the same time construing it as meaning depletion at the International

Boundary for the Lower Basin. I don't believe that it will be possible to accept one construction for the Upper Basin and have a different one apply in the Lower Basin. Ultimately probably this question will reach the Supreme Court of the United States. And I am inclined to the view that whatever is determined by that court will be something that is determined for both the Upper and the Lower Basin.

"Coming then to the question of whether or not this may be an entirely unmixed blessing, the figure has been given that by construing the Colorado River Compact as depletion at Lee Ferry, the Upper Basin will enjoy an additional 400,000 acre-feet of water at the site of use. Our Engineering Committee has not worked out the relative figure for the Lower Basin, at least it has not inserted it in any report, but I understand the Committee has agreed that under such an interpretation the Lower Basin will acquire at the site of use an additional amount of water of 2,150,000 acre feet.

"So that while the construction of depletion at the lower end of the Basin will permit the Upper Basin to use an additional amount of 400,000 acre feet of water at the point of use, the same construction applied to the Lower Basin will permit in the Lower Basin the use of 2,150,000 acre feet, which of course is not an exact figure any more than the 400,000 at site of use in the Upper Basin."

". . . .

"In order to make Wyoming's position in this matter entirely clear we do not propose

> to have anything adopted or inserted in the compact that will adopt one theory to the exclusion of the other. We see no necessity for it. The Upper Basin States will get the amount of water to which they are entitled under the Colorado River Compact regardless of what we say about it in this compact or what may be said by anyone else in the negotiation for this compact. The Supreme Court of the United States at some time will probably say what the Colorado River Compact means, and when that has been said, then we will know which of these theories has been adopted."

The Special Master attributes to "the opponents of the Motion" the statement that "whatever decision is made of this problem [measurement of beneficial consumptive use] the Upper States will follow it." (Report, pp. 51-52.) Neither in briefs nor in oral argument did counsel for the absent States take such a position.

The meaning and method of measurement of beneficial consumptive use under the Colorado River Compact are at issue in this suit. The issue is unavoidably an issue between Basins since the Compact uses the term for establishing rights *in perpetuity* between Basins. Arizona is seeking a declaration of the meaning of that term. The question is not whether anyone, either in the Lower Basin or Upper, is "fully performing." The Special Master, in this instance, has in effect recommended dismissal of that portion of the

complaint and the other pleadings which call for a determination.

Such dismissal, at this stage of the proceedings is improper; dismissal of this issue would make impossible the judicial resolution of other issues in the controversy.

2. *The Upper Basin States are affected by the issue of whether Article III(b) constitutes an apportionment to the Lower Basin of an additional 1,000,000 acre-feet per annum or whether the Lower Basin's right thereto is dependent upon appropriation and use.*

Article III(b) of the Compact provides that:

> "In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters [of the Colorado River System] by one million acre-feet per annum."

At issue in this case is the question of whether this paragraph constitutes an apportionment in perpetuity to the Lower Basin as against the Upper, as Arizona contends,* or whether the

* The real issue is not whether the Compact "apportioned" III(b) water to the Lower Basin, but whether Congress in enacting the Boulder Canyon Project Act, by failing to mention Article III(b) specifically in the proposed limitation, intended to exclude California from sharing in Article III(b) uses under its Limitation Act, whether "apportioned" by the Compact or not. The legislative history is clear that Congress did not so intend. (See H. Doc. No. 717, 80th Cong., 2d Sess., p. 55 n.14 (1948).)

Lower Basin's right thereto as against the Upper is dependent upon appropriation and use, as California contends,* the unused portion becoming available for possible future apportionment between the two Basins under Article III(f).

Arizona seeks to quiet title to the 1,000,000 acre-feet of Article III(b) uses in herself as "apportioned" by the Compact. (Complaint, par. XVII, p. 21.) California alleges that the language of Article III(b) does not constitute an apportionment to the Lower Basin, which remains good in perpetuity against the Upper Basin regardless of non-use, as does the apportionment made in Article III(a), but that the "right to increase its use" given the Lower Basin becomes effective only as rights are established to such increase of use in that Basin, by appropriation or contracts with the United States for the use of water stored by the United States in Lake Mead, that only upon the establishment of such rights by appropriation or otherwise and not until then, does the right become vested in the Lower Basin (Answer to Arizona's Complaint, par. 9, p. 13); and that the first million acre-feet so committed in excess of 7,500,000 in any year, throughout the

* The Special Master twice misstates California's contention, saying (p. 55), "The California parties maintain that the use of this water is subject to *apportionment* and use" and (p. 56) "solely dependent upon *apportionment* and use, as is contended by the California defendants." (Emphasis supplied.) Our position is just the reverse. We think he meant to say "appropriation."

Lower Basin, is covered by this permission.* It follows that if such rights have not been exercised by the time the Upper Basin becomes entitled under Articles III(f) and III(g) to seek a further apportionment, the uncommitted portion of this million acre-feet becomes available for further apportionment upon demand of the Upper

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* Nevada takes yet a third position and prays that "this . . . Court enter its judgment and decree, that the additional one million acre-feet of water set forth and provided in Article III(b) . . . is water apportioned to the Lower Basin, and be subject to use only when all the Lower Basin States shall have by authoritative Compact or Agreement increased the beneficial consumptive use in said Basin as provided in said Article III(b) . . . ." (Petition of Intervention, Prayer 3, p. 25.)

The Special Master twice misstates the Nevada contention:

(1) "~~In~~ 1963, when the Lower Basin shall become entitled to use the 1,000,000 acre-feet per annum apportioned to the Lower Basin by Article III(a) [III(b)?] of the Colorado River Compact, Nevada will have the right to use 900,000 acre-feet per annum of Colorado River System water (Petition for Intervention, p. 13)." (Report, p. 22.)

(2) "The State of Nevada maintains that this water [specified in Article III(b) of the Compact] may not be used until 1963." (Report, p. 55.)

In fact the compact or agreement which Nevada says is necessary to bring Article III(b) into operation is a Lower Basin Compact which may be executed at any time. It is not the Compact on or after October 1, 1963, among all signatories to the Colorado River Compact, which Articles III(f) and III(g) contemplate may apportion surplus water between basins. See Transcript, Oral Argument on Joinder Motion, pp. 141, 361-3.

Basin, as a part of the waters unapportioned by the Colorado River Compact.*

The Special Master gives three grounds for concluding that the absent States have no interest in the resolution of this issue, all of which are insufficient to preclude joinder. He first concludes that the absent States should not be joined because "insofar as [this issue] relates to the Upper Basin States it is a question of intra-basin apportionment of waters within the Upper Basin, a problem not involved in this litigation." (Report, p. 56.) It is difficult to ascertain exactly what the Special Master means here. Perhaps he meant to say *Lower* Basin, but if so he missed our point. The question of whether 1,000,000 acre-feet of Article III(b) uses are considered "apportioned" to the Lower Basin as against the Upper under the Colorado River Compact, and thereby valid in perpetuity as

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* See Report of Delph E. Carpenter, Compact Commissioner for Colorado, to the Governor of Colorado, December 15, 1922; 70 CONG. REC. 577-586 reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A81 (1948):

> "... a permissible additional development in the lower basin to the extent of a beneficial consumptive use of one million acre-feet, was recognized in order that any further apportionment of surplus waters might be altogether avoided or at least delayed to a very remote period. *This right of additional development is not a final apportionment.* This clause does not interfere with the apportionment to the upper basin or with the right of the States of the upper basin to ask for further apportionment by a subsequent commission." (Emphasis supplied.)

against the Upper Basin, clearly strikes to the heart of *inter*-basin rights under the Compact.

Second, the Special Master finds no effect on the Upper States because: "inter-basin apportionment is to be considered in 1963, at the earliest; it is not feasible to decide questions before they arise." (Report, p. 56.) However, Arizona has called upon the Court to determine that under the Colorado River Compact, the 1,000,000 acre-feet of Article III(b) uses are "apportioned" to the Lower Basin, and seeks to forever quiet title to this water *now*. The Special Master admits that this is a question "raised by the pleadings on the merits of this cause" which must be "resolved on final hearing." (Report, p. 51.) If the determination sought by Arizona were made, the rights of the Upper Basin States would be immediately affected by the present removal of this 1,000,000 acre-feet from any possible future allocation. In view of this the Special Master's third conclusion that "regardless of whether or not this apportionment by Article III(b) is one in perpetuity or solely dependent upon apportionment [*sic*] and use, as is contended by the California defendants, the absent States have no present interest in it" (Report, p. 56), seems clearly erroneous. Under the Special Master's reasoning there would be no interest in or harm to an absent remainderman in a suit to declare a devise invalid, on the ground that until the death of the life tenant, the remainderman could have no interest in the litigation. The Upper States, like contingent

remaindermen, have an immediate interest in the present resolution of the issue, and should be joined as necessary parties. *Wilson* v. *White*, 109 N.Y. 59, 15 N.E. 749 (1888).

3. *The absent Upper States are affected by the issue whether reservoir evaporation losses in the Lower Basin are to be charged to "surplus" waters in excess of the quantities specified in Articles III(a) and III(b), or whether these losses are to be charged to the Lower Basin III(a) apportionment.*

Arizona contends that main stream reservoir losses in the Lower Basin are to be charged to uses apportioned by Article III(a) of the Compact, as between Arizona and California. (Reply to California's Answer, p. 50.)* Nevada, on the other hand, contends that:

> "evaporation losses of water from storage reservoirs on the main stream of the Colorado River in the Lower Basin are first chargeable out of excess or surplus water and that such evaporation losses are not chargeable against Article III(a) or III(b) waters unless and until all such available excess or surplus water is exhausted in any given year." (Petition of Intervention, par. XVIII, p. 21.)

The quantities of reservoir evaporation losses involved in the whole Lower Basin are of the

* The Special Master paraphrases the prayer appearing at p. 31 of the Complaint. (Report, p. 19.) Actually Arizona amended her prayer in her reply to our answer.

order of 1,100,000 acre-feet per annum. The Upper States are affected by this issue, for if the reservoir losses in the Lower Basin are charged to surplus waters, it will automatically reduce (1) the quantity of such water available to satisfy the Mexican Treaty obligation before the States of the Upper Division are called on to make additional deliveries under Article III(c), as well as (2) the surplus available for future apportionment under Article III(f) and (g), in which all seven States of the Colorado River System have an undivided common fund interest.

The Special Master ruled that this issue does not affect the Upper States because:

> "With respect to evaporation, the water delivered at Lee Ferry to the Lower Basin has been specified as to quantities and relates to the 7,500,000 acre-feet per annum or unused waters of the Upper Basin, or waters to meet any possible deficiency in the supply to the Republic of Mexico. This permits of no question of evaporation before Upper Basin waters reach the point of delivery at Lee Ferry, and the Upper Basin cannot be charged with evaporations occurring in the Lower Basin after that delivery."* (Report, p. 52.)

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* The Special Master's determination that the Upper Basin cannot be charged with reservoir evaporation losses occurring in the Lower Basin seems especially unfair with respect to exclusively federal claims such as the Mexican Treaty. The Mexican Treaty of 1944 guarantees to Mexico "from any and all sources" an annual quantity of 1,500,000 acre-feet of water per year at the International Boundary. To meet

The Special Master begs the question when he states that the "water delivered at Lee Ferry to the Lower Basin has been *specified as to quantities*" part of which he identifies as including the quantity specified "to meet any possible deficiency in the supply to the Republic of Mexico." (Emphasis supplied.) Such "quantities" cannot be "specified" until there has been a resolution of issues, such as this issue over chargeability of reservoir losses in the Lower Basin. How reservoir losses are charged directly affects the "buffer" of surplus available for Mexico insulating the four absent States of the Upper Division against the liability for additional specified deliveries to satisfy the Mexican Treaty burden. The absent Upper States are therefore directly concerned with the resolution of this issue.

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this obligation, the Treaty provided for the construction of Davis storage dam and reservoir on the main stream. To charge the Lower Basin with all reservoir losses incidental to meeting this obligation of the entire River System is manifestly unwarranted. Also unwarranted is charging the Lower Basin with channel losses incidental to the flow of water which Article III(c) of the Compact requires the States of the Upper Division to deliver at Lee Ferry, which must flow to the international boundary. So also with reservoir losses properly allocable to other federal functions, *e.g.*, flood control, navigation and power operations, none of which is related to consumptive uses in any State as such.

B. Arizona's suit to quiet title to the beneficial consumptive use of 2,800,000 acre-feet per annum from the main stream, as waters apportioned by Article III(a), directly involves the obligations of the States of the Upper Division to deliver water under Articles III(c) and III(d) of the Colorado River Compact

1. *Arizona's claimed title to 2,800,000 acre-feet per annum under Article III(a) from the main stream is dependent upon quieting title in the Lower Basin to the 75,000,000 acre-feet per decade delivered by the States of the Upper Division under Article III(d) as apportioned to the Lower Basin by Article III(a).*

Arizona prays to have her title quieted to the annual beneficial consumptive use of 3,800,000 acre-feet per annum, subject to the rights of Utah and New Mexico and subject to availability under the Colorado River Compact. (Complaint, p. 30.) She alleges that "Such quantity is made up of 2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) of the Compact plus the 1,000,000 acre-feet apportioned by Article III(b) of the Compact." (Complaint, par. XVII, p. 21.)

As to the 2,800,000 acre-feet from the main stream Arizona alleges:

> "Arizona has the right to the beneficial consumptive use of 2,800,000 acre-feet of water diverted from the main stream of the Colorado River either above or below Hoover Dam subject only to the rights of Utah and New

> Mexico as Lower Basin States.'"* (Reply to California's Answer, par. 41(1), p. 33.)

Her claim of title to 2,800,000 acre-feet per annum under Article III(a) from the main stream is spelled out as follows:

> "The 7,500,000 acre-feet of water per year apportioned to the Lower Basin by Article III(a) was and is within the water present in the main stream and measured at Lee Ferry, a point approximately 675 miles northerly and upstream from the confluence of the Gila River and the Colorado River." (Reply to Defendants' Answer, par. 8, p. 16.)

This 7,500,000 acre-feet, Arizona says, bears a "direct quantitative relationship" to the 75,000,000 acre-feet which Article III(d) requires the States of the Upper Division to let pass Lee Ferry in each 10-year period. (Reply, par. 11, p. 18.)

Article III(d) provides:

> "The States of the Upper Division will not cause the flow of the river at Lee Ferry to be

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* This concession to Utah and New Mexico is meaningless. The main stream does not touch either State in the Lower Basin. Their Lower Basin interests are in tributaries, primarily the Virgin River in Utah, the Gila in New Mexico.

Arizona apparently assumes that Utah's uses on the Virgin River, and New Mexico's on the Gila, will not be protected by the apportionment made by Article III(a). The water of these streams is never present in the main stream at Lee Ferry. So also with uses on the Bill Williams, Little Colorado, Muddy, and other streams which enter below Lee Ferry, and, on Arizona's theory, are not covered by either Article III(a) or Article III(b).

> depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

Arizona also alleges that

> "The apportionment made by Article III(a) of the Colorado River Compact does not include and was not intended to include, any of the waters of the Gila River or its tributaries." (Reply, par. 8, p. 16.)

Arizona further alleges that "uses of the waters of the Gila River and its tributaries are chargeable to the apportionment made by Article III(b) of the Compact and are only chargeable to the apportionment made by Article III(a) of the Compact to the extent that such uses exceed 1,000,000 acre-feet of water per annum," (Reply, par. 8, pp. 16-17), and "Article III(b) relates solely to the waters of the Gila River and its tributaries."* (Reply, par. 9, p. 17.)

Arizona's allegations, identifying Article III(a) uses with Article III(d) main stream deliveries, and Article III(b) uses with the Gila, both of which California denies, are central to Arizona's case. Since she admits that California is entitled to 4,400,000 acre-feet of Article III(a) uses from the main stream (Complaint, p. 30) and

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* This contention that Article III(b) relates solely to the Gila was rejected in *Arizona* v. *California*, 292 U. S. 341, 358 (1934).

Nevada 300,000* (Reply, par. 63, p. 46), her claim to a residue of 2,800,000 acre-feet depends on the contention that all 7,500,000 acre-feet of the water for III(a) uses is found in the main stream. Without such allegations, Arizona's complaint would fail to state a cause of action to quiet title to the use of 2,800,000 acre-feet per annum under Article III(a) from the main stream.

If the Lower Basin is entitled to less than 7,500,000 acre-feet from the main stream under Article III(a), Arizona, on her own pleadings, is entitled to less than 2,800,000.

2. *If the deliveries by the States of the Upper Division under Article III(d) are all apportioned to the Lower Basin by Article III(a), they contain no "surplus" available for delivery to Mexico, and the States of the Upper Division are accordingly required by Article III(c) to increase their deliveries to supply one half of the Mexican deficiency.*

Article III(c) provides:

> "If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any

* Nevada denies this and asserts "the right to the beneficial consumptive use of 900,000 acre-feet of water per annum. The State of Nevada alleges that said 900,000 acre-feet of water consists of 539,100 acre-feet of the water apportioned to the Lower Basin by Article III(a) of the Colorado River Compact plus an equitable share in the water to be apportioned under Article III(b) and III(f) of the said Compact. . . ." (Petition of Intervention, par. VII, p. 13.)

> right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are *surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)*; and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary *the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).*" (Emphasis supplied.)

Arizona's case leaves no surplus water either in (1) the Upper Division III(d) deliveries, or (2) in the Gila River, or (3) elsewhere in the Lower Basin, for satisfaction of the Mexican burden:

(1) *There is no surplus in the Article III(d) deliveries.* Under Arizona's view, the Article III(d) deliveries of 75,000,000 acre-feet each ten years are fully accounted for as apportioned to the Lower Basin by Article III(a).

(2) *There is no surplus on the Gila.* Arizona not only identifies the Gila River with Article III(b) of the Compact, but alleges that "When and if any curtailment of Lower Basin use is required to satisfy the Mexican right, then such curtailment must be of the use apportioned by Article III(a).". She "denies that the Gila River and its tributaries are subject to any obligations imposed by the Mexican Water Treaty." (Reply, par. 10, p. 18; compare par. 62, p. 45.)

(3) *There is no surplus anywhere else in the Lower Basin.* The inflow to the main stream from Lower Basin tributaries other than the Gila System is substantially offset by natural stream losses.* On Arizona's interpretation of "beneficial consumptive use," if these natural losses were salvaged, the consumptive use of the salvaged tributary inflow would not be chargeable, but would be used (like the more than 1,000,000 acre-feet salvaged on the Gila) in the States where salvaged, without accounting for that use at all.

Arizona concedes that

> "It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico." (Complaint, par. XVI, p. 21.)**

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* See A. P. Davis, then Commissioner of Reclamation, "Answer No. 5" to Congressman Hayden's questionnaire, 64 CONG. REC. 2713-2717 (1923) reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A48 (1948). He states that mean flows during 1903-1920 at Lee Ferry and at Laguna Dam just above the mouth of the Gila are assumed to be substantially equal. More recent figures have been published by the United States Bureau of Reclamation, in H. Doc. No. 419, 80th Cong., 1st Sess., pp. 282-83 (1947). Based on data for the period 1897 to 1943, the report shows an average net inflow between Lee Ferry and a point above the mouth of the Gila of 180,000 acre-feet per annum.

** There is no uncertainty about it; on her theory in a quarter century of precipitation like 1930-54, there would be a deficit of one to two million acre-feet per year. See Plate II in Part V, Section C of this Brief, p. 119.

The States of the Upper Division, under Arizona's theory, would be obligated to increase their deliveries under Article III(c) in consequence of the fact that the 75,000,000 acre-feet delivered under Article III(d) contains no surplus for delivery to Mexico.

3. *California asserts that the Article III(a) apportionment to the Lower Basin includes uses under "rights which may now exist" on the tributaries, and that there is no identity between that apportionment and the Article III(d) obligation of the States of the Upper Division.*

Under California's interpretation of the Compact there is no identity between Articles III(a) and III(d). The deliveries under the latter include surplus available for delivery to Mexico. The Lower Basin cannot quiet title thereto as water the use of which is apportioned to that Basin.

California alleges (Answer to Arizona's Complaint, par. 11, p. 15) that "the quantity of 75,000,000 acre-feet specified in Article III(d) bears no quantitative relationship to the beneficial consumptive use of 7,500,000 acre-feet per annum apportioned to either the Upper Basin or Lower Basin by Article III(a);" that "Said apportionment [by Article III(a)] is from the waters of the entire Colorado River System, including the Gila

River and its tributaries,* and not merely from the virgin flow of the main stream" (*id.*, par. 8, p. 11); and that "Uses of the waters of the Gila River and its tributaries under rights which existed as of June 25, 1929, are chargeable first against the apportionment made to the Lower Basin by Article III(a) of the Compact. Such uses in Arizona as of that date aggregated not less than 2,000,000 acre-feet per annum." (*Id.*, par. 8, p. 12.)

As to Article III(b), California alleges (Answer to Arizona's Complaint, par. 9, p. 13): "The first million acre-feet of beneficial consumptive uses above 7,500,000 acre-feet per annum, wherever

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* See the Colorado River Compact: Analysis by Hon. Herbert Hoover, Chairman of the Colorado River Commission (Answer, Dated January 27, 1923, to Questionnaire submitted by Hon Carl Hayden, Representative from Arizona); 64 CONG. REC. 2710-13 (1923), reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A33 (1948):

> "*Question 4. Why was the term 'Colorado River system' used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins respectively?*
>
> "This term is defined in Article II as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt."

such uses in the Lower Basin may occur, are encompassed by Article III(b), and said Article III(b) does not relate solely to waters found flowing in the Gila River or any other specific portion of the Lower Basin.'"*

Thus, upon California's interpretation, the 75,000,000 acre-feet delivered each decade by the States of the Upper Division under Article III(d) is not water apportioned to the Lower Basin by Article III(a), but contains, in addition to water available for the "increase of use" permitted the Lower Basin by Article III(b), substantial quantities of water which are surplus to the quantities specified under Articles III(a) and III(b) and hence available for delivery to Mexico before either Basin is required by Article III(c) to contribute to the deficiency in the Mexican supply. It may amount to several million acre-feet in each decade.

4. *The Special Master's assumption that the obligation of the States of the Upper Division under Article III(d) is identical with the apportionment under Article III(a) to the*

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* See Hoover Analysis in response to Hayden Questionnaire cited in footnote at p. 81, *supra:*

> *"Question 6. Are the 1,000,000 additional acre-feet of water apportioned to the lower basin in paragraph (b) of Article III supposed to be obtained from the Colorado River or solely from the tributaries of that stream within the State of Arizona?*
>
> "The use of the word 'such waters' in this paragraph clearly refers to waters from the Colorado River system, and the extra 1,000,000 acre-feet provided for can therefore be taken from the main river or from any of its tributaries."

Lower Basin is erroneous, and predetermines an issue which requires the presence of the States of the Upper Division.

The Special Master in his Report apparently decides this issue in favor of Arizona and against California. At page 55 he says:

> "In interpreting the provision of the Colorado River Compact respecting the delivery by the Upper Basin of 7,500,000 acre-feet of water per annum (Article III(a)) and the other provision found therein respecting the requirement to deliver 75,000,000 acre-feet in a 10 year period commencing after the October 1st following the effective date of the Compact (Article III(d)), these must be considered together, and when so considered they are not in opposition. The obvious meaning would seem to be that in referring to the 7,500,000 acre-feet per annum, and bearing in mind possible droughts, this requirement would be met by an average delivery over the 10 year period of 75,000,000 acre-feet."

Again, at page 61, he writes:

> "[The Upper] basin has the duty of delivering to the Lower Basin 7,500,000 acre-feet per annum, which duty presumably can be done by providing at least 75,000,000 acre-feet in 10 year periods."

We think the Special Master in this determination is wrong. He confuses beneficial consumptive use, apportioned by Article III(a), with water supply, *i.e.*, the flow of the stream, dealt with by Article III(d). He reads Article III(a)

as a "delivery" obligation, which clearly it is not. If 75,000,000 acre-feet were diverted each decade, the consumptive use would be less, because on any theory the Lower Basin is entitled to credit for return flow at the Mexican border. He ignores the clear language of Article III(a) which apportions uses from the "Colorado River System," not the main stream alone. The Special Master's interpretation leaves the uses by Nevada and Utah on the Virgin River, New Mexico's uses on the Gila, and uses on all other Lower Basin tributaries, outside the scope of Article III(a). The identification of Articles III(a) and III(d) is a mathematical impossibility, in view of Arizona's admission that the uses on the Gila, to the extent that they exceed 1,000,000 acre-feet, are chargeable to Article III(a) and her further admission that they exceed that quantity by 170,000 acre-feet per annum. (Reply, par. 8, p. 17.) He ignores the deliberate distinction which the Compact makes between an apportionment "per annum" (Article III(a)), which can only refer to calendar years, and the ten year periods beginning October 1 of each year (Article III(d)). He assumes, as a fact, that there is water enough to satisfy both the Upper Basin's Article III(a) apportionment and the Upper Division's Article III(d) obligation.*

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* See "Report on Depletion of Surface Water Supplies of Colorado West of Continental Divide," Bulletin No. 1, Surface Water Series, Colorado Water Conservation Board, State of Colorado; reprinted as S. Doc. No. 23, 84th Cong., 1st Sess. (1955) (known as the Hill Report). This report is discussed in detail in Part V, Section C, *infra*.

California has pleaded that Arizona is estopped and precluded from now asserting the interpretations which the Special Master adopts. (Answer, Second Affirmative Defense, pp. 39-45.)

It is perfectly clear, from Arizona's own record, that the 7,500,000 acre-feet which was apportioned to the Lower Basin by Article III(a) was arrived at as a summation of the anticipated uses on the main stream plus those on the tributaries, and that the 75,000,000 acre-feet stated in Article III(d) was arrived at as a summation of the anticipated uses on the main stream plus the water for Mexico. As the Special Master's substantive interpretation in advance of trial amounts to rewriting the key feature of the Compact, upon which Arizona's whole quiet title action is hinged, the Court's attention is called to the following:

1. Excerpt from statement of Richard E. Sloan, Legal Adviser to the Arizona Colorado River Commissioner, (and Chairman of the Legal Committee in the Negotiation of the Compact) January 15, 1923, (Reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A69 (1948)).

> "It may be of interest to know why the figures of 7,500,000 acre-feet for the upper basin and 8,500,000 acre-feet for the lower basin were reached. It grew out of the proposition made by the upper basin that there should be a fifty-fifty division of rights to the use of the water of the river between the upper and lower basins which should include the flow of the Gila, and the insistence of Mr. Norviel, commissioner from Arizona, that no

fifty-fifty basis of division would be equitable unless the measurement should be at Lee's Ferry. As a compromise the known requirements of the two basins were to be taken as the basis of allotment with a definite quantity added as a margin of safety. The known requirements of the upper basin being placed at 6,500,000 acre-feet, a million acre-feet of margin gave the upper basin an allotment of 7,500,000 acre-feet. The known future requirements of the lower basin from the Colorado river proper were estimated at 5,100,000 acre-feet. To this, when the total possible consumptive use of 2,350,000 acre-feet from the Gila and its tributaries are added, gives a total of 7,450,000 acre-feet. In addition to this, upon the insistence of Mr. Norviel, 1,000,000 acre-feet was added as a margin of safety, bringing the total allotment for the lower basin up to 8,500,000 acre-feet."

2. Statements made in the Arizona brief (p. 32) submitted in *Arizona* v. *California,* 283 U. S. 423 (1931), (extracts from which are printed in the present case in Appendix 28 to California's Answer, pp. 397-399).

Surely any determination that will make the difference between whether States of the Upper Division are required to supply 75,000,000 acre-feet every ten years, *including* water for Mexico, or 75,000,000 acre-feet every ten years, *plus* water for Mexico, involves a direct and important determination of their obligation. Arizona, in seeking to quiet title to 7,500,000 acre-feet of Article III(a) uses each year from the main stream has,

in effect, brought an action to quiet title *pro tanto* against States of the Upper Division, the suppliers of that water. California's motion is designed to add four States which Arizona should have named as defendants in her complaint.

C. The absent States, as States of the Colorado River System, are vitally affected by the present controversy over the establishment of present rights to waters of the Colorado River System not covered by the Colorado River Compact

1. *The absent States are affected by whether the claimed rights to water for Indians in the Lower Basin are chargeable against the apportionments made by the Colorado River Compact or are excluded therefrom by Article VII.*

This question is discussed in Part II of this Brief, which relates to claims of the United States.

2. *The Upper States are affected by whether valid appropriative rights may be initiated in waters not covered by the Compact.*

We have heretofore pointed out the numerous respects in which the issues in this case bear upon the magnitude of the "surplus" in which the seven States have undivided common interests. But also at issue in this case is the question of whether surplus waters of the Colorado River System, unapportioned by Articles III(a), (b) and (c), and described by Article VI as "waters . . . not covered by the terms of this compact," may be validly appropriated prior to a possible interstate com-

pact apportionment after 1963. With respect to these waters, Article III(f) of the Compact provides that:

> "Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)."

Under California's view, rights to this unallocated surplus water beyond that needed to supply consumptive uses under Articles III(a) and III(b) could be acquired by appropriation* just as rights could be acquired in all of the water of the Colorado River System prior to the six-State Compact in 1929. (Answer to Arizona's Complaint, par. 27, p. 28; par. 13, p. 16.) Those rights are subject to divestment by interstate compact, just as rights acquired before 1929 in the rest of the waters of the System might have been divested by compact.** *Hinderlider* v. *La Plata*

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* The word "appropriation" as used in this brief with reference to rights to the use of water in California, includes rights arising out of contracts with the United States executed under the Boulder Canyon Project Act.

** "There is an essential difference between a substantial property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority, and an uncertain and contingent privilege which may not be allowed at all." *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 420-21 (1926).

River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). They are valid until so divested. See comments of Herbert Hoover, United States representative in the Compact negotiations: H. Doc. No. 717, 80th Cong., 2d Sess., p. A34 (1948).

The United States apparently supports this view for it alleges that its contracts aggregating 8,462,000 acre-feet of deliveries of water stored in Lake Mead "are valid, binding covenants constituting the measure of the rights of the parties." (Petition of Intervention, par. XXXI, pp. 27-28.)

Arizona, however, takes a contrary position, and maintains that no "firm rights" may be acquired to the use of surplus water prior to a post-1963 compact, to which all States must agree. (Reply to Defendants' Answer, par. 13, pp. 18-19.)

Since under the Compact the surplus waters of the river system constitute an undivided common fund of water in which the seven States of the Colorado River Basin have undetermined interests, the four absent States of Colorado, New Mexico, Utah and Wyoming are directly affected by the resolution of this issue.

Just as the Special Master finds that Utah and New Mexico must be joined because of their unascertained rights to the common fund of water allocated to the Lower Basin under the Compact, so also should the absent Upper States be joined in this suit to determine rights in the undivided common fund of water not covered by the Compact. See *Williams* v. *Bankhead,* 19 Wall. 563

(U.S. 1874); *United States* v. *Bank of New York & Trust Company,* 296 U.S. 463 (1936); *Barney* v. *Baltimore,* 6 Wall. 280 (U.S. 1868).

If Arizona may enjoin California's assertion of rights in excess or surplus waters unapportioned by the Colorado River Compact (notwithstanding the specific language of the Project Act recognizing California's right to contract with the Secretary of the Interior for the storage and delivery of one-half of that excess or surplus), no other State than Arizona may acquire appropriative rights in "surplus" without a new compact, *i.e.,* without Arizona's consent. Arizona may acquire such rights, however, regardless of the post-1963 compact, if she is held not to have effectively ratified the Colorado River Compact in 1944.

While the Special Master gave no specific consideration to this issue, as presented by the Defendants in this Motion to Join, he did make two substantive determinations which bear on the question. In discussing the relationship between Articles III(a) and III(d) (Report, p. 50), the Special Master concludes that "it is clear that in any instance the Upper Basin cannot use more than 7,500,000 acre-feet per annum (Article III(a) of the Compact)." Hence under this determination all of the System's surplus water must go to the Lower Basin. If the Special Master means that the Upper States can never acquire rights in surplus waters, it is clear that the determination

deeply affects their rights. Second, the Special Master in discussing the California Limitation Act has made the substantive determination on the merits, without hearing or briefs thereon, that the "excess or surplus" referred to relates to "waters of the Lower Basin."* (Report, pp. 45, 58.) This is another instance of premature determination of an issue between Arizona and California as a technique for testing the necessity of joinder of the absent States.

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* What the Special Master means by "waters of the Lower Basin" is left in some doubt. The Special Master says (Report, p. 50), "Article III(c) of the Compact makes it apparent that the Mexican supply shall come from surplus waters of the Lower Basin . . . ."

Of course, at the instant that any waters flow into Mexico, they are flowing from the Lower Basin, but that does not mean that they are surplus waters of the Lower Basin. If they are "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, they are surplus of the entire Colorado River System, in which all seven States have an undivided interest. We suggest that here, as elsewhere in the Report, there is confusion between the place of use, and classification of the waters used.

D. The Special Master is in error in assuming that the Colorado River Compact, in terms, prohibits the joinder of the States of the Upper Division in this action

The Special Master declares:

> "By Article I of the Colorado River Compact, the Upper and Lower Basins are separated for the purposes stated, one of them being that of avoiding litigation. . . . The proponents of the Motion rely upon the Colorado River Compact and say that the Upper Basin States should be joined because they were parties to it. It cannot be that this may be done when the instrument itself forbids it." (Report, p. 34.)

This conclusion is contrary to express terms in Article I itself:

> ". . . To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of *part* of the water of the Colorado River System is made to each of them . . . ." (Emphasis supplied.)

This conclusion is also contrary to two other provisions of the Colorado River Compact.

1. *Article VI* provides for two alternative methods of solution for five classes of disputes among the parties to the Compact:

> "Should any claim or controversy arise between any two or more of the signatory States: (a) *with respect to the waters of the Colorado River System not covered by the terms of this compact;* (b) *over the meaning*

or performance of any of the terms of this compact; (c) *as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided;* (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

"Nothing herein contained shall prevent *the adjustment of any such claim or controversy by any present method* or by direct future legislative action of the interested States." (Emphasis supplied.)

It is clear that this suit involves controversies in the first three categories mentioned in Article VI:

"(a) *with respect to the waters of the Colorado River System not covered by the terms of this compact.*" See, for example, paragraph 27 of California's Answer to Arizona's Complaint, p. 28, alleging a present right to one-half of the excess or surplus waters of the Colorado River System not apportioned by Article III(a) of the Colorado River Compact.

"(b) *over the meaning or performance of any of the terms of this compact.*" See, for ex-

ample, paragraph 5 of the prayer of Arizona's Complaint, pp. 30, 31, which asks a decree "establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of stream depletion."

"(c) *as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided.*" See, for example, Arizona's allegations that the waters to supply uses apportioned to the Lower Basin by Article III(a) are to be found flowing in the river and measured at Lee Ferry, and bear a quantitative relationship to the guarantee of the States of the Upper Division in Article III(d). (Reply, par. 8, p. 16; par. 11, p. 18.) Arizona's claims directly affect and increase the burdens imposed upon the absent States of the Upper Division under Articles III(c) and III(d) with respect to their "delivery of waters." (See discussion at pp. 74-87, *supra.*)

Negotiations extending over a period of more than thirty years, participated in by all seven States, have failed to resolve these controversies. We are here concerned with the second method for their resolution contemplated and preserved by Article VI.*

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* "[T]he adjustment of any such claim or controversy by any present method" by Article VI clearly envisages litigation. Jurisdiction of this Court to determine interstate controversies over the waters of interstate streams had been decided in *Kansas* v. *Colorado,* 185 U.S. 125 (1902). *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), had been decided while

2. *Article IX* provides:

> *"Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions."*

The purpose of Article IX becomes clear when read in connection with Article VI.

Certainly it may not be held, as the Special Master does, that the Compact forbids by implication what express language of the Compact is so careful to preserve.

Colorado River Compact negotiations were in progress, and the negotiators had that case very much in mind. See statement by Richard E. Sloan, Legal Adviser to Colorado River Commissioner for Arizona (1923), reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., pp. A63, A65 (1948).

V.

THE SPECIAL MASTER HAS ERRONEOUSLY CONCLUDED THAT THE ABSENT STATES SHOULD NOT BE JOINED EVEN THOUGH THEY MAY BE AFFECTED BY THE RESOLUTION OF ISSUES AMONG THE PRESENT PARTIES

A. The Special Master erred in determining that the absent Upper States, whose rights and obligations are vitally and inseparably affected by the present controversy to quiet title to certain waters of the Colorado River System, may not be joined for lack of a controversy independently justiciable as to them

The Special Master expressly finds that a justiciable controversy respecting "Lower Basin waters" exists. (Report, p. 68, conclusion 20.) The Special Master also expressly concedes that certain of the issues may ultimately affect the absent States,* but nevertheless has concluded that "As to the Upper Basin States as such, there is no existent justiciable controversy between them and the present parties to this cause." (Report, p. 67, conclusion 12.) If we understand the position taken by the Special Master—a position never previously suggested by this or any other court—it is that something like a separate cause of action, based upon a present breach of obligation or physical invasion of a claimed right, must exist

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* *E.g.*, whether there is a quantitative relationship between uses apportioned under Article III(a) of the Colorado River Compact and the delivery obligation imposed by Article III(d) (Report, pp. 49-50); whether the protection extended by Article VIII to "present perfected rights" extends to water quality as well as quantity (Report, p. 51); whether "salvaged water" is chargeable under the Compact as a beneficial consumptive use. (Report, p. 57.)

and must be pleaded between present parties and absent parties before joinder is appropriate.

The Special Master's error in this respect is two-fold.

First, the Special Master considers the question of justiciability with respect to the absent Upper Basin States as though there were no present justiciable controversy before the Court. He treats the issue of justiciability as if it required a separate bill of complaint against the Upper States, stating a de novo justiciable cause of action.* The error here, however, is that while an original bill of complaint may be dismissed, the justiciable controversy in the suit already before the Court requires judicial action regardless of the disposition of the joinder motion.**

Second, the Special Master's concept of justiciability is based upon his assumption that there can be no present effect upon the absent Upper States due to an abundance of water in the Colorado River System. Even assuming this assumption of fact to be presently true (and it is

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* In Part V, Section B of this Brief, p. 103, we demonstrate that the Special Master has applied an erroneous concept of justiciability, even considering the question on his own grounds as one of a de novo finding of justiciability.

** Only if the absent States were beyond the Supreme Court's jurisdiction so that the Court would have no power to join them, would the question be one of "indispensability" requiring dismissal of the suit. See California Defendants' Initial Brief in Support of Motion to Join, p. 30.

gravely mistaken, as is shown in Part V, Section C, pp. 112-121, this concept overlooks the fact that if the Upper States' permanent rights and obligations relating to the use of water are presently altered or affected by the resolution of issues in an existing controversy, then it is justiciable as to them, and whether they are presently using their rights is immaterial.

The requirement of "justiciability" to sustain the jurisdiction of this Court stems from the constitutional confinement of the judicial power to the resolution of matured and real disputes. Here these purposes are fully served by the justiciable character of the controversy already before the Court. The issues affecting the absent States are issues which must be decided in this suit whether the absent States are joined or not. If the dispute among present parties is "justiciable"—and the Special Master agrees with the present parties that it is*—there is no further justiciability problem to consider on the joinder motion.**

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* Report, p. 68, conclusion 20; Statement in Support of Motion, Arizona Complaint, p. 5; Return of Defendants to Rule to Show Cause and Brief in Support of Return, pp. 5-6; Motion by United States for Leave to Intervene, par. VIII, pp. 8-9; Nevada Petition of Intervention, par. I, pp. 7-8; Nevada Answer to United States, par. XVIII, p. 8.

** The well-established principles of ancillary jurisdiction support such a conclusion in that they give the Court power to hear questions even though there is no independent jurisdictional basis for a determination of the rights involved. See California Defendants' Reply Brief in Support of Motion to Join, pp. 19-27.

If, however, a separate element of justiciability as to the absent parties is required for joinder, this requirement is satisfied in the present case because the existing controversy immediately and vitally affects the present legal interests of the absent States.

In *Arizona* v. *California,* 298 U.S. 558, 567 (1936), Justice Stone announced the following standard for determining the existence of a justiciable controversy:

> "... A justiciable controversy is presented only if Arizona, as a sovereign state, or her citizens, whom she represents, *have present rights in the unappropriated* water of the river, or if the privilege to appropriate the water is capable of division and when partitioned may be judicially protected from appropriations by others pending its exercise." (Emphasis supplied.)*

By this standard, there can be no doubt of the existence of a justiciable controversy as to the

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* The suit, in which Arizona sought to have her rights in the River System decreed against the other six Colorado River Basin States, preceded Arizona's purported ratification of the Colorado River Compact in 1944. The Special Master errs in stating that one of the reasons for the Court's denial of leave to file the bill of complaint was the absence of a justiciable controversy. (Report, p. 32.) The Court found it unnecessary to decide the question of justiciability because of the absence of the United States, which was held to be an indispensable party and could not be sued without its consent. 298 U.S. at 568.

absent States if their "present rights in the unappropriated water of the river" are affected by the existing controversy before the Court. The Colorado River Compact apportions in perpetuity the right to use water which has not yet been appropriated. Article III(a) of the Compact confers on the Upper Basin, in Justice Stone's terms, "present rights in the unappropriated water of the river." The dispute among present parties involves the extent of the insulation afforded by Article III(a) to the Upper Basin and its effectiveness against both Arizona and the United States. Similarly the obligations of the absent States, as "States of the Upper Division," under Articles III(c) and III(d) of the Compact constitute present duties with respect to delivery of water at Lee Ferry. In settling the controversy among the present parties, this Court must determine the extent of the present duties of the Upper Division States to deliver water under these Articles of the Compact. The absent Upper States also share with all seven States of the River Basin a present undivided interest under Article III(f) in a common fund of surplus water, just as Arizona, California, Nevada, New Mexico and Utah share an interest in the undivided common fund of water allocated to the Lower Basin by Articles III(a) and III(b).

In Part II, we showed that the claims of the United States are asserted in such magnitude that they cannot be satisfied out of the 8,500,000 acre-

feet of beneficial consumptive use allocated to the Lower Basin by Articles III(a) and III(b) of the Compact. Those claims are urged as being outside of and unaffected by the Colorado River Compact. If this contention of the United States is sustained, and its claims are determined in the magnitude asserted, the United States will have acquired rights in the unused Upper Basin apportionment. Similarly, as we demonstrated in Part III, Section A, if the Court finds that Arizona has not effectively ratified the Colorado River Compact, she too is free to acquire rights in the unused Upper Basin apportionment to which her title may be quieted in the pending case. Even if it is determined that Arizona is a party to and bound by the Colorado River Compact, her claim to quiet title to 2,800,000 acre-feet of main stream uses can only be accomplished by identifying the Lower Basin's Article III(a) apportionment with the Upper Division States' Article III(d) delivery, thereby increasing their present obligation to deliver water under Article III(c) of the Compact. (See Part IV, Section B, pp. 74-87.) Further, the claim of California that her rights be decreed, and the claim of the United States that its title be quieted, to surplus waters of the Colorado River System, not covered by the Compact, immediately affect the present rights of the absent States in this undivided common fund of waters. (See Part IV, Section C, pp. 87-91.) If this Court, in its exercise of jurisdiction over the controversy before it, quiets title or determines rights

in any one of the instances enumerated above, the decreed rights would constitute an immediate invasion of the present rights of the absent States, whether or not those rights are being presently used to their full extent. A justiciable controversy as to the absent States is thus necessarily present.

In *United States* v. *Louisiana,* 339 U.S. 699, 702 (1950), Justice Douglas noted that Louisiana asserted:

> "... [T]hat there are no conflicting claims of governmental powers to authorize the use of the bed of the Gulf of Mexico for the purpose of searching for and producing oil and other natural resources, on which the relief sought by the United States depends, since the Congress has not adopted any law which asserts such federal authority over the bed of the Gulf of Mexico. Louisiana therefore contends that there is no actual justiciable controversy between the parties." 339 U.S. at p. 702.

This Court took jurisdiction, noting that its ruling in *United States* v. *California,* 332 U.S. 19 (1947) controlled. The absent Upper States argue in the present case, as did Louisiana in the tidelands case, that no justiciable controversy exists because they are not presently using their rightful share of water (as the United States was not using its rights in the tidelands), even though their rights to use the water may be presently invaded by resolution of the existing controversy. The Special Master adopted this

view. This position, rejected in *United States* v. *Louisiana,* must be similarly rejected here, as immaterial to the primary consideration of whether there is an invasion of existing rights.

B. Despite the absence of a present breach of obligation or a present physical invasion of a claimed right, a quiet title suit by Arizona against the absent States alleging the identical title here asserted would state a justiciable controversy within the constitutional power of this Court to decide. A fortiori, such a breach of obligation or invasion of right is not required where the joinder of the absent States is required to accord complete relief in the suits to quiet title brought by Arizona against California and by the United States against Arizona and California

A suit to quiet title by either the United States or Arizona against all of the Colorado River Basin States as defendants, claiming the same rights each alleges in the present suit, would state a justiciable controversy with respect to them. Since this is true, there can be no lack of justiciability to prevent joinder of the Upper States as parties to the present suit.

The specified claims of the United States to Colorado River System water amount to 11,785,250 acre-feet of water per year, of which about 11,000,000 acre-feet are asserted against the main stream water of the Colorado River.* Under

* These claims are for both diversions and beneficial consumptive use. All of the United States' claims which are included in the total of 11,785,250 acre-feet relate to the main stream except 822,800 acre-feet of Indian claims upon the tributaries.

Article III(a) of the Colorado River Compact, the Upper Basin States claim a right to the beneficial consumptive use of 7,500,000 acre-feet per annum. These combined claims total about 18,500,000 acre-feet per year. Yet, an engineering report recently published by the State of Colorado* indicates that the average annual dependable water supply of the Colorado River at Lee Ferry is approximately 13,700,000 acre-feet (virgin flow). (See Part V, Section C, p. 112.) On this basis, the claims exceed the supply by over 4,500,000 acre-feet per year.

Similarly, Arizona's claim that the Lower Basin is entitled to the ten-year 75,000,000 acre-feet Article III(d) delivery at Lee Ferry as water to supply Article III(a) uses, conflicts with the Upper States' claim to 7,500,000 acre-feet per annum under Article III(a) of the Compact. This is because 15,000,000 acre-feet of claims under Article III(a) cannot be satisfied if there is only 13,700,000 acre-feet flowing at Lee Ferry.** The Special Master would conclude that the Court has no power to hear these cases as long as the Upper

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*"Report on Depletion of Surface Water Supplies of Colorado West of Continental Divide," Bulletin No. 1, Surface Water Series, Colorado Water Conservation Board, State of Colorado (1953). Reprinted as S. Doc. No. 23, 84th Cong., 1st Sess. (1955).

** The quantity of water flowing at Lee Ferry, of course, is not a reliable index of water available for use at the site of use in the Upper Basin, which would be somewhat larger. Even so, there would not be sufficient water to supply 15,000,000 acre-feet of beneficial consumptive uses in both Basins.

Basin is not using its entire apportionment. (Report, p. 52.) However, where there is not enough water in the river to satisfy the claims asserted against it, the clash of interests is of that character and dignity which makes the controversy justiciable. *Nebraska* v. *Wyoming,* 325 U.S. 589, 610 (1945). Compare *Texas* v. *Florida,* 306 U.S. 398 (1939), with *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939).

The Special Master's criterion of justiciability is internally inconsistent. He has found that New Mexico and Utah are necessary (the Special Master says indispensable) parties to this controversy, although no allegation of any present injury or threat of injury by or against them has been made. They are necessary simply because they have an interest in the subject matter of the dispute that will be affected.

At the same time, the Special Master says that justiciability requirements prevent making the absent States parties in their Upper Division and Upper Basin capacities, that because no one has alleged a breach of obligation by them, the Court cannot make them parties.

If the Special Master had applied his Utah and New Mexico standard to all of the absent Upper States, there could be no question of the propriety of joining all of them. If applied to interstate controversies over interstate streams generally, the standard of justiciability which the Special Master has applied to the absent Upper Basin

States would mean that no method exists for those who wish to build projects to put at rest their uncertain water rights short of risking their treasure and the welfare of the people who will come to depend on those projects.

Nothing could be clearer than the equity court's traditional willingness to quiet title although no trespass or other wrong by the defendant has occurred. In most jurisdictions today, claims of ownership to property are asserted in a statutory suit to quiet title. These statutory suits embrace three traditional remedies: (1) bill of peace, (2) bill *quia timet,* and (3) bill to remove cloud on title. Of these remedies only the bill of peace required existing conflict in the claims of the parties. Chafee, *Bills of Peace with Multiple Parties,* 45 HARV. L. REV. 1297 (1932). The others required neither a present adverse claim nor a breach of obligation or duty on the part of the defendant.* Their purpose was to protect the

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* The bill *quia timet,* in contrast to the bill of peace, did not seek to put an end to existing vexatious litigation concerning claims to property. Rather it sought to prevent future litigation. The plaintiff sought "the aid of a Court of Equity because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief." 2 STORY, EQUITY JURISPRUDENCE § 1142 (14th ed. 1918). The bill was ordinarily applied "to prevent wrongs or anticipated mischiefs, and not merely to redress them when done." *Ibid.*

The bill to remove a cloud on title did not depend on the conduct of the defendant. It was designed to protect the marketability of the plaintiff's title against existing clouds whether actually asserted by the defendant or not. Howard, *Bills to Remove Clouds from Title,* 25 W. VA. L.Q. 4 (1917).

marketability and hence the usefulness of real property, and not to restrain unlawful conduct by the defendant.

The principle is illustrated by *Sharon* v. *Tucker,* 144 U.S. 533 (1892). Efforts of the complainants to dispose of the property had been frustrated, not by adverse claims by the defendants, but by the difficulty of securing an abstract of title which potential purchasers would accept. In ordering a decree quieting title in the plaintiffs, the Court found that

> "up to the commencement of these suits . . . [none] of the defendants therein or their predecessors in interest [have] asserted any claim to the property or interest in it, or attempted in any way to interfere with its possession or control. . . . The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as a matter of record, that is, by a judicial determination of its validity. . . ." 144 U.S. at 535-36, 543.

See also, *e.g., Simmons Creek Coal Co.* v. *Doran,* 142 U.S. 417 (1892); *Peirsoll* v. *Elliott,* 6 Pet. 95 (U.S. 1832); *Allen* v. *Hanks,* 136 U.S. 300 (1890).

Equity courts, of course, exercise discretion in determining whether relief is appropriate in a particular case. This does not, however, go to jurisdiction, but to the propriety of its exercise, after the case has been heard.

The usual reason given for the jurisdiction to quiet title is expressed in terms of "marketability." Here, the ability to utilize the property is at stake. No problem of justiciability would be presented if Arizona had brought suit against California to quiet title to 50,000 acres of barren desert land. Present injury or threatened injury stemming from the defendant's conduct would not be necessary to such a suit. Surely it would be a tragic anomaly if the judicial power of the United States were held to be incapable of determining the rights to the water which alone could give those 50,000 acres any utility.

This Court has jurisdiction to determine, in a quiet title suit, rights to the stream bed underlying the Colorado River System. *United States* v. *Utah*, 283 U.S. 64 (1931). Surely it has power to determine the incomparably more important issues over the rights to the use of water which flows in that stream bed.

Suits to quiet title have long been commonplace in dealing with western water rights.* *E.g.*, *Stone* v. *Imperial Water Co. No. 1*, 173 Cal. 39, 159 Pac. 164 (1916); *Yuba River Power Co.* v.

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* In fact, an essential feature of the doctrine of appropriation, developed to meet the needs of the western states, is the mechanism by which water users can establish their rights in advance of spending time and money in building works to put water to use. Chandler, *The Appropriation of Water in California*, 4 CAL. L. REV. 206, 212 (1916). Recognition of these policy considerations may be found in *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440, 448 (1916).

Nevada Irrigation Dist., 207 Cal. 521, 279 Pac. 128 (1929); *New Brantner Extension Ditch Co.* v. *Kramer*, 57 Colo. 218, 141 Pac. 498 (1914); *Conant* v. *Deep Creek & Curlew Valley Irrigation Co.*, 23 Utah 627, 66 Pac. 188 (1901). In such suits it is clear that "Actual present damage is not necessary in actions to quiet title, settle rights, or bills *quia timet* generally." WIEL, WATER RIGHTS IN THE WESTERN STATES 729 (3d ed. 1911). *Cf. Washington State Sugar Co.* v. *Sheppard*, 186 Fed. 233, 237 (C.C. Idaho 1911).

This Court has repeatedly recognized that the justiciability of an original suit to quiet title does not depend upon the same showing of injury that attends a suit for injunctive relief against a State, as in *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931), and *New York* v. *New Jersey*, 256 U.S. 296 (1921) (both of which are cited by the Special Master in his Report at pp. 35-38). Indeed, the Special Master's fundamental error lies in his application of an injunction standard to a quiet title suit.*

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* Analytically, the quiet title suit is a species of declaratory relief, long antedating modern statutory actions for declaratory judgment. The Special Master quotes (Report, p. 36) from *Alabama* v. *Arizona*, 291 U.S. 286, 291 (1934), the declaration:

> "This court may not be called on to give advisory opinions or to pronounce declaratory judgments."

Cited in the Court's opinion for this proposition are three prior Supreme Court decisions, all in the appellate jurisdiction. The statement with reference to declaratory judgments has been inaccurate since this Court in *Aetna Life*

In *United States* v. *West Virginia,* 295 U.S. 463 (1935), this Court dismissed, for want of a justiciable controversy, an original bill brought by the United States to enjoin West Virginia and certain corporate defendants from constructing and asserting any interest in a dam on the New River. The Court indicated that, had the United States asserted a property right to which title could be quieted, a justiciable controversy would have been presented. Mr. Justice Stone said (295 U.S. at 474-75):

> "The government places its chief reliance upon the decision in *United States* v. *Utah* . . . in which this Court took original jurisdiction of a suit, brought by the United States against the State, to quiet title to the bed of the Colorado River. But *the issue presented by adverse claims of title to identified land is a case or controversy traditionally within the jurisdiction of courts of equity. Such an issue does not want in definition. The public assertion of the adverse claim by a defendant out of possession is itself an invasion of the property interest asserted by the plaintiff, against*

Insurance Co. v. *Haworth,* 300 U.S. 227 (1937), upheld the constitutionality of the federal Declaratory Judgments Act. A suit for a declaratory judgment, other than a suit to quiet title, today may clearly present a case or controversy within the judicial power of the United States, and no distinction as to the existence of the power can be found between suits in the original jurisdiction of the Supreme Court and suits in the inferior federal courts. The judicial power of the United States is defined only once in Article III, Section 2, of the Constitution and the definition applies with equal force in all courts of the United States.

> *which equity alone can afford protection.*" (Emphasis supplied.)

The Court contrasted the position of the United States with that of a property owner "who because of the adverse claims to ownership can neither sell his property nor be assured of continued possession." 295 U.S. at 475. See also *United States* v. *Utah,* 283 U.S. 64 (1931); *United States* v. *Oregon,* 295 U.S. 1 (1935); *United States* v. *California,* 332 U.S. 19 (1947).

In *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), this distinction was invoked to support jurisdiction despite the absence of present interference with existing uses of the plaintiff as follows (325 U.S. at 610):

> "... If this were an equity suit to enjoin threatened injury, the showing made by Nebraska might possibly be insufficient ... But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction."

Colorado moved to dismiss on the ground that her uses were not conflicting with the present uses of either Wyoming or Nebraska and therefore there was no controversy with respect to them. The Court denied the motion, despite the fact that

Colorado's actual uses did not exceed those to which she was held to be entitled. Since the dependable natural flow of the North Platte River was overappropriated, as is the natural flow of the Colorado River, the Court found that a "controversy exists appropriate for judicial determination," in that the "claims" exceeded the supply. (*Ibid.*)

From the above, it is apparent that a quiet title suit by Arizona or the United States naming the absent States as parties defendant would be within the constitutional power of this Court to determine. There would be no lack of a justiciable controversy despite the existence of unused Upper Basin apportioned water. On what principle can it then be argued that this Court does not have the constitutional power to order the joinder of these same States in a quiet title suit which requires their presence in order to accord complete relief to those already parties?

C. Even if the Special Master's concept of justiciability is accepted, it cannot be the basis at this stage of the litigation for denial of the motion to join the absent States. His recommendation that joinder be denied is based on assumed facts as to water supply and water use which have no foundation in the record and are not the subject of judicial notice. Moreover, the assumed facts are contrary to what evidence would show to be the actual facts

The Special Master's conclusion that at present there is nothing for this Court to decide affecting the rights and obligations of the absent States is based on the assumption that the Upper Basin is

presently using only a small part of its 7,500,000 acre-foot apportionment, and that the unused remainder is physically available and flows to the Lower Basin* (*e.g.*, Report, pp. 52, 61); and on the further assumption that there is 3,500,000 to 5,000,000 acre-feet per annum of uncommitted surplus in the Colorado River System. (Report, p. 62.) He also assumes that this situation will persist into the distant future. (Report, p. 50.)

The Special Master's assumptions are obviously not based on evidence submitted to him, since none has been taken. Nor, from what appears in the Report, do the assumptions rest on data judicially noticed. The only factual data relating to the subject found in the Special Master's Report (p. 62) is the Report of Herbert Hoover, chairman of the Colorado River Commission which negotiated the compact (H. Doc. No. 605, 67th Cong., 4th Sess. (1923)), stating that the Compact commissioners assumed that there would be approximately 5,000,000 acre-feet of water per annum in the Colorado River System in excess of the quantities specified in Articles III(a) and III(b) of the

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*This assumption, constituting a major determination of fact, is made by the Special Master in apparent contradiction of his disclaimer that "The Special Master . . . makes no determination of facts. Such determinations are unnecessary on this joinder Motion." (Report, p. 22.) He also refers to the necessity of taking evidence upon the water supply in the Lower Basin. (Report, p. 62.)

Compact. (Report, p. 62.) The Special Master states that this figure has been reduced by virtue of the Mexican Treaty to 3,500,000 acre-feet per annum.* (*Ibid.*) On the basis of the information now known, it is clear that the assumptions of water supply made by the Colorado River Commission thirty years ago were optimistic.

With the exception of Herbert Hoover's 1923 figures, the Special Master's conclusion rests on unspecified information of which judicial notice has presumably been taken without notice to the parties.** These assumptions do not relate to facts

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*The accuracy of these figures was specifically challenged at the oral hearing on this motion by Mr. Hatfield Chilson, counsel for Colorado. Mr. Chilson said:

". . . [A]s Your Honor knows, the negotiators started out with a history of a water supply of the river system of some, oh, eighteen to twenty million acre-feet per year. The historical flow since that time has shown that the negotiators were optimistic and that the average annual supply since that time has been considerably less to the point that at the present time there is very serious doubt that there is any surplus waters in the Colorado River." (Transcript, p. 271.)

In 1945, Herbert Hoover, in a formal letter to Senator Albert W. Hawkes of New Jersey on the Mexican Treaty, advised that the Compact was negotiated on the basis of overestimated supply and underestimated demand. SEN. Doc. No. 32, 79th Cong. 1st Sess. (1945), reprinted in H. Doc. No. 717, 80th Cong. 2nd Sess., at 159 (1948).

**Fairness will ordinarily require that the court before making a final ruling that judicial notice will be taken of a given fact should notify the parties of his intention to do so and afford them an opportunity to present information which might bear upon the propriety of noticing the fact, or upon

which "can be immediately and accurately demonstrated to be true by resort to easily accessible sources of indisputable accuracy." Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 292 (1944). See also, 9 WIGMORE, EVIDENCE § 2571 (3d ed. 1940).

It is manifest that facts which are the subject of disagreement among qualified experts are not properly subject to judicial notice.

In 1953, the engineering firm of Leeds, Hill and Jewett, under contract with the State of Colorado, reported after extensive study on the availability of water to the State of Colorado and to the other Upper Basin States. Two conclusions from that report (known as the Hill Report)* are:

> "1. All of the 7,500,000 acre-feet of water per annum apportioned to the Upper Basin by the Colorado River Compact may not actually be available for use because of the requirement that 75 million acre-feet be delivered at Lee Ferry during each consecutive 10-year period.
>
> "2. Compliance with this provision and limiting the carryover in cyclic storage to the

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the truth of the matter to be noticed." McCormick, *Judicial Notice,* 5 VAND. L. REV. 296, 319 (1952). Such notice is required by the MODEL CODE OF EVIDENCE, Rule 804(1) (1942). See also, *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 300-303 (1937).

* Originally published as "Report on Depletion of Surface Water Supplies of Colorado West of Continental Divide," Bulletin No. 1, Surface Water Series, Colorado Water Conservation Board, State of Colorado. Reprinted as S. Doc. No. 23, 84th Cong., 1st Sess. (1955).

> 22 years from 1930 to 1952 would have required that reservoirs of 21 million acre-feet capacity had been available in 1927 for cyclic regulation and that the aggregate depletion in the upper basin be no more than 6,200,000 acre-feet per year." S. Doc. No. 23, 84th Cong., 1st Sess., p. vii (1955).

The Hill Report has been criticized by Governor Edwin C. Johnson of Colorado and others because, among other things, it does not take into account water that must be supplied for the Mexican Treaty and water for certain reservoir evaporation losses.*

As to water available to the Upper Basin as a whole, Governor Johnson has said:

> "Under the Seven State Compact the Upper States must deliver at Lee Ferry in each ten year period 75 million acre-feet to the Lower States and 7½ million acre-feet to Mexico before they can use one drop of water themselves beyond what they used before the Seven State Compact was ratified. In the current ten year period that will leave only 3,250,000 acre-feet per year for their total use. In the previous

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* ". . . Had Mr. Hill recognized these binding and irrevocable priorities and the evaporation of the down-river storage plans, which is to be charged to Colorado as 'consumptive use' of 400,000 acre-feet, he could not have shown any unappropriated water whatsoever in Colorado for Colorado." Statement by Governor Johnson of December 20, 1954, quoted in California Reply Brief, p. 54, at p. 72; see also, *Hearings Before the Senate Committee on Interior and Insular Affairs on S. 500*, 84th Cong., 1st Sess., pp. 251, 257, 717-718 (1955).

ten year period they would have had 4,150,000 acre-feet a year. In 1902 the Upper Basin States under this formula would have had no water at all." California Reply Brief, at page 70; *Hearings before the Senate Committee on Interior and Insular Affairs on S. 500,* 84th Cong., 1st Sess., pp. 251, 256 (1955).

The Special Master's statements that there is no foundation for deciding issues concerning the Mexican Treaty, and that there is no allegation that surplus for Mexico does not exist (Report, p. 50), require special attention. No party has alleged that such surplus does exist in quantities adequate to supply Mexico. To the contrary, Arizona alleges: "It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico." (Complaint, par. XVI, p. 21.) Similarly, counsel for Colorado, in his argument on this Motion, said that "at the present time there is very serious doubt that there is any surplus waters in the Colorado River." (Transcript of Oral Argument, p. 271.) The Special Master ignores the pleadings and the argument and, in effect, creates a conclusive presumption that surplus exists. The presumption is unwarranted.

Evidence would show that in some years, on any theory, surplus water (over and above the aggregate of the quantities specified in Articles III(a) and III(b)) clearly is available. In other years surplus, on any theory, clearly is not available. During the period 1930-1954, the average yearly water supply of the Colorado River System was

not sufficient to service the Mexican Treaty out of surplus waters. In fact, during this period, on the average, there was no surplus at all, if Arizona's theory of measurement of consumptive uses is followed. This is demonstrated by the computation on Plate II formally submitted on behalf of Arizona by Sidney P. Osborn, then Governor of Arizona, to the Department of the Interior on April 24, 1948, in connection with the Central Arizona Project. (Reprinted in Letter from the Secretary of the Interior transmitting a Report and Findings on the Central Arizona Project, H. Doc. No. 136, 81st Cong., 1st Sess., p. 11 (1948).) The first column represents the figures submitted by Governor Osborn, contained in H. Doc. No. 136. The second column represents the same computation, with one change made by us—an adjusted average Lee Ferry flow to conform with the period 1930-1954.* The second column, however, shows

*The adjusted Lee Ferry flow is based on two factors: (1) the average historical flow of 11,480,000 for the period as measured by the United States Geological Survey (USGS, Water Supply Paper No. 1313 (1954) and provisional records) and (2) the addition of 2,170,000 acre-feet representing average Upper Basin depletions estimated at Lee Ferry during the period in accordance with the technique adopted by the U. S. Bureau of Reclamation in THE COLORADO RIVER, H. Doc. No. 419, 80th Cong., 1st Sess. (1947).

The 1930-1954 period is used because it more nearly represents the dependable flow. As this Court recognized in *Nebraska* v. *Wyoming*, 325 U. S. 589, 620 (1945), "the decree which is fashioned must be based . . . on the dependable flow." As said in *Wyoming* v. *Colorado*, 259 U. S. 419, 476 (1922), "Crops cannot be grown on expectations of average flows . . . which have passed down the stream in prior years."

Plate II

Item	Acre-Feet (Osborn)	Acre-Feet (1930-54 Average Showing Breach of III(d) Obligation)	Acre-Feet (1930-54 Average Showing III(d) Obligation Performed)
[Average] Virgin flow at Lee Ferry	16,270,000	13,650,000	13,650,000
Less apportionment [available] to Upper Basin by Article III(a) of Colorado River Compact	7,500,000	7,500,000	6,150,000*
Total	8,770,000	6,150,000*	7,500,000
Natural gain from tributaries, Lee Ferry to Boulder [Hoover] Dam	1,060,000	1,060,000	1,060,000
Total	9,830,000	7,210,000	8,560,000
Natural gain from tributaries, Boulder [Hoover] Dam to Mexican Border	1,420,000	1,420,000	1,420,000
Total	11,250,000	8,630,000	9,980,000
Less natural losses, estimated	1,030,000	1,030,000	1,030,000
Total	10,220,000	7,600,000	8.950,000
Allocated to Mexico by treaty	1,500,000	1,500,000	1,500,000
Total	8,720,000	6,100,000	7,450,000
Apportionment to Lower Basin by Article III(a) and (b)	8,500,000	8,500,000	8,500,000
Not apportioned to Lower Basin but present in Lower Basin	220,000	2,400,000 (deficit)	1,050,000 (deficit)

* The figure of 6,150,000 in the second column indicates that if the Upper Basin used 7,500,000 acre-feet per year, in a period like 1930-54, the States of the Upper Division could supply only 61,500,000 acre-feet at Lee Ferry in any ten-year period, breaching the obligation under Article III(d) not to deplete the flow to less than 75,000,000 acre-feet in any period of ten successive years. Conversely, the figure of 6,150,000 in the third column illustrates that if the States of the Upper Division performed their obligation to supply 75,000,000 acre-feet under Article III(d) during each decade of such a historical period of water flow, they would not be entitled to consume more than 6,150,000 acre-feet per annum. Arizona's interpretations of the Compact are used throughout.

the States of the Upper Division in breach of their Article III(d) obligation to deliver 75,000,000 acre-feet every ten years. Hence, we show a third column reflecting a second necessary adjustment to show the absent States honoring their Article III(d) delivery obligation.

Although we challenge several of the assumptions made in Governor Osborn's computation, including his exclusion of the actual supply of water on tributaries available at the site of use, it is clear from his figures that, on the basis of the calculated average virgin flow at Lee Ferry during the period 1930-1954, the Arizona theory would leave no surplus in the Colorado River System to service the Mexican Treaty. How the burden of the deficits would be borne, Governor Osborn's calculations do not, of course, show. It is apparent, however, that under his theory, which follows Arizona's contentions in this suit, there is a substantial deficit in the system which, to serve Mexico, would require the Upper Basin to disgorge its uses to the extent of over a million acre-feet. Under the California theory that the available supply is determined by what is available for consumptive use at the site of use, the over-all deficit shown by Governor Osborn would be considerably reduced.*

*The quantity of the waters of the Colorado River System classifiable in the language of Article III(c) as "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, depends in large part upon how beneficial consumptive use is charged under those articles, particularly the accounting for use of salvaged

A further symptom of the shortage conditions which prevail throughout the System is reflected by the United States Bureau of Reclamation notification of July 20, 1955, to all agencies making water orders from Lake Mead for delivery at Imperial Dam that at its maximum level in 1955, Lake Mead held only enough water to supply downstream uses for about a year and one half. Letter from J. P. Jones, Regional Director, Region III, USBR (July 20, 1955).

It is clear that the motion may not be disposed of on the basis of the Special Master's unsubstantiated assumption as to the water supply and hence as to the remoteness of the issues between the two Basins.

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waters. If the depletion theory were applied throughout the Colorado River Basin, about 18,000,000 acre-feet could be consumed, measured at the site of use, to deplete the main stream by 16,000,000 acre-feet, the "aggregate of the quantities specified in paragraphs (a) and (b)." For example, the use of about 400,000 acre-feet per annum in the Palo Verde Valley of California would not deplete the stream at all. Natural losses on swampy land, now reclaimed, exceeded present uses. But if the standard set by Section 4(a) of the Project Act and by Article 1(j) of the Mexican Water Treaty were applied, *i.e.*, measurement of consumptive use at the site of use, the consumption of this same 18,000,000 acre-feet would invade the surplus above the "aggregate of the quantities specified in paragraphs (a) and (b)" by 2,000,000 acre-feet. See the discussion of the "beneficial consumptive use" issue at pp. 57-66 of this brief.

D. The Special Master's recommendation that California, sued as a sovereign, be denied the right to join Colorado, New Mexico, Utah and Wyoming because they are also sovereigns, is without support either in reason or in judicial precedent

The classic test for determining necessary parties, set forth in *Shields* v. *Barrow,* 17 How. 130, 139 (U.S. 1855), is that the Court should join all persons subject to its jurisdiction

> ". . . having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."

In accordance with the reference of the new Revised Rules of this Court, prescribing that the Federal Rules of Civil Procedure "where their application is appropriate, may be taken as a guide to procedure in original actions. . . ."* the California defendants framed this motion under Rule 19(b) of the Federal Rules of Civil Procedure on the ground that the absent States are subject to the jurisdiction of this Court and "ought to be parties if complete relief is to be accorded between those already parties."**

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* Rule 9(2), Revised Rules of United States Supreme Court, 1954.

** Rule 19 of the Federal Rules of Civil Procedure and the case authority on joinder of parties is analyzed in the California Defendants' Initial Brief, pp. 26-31, and their Reply Brief, pp. 7-19.

The Special Master finds that Rule 19 of the Rules of Civil Procedure "is not made applicable by Rule 9(2) [of the new Supreme Court Rules] if it conflicts with the principles governing controversies between States." (Report, p. 25.) He distinguishes *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855), and other cases cited in support of the joinder motion on the ground that they involved private parties and not States. (Report, pp. 31, 33, 34.)

We submit that there is no basis for such a distinction. This Court has applied the tests emanating from *Shields* to determine joinder questions in previous original suits and has more specifically applied them in a previous original suit brought by Arizona over the waters of the Colorado River System, now in litigation. *Arizona* v. *California,* 298 U.S. 558 (1936). Whether Rule 9(2) makes Rule 19 of the Federal Rules applicable to this motion does not, we believe, have any important bearing on disposition of the motion. If the purpose of the new Supreme Court rules is to unify procedure in the federal district courts and in the Supreme Court, and to provide definite guides for original suits in the Supreme Court, it would be preferable to follow Federal Rule 19, but the result should not be different whether Rule 19 is followed or not. This is because Rule 19 embodies the long-established joinder principles which this Court has con-

sistently applied in the exercise both of its appellate and original jurisdictions.*

In *Arizona* v. *California,* 298 U.S. 558, 572 (1936), this Court applied the established rules of joinder to determine that the interests of the United States in the waters of the Colorado River System were such as to make it an indispensable party to a suit by Arizona against all seven States of the Colorado River Basin for an equitable apportionment of the rights to the use of waters of the Colorado River System:

> "Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.,* 157 U.S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 235, 245-247; *International Postal Supply Co.* v. *Bruce,* 194 U.S. 601, 606; *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158, 163."

An analysis of the above cases cited by Mr. Justice Stone indicates the interchangeability of

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* Rule 19 "is substantially a restatement of the practice prevailing before its promulgation." 3 MOORE, FEDERAL PRACTICE ¶¶ 19.02, 19.05(1) (2d ed. 1948).

authority on joinder in original and appellate cases, as well as the applicability of the rules to interstate cases like this litigation over rights to use waters of the Colorado River System:

California v. *Southern Pacific Co.*, 157 U.S. 229, 251, 257 (1895), an original action, relying on the classic statement of the rules in *Shields* v. *Barrow*, 17 How. 130 (U.S. 1855), a case in the Court's appellate jurisdiction.

Minnesota v. *Northern Securities Co.*, 184 U.S. 199, 235, 245-47 (1902), also an original action, and also relying on *Shields* v. *Barrow, supra.*

International Postal Supply Co. v. *Bruce*, 194 U.S. 601, 606 (1904), a case in the Court's appellate jurisdiction.

Texas v. *Interstate Commerce Commission*, 258 U.S. 158, 163 (1922), an original action, in which the Court relied on *California* v. *Southern Pacific Co.*, and *Minnesota* v. *Northern Securities Co., supra.*

No case and no treatise writer cited either by the Special Master or by the opponents of the motion has suggested that different principles of joinder apply among states and among other parties. Indeed, the contrary view seems universally to be assumed.* Not to apply the joinder principles,

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* In *Texas* v. *New Mexico*, No. 9 Original, 1953 Term, the Special Master first recommended that the suit be dismissed because the United States was an indispensable party and had not consented to be sued. Cases cited by him are very largely cases involving non-sovereign parties. (See Special Master's

where their requirements are fulfilled,* to original actions between States would depart from the consistent practice of this Court over the years.

The only direct authority on joinder in litigation between States, we believe, favors the motion, despite the Special Master's contrary conclusion. (Report, pp. 38-41.) We refer to two decisions in the preliminary stages of litigation over the waters of the North Platte River to which the parties were Nebraska, Wyoming and Colorado. *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945).

Report filed March 15, 1954, pp. 7-8, 12, 47. This Court followed the Special Master's suggestion that Texas be given the opportunity to amend her complaint, and referred the question of the indispensability of the United States under a proposed amendment to the Complaint to the Special Master. *Texas* v. *New Mexico,* 348 U.S. 805 (1954). The Special Master reported on February 28, 1955, again applying the classic test of joinder announced in *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855). (Report, p. 8.) New Mexico filed exceptions to the recommendation that the United States is not, under the amended complaint, indispensable. In her exceptions, filed April 23, 1955, New Mexico's discussion hinges on the rules applied among private parties, and expressly assumes the applicability of Rule 19(b) of the Federal Rules of Civil Procedure. (New Mexico Exceptions and Brief, pp. 18, 20.)

A leading case on necessary and indispensable parties is *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936). Nowhere in its exhaustive opinion does the Court suggest that the sovereign character of the parties is a factor to be considered.

* Parts II, III, and IV of this Brief, *supra,* demonstrate that the absent States are vitally affected by the resolution of issues in the present controversy.

The first decision in that litigation was *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935). The Court there decided that Colorado's joinder was not required because the only allegations in the pleadings were that the North Platte rises in Colorado and drains a considerable area of that State. With that decision we have no quarrel. No problem of justiciability was raised or discussed. The decision followed application of the normal rules of joinder.

The second decision followed an Amended and Supplemental Answer by Wyoming. Without opinion, this Court ordered that Colorado be made a party. *Nebraska* v. *Wyoming,* 296 U.S. 553 (1935). In substance, the amended answer alleged that Colorado and its citizens "now contemplate and for a long time have contemplated and now threaten" the diversion of waters from the North Platte which would, of necessity, be the subject matter *pro tanto* of the controversy between Nebraska and Wyoming.* The new allegations, says the Special Master (Report, p. 40), "disclosed a present justiciable controversy existing between the State of Wyoming and Nebraska and the State of Colorado."

The Special Master distinguishes *Nebraska* v. *Wyoming* from the present case on three grounds, each of which is unsound:

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* The amended Wyoming pleadings on the basis of which Colorado was joined are quoted and analyzed in our Reply Brief on this Motion, pp. 12-17.

(1) *That the Upper Basin States are foreclosed from asserting claims to water available to the Lower Basin States.* (Report, p. 41.)

This conclusion, of itself, deeply and materially affects the absent States and affords a conclusive reason for their joinder. Moreover, it errs in two major respects:

> (a) Unless the absent States are foreclosed from litigating claims involving the construction of the Colorado River Compact, contrary to the express provision of Articles VI and IX, they cannot be foreclosed from asserting claims to water covered by Article III of the Compact.
>
> (b) The Compact does not purport to deal with "surplus" water, as defined in Article III(c), and the controversy involves such surplus. As to such water "not covered by the terms of this compact," the Compact in Article VI provides that "Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method . . . . " This is said with respect to "any claim or controversy . . . between any two or more of the signatory States."

(2) *That there is no allegation that the absent States are threatening to infringe rights of the present parties.* (Report, p. 41.)

This ground for distinction is based on an erroneous assumption that a complaint must be stated against absent parties before their joinder is required. That there is no such requirement is

recognized by the Special Master in his recommendation to join New Mexico and Utah in their Lower Basin capacities, although no threat by either of them is alleged. See *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Northern Indiana R.R.* v. *Michigan Central R.R.*, 15 How. 233 (U.S. 1854).

The pleadings of Wyoming, on the basis of which Colorado was joined, fail to indicate whether the threatened and contemplated diversions were in the next several years or in the next several decades. However, the decision on the merits (which also rejected a Colorado motion to be dismissed from the suit) makes clear that the threat was long range. Colorado's uses at the time of the decree, ten years after the pleading alleging the threat, were for 131,800 irrigated acres, and 6,000 acre-feet a year of exportations from the basin. 325 U.S. at 600. None of these uses, including out-of-priority diversions by Colorado, was wrongful in the light of the decree which limited Colorado uses to the irrigation of 135,000 acres and export of 60,000 acre-feet of water in any period of ten consecutive years. 325 U.S. at 665. The nature of the "threat," however, which justified judicial intervention, arose from 34,000 acres of additional land that could be irrigated. Concerning projects to irrigate those acres the Court said (325 U.S. at 600):

> ". . . Those projects, however, are not completed; they are indeed projects for the indefinite future."

(3) *That there is no allegation that the Upper Basin States are failing to meet, or threatening not to meet, delivery obligations to the Lower Basin States.* (Report, p. 41.)

A present breach of obligation is not a requisite to justiciability in a suit to quiet title, as authorities cited in Part V, Section B, p. 103, clearly show. The Special Master recognizes this in recommending the qualified joinder of New Mexico and Utah. The reasons for joining those States are compelling, even though no allegation of threatened or actual breach of obligation by either of them has thus far been made.

In interstate suits justiciability is based not on rigidly prescribed doctrines but on the necessity, in a federal system, of some effective means of resolving important controversies.* As Charles Warren concluded, "the Supreme Court has *power* . . . to settle, as between the States, questions which, between foreign nations, would be known as 'non-justiciable,' and for the Supreme Court, a 'justiciable question' means simply a question which the Court decides it will settle in any particular

*"Some things, undoubtedly, were made justiciable [by the Constitution] which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution." Bradley, J., in *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890), quoted with approval in *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900).

case."* WARREN, THE SUPREME COURT AND SOVEREIGN STATES 55 (1924).

The ultimate question as to justiciability among sovereign states is whether the Court should decide the controversy presented. A subsidiary problem is at what stage should the decision to decide or not decide be made? On the pleadings or on the basis of evidence?

Here, the answers seem clear. The subject matter of this dispute—rights of states in an interstate stream—has been cognizable by the Court since the first decision in *Kansas* v. *Colorado,* 185 U.S. 125 (1902). Moreover, after States have settled their differences by a compact, and a dispute arises over the meaning of the compact, there is no occasion for reluctance to decide an interstate case as there sometimes is before a compact has been executed. See *Washington* v. *Oregon,* 214 U.S. 205, 218 (1909). The usefulness of interstate compacts, and hence the willingness of states to enter into compacts, depends on their enforceability in this Court.**

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* Compare Frankfurter, J., in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 156 (1951):

> "Whether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."

** The Special Master quotes a dictum from *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 110-11 (1938), to the effect that the Court has jurisdiction to determine the validity and effect of a Compact between Colorado and New Mexico in a suit to which neither State is a

The Special Master quotes (Report, p. 26) from the opinion in *Colorado* v. *Kansas,* 320 U.S. 383, 393-94 (1943), the statement of a proposition well recognized:

> "In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the

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party. (Report, pp. 43-4.) The case is not a departure from principles that would be followed in a suit similarly involving a private contract. Since neither State was a party to the suit, neither State was affected except through the operation of *stare decisis.* Insofar as affected by *stare decisis,* both States were affected equally.

Moreover, a different result would have meant that no court in the United States would have had jurisdiction of the suit initiated by the Ditch Company against Hinderlider in the state courts of Colorado. Neither the state nor federal courts of Colorado or New Mexico could have exercised jurisdiction over the other State. The Supreme Court of the United States obviously would have lacked jurisdiction of the suit initiated by the Ditch Company against an individual officer and resident of the State of Colorado. The question in the *Hinderlider* case was whether Colorado and New Mexico were indispensable parties, not whether they were necessary parties.

> factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

The Special Master says that this quotation shows that this Court "long has been circumspect in taking cases in which sovereign states are the parties." (Report, p. 38.) The quotation, however, is clearly directed to the problem then before the Court. That problem was not whether to take the case, but whether the case in which jurisdiction had first been taken many years earlier had been proved and whether relief should be granted. The question of whether a case has been "fully and clearly proved" can only arise after jurisdiction has been assumed and the evidence heard. Compare earlier phases of the same dispute: *Kansas* v. *Colorado,* 185 U.S. 125 (1902) (overruling demurrer to complaint) and 206 U.S. 46 (1907) (opinion denying Kansas relief on the merits).

The 1943 opinion does not question justiciability, and it does not go to joinder of parties (although the Special Master attributes to the opponents of the motion the statement that it provides "the test with respect to joinder of parties in interstate litigation"). (Report, p. 28.) In fact, the case supports the view that, at this stage of the present litigation, any doubt about whether the absent States may be affected by the litigation should be resolved by taking jurisdiction over them. The fact that this Court in neither of two suits between Colorado and Kansas saw fit to enjoin Colorado's uses of water has never before, we believe, been cited to show that jurisdic-

tion to determine the merits was improperly assumed.

The first *Kansas* v. *Colorado* opinion, overruling Colorado's demurrer to Kansas' complaint, has recently been cited, in *United States* v. *Texas*, 339 U.S. 707, 715 (1950), for a necessary corollary of the doctrine that requires an interstate case to be fully proved:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." (Citing, *inter alia*, *Kansas* v. *Colorado*, 185 U.S. 125 (1902).)

California expects to prove all affirmative elements of her case, fully and clearly, according to the interstate standard. The fact that she has a burden of proving her case not imposed on a private litigant requires that she be given at least as full an opportunity to prove her case as would be accorded a private litigant.

Moreover, one consideration which differentiates the judicial treatment accorded States has been overlooked by the Special Master. A State suing a private citizen clearly has only the normal burdens of any other plaintiff. A State suing another State, however, must establish a case of serious magnitude, fully and clearly proved, before it is entitled to relief. Special consideration is accorded not to States as plaintiffs, but to States as defendants.

In this suit, California is a defendant. She is sued by one of six joint obligees of her obligation

under the Statutory Compact. She is sued for a declaration of rights under the Colorado River Compact whose rights and obligations run between the two Basins and the two Divisions which that Compact establishes. She is sued by the United States asserting claims independent of the Colorado River Compact which must be satisfied, if at all, from waters of the entire Colorado River System, most of which originate outside of Arizona, California and Nevada. The absent States have an interest in the controversy and "ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." The absent States "not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow,* 17 How. 130, 139 (U.S. 1855). If neither California nor the absent States were sovereigns, joinder under these rules would clearly be required. The States whom we seek to join under these rules have no higher sovereign status than does California, and all have equal status in this Court.

Certainly California as a sovereign defendant is entitled to at least the protection that would be accorded a private defendant. If joinder is denied, we believe it will be the first instance of treating a defendant State by a more severe rule of law than would be applied to a private party.

CONCLUSION

For the reasons stated in the exceptions and in this brief, we respectfully ask the Court to grant the motion to join the four absent States in their capacities as States of the Upper Division and States of the Upper Basin, notwithstanding the adverse report of the Special Master.

We also ask the Court's permission to be heard in oral argument on the motion and the exceptions to the Report of the Special Master.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Memorandum of the California Defendants in Reply to Motion of the United States for Determination of Questions of Law Presented by the Pleadings in This Cause and the Report of the Special Master

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(See List of Attorneys at end of Memorandum)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term, 1955

No. 10 Original

STATE OF ARIZONA, *Complainant*,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants*.

UNITED STATES OF AMERICA, *Intervener*.

STATE OF NEVADA, *Intervener*.

Memorandum of the California Defendants in Reply to Motion of the United States for Determination of Questions of Law Presented by the Pleadings in This Cause and the Report of the Special Master

The motion by the United States repeats in large part a proposal contained in "Memorandum of the United States Requesting Pre-Trial Con-

ference" filed with this Court May 13, 1954. The United States then proposed a pre-trial conference, to be presided over by a member of this Court to decide in advance of reference of the case to a Special Master what the United States called two "transcendent" issues and "such others as are susceptible of that disposition." (Memorandum, p. 8.) The "transcendent" issues were (1) whether Arizona is a party to the Colorado River Compact, and (2) whether the California water delivery contracts with the United States are superior in time and right to contracts between the United States and other parties. (Memorandum, p. 4.)

California objected to this proposal in a memorandum filed May 28, 1954, on the ground (1) that a decision in advance of determination of the parties to the case would be premature; (2) that an attempt to decide the "transcendent" issues in advance of trial would unnecessarily delay termination of the controversy, because the decisions do not relate to matters of law alone, and therefore require taking evidence; and (3) that the issues cannot be considered out of their context with other issues of fact and law, some of which have an even more controlling effect on the disposition of the case. (Memorandum of the California Defendants in Reply to Memorandum of the United States Requesting a Pre-Trial Conference, filed May 28, 1954.) The proposal of the United States was disposed of on June 1, 1954, by the

Court's order of reference of the case to the Special Master. 347 U. S. 986 (1954).

I.

The present Motion by the United States modifies the earlier proposal and urges, as we understand it, piece-meal decision of certain issues by the entire Court, rather than in pre-trial conference conducted by a single Justice. Most important among these issues, says the United States, is whether the State of Arizona is a party to the Colorado River Compact, but other issues would be decided as well. These decisions would be made by the Court in advance of decision who the parties to the case are to be, and presumably without taking evidence. The extent of the participation of the absent States in the hearing and whether the decisions to be made would bind the absent States as to matters decided is not made clear by the United States' Motion.

II.

The California defendants object to the present Motion of the United States on each of the grounds urged in our response to the earlier proposal advanced by the United States in May, 1954.

A. We believe that a decision cannot be made as to whether Arizona is a party to the Colorado River Compact without the presence in the suit of all six signatory States who were parties on the effective date of the Compact, June 25, 1929.

California Reply Brief, p. 32, and Exceptions and Brief on Special Master's Report, p. 38.

B. We believe that this issue should not be decided without taking evidence. The evidence relates, *inter alia,* to events occurring between 1929 and 1944 and to the stated position of Arizona in 1944 about the meaning of the Compact which prevented the agreement essential to the formation of any compact contractual in character.

C. We believe that this issue should not be decided out of its context with other issues in the case. It is true, as the United States says, that the decision affects many other issues. For precisely that reason, it should not be made without reference to those other issues. The Court, we believe, should decide the controversy before it as a whole, and not attempt to render an advisory opinion declaring an abstract proposition of law without consideration of its effect on the entire case.

III.

Answers to specific paragraphs of the United States' Motion follow:

A. In paragraph I the United States says that it seeks a determination of whether Arizona is a party to the Colorado River Compact because if she is held not to be a party "it must be presumed that Arizona will assert a claim against the River System as a whole. Under those circumstances there could be no final relief awarded in this action

without having all of the States of the Colorado River System, without regard to the Compact, before this Court." (p. 4)

The United States is correct that claims against the River System outside the Compact cannot be decided in the absence of all States affected. It is wrong, however, in the assumption that this reason disappears if Arizona is held to be a party.

The United States' proposal, even if otherwise acceptable, does not avoid a present decision on the joinder motion. The United States, California and Nevada assert claims relating to waters which, in the words of Article VI of the Colorado River Compact, are "waters not covered by this Compact."

B. In paragraph II the United States says that if Arizona is not a party to the Compact, there arises a question of propriety of considering two of the questions of Compact interpretation which Arizona raises. While it is true that Arizona would lack standing to raise these issues if held not a party to the Compact, quite similar issues have been raised by Nevada and California, and require decision whether Arizona is a party to the Compact or not.

C. In paragraph III the United States says that if Arizona is not a party to the Colorado River Compact the United States has an immediate concern respecting its obligation under the Treaty with Mexico. In fact, such issues are presented

whether Arizona is a party to the Colorado River Compact or not. See California Brief on Exceptions to Special Master's Report, pp. 74-87. The Treaty obligation of the United States is independent of the Compact, and by its terms commits the United States to deliver waters of the Colorado River "from any and all sources." At issue in the present suit among present parties is the extent to which those sources are waters to be delivered by States of the Upper Division and the extent to which they embrace water available to the Lower Basin. The United States' proposal, if followed, could not dispose of this issue, since, whether or not Arizona is a party to the Compact, it is nonetheless true that the Mexican Treaty involves "the obligation of Arizona and all of the other States of the Colorado River System." (p. 5.)

D. In paragraph IV the United States says that if the Arizona water delivery contract falls by reason of a determination that Arizona has not effectively ratified the Colorado River Compact, issues will probably be raised that "could not be resolved without the presence of the parties California seeks to join." (p. 6.) However, the validity of the Arizona water delivery contract is challenged in this case without reference to whether Arizona ratified the Colorado River Compact. See California Answer to United States Petition of Intervention, par. 35, p. 43. This issue requires joinder of the absent States whether or not Ari-

zona is a party to the Compact, for the very reason stated by the United States.

E. In paragraph V of its Motion, the United States says that the decision whether Indian claims are held to be "against the river" has a "far-reaching effect upon the interests of all States of the Colorado River Stream System." With this we agree. However, this issue is not distinguishable from a number of other issues raised by the United States (*e. g.*, Mexican Treaty water, water for fish and wildlife, and water to service water delivery contracts which, if all such contracts are valid as the United States has pleaded, necessarily include surplus water of the entire Colorado River System not allocated by the Colorado River Compact to either Upper or Lower Basins.) We do not know how the United States expects to distinguish this issue from the others presented in the case. The United States' proposal, even if followed, would still leave the Court facing the issues presented by the joinder motion.

F. In paragraph VI of its Motion the United States asks the Court to determine certain "legal principles" before deciding whether the absent States should be joined as parties. This, in effect, asks the Court first to decide the case and then to decide whether the absent parties are affected by that decision. This, we submit, would be to decide the case backwards. The United States does not indicate what "legal principles" the Court should pronounce, but to do so in the absence of

evidence, and without regard to all the issues in the controversy, would have all the vices of an advisory opinion. Further, it could produce only delay and confusion. It would require withdrawing the order of reference to the Special Master, it would leave the parties in doubt as to what issues they should brief and how they might present their factual evidence, and it would postpone the trial indefinitely.

IV.

With the major premises of the United States' Motion, however, we agree. The issues listed by the United States do require joining the absent States. They require joining them, however, before rather than after decision of those issues. The absent States must be bound by the decision on these issues as well as by the decision on the balance of the case. Furthermore, even if the issues listed by the United States could be disposed of as suggested, the other reasons for joinder would not disappear.

Accordingly, we ask that the United States' Motion be denied, and that defendants' motion to join the absent States be granted.

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Defendants.

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Memorandum of Arizona (a) in Reply to Motion of the United States for Preliminary Determination of Questions of Law; and (b) in Reply to California's and Nevada's Exceptions to the Master's Report on the Question of Joinder of Four States.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 10 Original

STATE OF ARIZONA

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA

Defendants.

UNITED STATES OF AMERICA, *Intervener.*
STATE OF NEVADA, *Intervener.*

Memorandum of Arizona (a) in Reply to Motion of the United States for Preliminary Determination of Questions of Law; and (b) in Reply to California's and Nevada's Exceptions to the Master's Report on the Question of Joinder of Four States.*

JURISDICTION

This case comes to this Court under its original jurisdiction, leave to file the Complaint having been

* This Court has not yet declared what briefs, if any, are required on the exceptions; but the Motion of the United States appears to require a Response. Since it relates to the same subject matter as the exceptions, it appears most economical of time to treat the entire problem under one cover.

given at 344 U.S. 919 (1953). On June 1, 1954, this Court referred the matter to a Special Master, 347 U.S. 986. Subsequently, this Court also referred to the Master the question of joinder of parties which had been moved by the State of California, 348 U.S. 947. On July 11, 1955, the Special Master filed his report on the question of joinder of parties.

STATEMENT

This is an action by the State of Arizona to determine its rights to a claimed 3,800,000 acre feet of Colorado River water in accordance with the terms of the Colorado River Compact, the Boulder Canyon Project Act, 45 Stat. 1057, and various other federal and state enactments. The 3,800,000 acre figure is made up of 2,800,000 acre feet of water allowed to Arizona under its contract with the United States for water from Lake Mead, subject to its availability under the applicable provisions of law and with due allowances for the interests of Utah and New Mexico, and 1,000,000 acre feet of water from other sources. The action was originally brought against the State of California and others by Arizona in 1952. The United States, as custodian of the works at Lake Mead and as the possessor of other interests, was permitted to intervene by an Order of this Court, 347 U.S. 986. The State of Nevada also intervened, 347 U.S. 986.

A few words of background will illuminate the general problem. The Colorado River and its tributaries drain or adjoin the seven states of Arizona, California, Nevada, New Mexico, Utah, Wyoming, and Colorado. For many years there has been dispute as to the distribution of the water of this system. As an initial step towards solution the Colorado River Compact

was drafted in 1922. This Compact made one basic determination: It divided the basin into two parts, an Upper Basin and a Lower Basin, the division point being Lee Ferry in Arizona. Basic ground rules were laid down in the Compact relating to the use of water in each Basin, and requiring the Upper Basin to let down a certain amount of water at regular intervals to the Lower States.

This Compact was slow in its ratification, Arizona in particular holding out against it for a number of years. However, upon the passage of the Boulder Canyon Project Act in 1928, *supra,* it was promptly ratified by the six states other than Arizona, and it was finally ratified by Arizona in 1944. (Ariz. Laws, 1st Spec. Sess., Ch. 5, 1944).

The Compact itself, though it divided the states into two Basins, did not attempt to work out the distribution of water within the Upper and the Lower Basins. This task was left to each Basin separately, to be solved among themselves, either by further compact or by litigation. The Upper Basin States proved able to solve these internal problems of distribution by compact, and this they did by the adoption of the Upper Colorado River Basin Compact, approved 63 Stat. 31, which, so far as they were concerned, settled their difficulties. Notwithstanding that the Congress in Section 4 (a) of the Project Act outlined a proposed distribution of Lower Basin water identical with Arizona's present request, no solution by agreement proved possible in the Lower Basin; all efforts to achieve agreement for distribution by Compact proved unsuccessful.

Against this background, the following events occurred:

1. In both the Eighty-First and Eighty-Second Congresses, the Senate of the United States passed legislation for the Central Arizona Project, a great reclamation work intended to utilize what Arizona conceives to be its share of the mainstream water of the Colorado. This legislation was not passed in the House of Representatives, largely due to the insistence of the State of California that the title to the water to be used in the State of Arizona was not clearly established, and that, indeed, a portion of the water required was rightfully that of the State of California.[1] In both Houses the Californians pressed the series of so-called "Suit Resolutions," repeatedly assuring the various committees that in the words of the chief counsel for the State of California:

> "We believe the questions required to be presented to the Supreme Court in this matter are all questions of law, interpretation of statutes, compacts, and documents of which the Court would take judicial notice, and that no protracted case or hearing shall be involved, of the character of which the committee has probably heard or may be familiar, with respect to" (various of the long drawn-out cases.)[2]

Repeated assurances of speedy litigation, many of which are collected in Arizona's response to defend-

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[1] The language adopted by a House Committee on April 18, 1951 was a recommendation of postponement of the Central Arizona Project "until such time as use of water of the *lower* Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the *lower* Colorado River Basin." (Emphasis added) Hearings, House Rep. Com. on Interior & Insular Affairs, 82nd Cong., 1st Sess., on H. R. 1500 and 1501, Pt. 2, p. 739.

[2] Hearings before Sub. Com. No. 4, H. Rep. Com. Jud., H. J. Res. 225, 226, 236, & H. R. 4097, 80th Cong., 1st Sess., p. 32.

ants' motion to join the States of Colorado, New Mexico, Utah, and Wyoming, previously filed in this action, were given by California. In response to a direct question by Senator O'Mahoney, inquiring whether any of the Upper Basin states would need to be involved in such litigation, one of California's principal attorneys in this action said:

> "So far as California is concerned, I think the answer is 'No'. We have no controversy with any of the Upper Basin States that requires any judicial examination."[3]

In the face of these representations, a House Committee concluded not to pass upon the Central Arizona Project until the litigation requested by California could be concluded.[4]

2. Thereupon Arizona filed the instant proceedings. It very carefully confined its case to the exact matters which had been in issue before the Congress. A glance at its prayer for relief will show that it asked in varying ways for the establishment in it "of 3,800,000 acre feet of the water *apportioned to the Lower Basin* by the Colorado River Compact." (Emphasis added) It asked for no relief whatsoever aimed at any water which was not apportioned to the Lower Basin of the Colorado by the Compact.

3. Thereafter the United States intervened. The claims of the United States are either limited explicitly to Lower Basin interests or are limited to claims "as against the parties to this cause;" see, for example,

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[3] Hearing, Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, 80th Cong., 1st Sess., S. J. Res. 145, p. 120.

[4] See n. 1, supra.

the basic claim of the United States in paragraph XXX of its petition for intervention. The United States claims were thus limited to Lower Basin controversies.

4. Nevada filed its petition of intervention made also only against the Lower Basin interest.

5. California then moved for the joinder of the States of New Mexico, Utah, Colorado, and Wyoming in their Upper Basin capacity, and the States of Utah and New Mexico in their Lower Basin capacity. A word of explanation is here required: The states of Wyoming and Colorado are in the Upper Basin of the Colorado. The states of New Mexico and Utah are predominantly in the Upper Basin, but small areas in each, covering comparatively minor tributaries, are below the line drawn through Lee Ferry which divides the two Basins.

6. This Court referred the question of joinder to the Special Master who heard five days of oral argument in Phoenix, Arizona, in April, 1955. At this argument, abundant opportunity to be heard was given to all, and all of the states were heard. The United States was there represented by Assistant Attorney General Lee Rankin and Mr. William H. Veeder. At the beginning the Special Master inquired of all counsel present whether they wished to be heard and the following dialogue took place:

> "The Master: How about the United States?
> "Mr. Rankin: The United States will not require any time on the motion.
> "The Master: You have filed no briefs and do not intend to speak?
> "Mr. Rankin: That is right.
> "The Master: What would you do if the Master asks you some questions?

"Mr. Rankin: We will try to answer, depending upon the question, though we may stand mute at times."

(Oral arguments before Special Master on motion to join, Volume 1, page 5.)

The same desire not to express itself was reiterated by the United States at Volume 2, page 356, of the oral argument. At that point California had sought to induce the United States to take some position. In response the Master noted in particular that he was anxious to find out from the United States what its position was in regard to the Indians, "because that is the subject of considerable mystery to me so far, and I think we all ought to know; but I believe that goes to the merits." Nonetheless, he said, if the United States wished to file no brief and make no argument saying, "We will stand by the result whatever it may be," then, said Mr. Haight, "I think that is their privilege." In reply Mr. Veeder said, "Thank you, Your Honor." Id. p. 356.

7. On July 11, 1955, the Special Master filed his Report concluding that the States of Utah and New Mexico ought to be joined in their Lower Basin capacity only, and not in their Upper Basin capacity; and that the States of Wyoming and Colorado ought not to be joined at all.

8. California and Nevada filed exceptions to the Master's Report, California also asking oral argument. California also filed a brief on the exceptions in supplement to the earlier briefs filed in the joinder question. The United States on October 20, 1955 also filed a motion for determination of questions of law presented by the pleadings in the cause and report of

the Special Master. The questions which the United States wished to determine in advance were, principally, the question of whether Arizona is a party to the Compact (California contends that it is not); and how the Compact may be said to affect the rights of the Indians in general. To this California has filed a response, denying that these questions could or should be settled in advance by this Court but contending that the very existence of the Motion of the United States is further reason for joining the additional parties.

QUESTIONS PRESENTED

1. Whether this Court should order special argument on a series of questions of law raised by the United States before disposing of the Master's Report on Joinder?

2. Whether the Master's recommendations as to joinder should be approved?

3. Whether the Court should order oral argument before deciding the immediately preceding questions?

SUMMARY OF ARGUMENT

The motion of the United States and the exceptions of California and Nevada are so closely related that argument as to one necessarily touches the other.

A. THE MOTION OF THE UNITED STATES.

The United States is estopped from offering the motion now presented by it. It expressly renounced the opportunity to discuss before the Master the questions it now seeks to raise. Moreover, the principal matters raised by the United States on this motion are either frivolous or not open to serious question; for

there is not room for reasonable difference of lawyer's opinion over whether Arizona is a party to the Colorado River Compact, and the Master's determination that the rights of the Indians are to be satisfied from the waters of the Basin in which they are is sound. Piece-meal review can serve no useful purpose.

B. THE EXCEPTIONS.

The motion of the United States in any case loses all point if the Master's Report deserves confirmation on the question of joinder. Such matters are largely discretionary with him who serves as a trial judge; see *United Mine Workers* v. *Coronado Coal Company,* 259 U.S. 344, 382 (1922).

The exceptions go largely to matters of dicta, detail or expression which do not affect the ultimate judgment on joinder. The absent states are not indispensable parties under the doctrine of *Shields* v. *Barrow,* 17 How. 130 (1854). As to whether they should be joined as necessary or proper parties, the best test is whether any relief is sought as to them, *West Coast Exploration Co.* v. *McKay,* 213 Fed. (2d) 582 (C.A. D.C. 1954), cert. den., 347 U.S. 989 (1954), for a so-called "community of interest" is not enough, *Samuel Goldwyn, Inc.* v. *United Artists Corp.,* 113 Fed. (2d) 703 (C.A. 3, 1940).

The instant case is controlled by the First Order in *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935), and is distinguishable from the Second Order in that case, 296 U.S. 553 (1935), because the Second Order was based upon assertions of actual threatening and immediate concrete dispute over the subject matter of the action.

The well-established policy of avoidance of needless interstate litigation precludes joinder of the Up-

per Basin States here, *Alabama* v. *Arizona,* 291 U.S. 286, 291-292 (1934). This is a policy of particular importance where, as here, the Upper Basin States have settled for themselves the bulk of questions in dispute in the Lower Basin by the Upper Basin Compact. See *Colorado* v. *Kansas,* 320 U.S. 383, 392 (1944).

Finally, no justiciable question is presented as to the absent states, *United States* v. *West Virginia,* 295 U.S. 463 (1935). As that case declares, the judicial power does not extend to the "adjudication of such differences of opinion" which is all that is here involved as to the Upper Basin States. The California contention that there need not be a justiciable controversy as to all parties to a law suit is unsound, *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947).

Nothing in the circumstances warrants oral argument on the joinder question.

ARGUMENT

I. INTRODUCTION.

The interest of Arizona is to get on with the business at hand. Shortly before the opening of this term of Court, the Special Master passed away and this Court appointed in his stead Judge Simon Rifkind. We are advised that Judge Rifkind hopes soon to be ready to proceed with the matter, and we are anxious to give him the opportunity to do so. As this memorandum is prepared, this Court has not yet entered an order determining what briefs, if any, may be required in connection with the exceptions; but in view of the circumstance that we feel compelled to respond to the motion of the United States, which involves the same matter, it has seemed most expeditious to file under

one cover a statement of Arizona both as to the motion of the United States and as to the Nevada and California exceptions.

II. THE MOTION OF THE UNITED STATES SHOULD BE DENIED.

We submit that the motion of the United States for preliminary determination of questions should be denied. We doubt if this Court ever has referred a case to a master and then taken it back to decide two or three legal points before the master proceeds, as the United States now suggests. For the following reasons in particular, we see no reason for establishing such a precedent now:

A. The United States Is Estopped From Offering the Motion Now Presented by It.

The United States has had over a year within which it might have made its present proposal. As the quotations above show, the United States chose to stand mute before the Special Master, making no expression on the exact questions which it now wants this Court to take up and determine. It did so when the Special Master had made abundantly clear that he would be most glad to hear anything that the United States wished to say, and when the United States had explicitly agreed to abide the result of its silence. We can conceive of no reason which would permit the United States now to take the time of this Court to discuss the exact matters which it declined to discuss before the Special Master. Such a proceeding would utterly defeat the purpose of reference to a master.

B. The Principal Matters Raised by the United States Are Either Frivolous or Not Open to Serious Question.

1. With all due respect to the State of California, we submit that there is not room for reasonable difference of opinion as to whether Arizona is a party to the Colorado River Compact. California admits that Arizona passed an act of ratification (California Answer, Par. 59). In all this mountain of pleadings and proceedings, we find no concrete reason suggested as to why this ratification is thought to be ineffective. Clearly under Article XI of the Compact, Arizona was entitled to ratify in 1922 and nothing in the Compact put a time limit on the right of ratification. The legislative history of the Compact shows that those who drafted it considered that the time for ratification would be indefinite.[5] Nothing in the Boulder Canyon Project Act contains any limitation on the right to ratify, and nothing subsequent indicates any loss of the right. When Arizona finally in 1944 entered into its contract with the Department of the Interior, which was expressly conditioned upon its ratification of the Compact, Mr. Shaw, then counsel for California, was positively enthusiastic about Arizona's ratification.[6] The Upper Colorado River Basin Compact, approved by the Congress, necessarily assumes the validity of Arizona's ratification of the main Compact. Nothing in the sheer passage of time vitiates the power of rati-

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[5] The minutes of the Twenty-First Meeting of the Compact Commission, November 20, 1922, page 9, contains a dialogue on the subject of time of ratification. Chairman Hoover raised the question of length of time. The consensus, as expressed by Mr. Davis for the Bureau of Reclamation, was "that the time was indefinite", to which Mr. Hoover replied, "All right, if that is clear, it satisfies me."

[6] See minutes of Committee of Fourteen on the drafting of the Arizona contract, May 3, 1943, page 27.

fying a compact, and numerous compacts have been outstanding for ratification for approximately as long as that here involved.[7]

2. The Special Master at pages 53 and 54 of his Report, dealing with the Indian question, analyzed the various provisions of the Compact and said:

> "From this, it appears that the rights of the Indian Tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian Tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin.
>
> "The question of how Lower Basin water shall be divided among the Lower Basin States is one for final hearing."[8]

Further argument might delay, but we think could not materially alter, the acceptance of the Master's conclusions in this regard.

C. Piece-Meal Review in This Court Would Delay Proceedings to No Good End.

We assume that the United States is asking for a determination of these questions, not in the abstract, but because they are supposed to have some relation

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[7] See for one of numerous instances the Interstate Oil Compact of 1935, ratified by four states in 1945, by two states in 1947, and by one state in 1951; Book of the States, 1948-49, p. 40, 1952-53, p. 23.

[8] We believe that California in its exceptions, p. 21, misconstrues this conclusion of the Special Master when they read the passage as a holding that the "Indian uses are to be charged to the State and Basin where they take place." We believe that the Master held that the uses should be charged to the Basin in which they take place, reserving the question of what the distribution within the Basin should be.

to the only matter now concretely before this Court, namely whether the Master's Report on the question of joinder should be accepted. We submit, for the reasons set forth in the Master's Report, supported by the balance of the argument in this brief, that the Master's Report should be accepted; and that it could serve no useful purpose to delay the resolution of that question pending consideration of these preliminary issues. By familiar doctrine, this Court does not sit to decide abstractions, however interesting.

III. THE JUDGMENT AS TO JOINDER WAS WITHIN THE FAIR DISCRETION OF THE MASTER AND SHOULD NOT BE LIGHTLY DISTURBED.

Questions of joinder involve large areas of discretion, and while they may be reviewed for abuse of discretion, the determination on such a question will not be lightly set aside. *United Mine Workers* v. *Coronado Coal Company,* 259 U.S. 344, 382 (1922); and see on the related question of intervention of parties, *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137, 141, 142 (1944); 4 Moore's *Fed Prac.,* 62-64. We appreciate that a Master does not stand in the identical position of a trial court, although the relationship is a very close one; see, *e.g., Anderson* v. *Mount Clemens Pottery Co.,* 328 U.S. 680 (1946), on the finality of master's reports as to matters of fact. While a master's report on a question of law is reviewable, *Louisiana* v. *Mississippi,* 282 U.S. 458, 465 (1931), the conclusions of the Master are nonetheless entitled to very serious consideration; *Lupton* v. *Chase National Bank,* 89 Fed. Supp. 393 (1950).

We respectfully submit that these discretionary considerations are particularly applicable in the circum-

stances of this case, where the matter was heard with singularly exhaustive patience by one well qualified to make the necessary determination.

IV. ON FAMILIAR PRINCIPLES OF JOINDER, THE UPPER BASIN STATES SHOULD NOT BE INCLUDED IN THESE PROCEEDINGS.

A. Introduction.

This Court has before it a question of joinder of parties, and of joinder only. In the course of determining that question it could lay out its position on numerous matters of law, but there is no necessity to do so. The Special Master attempted in his ruling and opinion generally to outline his understanding of the various matters presented, as much for the purpose of revealing to counsel where he needed further clarification himself as for the purpose of disposing of the matters involved. As a result, there are dicta in the Master's Report. There are also little slips of a word here or there; thus, as California points out at page 67 of its Exceptions, at one point the Master used the word "apportionment" when he may have meant to use the word "appropriation;" and as California contends at page 52, the Master may have erred in attributing certain language to Senator Hayden when in fact that language was used by then Secretary Hoover to Senator Hayden. But this Court need not concern itself with matters of dicta, or vocabulary, or citation. All that matters here is the end result; and we respectfully submit that many of the objections made to the Master's Report can only highlight the circumstance that the concrete question before him was soundly answered.

B. Under the Applicable Rules, the Resisting States Cannot be Joined. They are at Most "Proper" Parties, and are Neither Indispensable Nor Necessary Parties.

Under the familiar doctrine of *Shields* v. *Barrow*, 17 How. 130, 139 (1854), indispensable parties are those without whom "a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Necessary parties are those required to be present in order that "complete relief may be accorded between those already parties." *Greenleaf* v. *Safeway Trails*, 140 Fed. (2d) 889, 890 (C.A. 2, 1944). It is these parties who are covered by Rule 19 of the Rules of Civil Procedure. In the instant case, the absent parties are neither indispensable nor necessary. Far from being essential to a disposition of the case, this Court will have to reach far afield indeed to take any action which might affect the absent states. At most, the absent states are proper parties, permissibly joinable under Rule 20; see 3 Moore, *Federal Practice*, 2153 (2nd Ed.); although it is not conceded that they are even this.

"There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not," *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 77, 80 (1920). In making these practical determinations, the best test is the test of the relief to be granted; if relief is impossible without absent parties, those parties are indispensable; if relief amongst the parties to the action will be rendered greatly more effective by the addition of other parties, those parties are "necessary," but this only if those parties would otherwise be affected by the actual op-

eration of the judgment. *West Coast Exploration Co.* v. *McKay,* 213 Fed. (2d) 582 (C.A. D.C. 1954).

California and Nevada confuse possible intellectual interest in particular points with the proper test, which is that of the actual bearing of the relief to be granted. A so-called "community of interest" is not enough, *Samuel Goldwyn, Inc.* v. *United Artists Corp.,* 113 Fed. (2d) 703 (C.A. 3, 1940), even as in that case where identical contracts of persons sought to be joined might be affected by the litigation. As the Third Circuit there held, it was immaterial that the holding would affect the strangers to the litigation for "Such a conclusion however would not constitute an adjudication" (113 Fed. (2d), at 706) of the rights of the others, nor was there any relief which was actually being sought by the moving parties against the strangers. In those circumstances, said the Court, there could be no justiciable controversy between the parties and those sought to be joined.[9]

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[9] The cases cited by California do not require inclusion of the absent states. As California concedes in its original brief at page 49, the *Shields* case is of course distinguishable; it involved rescission of a contract. No more in point is *Niles-Bement-Pond Company* v. *Iron Moulders Union,* 254 U.S. 77 (1920), a suit in which a corporation sought to enjoin a strike not against itself but against a subsidiary corporation without making the subsidiary a party. Omission of the subsidiary corporation in those circumstances was a palpable fraud on the jurisdiction, and the Court, of course, held the subsidiary not merely a necessary but an indispensable party in the circumstances. *Gregory* v. *Stetson,* 133 U. S. 579 (1890), also relied upon, is particularly clearly inapplicable because it involved a suit for the proceeds of a note which by the very terms of the contract was "subject to the joint order and direction" of other persons, who hence were held not merely necessary but indispensable parties under the familiar rule. The further citation of a dictum in *National Licorice Company* v. *N.L.R.B.,* 309 U.S. 350, 363 (1940), is in substance approximately as remote from the conventional problem of joinder as the title of the case

In the instant case no party is seeking any relief whatsoever against any of the absent states. Arizona and her neighbors to the north and west ask nothing but the opportunity to live in peace with each other. All Arizona seeks is its share of the Lower Basin water as against its rivals, California, and to a lesser extent, Nevada.

> "The general rule in equity has been that one against whom nothing is alleged and no relief is demanded need not be impleaded as a defendant . . . ," 6 *Cyc. Fed. Proc.* (3rd Edition) 548.

And see *Clark on Code Pleading* (2nd Ed.) 205.

C. The Rulings of This Court in the Nebraska-Wyoming-Colorado Litigation Preclude Joinder in the Instant Case.

Since all parties invoke as precedent the two orders of the Supreme Court on the joinder question in the Nebraska-Wyoming-Colorado litigation, the exact events there require special attention. We refer to *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935), hereafter referred to as the First Order; and *Nebraska* v. *Wyoming,* 296 U.S. 553 (1935), hereafter referred to as the Second Order.

1. The First Order.

Nebraska sued Wyoming for an equitable apportionment, as between those states, of the waters of the North Platte River. Wyoming moved to dismiss on the ground, among others, that Colorado was an indis-

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would suggest; and the immediately succeeding passage in *National Licorice* shows its inapplicability to extra-contractual rights.

The *Goldwyn* case, *supra,* distinguishes *Commonwealth Trust Company* v. *Smith,* 266 U. S. 152 (1924), on which California particularly relied in the instant case, on the grounds that in that case the interests of the absent parties were cognizable in that suit.

pensable party. The contention was that the North Platte rose in Colorado, just as the Colorado rises in the Upper Basin States here. Wyoming rested its motion basically upon much the same cases as those offered by California in the instant situation.[10]

The position taken by Nebraska was the same as that taken here by Arizona, that "Since no relief is asked by complainant as against the State of Colorado, and since the State of Colorado has no interest in the relief asked, as against the State of Wyoming, or in the controversy between the State of Nebraska and the State of Wyoming, the State of Colorado is not a necessary or indispensable party." The Supreme Court accepted this position, saying of the Wyoming plea:

> "The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

2. The Second Order.

In due course, Wyoming filed a supplemental answer alleging that Colorado was *presently* contemplating and threatening the diversion of large amounts of water in the North Platte in such quantity as "will of necessity be the subject matter pro tanto of the deter-

---

[10] See particularly *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152 (1924), which was just as applicable in the first Colorado case as it is here, and which was rejected as inapplicable by the Supreme Court in the first proceedings.

mination of the rights in this action of the present parties." In these circumstances, Wyoming prayed for an equitable apportionment which included Colorado. In these circumstances, this Court permitted the joinder of Colorado.

The differences between the order in the second case and the instant situation are glaring. In the instant case there is no allegation at all of any actual present interference by the Upper Basin with the flow of water in controversy among the Lower Basin States, nor is there any plea of equitable apportionment against the Upper Basin by any party in the Lower Basin. That these differences are significant is shown by the discussion in the final disposition of the merits of the controversy in *Nebraska* v. *Wyoming,* 325 U.S. 589, 608 (1945), where this Court observed that where the controversy was among states all seeking the identical water, it was necessary to join absentees, particularly where "states have not been able to settle their differences by Compact." In the instant case the states have settled their major differences among themselves as between Basins by the Colorado River Compact, and the Upper Basin States have further settled the detailed differences amongst themselves by the Upper Colorado River Basin Compact.

We respectfully submit that this matter is controlled by the first Wyoming-Colorado-Nebraska order, which is virtually on all fours with the instant situation.[11]

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[11] California also makes some argument based on the fact that in the preceding Arizona-California cases, 283 U.S. 423 (1931), 292 U.S. 341 (1934), and 298 U.S. 558 (1936), Arizona did join all the states. In each of those cases, Arizona did in fact seek relief against all of the states, a position it could then take because it had not ratified the Compact. The claims for relief in those cases were radically different from those made here.

D. The Policy of Avoidance of Needless Interstate Litigation Precludes Joinder of the Upper Basin States Here.

This Court has made clear its basic policy on this score in *Alabama* v. *Arizona,* 291 U.S. 286, 291-292 (1934), when it said:

> The Supreme Court's "jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. A state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court for the action of a State. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent." (Citations omitted)

The jurisdiction of this Court in respect to the Upper Basin States cannot, even by the most vivid imaginings, be fairly described as a matter of "absolute necessity."

This policy is of particular importance where the matters involved can best be settled by compact, for this Court prefers compact settlement where this is possible:

> "We say of this case, as the Court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." *Colorado* v. *Kansas,* 320 U.S. 383, 392 (1944).

In the instant case the involvement of the Upper Basin States in litigation which they obviously wish to avoid

can only have the effect of unsettling compact commitments which they have already made for themselves. The questions of apportionment among states, Indian rights, evaporation loss distribution, and definition of "consumptive use," which are at the heart of this case, the Upper Basin States have already determined by their own agreement.

V. NO JUSTICIABLE QUESTION IS PRESENTED AS TO THE ABSENT STATES.

The Special Master found that there was no justiciable controversy between the Upper and Lower Basin States. California in its exceptions takes the position that there need be no justiciable controversy between original parties to an action and additional parties as a condition of the addition of those parties. California contends (a) that there is a justiciable controversy between the Lower and Upper Basin States; and (b) that if not, none is required.

California relies on *United States* v. *West Virginia,* 295 U.S. 463 (1935), for the proposition that the Court has jurisdiction of quiet title actions, and then assimilates this to such an action. But this is not a quiet title action so far as the Upper Basin States are concerned. As the Court said in the *United States* v. *West Virginia,* at 475, speaking of quiet title actions:

> "The public assertion of the adverse claim by a defendant out of possession is itself an invasion of the property interest asserted by the plaintiff, against which equity alone can afford protection."

Here there is absolutely no public assertion of any adverse claim by any of the Upper Basin States.

We believe that *United States* v. *West Virginia* teaches quite a different lesson. In that case this Court

held that there was no case or controversy where the United States sought to enjoin the construction of a dam upon a navigable stream by a state which had not first obtained a license from the Federal Power Commission. The state had licensed the construction of the dam but, said the Court, this was not enough to allege the invasion of any property right of the United States. In language which directly parallels the instant situation, this Court said:

> "There is presented here, as respects the state, no case of an actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion beween the officials of the two governments, . . . There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion." 295 U.S., at 473, 474.

For illustration of the requirement that there be a justiciable controversy as to each party involved in a case, see *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and for further affirmation that the case and controversy rule applies in full force to interstate litigation, see *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939). See also the concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com.* v. *McGrath,* 341 U.S. 123, 149-157 (1951), none of whose tests are met by the proposed joinder of the Upper Basin States.

VI. THE EXISTENCE OF QUESTIONS OF LAW IN WHICH THE ABSENT STATES MAY HAVE SOME INTELLECTUAL INTEREST IS NOT SUFFICIENT TO REQUIRE JOINDER.

As it seems to Arizona, the bulk of the Nevada exceptions and the heart of the California contentions go to discussion of questions of law in which the Upper

Basin States are said to be "interested." For example, Nevada contends that if the United States is given all it asks in the Lower Basin there will be too little water left for the Lower Basin States and therefore somehow the Upper Basin will be "materially affected," presumably because of the added pressures which, given this unhappy result, the Upper Basin States would then feel from their Lower Basin neighbors. Similarly California contends that the settlement of the allocation of reservoir losses by evaporation will affect the amount of "surplus" in the River; that this in turn will affect the amount of water available for the Mexican Treaty; and that the Upper Basin States are therefore concerned with the resolution of the question because there might conceivably be some added call upon them someday for Mexican Treaty purposes.

In the interest of brevity, we have chosen only a sample of the contentions of each of the excepting states. The point is that the case and controversy doctrine preserves this Court from the necessity of deciding hypothetical questions. Arizona disclaims any controversy with the Upper Basin States, and they with her. So far as California is concerned, we think its position was correctly stated in the passage quoted in the beginning of this brief when one of its most respected counsel told Senator O'Mahoney, while urging the reference of these questions to this Court, that there was no necessity for joinder of the Upper Basin States. As California's attorney said then:

> "We have no controversy with any of the Upper Basin States that requires any judicial examination."

VII. NOTHING IN THE CIRCUMSTANCES WARRANTS ORAL ARGUMENT ON THE JOINDER QUESTION.

We are aware of no instance in which this Court has ever interrupted an original proceedings after reference to a master for oral argument on a question of joinder of necessary or proper (as distinguished from indispensable, cf. *Texas* v. *New Mexico,* No. 9 Original) parties. The briefs are commonly adequate for decision one way or another, and they are particularly so here when the Master's Report is so extensive.

CONCLUSION

It is respectfully submitted that the motion of the United States should be denied and that the Report of the Special Master on the question of joinder be approved by this Court without oral argument.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961
No. [redacted] Original

STATE OF ARIZONA, Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants.

UNITED STATES OF AMERICA, Intervener,

STATE OF NEVADA, Intervener.

RESPONSE OF THE STATES OF COLORADO, WYOMING, UTAH AND NEW MEXICO TO MOTION OF THE UNITED STATES OF AMERICA FOR DETERMINATION OF QUESTIONS OF LAW PRIOR TO DETERMINATION OF JOINDER MOTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954
No. 10 Original

STATE OF ARIZONA, Complainant,
vs.
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UNITED STATES OF AMERICA, Intervener,
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RESPONSE OF THE STATES OF COLORADO, WYOMING, UTAH AND NEW MEXICO TO MOTION OF THE UNITED STATES OF AMERICA FOR DETERMINATION OF QUESTIONS OF LAW PRIOR TO DETERMINATION OF JOINDER MOTION.

PRELIMINARY STATEMENT

The State of Arizona instituted this action against the State of California and others; thereafter, the United States of America and the State of Nevada intervened. California moved to join the States of Colorado, Wyoming, Utah and New Mexico as parties to the action. Extensive briefs on the question of joinder were filed in this Court by all parties to the action except the United States, and by the States of Colorado, Wyoming, Utah and New Mexico.

On February 28, 1955, the Court referred the joinder motion to the Special Master, the Honorable George I.

Haight, "to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should be granted."

The Special Master held hearings on the joinder motion in Phoenix, Arizona, on April 12, 13, 14 and 15, 1955. At this hearing all parties to the action were represented by counsel. Also present by their counsel were the States of Colorado, Wyoming, Utah and New Mexico. All parties represented at the hearing, except the United States, participated in the hearing and the oral arguments. Although the United States was represented by counsel at the hearing, they did not participate in the arguments, although given an opportunity to do so. The following is taken from the report of the oral arguments in Volume 1, at page 5:

"The Master: How about the United States?

"Mr. Rankin: The United States will not require any time on the motion.

"The Master: You have filed no briefs and do not intend to speak?

"Mr. Rankin: That is right.

"The Master: What would you do if the Master asks you some questions?

"Mr. Rankin: We will try to answer, depending upon the question, though we may stand mute at times."

Later during the oral arguments, the following took place:

"Mr. Ely: Your Honor, I understand that counsel for the United States may not be here all through tomorrow, and while counsel for the government is still here I should like to suggest to Your Honor that it might be appropriate to address to the United States in some form an inquiry as to what position it cares to take as to the necessity of joinder of the absent states with respect to the claims made by the United States. We are in the dark as to how certain allegations of the government pleadings are interpreted by the United

States itself, particularly as to the Indian claims and their effect upon the Upper Basin.

"Mr. Chilson: If the Master please, on behalf of Colorado I seriously object to the suggestion made by Mr. Ely. The United States had an opportunity to come in here and file briefs and make its position clear if it took any position on this motion. It has not seen fit to do so, which is their right. They can remain neutral, they can remain mute, and they have done so. I think it would be entirely wrong to follow the suggestion of counsel for California.

"The Master: I will say right now I am not going to force the United States to say anything. If they wish to stay out and let it be a quarrel between states, I think that is their privilege. We are going to encounter a quite different situation when we get into the merits and when we get into the merits, one of the first things I am going to ask is to have a statement from the United States, particularly in regard to the Indians, because that is a subject of considerable mystery to me so far, and I think we all ought to know; but I believe that goes to the merits.

"Now, on this motion, if the United States comes in here and says, 'We file no brief, we make no argument, we leave it to the states to battle it out, we will stand by the result whatever it may be,' I think that is their privilege.

"Mr. Veeder: Thank you Your Honor."

(See Oral Arguments, Volume II, pages 355 and 356).

On July 11, 1955, the Special Master made his report to this Court and submitted to the Court the following recommendation:

"VII. RECOMMENDATION.

"Accordingly, it is recommended that the Motion of the California parties to join the States of Colorado, Wyoming, Utah and New Mexico as parties to this cause, in their capacities as Upper Basin States and in

respect to Upper Basin waters be denied. It is a further recommendation that as to each of the States Utah and New Mexico in their capacities as Lower Basin States and in relation to their respective Lower Basin waters only that the said Motion be allowed."

(Special Master's Report, page 69).

In October, 1955, California and Nevada filed exceptions to the Master's report and requested oral argument on the joinder motion and the exceptions.

Thereafter and on or about October 24, 1955, Colorado and Wyoming received a copy of the motion of the United States of America for determination of questions of law presented by the pleadings and the Report of the Special Master.

STATEMENT OF THE QUESTIONS PRESENTED

The motion of the United States is to the effect that there are certain legal questions which have a bearing on the determination of the joinder motion, and which should be determined by this Court before a determination of the joinder question.

The motion requests the Court to order briefs filed in connection with these legal questions before action on the joinder motion.

The legal questions which the motion of the United States contends should be first determined are:

1. Is Arizona a party to the Colorado River Compact, and thereby entitled to share in the water apportioned to the Lower Basin by that compact?

2. Are Indian claims to use of water a charge against the river as a whole, or are they to be satisfied from water apportioned by the Colorado River Compact to the basin in which the water use is made?

We object to the granting of the motion of the United States for the following reasons:

1. These legal questions and their bearing on the joinder motion, have been fully discussed and argued in the

briefs filed herein on the joinder motion and in the oral arguments before the Special Master.

2. The Special Master, after consideration of these questions and their bearing on the joinder motion, was of the opinion that the Upper Basin States, in their Upper Basin capacities, were not necessary or indispensable parties to this litigation.

3. That the United States had ample opportunity to file briefs with this Court and to participate in the proceedings before the Special Master, and state its position on these legal questions and their bearing on the joinder question, but refused so to do. Having waived its rights to participate, the United States should not now be heard on the joinder question.

ARGUMENT

I. THE QUESTION OF WHETHER OR NOT ARIZONA IS A PARTY TO THE COMPACT, HAS NO BEARING ON THE JOINDER QUESTION IN THIS ACTION.

The Colorado River Compact divides the use of the waters of the Colorado River between the Upper Basin and the Lower Basin. *The compact, by intent, does not divide the use of waters within either basin.*

Because the Colorado River Compact did not divide water use within either basin, the States of each basin have faced the problem of dividing the water use apportioned to the basin among the States therein.

The Upper Basin attacked the problem by negotiation, which eventually led to a division of the Upper Basin use by an agreement in the form of the Upper Colorado River Compact. By this compact the water apportioned to the Upper Basin by the Colorado River Compact was divided among the States of the Upper Basin. In view of the fact that the Colorado River is the only major source of water remaining for the development and growth of the Upper Basin region, division by agreement was thought improbable if not impossible, but this monumental task was achieved.

The Upper Basin Compact was negotiated and ratified without the consent or participation of the Lower Basin.

The Lower Basin of the river failed to accomplish the division of its water use by agreement, and this action was brought for the purpose of obtaining a division among the States of the Lower Basin, of the water use apportioned to the Lower Basin by the Colorado River Compact.

The Lower Basin States were not necessary parties to the division of the Upper Basin's apportionment, and the Upper States, in their Upper Basin capacities, are not necessary parties to a division of Lower Basin water use, whether that division is by agreement and compact or by litigation.

In this respect the Special Master said:

> "Although a Compact may be no more than a contract between States, it does not follow that all the parties to the Colorado River Compact must be parties here.
>
> "The Compact, by its terms, provides two separate groups in the Colorado River Basin. Each of these is independent in its sphere. The members of each group make the determinations respecting that group's problems. To destroy this arrangement made by the Colorado River Compact and to make the members of one group parties to the controversies of another group would be to deny the arrangement to keep the two groups separate and apart. The many cases which have been cited in support of the Motion do not bear upon this plain fundamental consideration. Save for some justiciable controversy existing between these two groups or between members of one group in respect to members of another group, there can be no sound reason for joining in a controversy within one group on the ground that in the making of the separation by the Colorado River Compact the members of both groups were parties thereto."
>
> (Special Master's Report, pages 33 and 34).

By Article III(a) of the Colorado River Compact, there is apportioned in perpetuity to the Upper Basin the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum. The Upper Basin's present consumptive use is approximately 2,500,000 acre-feet per annum, or about one-third of its apportionment. (See Hearings Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, Second Session, on S. 1555, page 286).

There is no allegation in the pleadings, and the facts warrant no allegation, that the Upper Basin is exceeding its apportioned use or is depriving the Lower Basin, or any user in the Lower Basin, of any water or right under the Colorado River Compact. Neither is there any allegation in the pleadings by the United States that the Upper Basin is depriving the United States of any rights which it claims in the Lower Basin or the Upper Basin.

Clearly the scope of the present action, and the justiciable issues therein, relate solely to a division of the Lower Basin's apportionment under the compact, among the various states in the Lower Basin and the United States. The Special Master, in this regard, said:

> "This cause was initiated by Arizona, as a Lower Basin State to quiet its title to waters of that basin." (Page 35, Special Master's Report).

The Special Master further said:

> "We find that the United States, as an intervener, does not attempt, even were it allowable so to do, to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin."

(Page 44, Special Master's Report).

Let us now turn to the motion of the United States. There is nothing of substance in this motion which was not argued before and considered by the Special Master. The question of whether or not Arizona is a party to the Colorado River Compact, and the bearing of this question on

the joinder of the Upper States, was argued at length in the briefs and in the oral argument before the Master.

Whether Arizona is or is not a party to the compact and entitled thereby to share in the apportionment to the Lower Basin under the Compact, is of only academic interest to the Upper Basin. Whether the Lower Basin's share is to be divided between California, Arizona and Nevada, or only between California and Nevada, neither increases nor decreases the Upper Basin's rights and obligations under the compact.

Arizona's claim in this suit is limited to a share of water use under the compact, and not in derogation or outside of the compact.

The United States, in Section IV of her motion, states:

> "It is patent that if the contracts between the United States of America and the State of Arizona should fall by reason of the determination that Arizona is not a party to the Colorado River Compact, its claimed rights to the water in the Colorado River would be materially changed, very probably presenting issues that could not be resolved without the presence of the parties California seeks to join."

We disagree with this statement. Arizona, by her complaint and otherwise, has specifically limited her claim in this action to a part of the Lower Basin apportionment under the compact.

In her brief filed in opposition to the motion of the United States, Arizona states:

> "It asked for no relief whatsoever aimed at any water which was not apportioned to the Lower Basin of the Colorado by the Compact."

If, therefore, it should be determined in this action that Arizona is not entitled to water under the compact, then certainly in this action Arizona cannot enlarge its claim to one in derogation of or outside of the scope of the compact.

Should Arizona at any time in the future institute liti-

gation, making claim beyond the Lower Basin's apportionment, most certainly the Upper Basin States will be concerned. No such issue has here been raised.

The Special Master, after considering the briefs and hearing the question discussed at length in oral argument, said:

> "The California defendants maintain that this question raises a justiciable controversy between the present parties and the four absent States, because (1) the absent States are members of the Compact, (2) a Compact is no more than a contract, and (3) parties to a contract cannot have new parties added to that contract, any more than could new provisions be added to it, in litigation to which they are not parties.
>
> "The Upper Basin opponents to this Motion are parties to the Compact, but deny that the question of Arizona's status respecting the Colorado River Compact is sufficient to grant the joinder motion because (1) to them it is immaterial whether or not Arizona is a party, and (2) their obligations and rights will not be affected regardless of the determination of this question since they are controlled by the Compact.
>
> "Arizona pleads that it is a party to the Compact. The proponents of the Motion deny this. No one has questioned the membership of the Upper Basin States in the Colorado River Compact or their rights and obligations thereunder. No one charges them with any failures of performance. How the waters of the Lower Basin are apportioned and whether in that apportionment Arizona technically or in equity is a party to the Colorado River Compact can be of no interest to them as Upper Basin States. The Court can do complete justice between the present parties without affecting the rights of the Upper Division States with regard to the waters of the Upper Basin. Further, we call attention to the provisions of Articles VIII and IX of the Compact and Section 13(a) of the Boulder Canyon Project Act following:
>
> "'Article VIII. *Present perfected rights to the beneficial use of waters of the Colorado River System*

are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"'All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.' (Emphasis added.)

"'Article IX. Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.'

"Section 13(a) of the Boulder Canyon Project Act provides:

"'The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled, "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes,' is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.'

"The joinder of these Upper Basin States is not necessary when based upon an assertion of the existence of controversy among the Lower Basin States

as to Arizona's status in relation to the Compact because (1) this is a suit by a State to quiet title to water of the Lower Basin; (2) the Compact does not apportion water among the States—but only between the Basins; (3) by considering Article VIII of the Compact it is clear that, regardless of how this question is resolved, it will not determine Arizona's right to waters of the Colorado River System. The only part of the Colorado River System involved here in which it has an interest is the Lower Basin; (4) the Compact does not provide for any change in the Upper Basin's rights or obligations whether or not Arizona becomes a party to said Compact; (5) should resolution of this question have a bearing on whether or not Arizona becomes a party to said Compact, or not, is a matter of concern to water users in the Lower Basin only."

(See Special Master's Report, pages 46, 47 and 48.)

In Section III of her motion, the United States says, "If this Court should declare that Arizona is not a party to the Colorado River Compact the United States of America has an immediate concern respecting its international obligations to deliver water arising in connection with its treaty with the United Mexican States."

Again we disagree. Article III(c) of the compact provides that the water due the United States of Mexico under the Mexican treaty shall be supplied from waters which are surplus over and above the Upper Basin and Lower Basin apportionments set forth in Articles III(a) and III(b), and further provides that if the surplus shall prove insufficient, that the burden of the deficiency shall be equally borne by the Upper Basin and the Lower Basin.

The compact does not impose any direct burden upon the State of Arizona for the Mexican treaty water. The compact apportions the burden upon the two basins. Whether Arizona is or is not a party to the compact, does not change the burden upon either the Upper or Lower Basin.

As we have pointed out heretofore, Arizona is not claiming any rights to the use of water in derogation or outside of the compact. Her claims are under the compact, and her claims are specifically subjected to the provisions

of the Colorado River Compact. The burden of the Mexican treaty water falls upon the users in both basins. If Arizona is not entitled to any water under the compact, she has no burden. If Arizona is entitled to water under the compact, then her rights in the Lower Basin are subject to the burden of the Mexican treaty water. In this litigation, whether Arizona is or is not a party to the Colorado River Compact, has no effect on either the Lower Basin's or Upper Basin's obligations with respect to the Mexican treaty water.

II. INDIAN RIGHTS HAVE NO BEARING ON THE QUESTION OF JOINDER IN THIS ACTION.

In Section V of its motion, the United States contends that the question of Indian rights has a bearing on the determination of the question of joinder. In the last paragraph of Section V of her motion, the United States says:

> "If the Indian claims are held to be 'against the river' as distinguished from the Lower Basin as defined by the Colorado River Compact, that conclusion would have far reaching effect on the interests of all of the states in the Colorado River stream system."

The question of Indian claims and their bearing on the question of joinder was discussed quite extensively in the briefs of the parties and in the oral argument before the Master.

The Special Master's analysis of the interests of the United States, including Indian claims, in this litigation and their bearing on the joinder question is as follows:

> "3. Claims Of The United States Of America, Intervener.
>
> "The California defendant urge the view that the United States of America, as an intervener in this cause, has the same rights as an original party to determine the scope of the controversy. It is the Master's view that there is no need to answer this, because even were it so, this is disposed of by the fact that the United States here asserts no rights against the Upper Basin States as to Upper Basin waters.
>
> "We find that the United States, as an intervener,

does not attempt, even were it allowable so to do, to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition of Intervention sets forth the following (p. 25):

" 'General Claims of the United States of America in the Colorado River System *in the Lower Basin.*

" 'The United States of America asserts claims, *as against the parties to this cause, of rights to the use of water in the Colorado River* and its tributaries—' (Emphasis added.)

The parties were and are Lower Basin States." (Special Master's Report, page 44.)

"10. Shall The Use of Colorado River System Waters By Indians Be Charged To The States In Which Such Uses Are Situated?

"This question is a question to be resolved in each Basin. How it is done in one Basin has no relationship to how it is done in the other.

"Article VII of the Colorado River Compact provides—

" 'Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.'

"Article VIII of said Compact bears upon this. It provides that 'Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact.' It also provides that when 'storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.'

"After these provisions, Article VIII also provides that 'all other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from

the water apportioned to that Basin in which they are situate.'

"From this, it appears that the rights of the Indian tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin.

"The question of how Lower Basin waters shall be divided among the Lower Basin States is one for final hearing." (Special Master's Report, pages 53 and 54.)

"15. Arguments Based Upon The Pleading and Prayer Of The United States Of America, Intervener, On The Merits Of The Cause.

"The California defendants, in a view to which the State of Nevada, Intervener, subscribes, contend that the United States of America, in its Petition for Intervention, asserts claims to Colorado River System water, and that this is a basis for joining the absent States because the rights of the absent states will be affected by any degree in which the United States is granted title to the use of any Colorado River System water.

"The opponents of the Motion submit that the claims made by the United States of America, in its Petition for Intervention, are insufficient on which to base joinder because (1) the United States is asserting rights only in the Lower Basin, and (2) that the Upper Basin States are not using all the water to which they are entitled and it therefore will not affect them in any way. However this may be, it is not alleged by anyone that the Upper Basin States are taking more than their share.

"We find that the United States, as an intervener, even were it allowable so to do, does not attempt to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition for Intervention sets forth the following (p. 25):

'GENERAL CLAIMS OF THE UNITED STATES OF AMERICA IN THE CLORADO RIVER SYSTEM *IN THE LOWER BASIN.*

'The United States of America asserts claims, *as against the parties to this cause*, of *rights to the use of water in the Colorado River* and its tributaries—' (Emphasis added)

"The parties to this cause were and are Lower Basin States.

"The Upper Colorado River Basin Compact, to which all these absent States are parties, as is the United States, specifically provides for the use of water by the United States in the Upper Basin by Articles VII and XIX.

"We find that the claims of the United States to Lower Basin waters made in this cause furnish no ground for joining the absent states."

(Special Master's Report, pages 59 and 60).

Article VII of the Upper Basin Compact referred to by the Master reads:

"The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State."

The pertinent parts of Article XIX of the Upper Basin Compact referred to by the Master are:

"Nothing in this Compact shall be construed as:

"(a) Affecting the obligations of the United States of America to Indian tribes;

"(b) Affecting the obligations of the United States of America under the Treaty with the United Mexican States (Treaty Series 994);

"(c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System, or its capacity to acquire rights in and to the use of said waters; . . ."

The Upper Basin Compact was ratified by the Upper Division States and consented to by the Congress of the United States.

There are no allegations in the pleadings that the Upper Basin States have violated these provisions of the Upper Basin Compact or any provisions of the Colorado River Compact. There is no allegation that the Upper Basin States are depriving the United States or the Indians in either the Upper or Lower Basins of the River of any water.

The issue in this case is the division of the water use apportioned to the Lower Basin by the Colorado River Compact. As the Master pointed out, the Upper Basin States have divided the Upper Basin apportionment by compact. The Lower Basin States are attempting to accomplish their division by litigation. There is no good reason that the Upper States should be drawn into this controversy to determine the basic issues in this litigation. The Master so found after extensive hearings and consideration of the same legal questions which are set forth in the motion of the United States.

CONCLUSION

We repectfully submit that the legal questions set forth in the motion of the United States, and their bearing upon the issue of joinder, were fully discussed and considered in the briefs filed with this Court on the joinder motion. These legal questions and their effect on the issue of joinder were further orally argued before the Special Master at Phoenix, Arizona. It is apparent from the Report of the Special Master that he gave full consideration to these legal questions and their bearing on the issue of joinder. The Master's Report and his conclusions and recommendation are before the Court for its determination.

The United States had ample opportunity to participate in the discussions by filing briefs with this Court or by participating in the oral argument before the Special Master at Phoenix, Arizona. The United States elected not to participate.

We rsepectfully submit that the motion of the United States, requiring further briefs to be filed in connection with these matters, should be denied.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Reply of California Defendants to Arizona's Memorandum Filed November 1, 1955, Directed to the Report of the Special Master

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Reply of California Defendants to Arizona's Memorandum Filed November 1, 1955, Directed to the Report of the Special Master

By her memorandum Arizona simultaneously attacks the "Motion of United States for Determination of Questions of Law Presented by the Pleadings in the Cause and the Report of the Spe-

cial Master", and the Exceptions to the Report of the Special Master filed by the California Defendants and by Nevada.

I. THE CLAIMS OF THE UNITED STATES ARE NOT "FRIVOLOUS". THEY ARE "OPEN TO SERIOUS QUESTION", AND THE PRESENCE OF ALL THE STATES IS NECESSARY TO THEIR ADJUDICATION

Arizona opposes the motion of the United States on the grounds that the United States is estopped to present it, that its grounds are frivolous, and that the matters the Government raises are not open to serious question. We also oppose the Government's motion (see California's memorandum filed October 21, 1955), but on opposite grounds.

1. The Government is not estopped to raise the questions it now presents. California's motion at the hearing before the Special Master to require the United States to state its position, particularly with respect to Indian claims, was objected to by Colorado and Arizona, not the Government, and the objection was sustained by the Special Master. (Transcript, p. 355-57.) We renewed the motion, and the Special Master said he intended to call upon the United States for an authoritative statement of its position. (*Id.*, p. 419.) He died before doing so, in advance of a conference he had called on this and other subjects for October 12, 1955. Arizona may not complain if the Government now asks the Court for instructions. We differ with the Government in that we think the issues involved in the federal claims, which we say are basin-wide in scope, can be decided on the

merits only after joinder of the other States, rather than before.

2. Nor are the Government's issues "frivolous." Arizona has not suggested how federal claims to 11,785,250 acre-feet of water per year are to be satisfied from the 8,500,000 acre-feet per annum that both Arizona and the United States say is available to the Lower Basin; nor why the Government's demands for Colorado River System water for Mexico, which the Mexican Water Treaty calls guaranteed "from any and all sources", are claims against the Lower Basin only; nor why the requirements of navigation and flood control, under which the Government claims the right to empty any reservoir, are not claims against the whole river system; nor why, as Arizona now implies (p. 13), the Government's claims for Indians shall be charged against "surplus" but not against Arizona; nor how the question of whether Indian claims are in or out of the Compact has suddenly been settled without hearing from the United States as guardian of the Indians. If there ever was any doubt that the Government contends that its Indian claims are outside of the Compact and prior and superior to claims under the Compact, that doubt is dispelled by the language of the Government's pending motion.

3. Certainly Arizona, like California and Nevada, should welcome the presence here of the other four States which we say must share the federal burdens. Of what possible advantage is it to Ari-

zona to leave only herself, California and Nevada to litigate the impact of federal claims which are half again as large as those of Arizona, California and Nevada all put together, and which are alleged to cut right across the Compact?

4. Are the Government's issues "not open to serious question"? The one issue which Arizona apparently most fears is the question of how she can simultaneously claim rights as beneficiary under the California Limitation Act (which Congress and California's legislature both stipulated should be operative only if a seven-state compact should *not* come into existence), and as party to a seven-state compact whose very existence—if it exists at all—precludes the existence of the Limitation Act. No one has yet submitted briefs on the merits of this question—it cannot be decided in the absence of the States which are parties to the Compact and beneficiaries of the Limitation Act—but it is obviously one which is "open to serious question", and it is certainly not frivolous. For example: Just how did Arizona, by delaying ratification until 1944, acquire a better position for herself, and impose greater burdens on California, than she could have acquired by timely ratification within the six months prescribed by Congress for her to make her election?

II. THIS IS A QUIET TITLE ACTION AGAINST THE ABSENT STATES OF THE UPPER DIVISION, MASKED AS AN ACTION FOR DECLARATORY RELIEF

Arizona says (p. 22), that "this is not a quiet title action so far as the Upper Basin States are concerned."

Of course it is. Arizona alleges:

(1) "The 7,500,000 acre-feet of water per year apportioned to the Lower Basin by Article III(a) was and is within the water present in the main stream and measured at Lee Ferry. . . . " (Reply to California's Answer, par. 8, p. 16.)

(2) " . . . that the 75,000,000 acre-feet specified in Article III(d) bears a direct quantitative relationship to the 7,500,000 acre-feet per year apportioned to the Lower Basin by Article III(a)." (*Id.*, par. 11, p. 18.)

(3) She has title to "2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) of the Compact. . . . " (Complaint, par. XVII, p. 21.)

(4) Since Arizona concedes California 4,400,000 acre-feet (Complaint, p. 30) and Nevada 300,000 (Reply to California's Answer, par. 63, p. 46), her title to 2,800,000 acre-feet per annum is utterly dependent, upon her own pleadings, on the establishment of title in the Lower Basin to 7,500,000 acre-feet of III(a) water at Lee Ferry.

As all this is in the face of the mandate of Article III(a) that the apportionment is from the waters of the "Colorado River System", defined by Article II(a) to include "its tributaries", and that this apportionment shall include "all water necessary for the supply of any rights which may now exist," Arizona's case turns upon the rewriting of Article III(a) to cast the whole burden of the Lower Basin's apportionment thereunder upon the States of the Upper Division, while exempting Arizona—and Arizona alone—from any charge for the use of water upon the tributaries.

This is a quiet title action against the States of the Upper Division, cloaked under a plea for declaratory relief. The declaratory relief which Arizona asks with respect to the meaning of "beneficial consumptive use", the identification of the Gila River with the "increase of use" permitted by Article III(b), the classification of Article III(b) as an "apportionment", and so on, all has just one purpose: the elimination of the Gila River from the accounting which the Lower Basin must make for its consumptive uses under Article III(a), and the resulting inflation of its claims upon the main stream, for Arizona's benefit, against the States of the Upper Division. This is to be done

(1) by down-grading Arizona's oldest uses, those on the Gila, from the status of "rights which may now exist" under Article III(a) and "present perfected rights" under Article

VIII to the status of a mere "right to increase its beneficial consumptive use" under Article III(b);

(2) by tailoring the rights on the Gila to fit the 1,000,000 acre-feet allowed by Article III(b), ignoring the fact that over 2,000,000 acre-feet of measured water is used each year in that area, and asserting that a new standard of "depletion of the virgin flow of the main stream"—applicable to Arizona, but not California—has replaced the statutory definitions of consumptive use in the Boulder Canyon Project Act and the Mexican Water Treaty, thus writing off 1,000,000 acre-feet of actual consumptive use;

(3) by offering, as an appendix to Arizona's reply to California's answer, the very same ex parte statements that this Court rejected in *Arizona* v. *California,* 292 U.S. 341 (1934), to prove that the Compact and Project Act identified the Gila with Article III(b), and gave the III(b) uses exclusively to Arizona.

But all of Arizona's "elaborate argument"—as the Court called it in 292 U.S. 341, 352—is simply the underbrush surrounding and confusing the main point: that this is essentially a quiet title action, first, against the States of the Upper Division, to brand as apportioned to the Lower Basin all of the 75,000,000 acre-feet they are obligated

to deliver each decade at Lee Ferry, and thus to convert the Compact from a System-wide agreement covering *uses* to a main-stream agreement covering *flow;* second, against California and Nevada to fix the rights of the three States in the water won from the States of the Upper Division.

To do so, Arizona now repudiates the interpretation of the Compact she formally presented to this Court in *Arizona* v. *California,* 283 U.S. 423 (1931), when all seven States were before the Court:

> "The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten year periods, has, as the Colorado brief, page 41, correctly states, no bearing on the amount of the apportionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all

beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt.

"Under the Compact, then, the only water of which the right to exclusive beneficial use in perpetuity may be acquired in the Lower Basin is the water apportioned to that basin. Such apportionment is limited to 7,500,000 acre-feet of water per annum by Article III(a). The Colorado brief, page 40, contends that paragraph (b) of Article III operates to increase this apportionment to 8,500,000 for the Lower Basin. This, we submit, is not the case. If it had been intended to apportion the larger amount, the Compact could easily have said so. The difference in language between paragraphs (a) and (b) is plain, and the difference in meaning is clear. Paragraph (b) does not *apportion in perpetuity,* as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of 'surplus' waters, and surplus waters are defined, not as surplus over quantities 'apportioned', but

> as surplus over quantities '*specified* in paragraphs (a) and (b).' Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs (b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c)." (Brief of Complainant in Opposition to Motion to Dismiss the Bill of Complaint, pp. 32-34)

Has the Compact been amended, that Arizona now may quiet in the Lower Basin the title which she said in 1930 did not exist? Did Arizona's belated unilateral ratification of the Compact in 1944 change the meaning which Arizona so clearly spelled out in 1930? May Arizona obtain a judicial reconstruction of the agreement in the

absence of all its parties, and in respects which amplify the obligations of the absent States of the Upper Division?

Why is Arizona so anxious to exclude now the States which she joined in three earlier actions in this Court? The reason is obvious: if called upon to declare their interests, the four Upper States could not for an instant acquiesce in Arizona's new interpretation of their obligations. If left out of the case, they might hope to assert at some later time the reverse of Arizona's contentions as to the identity of Articles III(d) and III(a). But that is the very reason why a decree in the instant case, predicated upon Arizona's interpretation, absent those States, would be inequitable or futile or both. If the absent States do acquiesce in Arizona's enlargement of their obligations, let them say so in a form which will subject them to the decree in this case.

III. ARIZONA'S NEW CONTENTION THAT UNDER THE SPECIAL MASTER'S REPORT INDIAN DIVERSION RIGHTS OF 1,556,250 ACRE-FEET, WITHIN ARIZONA, MAY BE IN ADDITION TO THE 3,800,000 ACRE-FEET OF CONSUMPTIVE USES CLAIMED BY THAT STATE, NECESSITATES THE JOINDER OF THE STATES OF THE UPPER DIVISION, AS IT WOULD INVADE AND DESTROY THE "SURPLUS" WHICH ALONE PROTECTS THEM FROM THE MEXICAN BURDEN UNDER ARTICLE III(c) OF THE COMPACT.

Arizona's memorandum (p. 13, n. 8) says:

> ". . . We believe that the Master held that the uses should be charged to the Basin in which they take place, reserving the question

of what distribution within the Basin should be."

Arizona seems to think that the Indian rights should be treated as those of an additional State in the Lower Basin; that the 1,556,250 acre-feet of diversion rights claimed for Indians *in Arizona* (Petition of Intervention of the United States, Appendix II, pp. 56-57) may be *in addition* to the 3,800,000 acre-feet claimed by the State of Arizona; that California "misconstrues this conclusion of the Special Master" when we say he held that "Indian uses are to be charged to the *State* and Basin where they take place." (Arizona Memorandum, p. 13, n. 8, emphasis supplied.)

Arizona thus hints at her hopes for a windfall of 1,556,250 acre-feet of diversion rights over and above the 3,800,000 acre-feet she claims.

But at whose expense? All of the 8,500,000 acre-feet of consumptive use available to the Lower Basin under Articles III(a) and III(b) of the Compact is already accounted for, on her theory: 4,400,000 acre-feet to California, 300,000 to Nevada, 3,800,000 to Arizona. Where is the added 1,556,250 acre-feet of diversion rights to come from? Obviously only from the waters which are "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)", of Article III (Article III(c)). But these are the waters dedicated in those very words to the supply of the Mexican burden, insulating the States of the Upper Division from the obligation otherwise imposed

by Article III(c) to increase their deliveries at Lee Ferry to supply one-half of the Mexican deficiency.

This new disclosure alone, in Arizona's brief, would necessitate the joinder of the States of the Upper Division. The surplus thus to be invaded for Arizona's benefit is the surplus of the entire Colorado River System, the only cushion against the impact of the Mexican burden upon the States of the Upper Division.

IV. ARIZONA'S MEMORANDUM FAILS TO MEET THE ISSUES PRESENTED BY THE EXCEPTIONS

Arizona's memorandum carefully avoids any discussion of the question whether the absent States are necessary to an adjudication of the claims of the United States; whether their rights as third party beneficiaries of the California Limitation Act survive if Arizona has become a party to the Compact; whether the declaratory relief which Arizona seeks can be granted without affecting their interests; whether Arizona's prayers to quiet title, if granted, would take their water; whether Arizona's invasions of the "surplus" deprive them of their protection against Mexico; whether they are affected by Arizona's denial of their right, and California's, to appropriate "surplus"; and so on, as to all the substantive issues.

Arizona's argument begs the whole question of whether, under the classic doctrine of *Shields* v. *Barrow*, 17 How. 130, 139 (U. S. 1855), followed by this Court for a hundred years, these States "ought

to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . ." Manifestly, if these States have the interests which we have spelled out in our exceptions and brief, but which Arizona now declines to brief and on which she shuns oral argument (Arizona Memorandum, p. 25), then the absent States "not only have an interest in the controversy, but an interest of such nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (*Ibid.*)

Arizona, avoiding all these questions, seemingly relies on the rule (Arizona Memorandum, p. 14) that a Special Master's finding of fact should be accepted by a District Court under Rule 53 (e) (2) of the Federal Rules of Civil Procedure. But the Special Master here held that, notwithstanding Rule 9 (2) of the Supreme Court Rules, Rule 19 of the Federal Rules, which would manifestly require joinder here if the parties were private, did not apply to this original action (Report, p. 25); and if not, then it is not clear why Rule 53 (e) (2) is applicable. Even if applicable, it relates only to findings of fact, and the Special Master in our case thought that he was making none, as no evidence had been taken. (Report, p. 4.) Moreover, the case on which Arizona principally relies,

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), is one in which the Court disagreed with a Special Master's finding of fact and sent the case back for further proceedings—notwithstanding that the employees aggrieved by the Master's finding had not appealed.

In the three cases which preceded the suit now before the Court, Arizona joined all six States. Were they proper parties, or did she improperly invoke the process of the Court to call her sister sovereigns here? If proper parties, it was only because the controversy she disclosed was justiciable as to them. She now says that "The claims for relief in those cases were radically different from those made here." (Arizona Memorandum, p. 20, n. 11) But in *Arizona* v. *California*, 292 U. S. 341 (1934), Arizona tendered a bill to perpetuate the identical testimony which she now annexes to her reply to California's answer (pp. 57-76), to establish the very contention she repeats here: that Article III(b) of the Compact was intended to apportion 1,000,000 acre-feet to Arizona. She told the Court in the 1934 case, in which she joined all these States, that at some time in the future she would commence an action against these six States "or some of them", in which she wished to use that testimony. This is that action. It is not a "radically different" one.

Arizona, while disclaiming the materiality of anything her counsel told this Court in pleadings and briefs in the three previous cases (Reply to

California's Answer, par. 40, p. 32), now dwells on the fact that various witnesses for California, testifying before Congressional Committees, have expressed the opinion that California could state a cause of action against Arizona that would not necessarily involve the Upper Basin States. That is not the problem here. It is Arizona, not California, which alleges that the water apportioned to the Lower Basin by Article III(a) is all to be found flowing at Lee Ferry, excluding the tributaries. It is Arizona, not California, which alleges that all of the deliveries by the States of the Upper Division under Article III(d) are apportioned to the Lower Basin and contain no water to satisfy the Mexican burden. It is Arizona, not California, which alleges that Article III(b) constitutes an apportionment in perpetuity to the Lower Basin. It is Arizona, not California, which seeks to use a million acre-feet of salvaged water free of any accounting under the Compact. It is Arizona, not California, which denies the existence of surplus above the quantities specified in Articles III(a) and III(b) and denies the right of any State to appropriate it if it exists. It is the United States which now asserts claims against the Colorado River System fifty per cent greater than the combined claims of Arizona, California and Nevada. In the light of all this, note the following colloquy in the hearings on the "Litigation Resolutions",* which Arizona omits:

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* See *Hearings before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S.J. Res. 145,* 80th

"Senator MILLIKIN. Are you limiting the issues that you would raise before the court to those which have been mentioned here?

"Mr. ELY. Well, if we control the issues to go to the court, we would ask to have these three go.

"Senator MILLIKIN. And as to any others? Would you reserve the right to raise others?

"Mr. ELY. It w ld depend entirely upon what position the other States took.

"Senator MILLIKIN. Then you are reserving the right to raise any issues in your own interest, as you should.

"Mr. ELY. Yes, sir."

(*Hearings before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S. J. Res. 145,* 80th Cong., 2d Sess., p. 114.)

Even if the suit had been restricted to the three issues on which Arizona asks declaratory relief, it was the opinion of counsel for the Upper States at the same hearing that they would have to be in the litigation. Counsel for Colorado said:

"Colorado is one of the signatory States to the Colorado River compact. We feel that any matter which involves the interpretation or application of the Colorado River compact necessarily involves every States (sic) which is signatory to that compact. In fact, we

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Cong., 2d Sess. (1948); *Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H.J. Res. 225, 226, 227, 236 and H.R. 4097,* 80th Cong., 2d Sess. (1948); *Hearings before the Senate Committee on Interior and Insular Affairs on S. 75 and S.J. Res. 4,* 81st Cong., 1st Sess. (1949).

feel that in any litigation each of the signatory States would be an indispensable party to the litigation." (*Id.*, p. 198.)

And counsel for Wyoming said:

"Now, there is another matter that I would like to mention briefly, and that is whether or not a suit, if commenced, will be in any way confined as to parties and whether or not Wyoming, for whom I speak, might not become a party. I doubt that very much. The resolution names all of the States in the basin except Colorado and Wyoming, but says "other parties." Regardless of what the resolution may say or what it may leave out, I do not believe that a controversy of this kind would be determined by the Supreme Court of the United States without Wyoming and Colorado being made parties to it." (Id., p. 302.)

V. THE PROPER TEST OF JOINDER IS THE EFFECT OF THE RELIEF SOUGHT AMONG PRESENT PARTIES ON THE ABSENT STATES, NOT THE LACK OF AN ALLEGATION OR CLAIM FOR RELIEF AGAINST THEM

Arizona asserts that the absent States are at most "proper parties" who have only a "possible intellectual interest" in the relief sought in the present controversy. She asserts magnanimously that all she wants is to live in peace with her neighbors to the north and west. (Arizona Memorandum, pp. 16-18.) Yet she carefully soft pedals any discussion or analysis of her claims which she seeks to have adjudicated. The reason is obvious. Arizona's claims to Colorado River water

can only be granted out of water to which the absent Upper States have present rights under the Colorado River Compact.

(1) Arizona's claim to quiet title to 2,800,000 acre-feet of main stream water under Article III (a) of the Compact can only be adjudicated by quieting title in her to Article III(d) water delivered by the Upper States in satisfaction of their Mexican obligation.*

(2) Arizona prays that her claims to "beneficial consumptive use" under the Colorado River Compact "be measured in terms of stream depletion." (Complaint, pp. 30-31.) This method of measurement would result in ballooning the rights of the Lower Basin (for the sole benefit of Arizona) against the absent Upper States from the 8,500,000 acre-feet per annum allocated to it under Articles III(a) and III(b) of the Compact to over 10,500,000 acre-feet of true consumptive use, measured by actual consumption at the site of use.**

(3) Arizona seeks an adjudication that the 1,000,000 acre-feet of "increase of use" permitted to the Lower Basin under Article III(b) of the Compact is apportioned in perpetuity to it (again, however, for the sole use and benefit of Arizona) as against the Upper Basin.***

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* See California Defendants' Brief on Exceptions, pp. 74-87.

** See California Defendants' Brief on Exceptions, pp. 57-66.

*** *Id.*, pp. 66-71.

These are but a few of Arizona's claims for relief that vitally affect the present legal rights of the absent Upper States. Arizona seeks to avoid their joinder by asserting that no party has formally asked for any relief against any of the absent states. However, if this were the test of joinder, no one would ever be found a necessary or indispensable party, for it is quite infrequent for a party litigant to admit that his asserted claims could involve the taking of property to which an absent party could have legal rights.* The Arizona position competely misconceives the question posed by a joinder motion. The issue is not whether the present parties have alleged a cause of action against the absent States, but whether their interests will be affected by the resolution of issues among the present parties. Former cases decided by this Court are clear that there need be no cause of action alleged, nor relief sought, nor allegation of a threat to infringe rights against the absent parties, as a prerequisite to their joinder, if they are affected by the issues to be resolved in the controversy before the Court. In *Arizona* v. *California,* 298 U.S. 558 (1936), this Court held that the United States was an indispensable party to a suit brought by Arizona to declare her equitable apportionment of the

* An exception to this in the present case is the United States, which frankly admits that unless its Indian claims are restricted under the Compact, which it submits they cannot be under Article VII of the Compact, then the Upper States are vitally affected, requiring joinder.

waters of the Colorado River System, even though there was no allegation by any of the parties that the United States was threatening to infringe any water rights, nor was any relief sought against the United States. The United States was indispensable solely because:

> " . . . The relief asked, and that which upon the facts alleged would alone be of benefit to Arizona, is a decree adjudicating to petitioners the 'unclouded . . . rights to the permanent use of' the water. Such a decree could not be framed without the adjudication of the superior rights asserted by the United States. . . . " (p. 571.)

Arizona asserted there, as she does here, that her rights do not conflict with those of the absent parties sought to be joined. In *Minnesota* v. *Northern Securities Company,* 184 U.S. 199 (1902), the State of Minnesota brought an original action to enjoin the Northern Securities Company from acquiring the stock of and exercising control over two parallel and competing railroads in Minnesota. There was no cause of action against the railroads and no relief against them was sought. Moreover, there was no controversy between the railroads and the Northern Securities Co. Nevertheless, they were held to be indispensable parties because their rights necessarily would have been affected by the litigation. For similar rulings see *Northern Indiana R.R.* v. *Michigan Central R.R.,* 15 How. 233 (U.S. 1854); *Mallow* v. *Hinde,* 12 Wheat. 193 (U.S. 1827), and

Keegan v. *Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir., 1946).

The justiciability of Arizona's quiet title action does not depend on whether any claims of the absent States invade Arizona's rights; it depends upon whether Arizona's claims invade the rights of the absent States to such a degree that those claims cannot be fully adjudicated in their absence.

Arizona, avoiding all discussion of whether *her* claims affect the absent States to a degree which makes those States necessary parties, dresses her argument on the straw man of whether *California* alleges any wrongdoing by those States. If Arizona's case is justiciable against California, it is justiciable against the States of the Upper Division, for her claims cannot be sustained unless the States of the Upper Division are first required to yield to the Lower Basin the water which Arizona would then take from California and Nevada.

In the language of Mr. Justice Stone in *Arizona* v. *California*, 298 U.S. 558, 567 (1936), a justiciable controversy would there exist if Arizona, "as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river . . . . " This test of Mr. Justice Stone is similar to that asserted by the Court opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141-142, 149-157 (1951), that "[t]he touchstone to justiciability is injury to a legally protected right. . . ." and the similar

tests laid down by Mr. Justice Frankfurter in his concurring opinion. Under all tests as applied to the facts and claims of the present suit (which the Arizona Memorandum neglects to do), it is clear that the decreed rights sought by the present parties would constitute an immediate invasion of the present rights of the absent States, thus posing a justiciable controversy with respect to them.

VI. THE NEBRASKA - WYOMING - COLORADO LITIGATION SUPPORTED JOINDER OF AN ABSENT STATE ON FACTS NO MORE INDUCIVE TO JOINDER THAN THOSE PRESENT IN THE INSTANT CASE

1. The First Order. (295 U. S. 40 (1935).)

Here the only ground alleged by Wyoming as to why Colorado was an indispensable party was because "the bill discloses that the North Platte rises in that state and drains a considerable area therein." (*Id.*, p. 43.) The Court properly held that that ground alone was "without merit," reserving the determination "whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit." (*Ibid.*) The mere fact that the water rises in the Upper State does not mean that there is any conflict between that State and the present parties to the controversy. Arizona asserts that the decision in the First Order is "on all fours" with the present case (Arizona Memorandum, p. 20)—in other words that the only ground asserted or present for joinder in the present case is that the Colorado River rises in and drains a considerable portion

of the Upper Basin States. This patently overlooks the claims of both the United States and Arizona to waters of the Colorado River System, asserted under as well as outside of the Colorado River Compact, which adversely affect the present legal rights and duties of the absent States to the same Colorado River System waters.

2. The Second Order. (296 U. S. 553 (1935).)

Some eight months later, the Court unanimously and without opinion ordered that Colorado be made a party "in accordance with the prayer of the amended and supplemental answer of the State of Wyoming. . . . " (*Ibid.*) That amended and supplemental answer,* so far as it dealt with Colorado's actions, alleged no present injury by Colorado but recited only contemplated and threatened diversions by Colorado of waters which were the "subject matter pro tanto of the determination of the rights in this action of the present parties." Hence the crucial point was not the threat but the fact that the rights of Colorado to the use of water of the North Platte conflicted with the asserted rights to the same waters claimed by Nebraska and Wyoming in their suit for an equitable apportionment. Wyoming made this fact clear when she stated in her amended and supplemental answer, after alleging Colorado's contemplated diversion, that

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* See pp. 13-14 of California Reply Brief on this Motion for the pertinent paragraphs of the Amended and Supplemental Answer.

> " . . . . if the present suit is permitted to proceed without making the State of Colorado a party, defendant will be subject to further litigation with the State of Colorado and its appropriators, involving the waters of the North Platte River which constitute the subject matter of this suit. And defendant says that a proper and equitable allocation of the waters of the North Platte River, as complainant well knows, cannot be made between the present parties upon any equitable basis without at the same time determining the rights, whatever they may be, of the State of Colorado and of its appropriators in said waters. . . . " (*Ibid.*, Paragraph Twentieth.)

This Court, in its final opinion (325 U.S. 589 (1945)), removed any doubt or ambiguity as to its action in joining Colorado in 1935. Colorado, after final hearing, moved to be dismissed from the suit on the ground that she had not injured or threatened to injure downstream water users in Wyoming and Nebraska. Indeed the actual uses of Colorado at that time did not exceed the amounts to which she was limited by the decree. Colorado asserted that her proposed projects were not planned for the immediate future and hence did not constitute a present threat. The Court held that

> "The fact that Colorado's proposed projects are not planned for the immediate future is not conclusive in view of the present overappropriation of natural flow. . . . If this were an equity suit to enjoin threatened in-

> jury, the showing made by Nebraska might possibly be insufficient. But Wyoming v. Colorado, supra, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. . . ." (*Ibid.*, pp. 609-610.)

There is no question but that the Colorado River, like the North Platte, is greatly over-appropriated, *Arizona* v. *California et al.*, 298 U. S. 558 (1935), so that the claims of the present parties to the suit cannot be granted without quieting title to water to which the absent States may have present rights.

The case now before the Court is much stronger than the second *Nebraska* v. *Wyoming* order for the joinder of the absent States. In addition to factors almost identical, the present litigation is based upon the interpretation of the meaning and effect of the Colorado River Compact and Statutory Compact which control the rights and obligations of all seven States of the Colorado River Basin. Contrary to Arizona's assertion that the Colorado River Compact settled the major differences between the Basins, her claims raise new interpretations of the Compact that strike at the heart of the understood rights between the Basins. Arizona's Complaint hence raises the central issue of the extent of rights allocated to the Lower Basin under the Compact, which directly involves the converse rights and obligations of the absent Upper States under that document.

CONCLUSION

The "business at hand", as Arizona calls it (memorandum, p. 10) would be a good deal further along if Arizona had joined the necessary parties in the first place, and if Arizona had not resisted, for the past year and more, California's efforts to cure that defect. This is the first of Arizona's four cases in this Court in which the United States, an indispensable party, has intervened, and hence the first in which there has been an opportunity for a complete settlement of the Colorado River controversy. In the other three cases, all seven States were before the Court upon Arizona's summons, but the United States was not. We respectfully submit that it will not be in the interest of any State of the Basin if the present opportunity for a final determination is lost through the failure to join the parties necessary to that determination.

Respectfully submitted,

(See list of signatures to this Reply on page 28.)

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IN THE

Supreme Court of the United States

October Term, 1961

No. 9, Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Petition for Rehearing of Decision Denying Motion to Join the States of Colorado, New Mexico, Utah and Wyoming

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IN THE

Supreme Court of the United States

October Term, 1955

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

Petition for Rehearing of Decision Denying Motion to Join the States of Colorado, New Mexico, Utah and Wyoming

PETITION FOR REHEARING

The per curiam decision of December 12, 1955, denies our motion to join Colorado and Wyoming, and grants the motion to join Utah and New Mexico as parties "only to the extent of their interest in Lower Basin waters."

The motion to join was decided in the absence of any brief or argument by the United States, which is by far the major claimant.

We respectfully petition for rehearing, and ask that the Court, under Rule 58 (3) of this Court, request the Solicitor General of the United States to reply to this petition, and, in so doing, to answer this question:

INQUIRY TO SOLICITOR GENERAL REQUESTED

> Are the claims which the United States pleads for water for Indian use, satisfaction of contract obligations, treaty requirements, navigation, flood control, and other federal purposes, restricted to the waters available to the Lower Basin under the Colorado River Compact, or are they claims against the waters of the entire Colorado River System?

COURT'S PREVIOUS INQUIRY TO SOLICITOR GENERAL

The Clerk of the Court, on October 15, 1952, wrote the Solicitor General, saying, *inter alia:*

> "I have been directed by the Court to request you to state your views as regards jurisdiction."

The Government's motion for leave to intervene (December 31, 1952) and Petition of Intervention (December 8, 1953), followed. To our eyes, the Petition is a plain claim of paramount federal powers "against the river", not merely "Lower Basin waters". Unfortunately, the Government's silence here and before the Special Master has created a situation which should be clarified before final disposition of the joinder motion.

If the Government, now or later, confirms that any of its claims are against the waters of the entire Colorado River System (there is no reason to believe that the Government will contend otherwise), then all seven States are necessary to their adjudication. It is better to know that now rather than later. "A decree could not be framed without the adjudication of the superior rights asserted by the United States." *Arizona* v. *California, et al.*, 298 U. S. 558, 572 (1936).

But if the Government's reply should be that the federal interests are limited to "Lower Basin waters", however defined,* that answer would be

* The expression "Lower Basin waters" used in the Court's per curiam decision of December 12, 1955, is not found in the Colorado River Compact or the Boulder Canyon Project Act. Does it mean the 7,500,000 acre-feet per annum, the use of which is apportioned to the Lower Basin by Article III (a) of the Compact? The added 1,000,000 acre-feet of consumptive use covered by Article III (b)? The 75,000,000 acre-feet per decade guaranteed by the States of the Upper Division in Article III (d)? The additional de-

inconsistent with the following claims made or necessarily implied in its Petition of Intervention:

I. FEDERAL INDIAN CLAIMS ARE PLEADED "AGAINST THE RIVER", NOT AGAINST "LOWER BASIN WATERS"

The Petition of Intervention claims 1,747,250 acre-feet per annum of diversion rights, of which 1,556,250 acre-feet are in Arizona (Petition, Par. XXVII, p. 23, Appendix II-A, pp. 56, 57), and *denies that these are subject to the Colorado River Compact* (Par. XXXIV, p. 34), *denies that Indian uses are chargeable to the Basin and State in which they are located* (Petition, Par. XXXVII, pp. 37, 38), and specifically alleges that Indian rights *"are in no way subject to or affected by the Colorado River Compact."* (Petition, Par. XXXVII, p. 38.) (Emphasis supplied) If that is so, they are not subject to the Compact's division of the Colorado River System into Basins. In a motion "for determination of questions of law" filed here October 20, 1955, denied November 7, 1955, the Government said, "If the Indian claims are held to be 'against the river' as distinguished from the Lower Basin as defined by the Colorado River Compact, that conclusion would have far-reaching effect upon the interests of all the States

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liveries required by Article III (c)? The "unapportioned excess or surplus" of which the Boulder Canyon Project Act permits California to use one-half? It seems clear that the federal claims are not restricted to waters fitting any of these descriptions.

in the Colorado River Stream System." Has it changed its view?

In *Texas* v. *New Mexico,* No. 9 Original, this Court now has under review a report of a Special Master on the relation of the Indian claims on the Rio Grande to the claims of Texas and New Mexico. The Rio Grande Compact, there litigated, contains an exemption of Indian rights (Art. XVI) which is modeled on that in the Colorado River Compact (Art. VII). In an *amicus* brief filed April 16, 1952, in *Texas* v. *New Mexico,* the United States contended, "In the absence of authority from Congress, the Compact could not bind the United States or its wards, the Pueblo Indians. The consent of Congress to the states entering into the Compact was not a consent to be a party bound by the Compact. Cf. *Hinderlider* v. *LaPlata Co.,* 304 U. S. 92, 109." On October 17, 1955, the Court requested the Department of Justice to again state its position on the indispensability of the United States as a party to the Rio Grande controversy.

Indian claims now asserted by the Government on the Colorado are at least thirty times larger than on the Rio Grande.

In *Federal Power Commission* v. *Oregon,* 349 U. S. 435 (1955), the United States asserted and the Court recently sustained federal water rights, based on Indian ownership of riparian lands, in contravention of statutes of Oregon. See *Winters* v. *United States,* 207 U. S. 564 (1908); *United*

States v. *Powers,* 305 U. S. 527 (1939); *United States* v. *Winans,* 198 U. S. 371 (1905).

The States of the Colorado River Basin cannot safely assume, in the teeth of the Government's Petition of Intervention here, that federal Indian claims on the Colorado are softer and less extensive than those asserted on the Columbia, the Milk River and the Rio Grande.

Does the Government here claim 1,747,250 acre-feet of diversion rights *in addition* to the "Lower Basin" waters referred to by the Court? If so, where is this water to come from, except the waters of the entire System? Does it claim 1,556,250 acre-feet in Arizona as part of the 3,800,000 Arizona claims, or *in addition* thereto? If in addition, how can this quantity possibly be supplied out of "Lower Basin waters"?

II. HAS THE UNITED STATES, BY CONSTRUCTING HOOVER DAM, APPROPRIATED THE "SURPLUS" UNAPPORTIONED BY THE COLORADO RIVER COMPACT?

Section 5 of the Boulder Canyon Project Act directs that no person shall have the right to use water stored by Hoover Dam except by contract with the Secretary of the Interior.

The question here is whether the United States, by construction of Hoover Dam, has appropriated the surplus waters of the Colorado River System as against all seven States and may lawfully dispose of their use by contract. The United

States was held indispensable in *Arizona* v. *California,* 298 U. S. 558, 571-72 (1936), because "a decree could not be framed without the adjudication of the superior rights asserted by the United States." One of the "superior rights" so asserted was thus described by this Court, after tabulating the California contracts: (p. 570.)

> "Without more detailed statement of the facts disclosed, it is evident that the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated."*

Cf. *Arizona* v. *California,* 283 U. S. 423, 456-58, (1931); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 328-30 (1935); *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 423-24, 426 (1940); *United States* v. *Chandler Dunbar Co.,* 229 U. S. 53, 72, 73 (1913); *United States* v. *San Francisco,* 310 U. S. 16, 29, 30 (1940); *Alabama* v. *Texas,* 347 U. S. 272, 273 (1954).

The Colorado River Compact does not allocate this "surplus", leaving that to a later compact.

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* In *Nebraska* v. *Wyoming,* 325 U. S. 589, 629-631, 639-640 (1945), Government contracts under the Warren Act (36 STAT. 925) for delivery of water stored by federal projects were recognized and excepted from the final apportionment of "natural flow" among the States.

(Art. III (f), (g).) But such a later compact would require anew the consent of Congress. (Constitution, Art. I, Sec. 10.) Thus such an appropriation by the United States of surplus which is explicitly excluded from the effect of the present compact, if valid now, cannot be divested without the consent of Congress to a suppositional new compact, and the Government's right is good until so divested. Cf. *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 420 (1926). The United States denies that "all" its rights are subject to the present compact. (Petition, Par. XXXIV, p. 34.) Cf. *Hinderlider* v. *LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 109 (1938). If not "all", then which ones?

III. FEDERAL TREATY CLAIMS ARE CLEARLY "AGAINST THE RIVER", NOT MERELY AGAINST "LOWER BASIN WATERS"

Article 10 of the Mexican Water Treaty (Treaty Series 994) guarantees Mexico 1,500,000 acre-feet per annum "of the waters of the Colorado River, from any and all sources". Senate Reservation "(c)" to that Treaty withholds power from the Secretary of State and the International Boundary and Water Commission "directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States," but it omits the Secretary of the Interior from the Prohibition. This omission was deliberate, to enable the Secretary of the Interior to operate all federal dams *in all seven States* so as to perform

the guaranty to Mexico. An amendment to include that officer in the prohibition was rejected for that very reason. See Senate debate on consent to ratification: 91 CONG. REC. 3373-81, (April 16, 1945, 79th Cong., 1st Sess.). The protocol of November 14, 1944, to the Treaty is in accord. (Treaty Series 994.) Cf. *Missouri* v. *Holland,* 252 U. S. 416, 434 (1920).

The treaty burden, in terms, rests upon the whole system, not the Lower Basin. Article III(c) of the Compact, Article 10 of the Treaty, say so.

The Government's Petition of Intervention (Par. XIII, p. 12, Par. XXVIII, p. 24) does not limit its treaty claims to "Lower Basin waters"; it denies that these rights are subject to the Colorado River Compact. (Par. XXXIV, p. 34.) California's answer to that petition (Par. 44 (b) (2), p. 51) alleges that the federal treaty claims are against all seven States of the Colorado River Basin, not merely against the Lower Basin. Does the United States assert otherwise?

IV. THE FEDERAL REQUIREMENTS FOR FLOOD CONTROL AND NAVIGATION, LIKE THOSE FOR THE MEXICAN WATER TREATY, ARE "AGAINST THE RIVER", NOT MERELY AGAINST "LOWER BASIN WATERS"

The federal navigation and flood control servitudes, like that imposed by the Treaty, cut across the Compact, indifferent to its division of the System into Basins.

As to navigation and flood control, Congress, in the Boulder Canyon Project Act (Act of December 21, 1948, 45 Stat. 1057) directed that the reservoir created by Hoover Dam "shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power." (Sec. 6) This Court has already held that this "*specific statement of primary purpose in the act governs the general references to the compact.*" *Arizona* v. *California,* 283 U. S. 423, 456 (1931). (Emphasis supplied)

There is thus no division into Upper Basin and "Lower Basin waters" so far as paramount federal powers are concerned. As between those powers and one State or seven, "This is not a controversy between equals." *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 425 (1925). See *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 512, 525-26 (1941); *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 426-27 (1940).

The Government claims the right to utilize the full capacity (38,000,000 acre-feet) of all its reservoirs for *all* federal purposes. (Petition, Par. XXX, p. 25; Appendix I, p. 43.) The power claimed and exercised (millions of acre-feet may be released from Hoover Dam to the Gulf under the flood control mandate: see 33 C.F.R. § 208.80

requiring 5,350,000 acre-feet of vacant capacity in Lake Mead to be available by January 1 of each year) is the power to withhold from use, or release to the ocean and destroy, the *corpus* of the water. It has nothing to do with the *consumptive use* of water, as apportioned by the Compact. Compare *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 425, 426 (1925), and *Wisconsin* v. *Illinois,* 278 U. S. 367, 415 (1929), with *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 737 (1950). It is more like the guaranty of the corpus of 1,500,000 acre-feet per year made to Mexico by Article 10 of the Treaty. (Treaty Series 994.)

California's answer to the Government's Petition of Intervention (Par. 44 (b) (4) p. 52) alleges that the Government's claims in the interests of flood control and navigation are against all seven States. The seven are on an equal footing with respect to paramount federal powers. *United States* v. *Texas,* 339 U. S. 707, 715-17, 719, 720 (1950); *United States* v. *Louisiana,* 339 U. S. 699 (1950); *United States* v. *California,* 332 U. S. 19, 31 (1947). Does the United States here contend otherwise?

Is the Colorado, alone of all the river systems of the country, one in which the adjudication of the rights of the United States for treaty, navigation and flood control functions can be restricted to the River's "Lower Basin waters," in consequence of the consent of Congress to an interstate compact?

Does the United States now so limit the plenary powers in aid of navigation and flood control which it asserted, and sustained, "without conforming to the police regulations of a state," in *Arizona* v. *California,* 283 U. S. 423, 451 (1931)? Nothing in its pleadings here so suggests. The Government, it can be predicted, will contend here, as it has done successfully before, that its constitutional functions cannot be limited by the legislation of any State, *e.g. Federal Power Commission* v. *Oregon,* 349 U. S. 435, 445 (1955); *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U. S. 152, 181, 182 (1946); *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 404, 405, 426, 427 (1940); *Washington Dept. of Game and Fish* v. *Federal Power Commission* 207 F. 2d 391, 395, 396 (9th Cir. 1953), *cert. denied* 347 U.S. 936 (1954), nor by any concert of States by Compact, *Pennsylvania* v. *Wheeling and Belmont Bridge Co.,* 18 How. 421, 433 (U.S. 1856); *South Carolina* v. *Georgia,* 93 U. S. 4, 8, 9 (1876), and that by consenting to the Compact the Congress has not enthroned it as a federal statute, *Arizona* v. *California,* 283 U. S. 423, 456 (1931). Cf. *Hinderlider* v. *LaPlata River and Cherry Creek Ditch Co.,* 304 U. S. 92, 109 (1938).

Piecemeal litigation involving great water systems and many states, with delayed fuses on federal issues, is not in the interest of anyone.

CONCLUSION

The Court properly denied the Government's motion of October 20, 1955, "For determination of questions of law," including some of those above stated. But this does not solve the problem. When the United States intervened, this became, as to the federal claims, a suit by the United States against the States. *Oklahoma* v. *Texas,* 258 U. S. 574, 581 (1922). The Government, in fairness to the States it has sued, ought to tell the Court, instead of asking to be told, whether its own claims are "against the river" (a possibility which it suggests), or against only "Lower Basin waters" (the Court's expression in the decision of December 12, 1955). The question of whether seven States or five are necessary parties turns on the answer. The lack of that answer is "leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow,* 17 How. 130, 139 (1855). The provisions of Supreme Court Rule 58 (3), providing for a reply to a petition for rehearing if directed by the Court, afford an appropriate channel for obtaining it. The question of the source and extent of the Government's water rights on the Colorado is one of the gravest questions in the case. All seven States are necessary parties to the decree which decides what Federal rights exist, determines their magnitude and whether they are subject to the Compact, and distributes the burden which they impose.

The Government's silence, although doubtless based upon a desire to remain neutral as between the contending States, places the Court, the Special Master, and these defendants in an intolerable position, because the Government is an affirmative claimant, asserting rights adverse to those of the States, and far exceeding theirs. As to its own claims, it cannot be neutral. Are the federal claims "against the river" or against only "Lower Basin waters"?

CERTIFICATE REQUIRED BY RULE 58

This petition is presented in good faith, and not for delay.

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Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]9 1961

No. [redacted]8 Original

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener.

COMPLAINT AND ANSWER IN INTERVENTION BY THE STATE OF UTAH

E. R. CALLISTER,
Attorney General of Utah,
DENNIS McCARTHY,
Special Assistant
Attorney General.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 10 Original

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener.

COMPLAINT AND ANSWER IN INTERVENTION BY THE STATE OF UTAH

Pursuant to the order of the United States Supreme Court, dated December 12, 1955, to the effect that the State of Utah and the State of New Mexico should be joined

as parties in the above cause in their respective capacities as States of the Lower Basin, the State of Utah does hereby plead as follows:

I.

The State of Utah is a signatory State of the Colorado River Compact dated November 24, 1922, and a member State of the Lower Basin thereunder, and is entitled to a share of the waters allocated to the Lower Basin by the said Colorado River Compact. Specifically, Articles III(a) and III(b) of said Compact apportion to the Lower Basin the exclusive beneficial consumptive use of 8,500,000 acre feet of water per annum. The State of Utah alleges that it has the right to the beneficial consumptive use of the waters thus apportioned under Articles III(a) and III(b) of said Compact to the extent of 175,000 acre feet per annum for present and future agricultural and domestic uses.

II.

Due to its physical location as a State of the Lower Basin, the State of Utah cannot feasibly or economically utilize any of the water flowing in the main stream of the Colorado River. For economic and geographic reasons, the only waters from the Colorado River System available to the State of Utah for present and future use in the Lower Basin are found in the Virgin River, Kanab Creek and Johnson Creek, and the tributaries of these streams. By reason of the unavailability of any other waters to it in the Lower Basin, the State of Utah is and should be entitled to a priority of use of the waters from the above designated streams in the aforesaid amount of 175,000 acre feet per annum. The respective areas in the State of Utah located in the Lower

Basin, and the amount of water necessary for the present and future development thereof are as follows:

Virgin River and Adjacent Areas

Depletions by presently irrigated areas after full water supply is available (22,857 acres)	65,625 acre feet
Depletions by irrigation of new lands with full water supply (23,534 acres)	70,852 acre feet
Depletions by miscellaneous uses (domestic, evaporation, industrial)	23,350 acre feet
	159,827 acre feet

Kanab Creek and Johnson Creek Areas

Depletions by presently irrigated areas under full water supply (5,338 acres)	15,173 acre feet
Total	175,000 acre feet

III.

Article III(f) of the Colorado River Compact provides for further "equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) * * * at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)." The State of Utah alleges that it has a right to an equitable share of these presently unapportioned waters, if and when a further apportionment is made under Article III(f) of said Compact.

IV.

With respect to certain questions raised by the pleadings of the parties on file herein, the State of Utah alleges as follows:

1. Is the State of Arizona a member of the Colorado River Compact? The State of Utah alleges that the State of Arizona effectively ratified said Compact on February 24, 1944, and thereby the State of Arizona became a member of said Compact and entitled to the rights conferred therein and subject also to the obligations therein imposed. The State of Utah also alleges that the State of California likewise is subject to said Compact, as well as to the obligations imposed by the California Limitation Act of 1929.

2. How is beneficial consumptive use under the Compact to be measured? The State of Utah alleges that beneficial consumptive use of the waters apportioned to the Lower Basin should be measured by the same method as adopted for the Upper Basin in the Upper Colorado River Basin Compact, to wit: By the inflow-outflow method in terms of the man-made depletion of the virgin flow at specified points along the main stream.

3. How shall evaporation losses from Lower Basin reservoirs be charged? The State of Utah alleges that evaporation losses shall be charged against the apportionment of water made to each state in the same proportion as the consumptive use of water delivered from storage reservoirs and used in each state bears to the total consumptive use in the Lower Basin of water delivered from storage reservoirs.

4. Is the water referred to in Article III(b) of the Colorado River Compact apportioned or unapportioned

water? The State of Utah alleges that the water referred to in Article III(b) of the said Compact is apportioned water and the beneficial consumptive use thereof is subject to apportionment between the States of the Lower Basin.

V.

To the extent that the foregoing allegations in Paragraphs I, II, III, and IV hereof conflict with or are inconsistent with the allegations contained in the several pleadings of the parties already on file herein, the State of Utah denies each and all such allegations. With respect to the other allegations of the several pleadings of the parties on file herein, the State of Utah neither admits nor denies such allegations, but reserves the right to take such position thereon as its interest in this suit may make apparent as the trial of the case proceeds.

WHEREFORE, the State of Utah respectfully prays:

1. That the respective rights of the States of Arizona, California, Nevada, Utah, New Mexico, and of the United States of America in and to the use of the waters of the Colorado River in the Lower Basin be adjudicated, determined and set at rest.

2. That the right of the State of Utah in and to the beneficial consumptive use of 175,000 acre feet per annum of the water apportioned to the Lower Basin by Articles III(a) and III(b) of the Colorado River Compact be confirmed in the State of Utah in perpetuity.

3. That the State of Utah be decreed the right to its equitable share in and to the beneficial consumptive use of

any waters which may be apportioned under Article III(f) of the Colorado River Compact.

4. That the State of Utah have such other and further relief as the Court may deem proper, also that the State of Utah be granted leave to amend or supplement this complaint and answer as its interests may appear as the trial of the case proceeds.

DATED this 10th day of February, 1956.

E. R. CALLISTER,
Attorney General of Utah,

DENNIS McCARTHY,
Special Assistant
Attorney General.

SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 29 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

STATE OF UTAH, *Party*

STATE OF NEW MEXICO, *Party.*

Answer of California Defendants to Complaint and Answer in Intervention by the State of Utah

and

Interrogatories Addressed to the State of Utah by the California Defendants

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

STATE OF UTAH, *Party*

STATE OF NEW MEXICO, *Party.*

Answer of California Defendants to Complaint and Answer in Intervention by the State of Utah

Defendants State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, by their duly authorized attorneys, jointly Answer

the Complaint and Answer in Intervention by the State of Utah as follows:

Incorporation of Appendixes by Reference

1.

Defendants refer to their "Appendixes to the Answer" to Arizona's Bill of Complaint, and incorporate those Appendixes by reference as a part of this Answer to the Complaint and Answer in Intervention by the State of Utah, as though the same were here set out at length.

FIRST AFFIRMATIVE DEFENSE

Defendants Have the Right to the Beneficial Consumptive Use in California of 5,362,000 Acre-Feet Per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto

2.

The Defendants incorporate by reference, as though here fully stated at length, as a part of this Answer to the Complaint and Answer in Intervention by the State of Utah, all of the allegations of the First Affirmative Defense of their Answer to the State of Arizona, and of the First Affirmative Defense of their Answer to the Petition of Intervention of the United States.

SECOND AFFIRMATIVE DEFENSE

Defendants Have Appropriative Rights, Recognized by the Boulder Canyon Project Act and Protected by the Statutory Compact Between the United States and California, to the Beneficial Consumptive Use in California of Not Less Than 5,362,000 Acre-Feet of Colorado River System Water Per Annum, Senior to the Claims Made by Utah

3.

Incorporation by Reference

The defendants incorporate by reference, as though here fully stated at length, as a part of this Answer to the Complaint and Answer in Intervention by the State of Utah, all of the allegations of the Second Affirmative Defense contained in the Answer of the defendants to the Petition of Intervention of the United States.

4.

All of the appropriations of defendants above alleged are senior in time and right to all claims of Utah for the beneficial consumptive use of waters of the Colorado River System, except for certain beneficial consumptive uses which may have been initiated in Utah prior to one or more of the dates of the initiation of defendants' appropriative rights. The exact quantities of such uses are unknown to the defendants, but upon information and belief, defendants allege that the quantities are not sufficient to interfere with the fulfillment of the appropriative rights of the defendants as such rights are recognized by the Boulder Canyon Project Act and Statutory Compact between the United States and California.

TRAVERSE

5.

Answering paragraph I of said Complaint and Answer, deny all of the allegations except as expressly admitted herein. Allege that the State of Utah is a party to the six-state Colorado River Compact which became operative as a result of reciprocal legislation among the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming and congressional consent thereto in the Boulder Canyon Project Act, all as proclaimed effective by the President of the United States June 25, 1929, 46 Stat. 3000. Allege that the quantities of water to which Utah may be entitled to use have not been determined in any manner.

6.

Answering paragraph II, deny all of the allegations contained in said paragraph not expressly admitted herein. Admit that Utah cannot utilize any of the water flowing in the main stream of the Colorado River in its Lower Basin area, for the reason that Utah has no physical access to such water.

7.

Answering paragraph III, defendants deny all of the allegations contained in said paragraph not expressly admitted herein. Admit that Article III(f) of the Colorado River Compact contains, among other provisions, those quoted.

8.

Answering paragraph IV, deny all of the allegations contained in said paragraph not expressly admitted

herein. Admit that the State of California is subject to the California Limitation Act of 1929, except that California's obligation under that Act did not survive the ratification by Arizona of the Colorado River Compact in 1944 if that ratification was legally effective. Admit that the use of the water referred to in Article III(b) of the Colorado River Compact is subject to division among the States of Arizona, California, Nevada, New Mexico and Utah, and allege that, in the absence of a compact among said states, rights therein are established by appropriation, or, with respect to water stored under the Boulder Canyon Project Act, by contract with the Secretary of the Interior. Deny that the issues are adequately or accurately stated in said paragraph IV, and allege that the issues in controversy are summarized in Exhibit "A" attached hereto, and incorporated by reference as though fully stated herein.

9.

Defendants deny all allegations contained in the Complaint and Answer of the State of Utah not specifically admitted herein, or which are at variance with the defendants' other pleadings in this suit.

PRAYER

WHEREFORE, defendants pray:

1. That the rights and interests of defendants as against all parties to this cause be adjudged and decreed as alleged in their Answer to the Bill of Complaint of Arizona, their Answers to the Petitions of Intervention of the United States and Nevada, and this Answer to Utah.

2. That the Court grant to the defendants such other and further relief as to the Court may seem meet and proper.

The defendants respectfully pray leave to amend this Answer if amendment should hereafter become appropriate or necessary in the course of the proceedings in this cause.

Respectfully submitted,

For the State of California

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EXHIBIT A

Summary of the Controversy

The pleadings filed by Arizona, Nevada, the United States and California, to date, disclose complex questions of fact and law, many of which are interrelated. The summary of principal questions presented below is divided into four parts: (I) the quantities of water in controversy; (II) the ultimate issues, from the standpoint of the respective prayers; (III) a tabulation of factual issues; and (IV) the issues of interpretation of the basic documents involved. Under this division, certain questions reappear and to this extent reflect the interlocking nature of the problem.

I. The Quantities of Water in Controversy

The United States seeks to quiet title to rights to the use of water, consumptive and otherwise, "as against the parties to this cause," for federal purposes, in unstated amounts.

Arizona seeks to quiet title to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters of the Colorado River System (measured by "man-made depletion of the virgin flow of the main stream") and to enjoin California's right to permanently use any water in excess of approximately 3,800,000 acre-feet per annum (measured by "diversions less returns to the river"), that being the effect of (1) reducing 4,400,000 acre-feet of III(a) water by reservoir losses, and (2) denying California any permanent right to use excess or surplus waters.

California asserts a right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of the waters of the Colorado River System (measured by "diversions less returns to the river") under contracts with the United States, comprising 4,400,000 acre-feet of the waters apportioned by Article III(a) of the Colo-

rado River Compact and 962,000 acre-feet per annum of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact.

Nevada seeks to quiet title to 539,100 acre-feet per annum (measured in part by both methods) of the beneficial consumptive uses apportioned by Article III(a) of the Colorado River Compact, and to not less than a total of 900,000 acre-feet from all classes of water.

As the States differ in their definition of "beneficial consumptive use," their claims require restatement in terms of a common denominator in order to evaluate their effects. Thus:

The quantity to which Arizona seeks to quiet title, 3,800,000 acre-feet per annum, measured by the method she urges, "depletion of the virgin flow of the main stream occasioned by the activities of man," is equivalent to more than 5,000,000 acre-feet measured by consumption at the site of use, or "diversions less returns to the river," the standard established by the Boulder Canyon Project Act and asserted by California. The difference is due primarily to the fact that under Arizona's interpretation, the Compact deals with the virgin flow in the main stream only and that the use of water "salvaged by man" is not charged as a beneficial consumptive use, whereas under California's interpretation the Compact deals with the waters of the entire river system and such salvage is so charged.

Conversely, the aggregate of the California contracts, 5,362,000 acre-feet per annum, measured by "diversions less returns to the river," is equivalent to only about 4,500,000 acre-feet measured by "man-made depletion" (without charge for salvaged water). If Arizona's prayer should be granted, California's rights would be reduced to about 3,800,000 acre-feet per annum, measured by "diver-

sions less returns to the river," or to about 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream."

The impact of Nevada's claims on those of the other states is not readily evaluated.

II. Ultimate Issues

The ultimate issues, in the sense of the results sought by each party, may be grouped as follows:

The United States.

Does the United States have rights, "as against the parties to this cause, to the use of water in the Colorado River and its tributaries" in the following categories?

(1) for consumptive use of all projects in the Lower Basin, which it asserts independently of any rights claimed by the States in which such projects are located;

(2) to fulfill its obligations arising from international treaties and conventions; but this involves, with respect to the burden of the Mexican Water Treaty, the obligations as between the States of the Upper Division and the States of the Lower Division under Articles III(c) and III(d) of the Colorado River Compact, and involves also the effect of the so-called "escape clause" of Article 10 of that Treaty, which allows reduction in the guaranteed deliveries to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty;

(3) to fulfill all its contracts for the delivery of water and electric power, *i.e.*, with or in Arizona, California, and Nevada; but it alleges that the water available is not sufficient to satisfy all these obligations;

(4) to fulfill the Government's obligations to Indians and Indian Tribes; but this involves not only the questions of the magnitude and priorities of these claims but the questions of whether or not they are chargeable under the Colorado River Compact to the Basin and State in which such uses are made, what the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and what rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins;

(5) to protect its interests in fish and wildlife, flood control and navigation; but such rights as it may have for these purposes may require the impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona and California, and again involves the question of accounting under the Compact; and

(6) for use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties to this cause" for these functions, such claims apply to all the waters of the Colorado River System in both Basins.

The adjudication of these claims of the United States requires consideration and resolution of: questions of fact, referred to later; the power of the United States to impound and dispose of water independently of rights derived from the States; the extent of its obligations under treaties and contracts; the impact and effect of its treaties upon rights of domestic water users; how its claims to the use of water shall be measured; the location, magnitude and priorities of Indian claims, and claims for other alleged federal purposes; the extent to which its rights and obligations are controlled by the Colorado River Compact; and the extent to which its claims may be exereised *in futuro* in derogation of intervening rights and uses.

Arizona.

Is Arizona entitled to a decree:

(1) Quieting title to 2,800,000 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, substantially all to be taken from the main stream, and measured in terms of man-made depletion of the virgin flow of the main stream?

(2) Quieting title to all of the 1,000,000 acre-feet per annum by which the Lower Basin is permitted to "increase its use" by Article III(b) of the Colorado River Compact (notwithstanding the decision of this Court in *Arizona* v. *California et al.*, 292 U.S. 341 (1934)), to the exclusion of the other States of the Lower Basin, all to be taken from the waters flowing in the Gila River, and to be measured in terms of man-made depletion of the virgin flow of the main stream?

(3) Reducing California's right to the uses apportioned by Article III(a) of the Colorado River Compact to approximately 3,800,000 acre-feet per annum, in consequence of reservoir losses?

(4) Enjoining California's right to receive and permanently use under its government contracts 962,000 acre-feet per annum, or any part thereof, in excess of 4,400,000 acre-feet per annum?

The determination of Arizona's claims involves: the questions of fact, later referred to; the standing of Arizona to seek a declaratory decree quieting title to a "block" of water for projects not yet constructed or authorized (about 1,600,000 acre-feet per annum of the 2,800,000 claimed from the main stream); the source of title to Arizona's claims to 2,800,000 acre-feet of III(a) water and 1,000,000 acre-feet of III(b) water; the status of the uses on the Gila; the measurement of uses thereof and of the main stream; whether Arizona's status is

that of a party to the Colorado River Compact or that of a third party beneficiary of the Statutory Compact between the United States and California, and if so, whether Arizona is bound by the interpretations placed thereon by the principal parties thereto in its formulation and administration; and the validity and effect of Arizona's water delivery contract with the United States.

Most of the questions posed by Arizona's claims revolve around the issue of whether the Gila River shall be treated as a part of the Colorado River System for all purposes, or shall receive special treatment in respect of (1) the identification of uses thereon with the waters referred to in Article III(b); (2) the corollary exemption of "rights which may now exist" on the Gila from any charge under Article III(a); and (3) the devaluation of the charge for beneficial consumptive uses from the quantity which is in fact consumed on the Gila (alleged by California to be about 2,000,000 acre-feet per annum) to the lesser quantity represented by the resulting depletion in the virgin flow of the main stream (alleged by Arizona to be about 1,000,000 acre-feet per annum).

California.

Are the contracts between the United States and the defendant public agencies of California for the storage and delivery of water valid and enforceable? Inasmuch as the contracts are, in terms, for permanent service but subject to the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, the issue is whether these enactments, considered together as a Statutory Compact established by reciprocal legislation, authorize and permit the Secretary of the Interior to presently contract for the storage and delivery for permanent beneficial consumptive use in California, of 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) of the Colorado River Com-

pact plus one-half of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact. The aggregate of these contracted quantities, subject to physical availability of the amounts of excess or surplus waters, which vary from year to year, is 5,362,000 acre-feet per annum.

The determination of California's claims involves: the questions of fact, later referred to; the extent to which rights have vested in both the United States and California under the Statutory Compact; whether Arizona is estopped by her previous conduct from asserting her present position; whether the limitation is net of reservoir losses; how California's uses shall be measured; whether California is chargeable with the use of salvaged water; the effect of California's appropriations, in their relation to the expressions "rights which may now exist" and "present perfected rights" in the Compact and Project Act; the definition of the Project Act term, "excess or surplus waters unapportioned by" the Colorado River Compact; the availability of such waters for permanent service; the intent of Congress with respect to the waters referred to in Article III(b); and the relation between California's contracts and the later agreements which the Secretary of the Interior has entered into with others.

Nevada.

Is Nevada entitled to a decree:

(1) Quieting title to 539,100 acre feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact?

(2) Reserving for a future agreement the disposition of the use of the 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact, and preserving to Nevada an equitable share thereof?

(3) Assuring Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum from all classes of water?

The determination of Nevada's claims requires the consideration and resolution of: the questions of fact later referred to; the questions of interpretation previously mentioned; the question of whether Nevada's share of III(a) waters has been determined or limited to 300,000 acre-feet per annum; whether, as to stored waters, Nevada may claim any quantity in excess of her contracts with the United States; and the source of title to her claims to 539,100 acre-feet per annum of III(a) water and not less than 900,000 acre-feet per annum from all sources.

Interests of Other States.

There remains the question whether the claims of the United States, Arizona, California, and Nevada can be effectively determined without concurrently determining the rights and obligations of Utah and New Mexico with respect to the waters of the Lower Basin, and the rights and obligations of those states and Colorado and Wyoming with respect to other waters of the Colorado River System, to the extent that they are affected by the issues in controversy here.

In more detail, these "ultimate issues" depend upon the resolution of the following questions of fact and of the interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Mexican Water Treaty.

III. Factual Issues

There are substantial issues of fact, raised by the pleadings to date. These include, but are not limited to, determination of:

(1) the investments and obligations undertaken by the parties in the construction of works and in the performance of their contracts with the United States, and the investments and obligations undertaken by the United States in reliance upon such contracts;

(2) the location, magnitude and priorities of the water rights necessary to enable the United States to perform its obligations to Indians and Indian tribes pursuant to Article VII of the Compact;

(3) the requirements of the United States for (a) flood control, (b) navigation, (c) fish and wild life, and (d) the other claims which it makes;

(4) the quantities of water physically available for beneficial consumptive use in the Lower Basin, assuming full use by the Upper Basin of its Compact apportionment, full regulation of the supply available to the Lower Basin, and full performance of the Mexican Water Treaty;

(5) the uses, present and potential, on the main stream and on each tributary, determined as of the place of use, as California contends is the proper method, and the effect of those uses in terms of man-made depletion of the virgin flow of the main stream, as Arizona contends is the proper method;

(6) the quantities of water "salvaged" by the activities of man, on the main stream and on the tributaries;

(7) reservoir losses, present and potential, gross and net;

(8) appropriative rights, priorities, and uses thereunder, on the main stream and tributaries;

(9) the extent and place of use of "rights which may now exist" and which, under Article III(a) of the Compact, are to be charged as uses of water apportioned by Article III(a), and of "rights which may now exist" in

California, within the meaning of Section 4(a) of the Project Act; and

(10) the extent and place of use of "present perfected rights" protected by Article VIII of the Compact and directed by the Boulder Canyon Project Act to be satisfied in the operation and management of the Project.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty

Questions relating primarily to Article III(a) of the Colorado River Compact include the following: Whether the Colorado River Compact deals only with the main stream or treats with Colorado River System waters wherever they may be found; whether the uses apportioned by Article III(a) to the Lower Basin are to be taken only from "water present in the main stream and flowing at Lee Ferry," as Arizona contends, or from the tributaries as well, as California and Nevada contend; whether the 7,500,000 acre-feet referred to in Article III(a) is related to the 75,000,000 acre-feet referred to in Article III(d), as Arizona contends, or whether the latter figure includes excess or surplus waters unapportioned by the Compact, as California contends; by what process Arizona claims to have acquired an apportionment of 2,800,000 acre-feet of III(a) water, to be taken from the main stream; whether the apportionment of 7,500,000 acre-feet "per annum" is a statement of a maximum, or of an average, and, if the latter, over what period of years; the definition and measurement of "beneficial consumptive use"; the accounting for water added to and withdrawn from storage on the main stream and tributaries; whether the use of water salvaged by man on the main stream and tributaries is to be charged under the Compact; the definition of "rights which may now exist," which are to be included in charges to water apportioned by Article III(a) and their magnitude on the main stream and tributaries; the

date to which this last expression refers; whether, in the absence of a compact among the Lower Basin States, the division of water among them is to be affected by appropriative rights, *i. e.*, "rights which may now exist"; whether Indian rights, and other federal claims to consumptive use, are included within that expression and are to be charged under the Compact; whether reservoir losses are chargeable as beneficial consumptive uses, and if so, their classification under the Compact and their relation to other uses.

Questions relating primarily to Article III(b) of the Colorado River Compact include the following: The questions relating to the definition of "beneficial consumptive use" and "per annum" previously stated in connection with Article III(a); whether the "increase of use" permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as in Article III(a), as Arizona contends, or a license to acquire rights by appropriation and contracts under the Project Act in excess or surplus water unapportioned by the Compact, as California contends; whether this right to increased use is identified solely with the water found flowing in the Gila River, as Arizona contends, or is identified with the first 1,000,000 acre-feet of increased use (above 7,500,000) per annum throughout the Lower Basin, as California and Nevada contend; whether this right is available to all five States of the Lower Basin, or to Arizona alone, as she contends (notwithstanding the decision of this court in *Arizona* v. *California et al.*, 292 U.S. 341 (1934)); the status of uses in New Mexico on the Gila; the status of uses on other tributaries; and to what degree reservoir losses are chargeable to this increase of use. Reference to the relation of the Mexican Treaty burden to the uses under Article III(b) appears below in connection with Article III(c).

Questions relating primarily to Article III(c) of the Colorado River Compact include the following: Whether

the waters to be supplied Mexico are "apportioned" thereby (this bears upon the determination of the meaning of the expression "excess or surplus waters unapportioned by" the Colorado River Compact, appearing in the Boulder Canyon Project Act, *infra*); whether, if the quantities in excess of those specified in Articles III(a) and III(b) are insufficient to supply the deliveries to Mexico, the burden, with respect to the Lower Basin, falls first upon the uses referred to in Article III(b), as California contends, or upon those referred to in Article III(a), as Arizona contends; and the relation of the "escape clause" in Article 10 of the Treaty, which permits reduction in deliveries to Mexico in case of extraordinary drought in proportion to the reduction in consumptive uses in the United States. The relation of Article III(c) to Articles III(d) and III(a), with respect to the obligations of the Upper Division States, is referred to below in connection with Article III(d).

Questions relating primarily to Article III(d) of the Colorado River Compact include the following: As a corollary to one of the questions stated with reference to Article III(a), whether the 75,000,000 acre-feet referred to in Article III(d) is related to the 7,500,000 acre-feet apportioned by Article III(a) to the Lower Basin, or whether the 75,000,000 acre-feet include excess or surplus waters available for delivery to Mexico or use in the Lower Basin; the resulting effect on the obligation of the States of the Upper Division stated in Article III(c) to furnish additional water to meet the deficiency if surplus above the quantities specified in Articles III(a) and III(b) is insufficient to supply Mexico; and whether the Lower Basin is entitled to demand release of this 75,000,000 acre-feet notwithstanding the consequent inability of the Upper Basin to make beneficial consumptive use of 7,500,000 acre-feet per annum.

Questions relating primarily to Article III(e) of the Colorado River Compact include the following: Whether,

if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required; whether, if Indian uses are not subject to the Colorado River Compact, the United States may require release of water from reservoirs in the Upper Basin to satisfy them, in addition to the water which the States of the Upper Division are required to release in performance of Articles III(c) and III(d) of the Compact; so also with respect to the other federal claims asserted by the United States, "as against the parties to this cause," for use of water in the Lower Basin.

Questions relating primarily to Articles III(f) and III(g) of the Colorado River Compact include the following: Whether the provisions in these articles with reference to a compact to be made after October 1, 1963, are permissive or mandatory; whether, in the light of the Statutory Compact, these provisions preclude the acquisition of rights in excess or surplus waters by appropriation and by contract with the United States in the interim, subject only to further apportionment as between Basins by such a future compact; and whether, in the event of competing interstate claims to such excess or surplus waters, in the absence of a compact apportioning them, priority of appropriation, including contracts with the United States, controls.

Questions relating to Article VII of the Colorado River Compact include the following: Whether uses by Indians are subject to the Colorado River Compact; whether Indian uses are chargeable under the Compact to the Basin and the State in which they are situate; if not, whether they are prior and superior to the apportionments made by the Compact, or are in competition with appropriations of others which are subject to the Compact; the location, magnitude, and asserted priority of Indian claims; their effect upon the quantities available to non-Indian users under Articles III(a), III(b), etc.; their effect on the distribution of the Mexican Treaty burden;

and their effect on the obligations of the States of the Upper Division under Articles III(c) and III(d).

Questions relating primarily to Article VIII of the Colorado River Compact include the following: The date to which the expression "present perfected rights" relates, *i.e.*, 1922, 1929, or some other date; the definition of said term; whether such definition is to be determined under the law of the State under which the right arose; whether the assurance against impairment extends to quality as well as quantity; the extent of these rights in each State; their relation to the expression "rights which may now exist," as used in Article III(a) of the Compact and Section 4(a) of the Project Act; and the impact of reservoir losses when "present perfected rights" attach to, and are satisfied from stored waters, pursuant to the direction in Article VIII.

Questions relating primarily to the Boulder Canyon Project Act and the resulting Statutory Compact between the United States and California include the following: Whether the alternative consent given in the Project Act to a Seven-State or Six-State Compact became final on June 25, 1929, in establishing the latter; whether Arizona could, or did, effectively ratify a Seven-State Compact thereafter; if so, whether the Statutory Compact authorized by the Project Act as a corollary to a Six-State Compact remains in effect; if it does, whether Arizona can claim the benefits of both; whether the Statutory Compact authorized contracts to be made with the California defendants for the permanent service (in addition to 4,400,000 acre-feet of III(a) waters) of one-half of the excess or surplus waters unapportioned by the Compact for use in California; whether it included therein the waters referred to in Article III(b), or precluded California from use of such waters; whether the "excess or surplus," of which California may use one-half, is to be reckoned before or after deduction of the quantity required to be delivered to Mexico; the effect on California's

right to "excess or surplus" of a future compact apportioning such waters; whether the limitation "for use in California" is net of reservoir losses, or is subject to further reduction in consequence of such losses; whether the definition of consumptive uses applicable to California is applicable to Arizona, and vice versa; whether California is free to make use of salvaged waters without charge under the Compact or the Limitation Act; the effect of California's appropriations; the meaning and effect of the reference to "rights which may now exist" in Section 4(a) of the Project Act; the extent of California's "present perfected rights" as referred to in Section 6 of the Project Act; whether by the Project Act, or otherwise, the shares of Nevada or Arizona in the waters of the Colorado River System have been determined; and the construction and effect of the water delivery contracts held by those States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

STATE OF UTAH, *Party*

STATE OF NEW MEXICO, *Party.*

Interrogatories Addressed to the State of Utah by the California Defendants

To: Hon. E. R. Callister
Attorney General of Utah
Salt Lake City, Utah

The defendants, State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water

District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, request that the State of Utah, by an officer or agent thereof, answer, in accordance with Rule 9(2) of the Rules of the Supreme Court of the United States and Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories, the requirement of oath being waived:

A. Utah Projects

A-1. Is the claim to 175,000 acre-feet per annum of beneficial consumptive use claimed in paragraph II of the Utah Complaint and Answer based upon appropriations heretofore made? If so, by what appropriators, on what dates and in what quantities?

A-2. Of the 175,000 acre-feet per annum of beneficial consumptive use claimed in paragraph II, please state how much has been in fact used in each of the past ten years. If the period given is other than a calendar year, please specify when the year begins.

A-3. Please list and locate on a map the existing projects and the planned future projects, whether or not now under construction, for which any part of the beneficial consumptive use claimed in paragraph II is claimed.

A-4. Please state when Utah asserts that the full quantities of water claimed for beneficial consumptive use in Utah will be put to use.

A-5. Please state what is meant by "full water supply" as that phrase is used in paragraph II, and state what works must be completed or what conditions must be met to provide such a supply.

B. Beneficial Consumptive Use

B-1. Reference is made to paragraph II of the Utah Complaint and Answer in Intervention. Are the claims for 175,000 acre-feet of beneficial consumptive use on the

Virgin River, Kanab Creek and Johnson Creek areas measured in accordance with the method referred to in paragraph IV(2) of the Utah Complaint and Answer?

B-2. If the answer to interrogatory B-1 is "no," please specify and describe the method used in measuring the claims there referred to.

B-3. Reference is made to paragraph IV(2) of the Utah Complaint and Answer in Intervention: Please describe and locate on a map the "specified points along the main stream," at which the claimed beneficial consumptive use in each State in the Lower Basin is to be measured.

B-4. Please state by what criteria the points described in interrogatory B-3, if any, were selected.

B-5. Please describe the "inflow-outflow method" referred to in paragraph IV(2), and how it is applied to determine beneficial consumptive use of each State in the Lower Basin.

C. Indian and *Other* Federal Uses

Reference is made to paragraph II of the Utah Complaint and Answer in Intervention:

C-1. Do the claims for 175,000 acre-feet of beneficial consumptive use per annum include water for Indian lands?

C-2. Please state how much water is presently being consumptively used each year on Indian lands within Lower Basin areas of Utah.

C-3. Do the claims for 175,000 acre-feet per annum include the use of water for other federal purposes, including the National Park Service, Forest Service, Bureau of Land Management, fish and wildlife refuges?

D. Compact Questions

D-1. How much of the 175,000 acre-feet per annum of beneficial consumptive use claimed in paragraph II is

claimed from Article III(a) uses? How much from Article III(b) uses?

D-2. What criteria determines whether specific uses claimed by Utah are chargeable to Article III(a) or to Article III(b) uses under the Colorado River Compact?

D-3. What "rights which may now exist," as that phrase is used in Article III(a) of the Colorado River Compact, does Utah claim in the Lower Basin as of 1922? As of 1929? What "present perfected rights," as that phrase is used in Article VIII of the Colorado River Compact does Utah claim in the Lower Basin as of 1922? As of 1929?

It is requested that answers to the foregoing interrogatories be addressed to Edmund G. Brown, Attorney General of California, Attention: Gilbert F. Nelson, Assistant Attorney General, 909 South Broadway, Los Angeles 15, California.

Dated: February 28, 1956.

Respectfully,

For the State of California

EDMUND G. BROWN,
Attorney General of the
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SUPREME COURT, U.S.

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MAR 2 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. [redacted] ORIGINAL

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*

STATE OF NEVADA, *Intervener.*

APPEARANCE AND STATEMENT IN BEHALF OF NEW MEXICO OF ITS CLAIM OF INTEREST IN AND TO LOWER BASIN WATERS

RICHARD H. ROBINSON
Attorney General of New Mexico

FRED E. WILSON
Special Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10 ORIGINAL

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, et al., *Defendants.*

APPEARANCE AND STATEMENT IN BEHALF OF NEW MEXICO OF ITS CLAIM OF INTEREST IN AND TO LOWER BASIN WATERS

I.

Pursuant to the Order of the Supreme Court dated December 12, 1955, New Mexico enters its appearance herein as a party, solely in its capacity as one of the Lower Basin States as defined in the Colorado River Compact of 1922.

II.

Its appearance is made by authority of its Attorney General, concurred in by its Governor and the New Mexico Interstate Stream Commission. The Interstate Stream Commission is an agency of the state, created by the legislature with power to protect, conserve, and develop the waters and stream systems of the state, including the power to institute in the name of the State of New Mexico any and all legal proceedings as in its judgment are necessary to carry out its duties and powers.

III.

New Mexico as a sovereign state is a party to the Colorado River Compact dated November 24, 1922, and one of the states of the Lower Basin, as defined in Article II (g) and Articles III (a) and III (b) of said compact, and is entitled to its share of the beneficial consumptive use of the waters allocated to the Lower Basin by said compact.

IV.

The various statements as to geographical and historical background of the Colorado River system, and the various documents referred to as constituting the "Law of the River" made by the parties and intervenors herein are sufficiently accurate and complete for the use of the Court in determining the issues herein. Therefore, no formal admissions or denials by New Mexico in reference thereto are deemed necessary.

The documents referred to as constituting the "Law of the River" are as follows:

1. The Colorado River Compact of 1922 (Exhibit A, Arizona Complaint).
2. The Boulder Canyon Project Act of May 28, 1928 (45 Stat. 1057; Appendix 2, Calif. Answer).
3. California Limitation Act.
4. Various contracts with the United States for delivery of water from Lake Meade.
5. The Treaty with the Republic of Mexico.

V.

New Mexico does not have sufficient information or knowledge to form a belief as to the legal justification for the claims made by Arizona, California, and Nevada to the use

of specific quantities of water allocated by the Colorado River Compact of 1922 to the Lower Basin States, and therefore, denies that said states are entitled to the quantities claimed in their pleadings. Alleges that all claims made by each of the three states of the Lower Division (Arizona, California, and Nevada), are subject to the interests of New Mexico and Utah to be determined by this Court in this proceeding, based upon the terms of the Colorado River Compact. Alleges that since the signing of the Colorado River Compact at Santa Fe, New Mexico, November 24, 1922, by all seven states of the Colorado River Basin, nothing has transpired or occurred to lessen or destroy the legal right of New Mexico to have determined and apportioned to it, as a sovereign state, by this Court a fair, equitable and reasonable share of the apportionment made by the compact to the states of the Lower Basin, as well as its right to future apportionments to be made under the provisions of the compact. New Mexico recognizes that by Article VII of the Compact nothing in the Compact shall be construed as affecting the obligations of the United States of America to Indian Tribes. Alleges that there is no controversy between New Mexico and the United States either as guardian of the Indians or otherwise, relative to their respective rights to the use of the water allocated by the compact to the Lower Basin states.

VI.

New Mexico further states:

1. It admits, as alleged by all the parties hereto including intervenors, that the Colorado River Compact did not apportion to the individual states of the Lower Basin the right to the beneficial consumptive use of any specific quantity of water, but contemplated that such apportionment to each state of the Lower Basin should be made by compact or

negotiation; that because of the long standing controversy between Arizona and California, which has existed since 1922, no such division or apportionment has been made.

2. Due to its geographical position among the states of the Lower Basin, New Mexico cannot under present conceptions of economics and feasibility obtain any water from the main stem of the Colorado or through contracts with the United States from Lake Meade; its only source of supply is from the Gila and Little Colorado River basins, both of which rivers, or their tributaries, rise in New Mexico and flow into and across portions of Arizona and empty into the Colorado River below Lee Ferry.

3. That any apportionment made by decree of this Court which will be of any practical benefit to New Mexico must come from the natural stream flow of the Gila and Little Colorado Rivers and their tributaries within the boundaries of the State of New Mexico; Arizona is in a position geographically to make use of main stem water of the Colorado River and water impounded in Lake Meade, and is the only state other than New Mexico which is in any position geographically to make use of Gila River waters. (By paragraphs 13, 17, and 29 of the Arizona complaint claim is made only to the right to the use of Gila River waters within the boundaries of the State of Arizona.)

VII.

At the present time the irrigated acreage in New Mexico making beneficial consumptive use of Colorado River water is approximately 20,900 acres, including Indian and non-Indian uses, 9,500 acres of which are within the basin of the Little Colorado River and 11,400 acres within the Gila River basin within the State of New Mexico. Plans are being made for the irrigation of approximately 7,000 acres of additional land in the two basins (Indian and non-Indian),

and there are at least 50,000 acres of additional land that could be irrigated if a water supply were available. In addition to the foregoing, there is need for at least 50,000 acre-feet of water for municipal and industrial purposes in the region. The area involved includes McKinley, Valencia, Catron, Hidalgo, and Grant Counties which have extensive mining operations including oil, gas, uranium, copper, and other minerals; that New Mexico has been prevented from making beneficial use of greater quantities of water because of the long-standing controversy between Arizona and California, the uncertainty of the extent of its interest in the allocations made to the Lower Basin (Articles III (a) and III (b) of the Colorado River Compact), and from the lack of storage facilities. The natural flow of the Gila River and its tributaries and the Little Colorado and its tributaries, which at the New Mexico-Arizona boundary is on the average of approximately 275,600 acre-feet, varies greatly and does not conform to the seasonal demand of actual requirements. In most years the total annual flow is adequate to meet the present needs of the area in New Mexico if necessary storage facilities are constructed. However, the greater part of the annual flow occurs in the winter when the irrigation demand is less. When the demand is greatest in the summer the stream flow is deficient and many areas experience seasonal water shortages. Due to the erratic flow of the river and the lack of regulatory storage, considerable damage is done by floods to the lands presently in cultivation.

VIII.

New Mexico claims that her legal interest in and to the waters apportioned by the Colorado River Compact to the Lower Basin states should be determined by the Court to be as follows: In order to enable New Mexico to make beneficial consumptive use within the state of a portion of

the waters apportioned in perpetuity to the Lower Basin states by the Colorado River Compact (Articles III (a) and III (b), signed at Santa Fe, New Mexico, November 24, 1922, New Mexico shall have free and unrestricted use of all waters originating within the drainage basins of the Gila River and its tributaries, the Little Colorado River and its tributaries, within the boundaries of the State of New Mexico, with the right to divert, store and beneficially consume the same. All existing rights within the state to the use of all such waters for any beneficial purpose shall be protected and remain unimpaired (See New Mexico Constitution, Article XVI). In addition to the foregoing, New Mexico shall retain its right to participate in any further apportionment in conformity with the Colorado River Compact.

IX.

The above apportionment should be made to New Mexico as a sovereign state, regardless of whether the Court determines that Arizona is entitled to the claims made by her to the use of Gila River waters within the boundaries of Arizona, or whether California prevails in establishing her claim, and without regard to what the determination is as to the other issues relating to the method of measuring beneficial consumptive use, evaporation losses, and whether III (b) water refers exclusively to the Gila River or not. New Mexico alleges that the apportionments made in the final decree to each of the states of the Lower Basin under the doctrine of *Hinderlider vs. La Plata (304 U. S. 92)* will become public waters of the individual state for the benefit of the individual water users within the boundaries of each state; that under the doctrine of said case, and of *Nebraska vs. Wyoming (325 U. S. 589,627)*, the relative rights of individual water users within each state as to priorities

and uses should be determined in accordance with the laws of each respective state and satisfied from the total quantity of water apportioned by the final decree to each state.

X.

With respect to certain legal questions involved primarily in the issues made by the pleadings between Arizona and California, the State of New Mexico alleges:

1. That the above questions are

(a) Is the State of Arizona a party to the Colorado River Compact?

(b) How is beneficial consumptive use under the compact to be measured?

(c) How shall evaporation losses from the Lower Basin reservoirs be charged?

(d) Is the water referred to in Article III (b) of the compact apportioned or unapportioned water?

2. That however the issues among the other parties hereto are determined by the final decree herein, New Mexico has the right to the beneficial consumptive use of a sufficient quantity of water per annum to supply any rights which existed in 1922 or which may now exist within the state, and to satisfy the future uses set forth in paragraph VII hereof.

3. While the right of New Mexico to have apportioned to it as a sovereign state, by the decree of this Court, its share of the use of the waters allocated by Article III (a) and Article III (b) of the compact is unaffected by a determination of the foregoing issues primarily between Arizona and California, New Mexico alleges that it believes the true meaning and intent of the compact in reference to said questions is as follows:

(1) The State of Arizona is a party to the Colorado River Compact.

(2) Beneficial consumptive use, as used in Articles III (a) and III (b) of the compact, should be measured in terms of stream depletion; that the compact contains no definition of beneficial consumptive use, nor does it define how such beneficial consumptive use shall be measured.

(3) As heretofore alleged, New Mexico is not in a position geographically to use any water from reservoirs presently in existence in the Lower Basin; that a reasonable interpretation of the compact would be that losses of water in and from reservoirs located in the Lower Basin of the Colorado River should be charged against the apportionment to those states which use water from said reservoirs, in the same proportion as the consumptive use of water in the state against which the charge is made currently bears to the total consumptive use of water in the Lower Basin made by states using water from reservoirs in the lower basin of the Colorado River.

(4) The water referred to in Article III (b) of the Colorado River Compact is apportioned water, and is included within the 8,500,000 acre-feet of beneficial consumptive use per annum for the benefit of and apportioned to all of the states of the Lower Basin.

WHEREFORE, the State of New Mexico prays:

1. That the respective rights of the States of California, Arizona, Nevada, Utah, and New Mexico, and the United States of America, in and to the beneficial consumptive use of the waters of the Colorado River in the Lower Basin included and referred to by Articles III (a), III (b), and III (f) of the compact, be adjudicated and determined in terms of acre-feet, or based upon a percentage of the total amount available.

2. That the right of the state of New Mexico in and to the annual beneficial consumptive use of waters of the Colo-

rado River below Lee Ferry, be determined to be that portion of the allocation to the Lower Basin States allocated by Articles III (a) and III (b) of the Colorado River Compact equal to the amount of such waters originating within the boundaries of the State of New Mexico, in terms of acre-feet, or in terms of the percentage that such water so originating within the boundaries of the state bears to the total amount allocated to the Lower Basin states annually and available for beneficial consumptive use.

3. That the State of New Mexico be decreed to have the right to its share in and to the beneficial consumptive use of waters which may be apportioned under Article III (f) of the Colorado River Compact, in accordance with its terms.

4. That the State of New Mexico be granted such other and further relief as to the Court may seem proper; that the State of New Mexico be granted leave to amend and supplement this pleading as its interest may appear.

.....

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Attorney General of New Mexico

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FRED E. WILSON
Special Assistant Attorney General of New Mexico

APPROVED:

.....

Governor of the State of New Mexico

INTERSTATE STREAM COMMISSION

By: .....

Chairman

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Party,*

STATE OF UTAH, *Party.*

Answer of California Defendants to Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters

and

Interrogatories Addressed to the State of New Mexico by the California Defendants

---

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955
No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Party,*

STATE OF UTAH, *Party.*

Answer of California Defendants to Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters

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Defendants State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella

Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, by their duly authorized attorneys, jointly answer the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters.

Incorporation of Appendixes by Reference

1.

Defendants refer to their "Appendixes to the Answer" to Arizona's Bill of Complaint, and incorporate those Appendixes by reference as a part of this Answer to the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters, as though the same were here set out at length.

FIRST AFFIRMATIVE DEFENSE

Defendants Have the Right to the Beneficial Consumptive Use in California of 5,362,000 Acre-Feet Per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto

2.

The defendants incorporate by reference, as though here fully stated at length, as a part of this Answer to the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters, all of the allegations of the First Affirmative Defense of their Answer to the State of Arizona, and of the First Affirmative Defense of their Answer to the Petition of Intervention of the United States.

SECOND AFFIRMATIVE DEFENSE

Defendants Have Appropriative Rights, Recognized by the Boulder Canyon Project Act and Protected by the Statutory Compact Between the United States and California, to the Beneficial Consumptive Use in California of Not Less Than 5,362,000 Acre-Feet of Colorado River System Water Per Annum, Senior to the Claims Made by New Mexico

3.

Incorporation by Reference

The defendants incorporate by reference, as though here fully stated at length, as a part of this Answer to the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters, all of the allegations of the Second Affirmative Defense contained in the Answer of the defendants to the Petition of Intervention of the United States.

4.

All of the appropriations of defendants above alleged are senior in time and right to all claims of New Mexico for the beneficial consumptive use of waters of the Colorado River System, except for certain beneficial consumptive uses which may have been initiated in New Mexico prior to one or more of the dates of the initiation of defendants' appropriative rights. The exact quantities of such uses are unknown to the defendants, but upon information and belief, defendants allege that the quantities are not sufficient to interfere with the fulfillment of the appropriative rights of the defendants as such rights are recognized by the Boulder Canyon Project Act and Statutory Compact between the United States and California.

TRAVERSE

5.

The allegations of paragraphs I and II of said Appearance and Statement do not appear to require answer by the California defendants.

6.

Answering paragraph III, deny all of the allegations contained in said paragraph except as expressly admitted herein. Allege that the State of New Mexico is a party to the six-state Colorado River Compact which became operative as a result of reciprocal legislation among the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming and congressional consent thereto in the Boulder Canyon Project Act, all as proclaimed effective by the President of the United States June 25, 1929, 46 Stat. 3000. Allege that the quantities of water of the Colorado River System which New Mexico may be entitled to use have not been determined in any manner.

7.

Answering paragraph IV, admit that the documents therein listed constitute a part of the "Law of the River," but deny that the list is complete.

8.

Answering paragraph V, deny all of the allegations contained in said paragraph, insofar as answer may be required.

9.

Answering paragraph VI, deny all of the allegations contained in said paragraph not expressly admitted herein. Admit that the Colorado River Compact did

not apportion rights to the use of water to individual States. Admit that its geographical position prevents New Mexico from using water from the main stream of the Colorado River or through contracts for the delivery of water stored in Lake Mead.

10.

Answering paragraph VII, deny, based on lack of information or belief, all of the allegations contained in said paragraph, and refer to the Interrogatories addressed to the State of New Mexico and served herewith, which Interrogatories demand disclosure of particulars concerning certain of said allegations.

11.

Answering paragraph VIII, deny that Article III(b) of the Colorado River Compact apportioned in perpetuity the use of water by the Lower Basin States. Deny, based on lack of information or belief, all of the other allegations contained in said paragraph, and refer to the Interrogatories addressed to the State of New Mexico and served herewith, which Interrogatories demand disclosure of particulars concerning certain of said allegations.

12.

Answering paragraph IX, deny all of the allegations contained in said paragraph not expressly admitted herein. Admit that the relative rights of individual water users within each State should be determined in accordance with the laws of each respective State and satisfied from the total quantity of water the use of which may be permitted to each State by the final decree in this suit.

13.

Answering paragraph X, deny all of the allegations contained in said paragraph not expressly admitted herein. Deny that the issues are adequately or accurately stated in said paragraph X, and allege that the issues in controversy are summarized in Exhibit "A" hereto annexed and incorporated by reference as though fully stated herein. Admit that the Colorado River Compact contains no definition of beneficial consumptive use, nor of how beneficial consumptive use shall be measured.

14.

Defendants deny all allegations contained in the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters not specifically admitted herein, or which are at variance with the defendants' other pleadings in this suit.

PRAYER

WHEREFORE, defendants pray:

1. That the rights and interests of defendants as against all parties to this cause be adjudged and decreed as alleged in their Answer to the Bill of Complaint of Arizona, their Answers to the Petitions of Intervention of the United States and Nevada, their Answer to the Complaint and Answer of Utah, and this Answer to New Mexico.

2. That the Court grant to the defendants such other and further relief as to the Court may seem meet and proper.

The defendants respectfully pray leave to amend this Answer if amendment should hereafter become appropriate or necessary in the course of the proceedings in this cause.

Respectfully submitted,

For the State of California

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EXHIBIT A

Summary of the Controversy

The pleadings filed by Arizona, Nevada, the United States and California, to date, disclose complex questions of fact and law, many of which are interrelated. The summary of principal questions presented below is divided into four parts: (I) the quantities of water in controversy; (II) the ultimate issues, from the standpoint of the respective prayers; (III) a tabulation of factual issues; and (IV) the issues of interpretation of the basic documents involved. Under this division, certain questions reappear and to this extent reflect the interlocking nature of the problem.

I. The Quantities of Water in Controversy

The United States seeks to quiet title to rights to the use of water, consumptive and otherwise, "as against the parties to this cause," for federal purposes, in unstated amounts.

Arizona seeks to quiet title to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters of the Colorado River System (measured by "man-made depletion of the virgin flow of the main stream") and to enjoin California's right to permanently use any water in excess of approximately 3,800,000 acre-feet per annum (measured by "diversions less returns to the river"), that being the effect of (1) reducing 4,400,000 acre-feet of III(a) water by reservoir losses, and (2) denying California any permanent right to use excess or surplus waters.

California asserts a right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of the waters of the Colorado River System (measured by "diversions less returns to the river") under contracts with the United States, comprising 4,400,000 acre-feet of the waters apportioned by Article III(a) of the Colo-

rado River Compact and 962,000 acre-feet per annum of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact.

Nevada seeks to quiet title to 539,100 acre-feet per annum (measured in part by both methods) of the beneficial consumptive uses apportioned by Article III(a) of the Colorado River Compact, and to not less than a total of 900,000 acre-feet from all classes of water.

As the States differ in their definition of "beneficial consumptive use," their claims require restatement in terms of a common denominator in order to evaluate their effects. Thus:

The quantity to which Arizona seeks to quiet title, 3,800,000 acre-feet per annum, measured by the method she urges, "depletion of the virgin flow of the main stream occasioned by the activities of man," is equivalent to more than 5,000,000 acre-feet measured by consumption at the site of use, or "diversions less returns to the river," the standard established by the Boulder Canyon Project Act and asserted by California. The difference is due primarily to the fact that under Arizona's interpretation, the Compact deals with the virgin flow in the main stream only and that the use of water "salvaged by man" is not charged as a beneficial consumptive use, whereas under California's interpretation the Compact deals with the waters of the entire river system and such salvage is so charged.

Conversely, the aggregate of the California contracts, 5,362,000 acre-feet per annum, measured by "diversions less returns to the river," is equivalent to only about 4,500,000 acre-feet measured by "man-made depletion" (without charge for salvaged water). If Arizona's prayer should be granted, California's rights would be reduced to about 3,800,000 acre-feet per annum, measured by "diver-

sions less returns to the river," or to about 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream."

The impact of Nevada's claims on those of the other states is not readily evaluated.

II. Ultimate Issues

The ultimate issues, in the sense of the results sought by each party, may be grouped as follows:

The United States.

Does the United States have rights, "as against the parties to this cause, to the use of water in the Colorado River and its tributaries" in the following categories?

(1) for consumptive use of all projects in the Lower Basin, which it asserts independently of any rights claimed by the States in which such projects are located;

(2) to fulfill its obligations arising from international treaties and conventions; but this involves, with respect to the burden of the Mexican Water Treaty, the obligations as between the States of the Upper Division and the States of the Lower Division under Articles III(c) and III(d) of the Colorado River Compact, and involves also the effect of the so-called "escape clause" of Article 10 of that Treaty, which allows reduction in the guaranteed deliveries to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty;

(3) to fulfill all its contracts for the delivery of water and electric power, *i.e.*, with or in Arizona, California, and Nevada; but it alleges that the water available is not sufficient to satisfy all these obligations;

(4) to fulfill the Government's obligations to Indians and Indian Tribes; but this involves not only the questions of the magnitude and priorities of these claims but the questions of whether or not they are chargeable under the Colorado River Compact to the Basin and State in which such uses are made, what the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and what rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins;

(5) to protect its interests in fish and wildlife, flood control and navigation; but such rights as it may have for these purposes may require the impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona and California, and again involves the question of accounting under the Compact; and

(6) for use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties to this cause" for these functions, such claims apply to all the waters of the Colorado River System in both Basins.

The adjudication of these claims of the United States requires consideration and resolution of: questions of fact, referred to later; the power of the United States to impound and dispose of water independently of rights derived from the States; the extent of its obligations under treaties and contracts; the impact and effect of its treaties upon rights of domestic water users; how its claims to the use of water shall be measured; the location, magnitude and priorities of Indian claims, and claims for other alleged federal purposes; the extent to which its rights and obligations are controlled by the Colorado River Compact; and the extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

Arizona.

Is Arizona entitled to a decree:

(1) Quieting title to 2,800,000 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, substantially all to be taken from the main stream, and measured in terms of man-made depletion of the virgin flow of the main stream?

(2) Quieting title to all of the 1,000,000 acre-feet per annum by which the Lower Basin is permitted to "increase its use" by Article III(b) of the Colorado River Compact (notwithstanding the decision of this Court in *Arizona* v. *California, et al.*, 292 U.S. 341 (1934)), to the exclusion of the other States of the Lower Basin, all to be taken from the waters flowing in the Gila River, and to be measured in terms of man-made depletion of the virgin flow of the main stream?

(3) Reducing California's right to the uses apportioned by Article III(a) of the Colorado River Compact to approximately 3,800,000 acre-feet per annum, in consequence of reservoir losses?

(4) Enjoining California's right to receive and permanently use under its Government contracts 962,000 acre-feet per annum, or any part thereof, in excess of 4,400,000 acre-feet per annum?

The determination of Arizona's claims involves: the questions of fact, later referred to; the standing of Arizona to seek a declaratory decree quieting title to a "block" of water for projects not yet constructed or authorized (about 1,600,000 acre-feet per annum of the 2,800,000 claimed from the main stream); the source of title to Arizona's claims to 2,800,000 acre-feet of III(a) water and 1,000,000 acre-feet of III(b) water; the status of the uses on the Gila; the measurement of uses thereof and of the main stream; whether Arizona's status is

that of a party to the Colorado River Compact or that of a third party beneficiary of the Statutory Compact between the United States and California, and if so, whether Arizona is bound by the interpretations placed thereon by the principal parties thereto in its formulation and administration; and the validity and effect of Arizona's water delivery contract with the United States.

Most of the questions posed by Arizona's claims revolve around the issue of whether the Gila River shall be treated as a part of the Colorado River System for all purposes, or shall receive special treatment in respect of (1) the identification of uses thereon with the waters referred to in Article III(b); (2) the corollary exemption of "rights which may now exist" on the Gila from any charge under Article III(a); and (3) the devaluation of the charge for beneficial consumptive uses from the quantity which is in fact consumed on the Gila (alleged by California to be about 2,000,000 acre-feet per annum) to the lesser quantity represented by the resulting depletion in the virgin flow of the main stream (alleged by Arizona to be about 1,000,000 acre-feet per annum).

California.

Are the contracts between the United States and the defendant public agencies of California for the storage and delivery of water valid and enforceable? Inasmuch as the contracts are, in terms, for permanent service but subject to the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, the issue is whether these enactments, considered together as a Statutory Compact established by reciprocal legislation, authorize and permit the Secretary of the Interior to presently contract for the storage and delivery for permanent beneficial consumptive use in California, of 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) of the Colorado River Com-

pact plus one-half of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact. The aggregate of these contracted quantities, subject to physical availability of the amounts of excess or surplus waters, which vary from year to year, is 5,362,000 acre-feet per annum.

The determination of California's claims involves: the questions of fact, later referred to; the extent to which rights have vested in both the United States and California under the Statutory Compact; whether Arizona is estopped by her previous conduct from asserting her present position; whether the limitation is net of reservoir losses; how California's uses shall be measured; whether California is chargeable with the use of salvaged water; the effect of California's appropriations, in their relation to the expressions "rights which may now exist" and "present perfected rights" in the Compact and Project Act; the definition of the Project Act term, "excess or surplus waters unapportioned by" the Colorado River Compact; the availability of such waters for permanent service; the intent of Congress with respect to the waters referred to in Article III(b); and the relation between California's contracts and the later agreements which the Secretary of the Interior has entered into with others.

Nevada.

Is Nevada entitled to a decree:

(1) Quieting title to 539,100 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact?

(2) Reserving for a future agreement the disposition of the use of the 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact, and preserving to Nevada an equitable share thereof?

(3) Assuring Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum from all classes of water?

The determination of Nevada's claims requires the consideration and resolution of: the questions of fact later referred to; the questions of interpretation previously mentioned; the question of whether Nevada's share of III(a) waters has been determined or limited to 300,000 acre-feet per annum; whether, as to stored waters, Nevada may claim any quantity in excess of her contracts with the United States; and the source of title to her claims to 539,100 acre-feet per annum of III(a) water and not less than 900,000 acre-feet per annum from all sources.

Interests of Other States.

There remains the question whether the claims of the United States, Arizona, California, and Nevada can be effectively determined without concurrently determining the rights and obligations of Utah and New Mexico with respect to the waters of the Lower Basin, and the rights and obligations of those states and Colorado and Wyoming with respect to other waters of the Colorado River System, to the extent that they are affected by the issues in controversy here.

In more detail, these "ultimate issues" depend upon the resolution of the following questions of fact and of the interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Mexican Water Treaty.

III. Factual Issues

There are substantial issues of fact, raised by the pleadings to date. These include, but are not limited to, determination of:

(1) the investments and obligations undertaken by the parties in the construction of works and in the performance of their contracts with the United States, and the investments and obligations undertaken by the United States in reliance upon such contracts;

(2) the location, magnitude and priorities of the water rights necessary to enable the United States to perform its obligations to Indians and Indian Tribes pursuant to Article VII of the Compact;

(3) the requirements of the United States for (a) flood control, (b) navigation, (c) fish and wildlife, and (d) the other claims which it makes;

(4) the quantities of water physically available for beneficial consumptive use in the Lower Basin, assuming full use by the Upper Basin of its Compact apportionment, full regulation of the supply available to the Lower Basin, and full performance of the Mexican Water Treaty;

(5) the uses, present and potential, on the main stream and on each tributary, determined as of the place of use, as California contends is the proper method, and the effect of those uses in terms of man-made depletion of the virgin flow of the main stream, as Arizona contends is the proper method;

(6) the quantities of water "salvaged" by the activities of man, on the main stream and on the tributaries;

(7) reservoir losses, present and potential, gross and net;

(8) appropriative rights, priorities, and uses thereunder, on the main stream and tributaries;

(9) the extent and place of use of "rights which may now exist" and which, under Article III(a) of the Compact, are to be charged as uses of water apportioned by Article III(a), and of "rights which may now exist" in

California, within the meaning of Section 4(a) of the Project Act; and

(10) the extent and place of use of "present perfected rights" protected by Article VIII of the Compact and directed by the Boulder Canyon Project Act to be satisfied in the operation and management of the Project.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty

Questions relating primarily to Article III(a) of the Colorado River Compact include the following: Whether the Colorado River Compact deals only with the main stream or treats with Colorado River System waters wherever they may be found; whether the uses apportioned by Article III(a) to the Lower Basin are to be taken only from "water present in the main stream and flowing at Lee Ferry," as Arizona contends, or from the tributaries as well, as California and Nevada contend; whether the 7,500,000 acre-feet referred to in Article III(a) is related to the 75,000,000 acre-feet referred to in Article III(d), as Arizona contends, or whether the latter figure includes excess or surplus waters unapportioned by the Compact, as California contends; by what process Arizona claims to have acquired an apportionment of 2,800,000 acre-feet of III(a) water, to be taken from the main stream; whether the apportionment of 7,500,000 acre-feet "per annum" is a statement of a maximum, or of an average, and, if the latter, over what period of years; the definition and measurement of "beneficial consumptive use"; the accounting for water added to and withdrawn from storage on the main stream and tributaries; whether the use of water salvaged by man on the main stream and tributaries is to be charged under the Compact; the definition of "rights which may now exist," which are to be included in charges to water apportioned by Article III(a) and their magnitude on the main stream and tributaries; the

date to which this last expression refers; whether, in the absence of a compact among the Lower Basin States, the division of water among them is to be affected by appropriative rights, *i. e.*, "rights which may now exist"; whether Indian rights, and other federal claims to consumptive use, are included within that expression and are to be charged under the Compact; whether reservoir losses are chargeable as beneficial consumptive uses, and if so, their classification under the Compact and their relation to other uses.

Questions relating primarily to Article III(b) of the Colorado River Compact include the following: The questions relating to the definition of "beneficial consumptive use" and "per annum" previously stated in connection with Article III(a); whether the "increase of use" permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as in Article III(a), as Arizona contends, or a license to acquire rights by appropriation and contracts under the Project Act in excess or surplus water unapportioned by the Compact, as California contends; whether this right to increased use is identified solely with the water found flowing in the Gila River, as Arizona contends, or is identified with the first 1,000,000 acre-feet of increased use (above 7,500,000) per annum throughout the Lower Basin, as California and Nevada contend; whether this right is available to all five States of the Lower Basin, or to Arizona alone, as she contends (notwithstanding the decision of this court in *Arizona* v. *California, et al.*, 292 U.S. 341 (1934)); the status of uses in New Mexico on the Gila; the status of uses on other tributaries; and to what degree reservoir losses are chargeable to this increase of use. Reference to the relation of the Mexican Treaty burden to the uses under Article III(b) appears below in connection with Article III(c).

Questions relating primarily to Article III(c) of the Colorado River Compact include the following: Whether

the waters to be supplied Mexico are "apportioned" thereby (this bears upon the determination of the meaning of the expression "excess or surplus waters unapportioned by" the Colorado River Compact, appearing in the Boulder Canyon Project Act, *infra*); whether, if the quantities in excess of those specified in Articles III(a) and III(b) are insufficient to supply the deliveries to Mexico, the burden, with respect to the Lower Basin, falls first upon the uses referred to in Article III(b), as California contends, or upon those referred to in Article III(a), as Arizona contends; and the relation of the "escape clause" in Article 10 of the Treaty, which permits reduction in deliveries to Mexico in case of extraordinary drought in proportion to the reduction in consumptive uses in the United States. The relation of Article III(c) to Articles III(d) and III(a), with respect to the obligations of the Upper Division States, is referred to below in connection with Article III(d).

Questions relating primarily to Article III(d) of the Colorado River Compact include the following: As a corollary to one of the questions stated with reference to Article III(a), whether the 75,000,000 acre-feet referred to in Article III(d) is related to the 7,500,000 acre-feet apportioned by Article III(a) to the Lower Basin, or whether the 75,000,000 acre-feet include excess or surplus waters available for delivery to Mexico or use in the Lower Basin; the resulting effect on the obligation of the States of the Upper Division stated in Article III(c) to furnish additional water to meet the deficiency if surplus above the quantities specified in Articles III(a) and III(b) is insufficient to supply Mexico; and whether the Lower Basin is entitled to demand release of this 75,000,000 acre-feet notwithstanding the consequent inability of the Upper Basin to make beneficial consumptive use of 7,500,000 acre-feet per annum.

Questions relating primarily to Article III(e) of the Colorado River Compact include the following: Whether,

if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required; whether, if Indian uses are not subject to the Colorado River Compact, the United States may require release of water from reservoirs in the Upper Basin to satisfy them, in addition to the water which the States of the Upper Division are required to release in performance of Articles III(c) and III(d) of the Compact; so also with respect to the other federal claims asserted by the United States "as against the parties to this cause," for use of water in the Lower Basin.

Questions relating primarily to Articles III(f) and III(g) of the Colorado River Compact include the following: Whether the provisions in these articles with reference to a compact to be made after October 1, 1963, are permissive or mandatory; whether, in the light of the Statutory Compact, these provisions preclude the acquisition of rights in excess or surplus waters by appropriation and by contract with the United States in the interim, subject only to further apportionment as between Basins by such a future compact; and whether, in the event of competing interstate claims to such excess or surplus waters, in the absence of a compact apportioning them, priority of appropriation, including contracts with the United States, controls.

Questions relating to Article VII of the Colorado River Compact include the following: Whether uses by Indians are subject to the Colorado River Compact; whether Indian uses are chargeable under the Compact to the Basin and the State in which they are situate; if not, whether they are prior and superior to the apportionments made by the Compact, or are in competition with appropriations of others which are subject to the Compact; the location, magnitude, and asserted priority of Indian claims; their effect upon the quantities available to non-Indian users under Articles III(a), III(b), etc.; their effect on the distribution of the Mexican Treaty burden;

and their effect on the obligations of the States of the Upper Division under Articles III(c) and III(d).

Questions relating primarily to Article VIII of the Colorado River Compact include the following: The date to which the expression "present perfected rights" relates, *i.e.*, 1922, 1929, or some other date; the definition of said term; whether such definition is to be determined under the law of the State under which the right arose; whether the assurance against impairment extends to quality as well as quantity; the extent of these rights in each State; their relation to the expression "rights which may now exist," as used in Article III(a) of the Compact and Section 4(a) of the Project Act; and the impact of reservoir losses when "present perfected rights" attach to, and are satisfied from stored waters, pursuant to the direction in Article VIII.

Questions relating primarily to the Boulder Canyon Project Act and the resulting Statutory Compact between the United States and California include the following: Whether the alternative consent given in the Project Act to a Seven-State or Six-State Compact became final on June 25, 1929, in establishing the latter; whether Arizona could, or did, effectively ratify a Seven-State Compact thereafter; if so, whether the Statutory Compact authorized by the Project Act as a corollary to a Six-State Compact remains in effect; if it does, whether Arizona can claim the benefits of both; whether the Statutory Compact authorized contracts to be made with the California defendants for the permanent service (in addition to 4,400,000 acre-feet of III(a) waters) of one-half of the excess or surplus waters unapportioned by the Compact for use in California; whether it included therein the waters referred to in Article III(b), or precluded California from use of such waters; whether the "excess or surplus," of which California may use one-half, is to be reckoned before or after deduction of the quantity required to be delivered to Mexico; the effect on California's

right to "excess or surplus" of a future compact apportioning such waters; whether the limitation "for use in California" is net of reservoir losses, or is subject to further reduction in consequence of such losses; whether the definition of consumptive uses applicable to California is applicable to Arizona, and vice versa; whether California is free to make use of salvaged waters without charge under the Compact or the Limitation Act; the effect of California's appropriations; the meaning and effect of the reference to "rights which may now exist" in Section 4(a) of the Project Act; the extent of California's "present perfected rights" as referred to in Section 6 of the Project Act; whether by the Project Act, or otherwise, the shares of Nevada or Arizona in the waters of the Colorado River System have been determined; and the construction and effect of the water delivery contracts held by those States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Party,*

STATE OF UTAH, *Party.*

Interrogatories Addressed to the State of New Mexico by the California Defendants

To: Honorable Richard H. Robinson
Attorney General of New Mexico
Santa Fe, New Mexico

The defendants, State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San

Diego, and County of San Diego, request that the State of New Mexico, by an officer or agent thereof, answer, in accordance with Rule 9(2) of the Rules of the Supreme Court of the United States and Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories, the requirement of oath being waived:

1. Please locate on a map the 20,900 irrigated acres referred to in paragraph VII of the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters (hereinafter referred to as "New Mexico Statement").

2. Please state, in acre-feet per annum, the quantities of beneficial consumptive use claimed for the 20,900 irrigated acres referred to in Interrogatory 1, indicating the definition or method of measurement of beneficial consumptive use employed in the calculation.

3. Please give the quantities of beneficial consumptive use for each of the last ten years on the 20,900 irrigated acres referred to in Interrogatory 1. If the period given is other than a calendar year, please specify when such year begins.

4. Please locate on a map the "approximately 7,000 acres of additional land" which, as alleged in paragraph VII of the New Mexico Statement, plans are being made to irrigate.

5. Please state, in acre-feet per annum, the quantities of beneficial consumptive use claimed for the 7,000 acres of land referred to in Interrogatory 4, indicating the definition or method of measurement employed in the answer.

6. Please locate on a map the 50,000 acres of additional land referred to in paragraph VII of the New Mexico Statement that it is stated could be irrigated if a water supply were available.

7. Please state, in acre-feet per annum, the quantities of beneficial consumptive use claimed for the 50,000 acres of land referred to in Interrogatory 6, and indicate the definition or method of measurement employed in the calculation.

8. Please state whether the "50,000 acre-feet of water for muncipal and industrial purposes" referred to in paragraph VII of the New Mexico Statement is a figure based on alleged needs for each year or for some other period, and whether the figure refers to diversions or beneficial consumptive use. If beneficial consumptive use, what definition or method of measurement was used in the calculation? If the 50,000 acre-feet referred to is not beneficial consumptive use, please state this portion of the claim in terms of beneficial consumptive use indicating what definition or method of measurement is employed in the calculation.

9. Please provide citations to engineering reports or other descriptions of the projects or works contemplated for the irrigation of 7,000 additional acres referred to in paragraph VII of the New Mexico Statement, and if possible, please provide copies.

10. Please state whether the acreages referred to in paragraph VII include roads, canals and farmsteads.

11. Please state, in acre-feet per annum of beneficial consumptive use, the aggregate of the "existing rights within the state" which paragraph VIII of the New Mexico Statement says shall be "protected and remain unimpaired," specifying the definition or method of measurement of beneficial consumptive use employed in the calculation.

12. Please state, in acre-feet per annum, the quantities of beneficial consumptive use to which paragraph X, subparagraph 2, asserts a right under each of the following categories:

(a) "Rights which existed in 1922";

(b) Rights "which may now exist within the state";

(c) Rights to satisfy "future uses" described in paragraph VII.

Specify the definition or method of measurement of beneficial consumptive use employed in each calculation.

13. What "rights which may now exist" within the meaning of Article III(a) of the Colorado River Compact does New Mexico claim as of 1922? As of 1929? What "present perfected rights" as that phrase is used in Article VIII of the Colorado River Compact does New Mexico claim in the Lower Basin as of 1922? As of 1929?

14. Are the rights claimed by New Mexico based upon appropriations heretofore made? If so, by what appropriators, on what dates and in what quantities?

15. What quantity of the claims referred to in the answer to parts (a), (b), and (c), respectively, of Interrogatory 12 are asserted against Lower Basin uses under Article III(a) of the Colorado River Compact? What quantity against Article III(b) uses?

16. What criteria is it alleged determine whether specific uses claimed by New Mexico are chargeable to Article III(a) or to Article III(b) uses under the Colorado River Compact?

17. Of the 275,600 acre-feet referred to in paragraph VII of the New Mexico Statement as the average of the natural flow of the Gila River and its tributaries and the Little Colorado River and its tributaries at the New Mexico-Arizona boundary, please specify the figure attributed to the Gila, to the Little Colorado, and to each tributary, respectively, naming the tributaries referred to.

18. What period of time was used in calculating the "average of approximately 275,600 acre-feet," referred to in paragraph VII of the New Mexico Statement?

19. Please state what is meant by "natural flow" in paragraph VII of the New Mexico Statement and how its quantity is determined.

20. Does New Mexico claim the right to put to beneficial consumptive use all the 275,600 acre-feet referred to in paragraph VII?

21. Reference is made to paragraph 2 of the New Mexico prayer which asks "That the right of the state of New Mexico in and to the annual beneficial consumptive use of waters of the Colorado River below Lee Ferry, be determined to be that portion of the allocation to the Lower Basin States allocated by Articles III(a) and III(b) of the Colorado River Compact equal to the amount of such waters originating within the boundaries of the State of New Mexico, in terms of acre-feet, or in terms of the percentage that such waters so originating within the boundaries of the state bears to the total amount allocated to the Lower Basin states annually and available for beneficial consumptive use."

(a) What is the quantity of "such waters originating within the boundaries of the State of New Mexico, in terms of acre-feet," for each year for which records are available?

(b) What is the quantity of "such water originating within the boundaries of the State of New Mexico . . . in terms of the percentage that such water so originating within the boundaries of the state bears to the total amount alloeated to the Lower Basin states annually and available for beneficial consumptive use" for each year for which records are available?

22. Reference is made to paragraph X-3(2) of the New Mexico Statement to the effect that "beneficial consumptive use, as used in Articles III(a) and III(b) of the compact, should be measured in terms of stream depletion." Please define what is meant by "stream depletion," state what physical data are nceessary for this method of measure-

ment, and state at what point or points stream depletion is to be measured with respect to each State in the Lower Basin.

23. Please state how many of the acres for which water is claimed in paragraph VII are Indian lands with particular reference to the following:

(a) The 9,500 acres stated to be within the basin of the Little Colorado River.

(b) The 11,400 acres stated to be within the Gila River basin within New Mexico.

(c) The 7,000 acres of additional land in the two basins.

(d) The 50,000 acres of additional land that could be irrigated if a water supply were available.

24. Please state how much water is presently being consumptively used each year on Indian lands within Lower Basin areas of New Mexico.

25. Please locate on a map the Indian lands within the Lower Basin areas of New Mexico on which water is now being consumptively used.

26. Do the New Mexico claims include the use of water for federal purposes other than Indian uses, including the National Park Service, Forest Service, Bureau of Land Management, fish and wildlife refuges?

27. If the answer to Interrogatory 26 is yes, please state the location and quantities of such use.

It is requested that answers to the foregoing interrogatories be addressed to Edmund G. Brown, Attorney General of California, Attention: Gilbert F. Nelson, Assistant Attorney General, 909 South Broadway, Los Angeles 15, California.

Dated: March 14, 1956.

Respectfully,

For the State of California

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SUPREME COURT, U.S.

MAR 1961
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 10, ORIGINAL

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

STATE OF NEW MEXICO, Intervener.

STATE OF UTAH, Intervener.

ANSWER OF THE STATE OF NEVADA TO COMPLAINT AND ANSWER IN INTERVENTION BY THE STATE OF UTAH

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In the Supreme Court of the United States

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STATE OF ARIZONA, COMPLAINANT,

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

STATE OF NEW MEXICO, Intervener.

STATE OF UTAH, Intervener.

ANSWER OF THE STATE OF NEVADA TO COMPLAINT AND ANSWER IN INTERVENTION BY THE STATE OF UTAH

COMES NOW the intervening State of Nevada in response to the Complaint and Answer in Intervention of the State of Utah, and admits, denies and alleges as follows:

I

Answering paragraph II of said Complaint and Answer, Nevada states it has not sufficient knowledge or information upon which to

base a belief and therefore denies that the State of Utah is and/or should be entitled to a priority of the present and future beneficial consumptive use of the waters in the Lower Basin found in the Virgin River, Kanab Creek and Johnson Creek to the extent and amount of 175,000 acre-feet.

II

Answering subdivision No. 2, paragraph IV of said Complaint and Answer, Nevada denies that the beneficial consumptive use of the waters apportioned to the Lower Basin should be measured by the inflow-outflow method adopted for the Upper Basin in the Upper Colorado River Basin Compact, i. e., in terms of man-made depletion of the virgin flow at specified points along the main stream, and in connection with this said denial, Nevada alleges that the commonly and well-recognized measure of beneficial consumptive use in the Western States, including Nevada, is the measured diversion from the source less the measured return flow thereof to said source, and that the only exception thereto is where wasting streams due to channel losses occasioned by evaporation and transpiration, a portion of said losses were converted to beneficial use by the activities of man through the impounding, pumping and diversion of said waters upstream from the area wherein the major losses by evaporation and transpiration took place, then the measure of beneficial use is by the main stream depletion theory. Nevada, in subdivision No. 2, paragraph XVIII of its Petition in Intervention has heretofore so alleged.

WHEREFORE, the State of Nevada reiterates its Prayer set forth in its Petition in Intervention.

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Attorney General

W. T. MATHEWS
Special Assistant Attorney General

WM. J. KANE
Special Assistant Attorney General

Counsel for State of Nevada

STATE PRINTING OFFICE CARSON CITY, NEVADA

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October Term, [redacted] 1961

No. [redacted] Original

STATE OF ARIZONA, COMPLAINANT,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS.

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

STATES OF NEW MEXICO AND UTAH, IMPLEADED.

RESPONSE OF STATE OF ARIZONA TO COMPLAINT AND ANSWER BY THE STATE OF UTAH

JOHN H. MOEUR,
Chief Counsel
Arizona Interstate Stream Commission

JOHN P. FRANK
JOHN GEOFFREY WILL
BURR SUTTER
PERRY LING
THEODORE KIENDL

For the Arizona Interstate Stream Commission

ROBERT MORRISON,
Attorney General of Arizona

IN THE

Supreme Court of the United States

October Term, 1955

No. 10 Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener,

STATES OF NEW MEXICO AND UTAH,

Impleaded.

RESPONSE OF STATE OF ARIZONA TO COMPLAINT AND ANSWER BY THE STATE OF UTAH

The State of Arizona, by its duly authorized attorneys, respectfully submits its response to the Complaint and Answer of the State of Utah, as follows:

I.

Arizona admits all of the allegations therein contained save and except those allegations or parts thereof hereinafter specifically denied.

II.

Arizona denies that the State of Utah has or should be entitled to a priority for use of the waters of the Virgin River, Kanab Creek or Johnson Creek.

III.

Arizona denies that the State of Utah has the right to the beneficial consumptive use of the waters apportioned to the Lower Basin by the Colorado River Compact to the extent of 175,000 acre-feet per annum for present and future agricultural and domestic uses; alleges that the State of Utah is entitled to the use of no more than 52,100 acre-feet per annum, in the aggregate, of said waters for said purposes, measured in terms of depletion of the main stream; alleges that there are established uses by the States of Arizona and Nevada of the waters of the Virgin River and Kanab Creek; and alleges that additional use of the waters of said streams by the State of Utah cannot exceed such amount as will permit continued uses established by the State of Arizona.

WHEREFORE, the State of Arizona prays that the decree entered herein contain, among other appropriate provisions, provision limiting the rights of the State of Utah in and to the beneficial consumptive use of the waters of the Virgin River, Kanab Creek and Johnson Creek to not more than 52,100 acre-feet per annum in the aggregate, measured in terms of depletion of the main stream; and that said uses in the State of Utah be decreed not to have priority over the rights of the

State of Arizona in and to the consumptive use of the waters of said river and creeks.

JOHN H. MOEUR
Chief Counsel
Arizona Interstate Stream Commission

JOHN P. FRANK
JOHN GEOFFREY WILL
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For the Arizona Interstate Stream Commission

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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10, Original

STATE OF ARIZONA, COMPLAINANT,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS.

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

STATES OF NEW MEXICO AND UTAH, IMPLEADED.

RESPONSE OF STATE OF ARIZONA TO APPEARANCE AND STATEMENT OF NEW MEXICO.

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IN THE

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STATE OF ARIZONA,

Complainant,

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener,

STATES OF NEW MEXICO AND UTAH,

Impleaded.

RESPONSE OF STATE OF ARIZONA TO APPEARANCE AND STATEMENT OF NEW MEXICO.

The State of Arizona, by its duly authorized attorneys, respectfully submits its response to the Appearance and Statement in behalf of New Mexico as follows:

I.

Arizona admits all of the allegations of Paragraphs I to VI, inclusive, of said statement.

II.

Arizona denies the allegations of the first sentence of Paragraph VII of said statement and alleges that not more than 18,550 acres are irrigated in New Mexico by waters of the Colorado River System; alleges that Arizona is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second, third and fourth sentences of Paragraph VII of said statement.

Arizona admits that the allegations of the fifth sentence of said Paragraph VII are substantially correct.

Arizona admits the remaining allegations of said Paragraph VII, but alleges that no storage facilities can legally be constructed on either the Gila or Little Colorado Rivers or their tributaries in New Mexico which interfere with or obstruct established downstream uses in Arizona.

III.

Arizona denies the allegations of Paragraph VIII of said statement except the allegations of the last sentence thereof, which allegations Arizona admits.

IV.

Arizona denies the allegations of the first sentence of Paragraph IX of said statement and admits the allegations of the second sentence of said paragraph.

V.

Arizona admits that the questions set forth in subparagraph 1 of Paragraph X of said statement are the basic issues to be determined in this litigation.

Arizona admits that, as alleged in subparagraph 2 of said Paragraph X, New Mexico has the right to the beneficial consumptive use of a sufficient quantity of Lower Basin waters per annum to supply any rights which existed in 1922 and alleges that any rights in New Mexico, to the use of waters of the Gila River

and its tributaries are governed and controlled by that certain decree entitled "Globe Equity 59", dated June 29, 1935, in the United States District Court for the District of Arizona.

Arizona admits the allegations of subparagraph 3 of Paragraph X and alleges that beneficial consumptive use is required to be measured in terms of main stream depletion and further alleges that, under the provisions of the Boulder Canyon Project Act and the California Limitation Act, the State of California is precluded from claiming any portion of the waters referred to in Article III(b) of the Compact.

WHEREFORE, Arizona prays that the decree entered herein shall contain, among other appropriate provisions, provision:

1. Limiting uses by New Mexico of the waters of the Little Colorado and its tributaries to such uses as will not interfere with or obstruct uses being made in or planned by Arizona of the waters of said stream and its tributaries; and

2. Limiting uses by New Mexico of the waters of the Gila River and its tributaries in accordance with that certain decree entitled Globe Equity 59, dated June 29, 1935, and further limiting such uses to uses such as will not interfere with or obstruct uses being made in or planned by Arizona of the waters of said stream and its tributaries.

JOHN H. MOEUR
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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

MAR 19 1956
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No. 10, ORIGINAL

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

STATE OF NEW MEXICO, PARTY.

STATE OF UTAH, PARTY.

ANSWER OF THE STATE OF NEVADA TO THE APPEARANCE AND STATEMENT IN BEHALF OF NEW MEXICO OF ITS CLAIM OF INTEREST IN AND TO LOWER BASIN WATERS

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 10, ORIGINAL

STATE OF ARIZONA, COMPLAINANT,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENER,

STATE OF NEVADA, INTERVENER.

STATE OF NEW MEXICO, PARTY.

STATE OF UTAH, PARTY.

ANSWER OF THE STATE OF NEVADA TO THE APPEARANCE AND STATEMENT IN BEHALF OF NEW MEXICO OF ITS CLAIM OF INTEREST IN AND TO LOWER BASIN WATERS

COMES NOW the intervening State of Nevada in answer to the Appearance and Statement of the intervening State of New Mexico, and admits, denies and alleges, as follows:

I

Answering paragraph IV of said Statement, Nevada denies that

"various contracts with the United States for delivery of water from Lake Mead" constitutes the "Law of the River" or any part thereof.

II

Answering paragraph VIII of said Statement, Nevada denies that New Mexico shall have free and unrestricted beneficial consumptive use of all waters originating within the drainage basins of the Gila River and its tributaries and the Little Colorado and its tributaries within the boundaries of said State, and in this connection Nevada alleges that said waters within said drainage basins are waters that constitute a portion of the waters lying and being situate in the Lower Basin of the Colorado River Stream System as defined in Article II(f) of the Colorado River Compact, the beneficial consumptive use of which was and is apportioned to the entire Lower Basin in and by the provisions of Article III thereof, with no apportionment of said waters and/or the beneficial consumptive use thereof being made to any individual State signatory to said Compact. Nevada further alleges that said waters are a part of the common fund of the waters that drain into the Colorado River Stream System below Lee Ferry and are therefore subject to the provisions of the said Compact with respect to the equitable apportionment thereof.

III

(a) Answering subparagraph 3(2) of paragraph X, page 8 of said Statement, Nevada denies that beneficial consumptive use, as used in Article III(a) and III(b) of the Compact, should be measured in terms of stream depletion, in that and for the reason that the well-recognized rule of measurement of beneficial consumptive use of water in the Western States is the measured diversion from the source less the measured return flow thereof to the source, and that the stream depletion measurement is an exception to the return flow measurement to be used only upon wasting streams where major channel losses of water are brought about by evaporation and transpiration, but which a portion of such losses are converted to beneficial uses by the activities of man by impounding, pumping and

diversion of the waters upstream from the area wherein said losses took place—all as alleged in subparagraph 2 of paragraph XVIII, Petition of Intervention of Nevada.

(b) Answering subparagraph 3(3) of paragraph X, page 8 of said Statement, Nevada reiterates the allegations of subparagraph 3 of paragraph XVIII of its Petition in Intervention "that evaporation losses of water from storage reservoirs on the main stream of the Colorado River in the Lower Basin are first chargeable out of excess or surplus water and that such evaporation losses are not chargeable against Article III(a) or III(b) waters unless and until all such available excess or surplus water is exhausted in any given year."

Nevada reiterates the prayer of its Petition in Intervention.

HARVEY DICKERSON
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SUPREME COURT OF THE UNITED STATES

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STATE OF ARIZONA,

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Defendants,

UNITED STATES OF AMERICA,

Intervener

MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST AND REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA AND THE FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT MCDOWELL RESERVATION, ARIZONA.

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No. 10, Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener

MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA AND THE FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT McDOWELL RESERVATION, ARIZONA.

The petitioners herein move for leave to file the accompanying representation of interest. In support of this motion petitioners show as follows:

1. The petitioners are American Indian Tribes with a total population of about 85,000, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its Tribe.

2. Each of the Tribes resides within the lower Colorado River Basin and is the beneficial owner of lands and the

right to the use of water within the basin. The right to their respective shares of these waters is vital to the continued existence of the members of the Tribes and to the future development of a stable economy on their reservations.

3. This case presents for adjudication the relative rights of the parties-litigant and of petitioners and other Indian wards of the United States to divert waters from the lower Colorado River Basin.

4. Justice and fair play require that a determination be made as to whether the Attorney General of the United States is representing conflicting interests in this case, and if so, whether the interests of petitioners are adequately and properly represented.

5. There is doubt as to whether petitioners may file as amicus curiae since they are real parties in interest as beneficial owners of an undetermined portion of the water rights at stake.

6. There is doubt as to whether petitioners may intervene as separate parties since their interests are committed to adjudication by the intervention of the United States and in any event petitioners are without available funds or means for preparing and participating in this case.

7. Under Rule 9 of this Court, the Federal Rules of Civil Procedure are applicable as a guide in original actions. The procedure here followed by petitioners would be the

procedure utilized to apprise a district court of a comparable situation.

Respectfully submitted,

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DRAFT June 20, 1956

No. 10, Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener

REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA AND THE FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT MCDOWELL RESERVATION, ARIZONA.

---

1. The petitioners are American Indian Tribes with a total population of about 85,000, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its Tribe.

2. Each of the Tribes resides within the lower Colorado River Basin and is the beneficial owner of lands and the right to the use of water within the basin. The right to their respective shares of these waters is vital to the continued existence of the members of the Tribes and to the future development of a stable economy on their reservations.

3. This case presents for adjudication the relative rights

of the parties-litigant and of petitioners and other Indian wards of the United States to divert waters from the lower Colorado River Basin. The Indian rights in the water stem from treaties with Indian tribes, executive action, the creation of Indian reservations and various Acts of Congress. *Winters* v. *United States,* 207 U. S. 564, 576-577; *United States v. Walker River Irr. Dist.,* 104 F. 2d 334, 336 (C.A. 9, 1939); *Cohen, Felix S., Handbook of Federal Indian Law,* pp. 316-319 (1945).

4. The United States has intervened in this case and has placed the rights of petitioners in issue. As a result petitioners are precluded from asserting their rights in their own names and on their own behalf. They have no control over the course of the suit, no voice in its direction and no right or opportunity to participate in the formation or trial of the issues. The United States controls their interests in issue. It can waive or compromise their rights, fail to prosecute them in full or in part, allow them to go by default, or fail to assert essential contentions. *Heckman* v. *United States,* 224 U. S. 413, 445-446; *Pueblo of Picuris in State of New Mexico* v. *Abeyta,* 50 F. 2d 12, 13-14 (C.A. 10, 1931).

5. The petitioners present to the Court the question of whether their interests can be properly or adequately represented by the Attorney General of the United States if the interests of the United States, as a sovereign proprietor and contractor are in direct conflict with the interests of the petitioners. Thus the United States has numerous contractual obligations to deliver Colorado River water to various water and irrigation districts and projects, and to the States of Nevada and Arizona. It has contracted to sell electricity (Petition of Intervention, Pars. XII-XXIV). In addition it has an international treaty obligation to de-

liver annually 1,500,000 acre feet of Colorado River water to Mexico (*Ibid.*, Par. XIII).

The proprietary rights and contract commitments of the United States on the one hand and the beneficial rights of the Indians on the other are in competition with each other for the same water. Since there is not sufficient water to meet the demands of all parties, priorities and allocations will be adjudicated. The Attorney General has undertaken to represent both antagonistic interests of the United States and these petitioners, competitors for the same water, and his obligations force him to sit on both sides of the counsel table at the same time.

6. The dual and conflicting nature of the Attorney General's position in this case is emphasized by his obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by Indian tribes seeking compensation for loss of water rights. The law established in this case may provide a clear basis for recovery or a complete defense in such claims cases of Indian tribes. Proper advocacy in this case would compel the Attorney General to vigorously prosecute the full rights of petitioners. But if he does so, the Attorney General may be providing the basis for recovery in Indian claims cases in which he is obliged to defend the United States. The conflict seems evident.

7. Petitioners' concern motivating this representation has not been lessened by the proceedings and actions in this case. The following is illustrative:

(a) On December 31, 1952 the United States moved this Court for leave to intervene and in support of its motion advanced the interests of petitioners as a major ground for intervention. The United States referred to the Colorado River Compact, a document basic to the rights of the par-

ties and advised this Court as follows (Motion for leave to intervene, Par. XII):

> * * * Thus there is excluded from the operation of the compact the rights of the United States to divert or to have diverted water from the Colorado River and its tributaries on behalf of the Indians. There is annually diverted for or by the Indians from the Colorado River and its tributaries in the Lower Basin in excess of 750,000 acre-feet and there are asserted, in the ultimate, claims to a greater amount.

In its brief in support of the motion for leave to intervene the United States stated (p. 32) "* * * large claims are asserted on behalf of the Indians whose rights are excluded from the operation of the Colorado River Compact; * * *".

(b) On November 2, 1953 pursuant to the Court's order of January 19, 1953, the United States filed its petition of intervention with the Clerk of this Court. The petition in unmistakable terms asserted the "prior and superior" rights of the Indians. It declared (Par. XXVII, p. 23):

> The United States of America asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.

Four days later, apparently following heated protests by parties-litigant opposing the Attorney General's assertion of the Indians' claims, the Attorney General, without order of this Court and by means unknown to us, physically withdrew the Government's petition of intervention from the Clerk's office. On December 8, 1953, without order of

this Court authorizing amendment, the Attorney General substituted a revised petition of intervention as if it were the initial filing. This extraordinary procedural lapse supplied the means for omitting the critical language quoted above pleading the "prior and superior" rights of the Indians. It permitted the United States to make a radical shift in position without the embarrassment of setting forth the reasons for the change as part of an application for leave to amend. A copy of an article written by Luther A. Huston and published in the *New York Times* of November 16, 1953, describing this unusual procedure is printed in the Appendix, *infra*.

(c) At the pre-trial conference before the Special Master on April 10-13, 1956, almost two and one-half years after the Government's petition of intervention was filed, the United States declared that it still was not ready to define its position on Indian claims either from the standpoint of law or facts. (Transcript, pre-trial proceedings, April 10, 1956, pp. 18, 23-26, 34-35). The Government's attitude was akin to that of a passive bystander, with the clear inference that it desired an inactive role in this case. Thus the Assistant Attorney General in charge urged (*Ibid*, p. 39):

> The United States would like to be last, and we will only ask the questions we feel the States have not covered, if that will be permitted.

It seems to petitioners that such an attitude cannot be reconciled with an intent to present and protect the Indians' full rights. An advocate for the Indians would have no difficulty in unequivocally asserting the prior and superior rights justified by law, set out in the petition of intervention initially filed with this Court and withdrawn and

amended without permission. (See paragraph No. 7a, *supra.*)

(e) The transcript of the pre-trial proceedings reveals a complete failure on the part of the United States to state affirmatively any intention to present and advocate the petitioners' full rights. The Master's efforts to ascertain the Government's position were met with avoidance and pleas of lack of understanding (e.g. *passim*, Tr. 173-204). The failure of the Attorney General to assert petitioners' full rights raises serious doubt as to whether those rights will be effectively prosecuted by the Attorney General.

8. Petitioners probably have no standing separately to sue and in any event are without available funds to prepare a project case of this magnitude. The United States has committed petitioners' rights to adjudication but all decisions concerning the prosecution or abandonment of their rights are made by the Attorney General without reference to or consultation with petitioners. The ultimate responsibility for rendering a just and correct decree rests with this Court. Justice and fair dealing require that petitioners' rights should not be subordinated to conflicting interests through lack of independent advocacy.

Wherefore, petitioners pray as follows:

1. That cognizance be taken of this representation in view of the helpless position in which these petitioners find themselves;

2. That the Attorney General be called upon to explain his unauthorized amendment of the petition of intervention;

3. That the Special Master be instructed as follows:

a. To determine whether a conflict exists between the Indian interests and the interests of the United States apart from those of the Indians;

b. To determine whether the Indian interests are, or can be adequately represented by the Attorney General of the United States; and

c. To recommend whether the interests of justice and fair dealing require separate and independent counsel for the Indians.

Respectfully submitted,

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Attorney for the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona.

WEST BESET AGAIN BY INDIAN TROUBLE

Gets Government to Withdraw Colorado River Brief Putting Tribes' Water Rights First

By LUTHER A. HUSTON

Special to THE NEW YORK TIMES.

WASHINGTON, Nov. 15—Indian trouble has developed again in the West and this time it was not the Indians but the Great White Father who started it.

Pow-wows are under way in some of Washington's most impressive wigwams in an effort to settle it and the pipe of peace eventually may be smoked in the Supreme Court.

It is a complicated situation that involves the fight between Arizona and California over the use of the waters of the Colorado River, a controversy that has been raging for more than three decades. The Department of Justice brought the Indians into it.

Despite a disinclination on the part of the Justice Department to talk about it, officials revealed today that pressures from Governors of some Western states induced the department to withdraw a brief it had filed in the Supreme Court, a step rarely taken, and agree to reexamine an issue it had put forward as a major ground for intervening in a suit now pending in the high court.

On Nov. 2 the Justice Department filed a brief with the clerk of the Supreme Court as an intervenor in a suit brought by the State of Arizona against the State of California and other defendants. Quietly, late in the afternoon of Friday, Nov. 6, the brief was withdrawn.

At that time, it is understood, it had not been distributed to any of the Supreme Court Justices.

States' Rights Held Subordinate

The controversial part of the brief asserted that the rights of the Indians and Indian tribes in the Colorado River basin to the use of the waters of the river and its tributaries "are prior and superior" to the water-delivery rights of other citizens under the Colorado River compact.

The Justice Department's position was that the Indians have priority to take what water they want when they want it, regardless of the share of the states.

Arizona contends that the Indians must share, the same as white citizens, in the total allotment of the lower basin. Under this interpretation, Arizona, which has more Indians and more reservations than California, would have to give up more water to Indian uses than would its sister state.

California, according to Mr. Ely, does not join in the protest against the claim asserted by the Department of Justice on behalf of the Indians to "prior and superior" water delivery rights. Mr. Ely said that his state would like to have the matter litigated before the Supreme Court. He contends that the question cannot be settled by stipulation, as Arizona has proposed in the conferences now going on.

The United States should be a party in interest to the Arizona-California litigation, Mr. Ely asserts, because of its responsibility to the Indians, its vast expenditures in constructing Boulder Dam, which impounds the waters allotted to the states, and other works necessary to the operation of the project.

The Supreme Court was correct, Mr. Ely asserted, in allowing the Justice Department to intervene in the Arizona-California suit, but the Justice Department was wrong in asserting that the rights of the Indians were "prior and superior" to the water-delivery rights of other citizens under the Colorado compact.

Commitment Is Denied

Mr. Rankin has told attorneys representing Arizona and California that the Justice Department was under no commitment to amend the brief. He is said to have agreed, however, to re-examine the question with an eye to a possible stipulation that would clarify the extent of Indian rights as against those of the states involved.

A Justice Department spokesman said that a new brief would be filed. Conferences at the legal level were going on, he said. Whether or not there would be later conferences between Herbert Brownell Jr., the Attorney General, and some of the Governors who joined in the protest had not been determined.

Northcutt Ely, an Assistant Attorney General of California, who maintains offices here and handles the interests of that state in the Colorado River water controversy, said that what the Federal Government was doing was asserting a first mortgage on behalf of the Indians on water that already had been apportioned between the states under the Colorado River Compact to which Congress had given approval.

If the position taken by the Government should be maintained, and sustained by court decrees, Mr. Ely said, the interstate compact under which California had spent more than half a billion dollars to develop water projects would "be busted."

Arizona filed its suit on Aug. 28 against California and seven municipal or public corporations that have participated, under the laws of California, in the development of reclamation, electric power and other projects undertaken under the Colorado River Compact. In use of the Colorado River's water is a long one. The river rises in Colorado, near the crest of the Continental Divide, 9,000 feet above sea level. It flows 1,293 miles, draining, with its tributaries, parts of the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.

The river traverses a semi-arid region containing about 240,000 square miles. It finds the sea in the Gulf of California, seventy-five miles below the border between the United States and Mexico.

Canyon Separates Lands

The lands to which water of the river may be beneficially applied are separated by nearly 1,000 miles of canyon, and the states above this canyon are in what is known as the upper basin; those below it in the lower basin. The dividing line is at Lee Ferry, twenty-three miles below the Utah-Arizona border.

More than fifty years ago it was discovered that the claims of rights to use water in the lower basin exceeded the amount of water available. So there might be an equitable distribution of the available water, the Colorado River Compact was signed in November, 1922, by California, Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming.

The compact became effective June 25, 1929, by act of Congress and by Presidential proclamation, although Arizona had not ratified it at the time. Although water was allotted to Arizona under the compact, the state did not ratify the agreement until 1944.

The compact appointed in perpetuity to the states of the upper basin 7,500,000 acre feet of water and to the states of the lower basin an equal amount. It was provided, however, that the lower basin had the right to increase its beneficial consumptive use of water by 1,000,000 acre feet annually.

Right t oWater Limited

When Congress passed the Boulder Canyon Project Act, it required California to adopt a state law limiting its right to water delivery from the Colorado to the number of acre feet specified in the compact, Arizona contends that this means the 4,400,000 acre feet that constituted the basic allottment made under the lower basin compact and does not apply to the 1,000,000 additional acre feet the lower basin received the right to use annually.

Arizona, which is the only other state in the lower basin, declares that all of the 1,000,000 acre feet should be given to her.

The Indians come into the picture under a clause in the Colorado Compact that says:

"Nothing in this compact shall be constituted as affecting the obligations of the United States of America to Indian tribes."

The various Indian reservations and projects in Arizona and California are at present using, according to the Justice Department brief, 747,170 acre feet of water from the Colorado River system. The Government asserted that this use ultimately will increase to 1,747,000 acre feet.

This presents a two-fold problem, according to Mr. Ely. The first is whether the Indians have a priority to take whatever water they want whether they fell like it. The second is whether the water claimed by the Indians is to come out of the amounts allotted to the lower basin or whether the Indians can just take their share in as they want it and let Arizona and California divide what is left.

California Position Outlined

The position taken by the Justice Department in its brief is that the Indians have priority to take what water they want when they want it, regardless of the share of the states.

Britain Has 82,000 Pubs

LONDON, Nov. 15 (AP)—The Government's "annual abstract of statistics," published today, says this country has 82,000 pubs. Last year these pubs sold about nine gallons of beer per head to the 50,000,000 population.

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States' Rights Held Subordinate

The controversial part of the brief asserted that the rights of the Indians and Indian tribes in the Colorado River basin to the use of the waters of the river and its tributaries "are prior and superior" to the rights of Arizona, California or the other states in the basin. This was a position never before taken, attorneys said, in all the long history of the development of the prevailing system of distribution of the waters of the river among the states.

Eleven Governors of Western states were in conference at Albuquerque, N. M., when news of the Justice Department's assertion of the paramount claims of the Indians reached that region.

Gov. Howard Pyle of Arizona, according to officials here, told the Governors that the interests of his state would be vitally affected [illegible] of the executive adjudications division, and other high officials of the department. On the basis of the protests of the Western Governors as conveyed by Mr. Breitenstein, the brief was withdrawn.

Commitment Is Denied

Mr. Rankin has told attorneys representing Arizona and California that the Justice Department was under no commitment to amend the brief. He is said to have agreed, however, to re-examine the question with an eye to a possible stipulation that would clarify the extent of Indian rights as against those of the states involved.

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If the position taken by the Government should be maintained, and sustained by court decrees, Mr. Ely said, the interstate compact under which California had spent more than half a billion dollars to develop water projects would "be busted."

Arizona filed its suit on Aug. 28 against California and seven municipal or public corporations that have participated, under the laws of California, in the development of reclamation, electric power and other projects undertaken under the Colorado River Compact. In substance, Arizona asks the Supreme Court to declare it entitled to 3,280,000 acre feet of water and limit California to 4,400,000 acre feet. This would add 500,000 acre feet to what Arizona gets now and take away 500,000 acre feet from California.

An acre foot is sufficient water to fill a prism the size of an acre of land to a depth of one foot.

Arizona also raised the question of the validity of California's water delivery contracts under laws passed by the California Legislature.

The story of the fight over the river traverses a semi-arid region containing about 240,000 square miles. It finds the sea in the Gulf of California, seventy-five miles below the border between the United States and Mexico.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 10, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA; PALO VERDE IRRIGATION DISTRICT; IMPERIAL IRRIGATION DISTRICT; COACHELLA VALLEY COUNTY WATER DISTRICT; METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SAN DIEGO, CALIFORNIA; AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

UNITED STATES OF AMERICA, INTERVENOR

RESPONSE BY UNITED STATES OF AMERICA, INTERVENOR, TO MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST AND REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA; AND THE FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT McDOWELL RESERVATION, ARIZONA[1]

I

The United States is authorized by law and committed by tradition to represent the Indians and In-

[1] The untimeliness of the "Motion for Leave to File * * *" is apparent from the fact that it has been presented more than 2½ years after the filing of the Petition of Intervention by the United States and well after the commencement of the trial before the Special Master.

dian tribes in litigation affecting their property rights. Such representation is an established aspect of the plenary power to manage the affairs of Indians assumed by Congress and approved by the Courts under several constitutional provisions.[2] *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U. S. 375; *United States* v. *Ramsey,* 271 U. S. 467. "The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 308; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 311.

Congress has generally delegated to the Secretary of the Interior the management of Indian property and to the Attorney General the conduct of litigation affecting that property. Thus, as to the authority of the Secretary of the Interior, it was said in *United States* v. *Anglin & Stevenson,* 145 F. 2d 622, 628–629 (C. A. 10), certiorari denied, 324 U. S. 844:

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[2] The Constitution grants to Congress authority over commerce with Indian tribes (Art. 1, sec. 8, cl. 3), expenditures for the general welfare (Art. 1, sec. 8, cl. 1), property of the United States (Art 4, sec. 3, cl. 2), treaties (Art. 2, sec. 2, cl. 2), the waging of war (Art. 1, sec. 8, cl. 11) and the admission of new states and the terms of such admission (Art. 4, sec. 3, cl. 1). The power of Congress extends from the control of the use of the lands (e. g., grazing, Act of June 18, 1934, sec. 6, 48 Stat. 984, 986, 25 U. S. C. 466), through the grant of adverse interests in the lands (*Nadeau* v. *Union Pacific R. R. Co.*, 253 U. S. 442), to the sale and removal of the Indians' interests (*Lone Wolf* v. *Hitchcock*, 187 U. S. 553).

> We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection. [Cases omitted.] In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indian and his property, whether in the nature of lands or restricted funds. While exercising the powers and duties imposed by law, he is clothed with sovereign immunity, and ordinarily is not amenable to judicial processes or bound by judicial decrees absent legislative consent. * * * It is not the judicial function to administer the affairs of incompetent Indians, and courts should be at pains not to invade the trust or encroach upon the prerogative which has been traditionally assigned to the Secretary.

The authority of the Attorney General to control litigation affecting Indian property is equally broad. This is, of course, necessary in order to effectuate the foregoing responsibility of the Secretary of the Interior. It is provided in 28 U. S. C. 507 (b) that "The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party * * *."[3] That means that "the

[3] "In all States and Territories where there are reservations or allotted Indians the United States district attorney shall repre-

full responsibility and control are imposed directly upon him as the head of the Department of Justice." *United States* v. *Winston,* 170 U. S. 522, 525. "If the United States is entitled to institute an action on its own behalf and on behalf of the Indians, the Indians cannot determine the course of the suit or settle it contrary to the position of the Government." Cohen, *Handbook of Federal Indian Law* (1942), p. 370; *Conner* v. *Cornell,* 32 F. 2d 581, 584–585 (C. A. 8); *McGugin* v. *United States,* 109 F. 2d 94 (C. A. 10); *White* v. *Sinclair Prairie Oil Co.,* 139 F. 2d 103, 106–107 (C. A. 10); *United States* v. *Adamic,* 54 F. Supp. 221, 223 (W. D. N. Y.)

This Court announced the complete control of the United States over Indian litigation in *Heckman* v. *United States,* 224 U. S. 413, wherein the United States sued to set aside conveyances of allotted lands by restricted Indians, as follows (pp. 444–446):

> It is further urged that there is a defect of parties, on account of the absence of the Indian grantors. It is said that they are the owners of the lands and hence sustain such a relation to the controversy that final decree cannot be made without affecting their interest. *Shields* v. *Barrow,* 17 How. 130, 139; *Williams* v. *Bankhead,* 19 Wall. 563.

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sent them in all suits at law and in equity." Act of March 3, 1893, 27 Stat. 631, 25 U. S. C. 175. See also Act of June 22, 1870, 16 Stat. 164, as amended September 3, 1954, 68 Stat. 1229, 5 U. S. C. 306; Executive Order No. 6166 of June 10, 1933 (Reorganization of Executive Agencies), Section 5, 5 U. S. C. following Section 132; Reorganization Plan No. 2 of May 14, 1950, 64 Stat. 1261, as amended July 5, 1952, 66 Stat. 121, 5 U. S. C. following Section 291.

The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the act of Congress they were precluded from alienating

> their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States.
>
> * * * * *
>
> And when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property.

The United States, acting through the Attorney General, "may in cases brought by restricted Indians, when it is served with notice, enter its appearance and take over the general management of the case without consulting such Indians * * *." *Sadler* v. *Public National Bank & Trust Co. of New York,* 172 F. 2d 870, 874 (C. A. 10); *Mars* v. *McDougal,* 40 F. 2d 247 (C. A. 10), certiorari denied, 282 U. S. 850. In *Pueblo of Picuris in State of New Mexico* v. *Abeyta,* 50 F. 2d 12 (C. A. 10), the Indians sought to present contentions of their own in litigation instituted by the United States to quiet title to land in their behalf. The court refused to permit this, stating (p. 14):

> The statutory power of the United States to initiate actions for the Pueblo Indians necessarily involves the power to control such litigation. If the private attorneys of the pueblo could dictate the averments of the bill, or could prevail in questions of judgment in the introduction of evidence, there would be no substance to the guardianship of the United States over the Indians. There cannot be a divided authority in the conduct of litigation; divided authority results in hopeless confusion.

It is plain, therefore, that the United States has full and exclusive authority to control the presentation of the Indians' interests in the instant case. The Attorney General, acting for the United States, has undertaken to present those interests. It "is to be presumed" that "the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race." *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 117.[4]

Thus the granting of movants' request for "separate and independent counsel" would require that the Attorney General abdicate the responsibility clearly

[4] There is no substance to the intimations by the movants (pp. 7–9, 10) that the Attorney General will not fully protect their rights. The amendment of the petition of intervention was not "unauthorized", as alleged. Rule 9 of this Court provides that the Federal Rules of Civil Procedure are applicable as a guide in original actions. Rule 15 (a), F. R. C. P., allows a party to "amend his pleading once as a matter of course at any time before a responsive pleading is served." The phrasing of the petition and the request to proceed last at the trial are no indication of an intention not to protect fully the rights of the Indians.

laid upon him by law and tradition to represent the Indians in litigation affecting their property rights.

II

But there is another compelling reason why the movants' request cannot be granted. For the Indians to present their own case (or cases) at the trial by "separate and independent" counsel would not only result in unseemly confusion and conflict[5] but would require the legislative consent of the States of Arizona and California, because the sovereign immunity of states extends against Indian tribes. *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110. Movants themselves admit this, in effect, by their statement that "There is doubt as to whether petitioners may intervene as

[5] The motion does not and cannot establish that movants are *all* the Indians whose rights may be affected by this litigation. Only the Attorney General can represent *all* Indian rights. Additionally, no basis is either suggested or imaginable upon which the Master could, without extensive testimony, determine (as prayed) "whether a conflict exists between the Indian interest and the interests of the United States apart from those of the Indians." Indeed, it is quite likely that there may be, in some respects, conflicts between the movants themselves. It is by no means unusual for the Attorney General to represent possibly conflicting interests. This is inherent in the very nature of much Government litigation. Thus, within a particular case, the position of the Bureau of Reclamation of the Department of the Interior may be in actual or apparent conflict with the Forest Service of the Department of Agriculture, or with the obligations of the United States under an international treaty, or with the Corps of Engineers of the Department of the Army. But it is essential to orderly government and judicial procedure that there shall be one and only one law officer—the Attorney General—representing, in ultimate responsibility, all the interests of the United States in all of their various and relative aspects.

separate parties. * * *'" Accordingly, in the face of this clear legal obstacle to the consideration of movants' request, the Attorney General has no choice, as a matter of law, but to continue upon the course already taken. The responsibilities of his office compel him to supervise and control the presentation of all interests of the United States in this litigation. These responsibilities he has properly undertaken to discharge pursuant to the petition of intervention by the United States.

CONCLUSION

For the reasons stated, the terms of reference to the Master should not be expanded to comply with the prayer of the movants and the motion should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1960

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO, IMPLEADED DEFENDANTS

Simon H. Rifkind, *Special Master*

REPORT

December 5, 1960

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PART ONE

I. Introductory Statement of the Case

The record of this action is another chapter in the long history of controversy relating to the Colorado River. Suit was initiated by Arizona on August 13, 1952, by filing a motion for leave to file a bill of complaint against the State of California and seven public agencies of the State.[1] On January 19, 1953, the motion, unopposed, was granted.[2]

The complaint invoked the original jurisdiction of the Court under Article III, Section 2, Clause 2 of the Constitution. It alleged that pursuant to the Colorado River Compact[3] and the Boulder Canyon Project Act[4] Arizona was entitled annually to a certain quantity of water from the Colorado River System. It further alleged that various claims asserted by the defendants adversely affected the rights asserted by Arizona and that unless and until such rights were confirmed various existing projects in Arizona could not be operated at present levels and prospective projects could not be financed and constructed. Arizona requested, *inter alia,* that her title to the annual beneficial consumptive use of 3,800,000 acre-feet[5] of water of the Colorado River System be forever confirmed, that title of the State of California to the annual beneficial consumptive use of Colorado River System water be forever fixed at and

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[1]Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, the Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego.

[2]344 U. S. 919 (1953).

[3]For the complete text of the Compact see Appendix 2.

[4]45 Stat. 1057 (1928). For the complete text of the Project Act see Appendix 3.

[5]An acre-foot of water is water sufficient to cover an acre of land to a depth of one foot. It is approximately 325,850 gallons. Ariz. Ex. 1000, p. 17 (Pre-Trial Order).

limited to 4,400,000 acre-feet, and that the defendants be forever enjoined from asserting claims inconsistent with Arizona's title so confirmed.

California answered, denying some of the allegations, and pleading several affirmative defenses. The United States, pursuant to leave granted, intervened.[5a] Nevada too obtained leave to intervene.[6]

After pleadings were exchanged among the parties, the Court, on June 1, 1954, appointed George I. Haight, Esq., of Chicago, Illinois, as Special Master. The Order directed him to find the facts specially and state separately his conclusions of law thereon, and to submit them to the Court together with a draft of a recommended decree.[7]

Thereafter, California moved to have Colorado, New Mexico, Utah and Wyoming joined as necessary parties. The Court, following receipt of a report from the Special Master pursuant to a reference,[8] denied the motion to join Colorado and Wyoming and granted the motion to join Utah and New Mexico only to the extent of their capacity as Lower Basin states.[9]

Thereupon, Utah filed a pleading called a "Complaint and Answer" and New Mexico filed an "Appearance and Statement." The last pleading herein was filed by Nevada on March 19, 1956. On August 13, 1958, Arizona offered amended pleadings. A detailed catalogue of all the pleadings and preliminary motions is set forth in Appendix 1.

On October 10, 1955, the undersigned was appointed Special Master *vice* George I. Haight, deceased, with instructions to proceed under the original order of reference.[10]

After pre-trial conferences a pre-trial order was entered by the Special Master, on the stipulation and consent of all

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[5a] 344 U. S. 919 (1953).
[6] 347 U. S. 985 (1954).
[7] 347 U. S. 986 (1954).
[8] 348 U. S. 947 (1955).
[9] 350 U. S. 114 (1955), *rehearing denied*, 350 U. S. 955 (1956).
[10] 350 U. S. 812 (1955).

the parties, which regulated the proceedings in several particulars. On June 14, 1956, in the United States Courthouse at San Francisco, California, the trial was begun.

In the course thereof, 106 witnesses were heard. The transcript of their testimony occupies about 22,500 pages. Thousands of exhibits were received in evidence. In addition, during a recess, depositions were taken at Silver City, New Mexico and at Reserve, New Mexico, at which 234 witnesses were heard. The deposition transcripts consist of 3,742 pages.

The trial was concluded on August 28, 1958. Thereafter, briefs, reply briefs and rebuttal briefs were exchanged among the parties, together with proposed findings of fact and conclusions of law.[11] On July 1, 1959, the matter was finally submitted for consideration.

As the action progressed it became clear that the pleadings were of little use in formulating the issues to be tried. Seeking to define the controversies among the parties more sharply, I requested them to file Statements of Position to clarify their respective contentions. While these were of some assistance, it is fair to say that many of the issues for decision did not emerge until final briefs were submitted.

On May 5, 1960, a Draft Report was circulated among the parties pursuant to the pre-trial order. All of the parties except Utah submitted comments on the Draft Report,[11a] and some replies to these comments were received. On motion by California, three days of oral argument were held in New York City on the Draft Report and the recommended decree. California also made several motions to

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[11]Proposed findings and conclusions and brief materials were received as follows: from Arizona 426 pages; California 2,179 pages; Nevada 394 pages; New Mexico 356 pages; United States 471 pages; Utah 36 pages—a total of 3,862 pages.

[11a]Comments on the Draft Report were received as follows: from Arizona 26 pages; California 144 pages; Nevada 26 pages; New Mexico 41 pages; United States 18 pages; Metropolitan Water District 17 pages—a total of 272 pages.

re-open the trial and take additional evidence; these motions have been denied. New Mexico moved to re-open the trial and take additional evidence on the present use of water from the Gila River System; this motion has since become moot.

As ultimately submitted, the action really presents a number of different but related controversies among the parties. First, there is the mainstream controversy, involving as parties Arizona, California and Nevada. Arizona claims the right to use 2.8 million acre-feet of water in the Colorado River plus half of "surplus." This claim is based on what Arizona conceives to be a mandatory division of water made by Congress in the second paragraph of Section 4(a) of the Boulder Canyon Project Act. Existing projects in Arizona consume somewhat less than half of this amount of water. Arizona expects to use most of the presently uncommitted water which she claims for a new project, called the Central Arizona Project, to provide water for irrigation in a large portion of central Arizona.

California, on the other hand, claims that existing mainstream projects exhaust the safe annual yield (*i.e.*, the dependable supply) of water in the Colorado River and that, accordingly, there is no supply available for new projects in Arizona.

California argues for an allocation to Arizona of approximately 3 million acre-feet of water from all sources in the Lower Basin, both mainstream and tributaries. Under California's method of system-wide accounting, Arizona's share of the total Lower Basin apportionment would be in large part exhausted by her uses on the Gila River System, and California would be free to use most of the water available in the mainstream.

Perhaps the most crucial issue in the case arises from these conflicting views, an issue that is summarized by this

question: Is the application of the Project Act limited to the mainstream of the Colorado River or does it apply to the entire River System in the Lower Basin, that is to both mainstream and tributaries? Other important questions are at issue between the two states, such as the interpretation, operative effect and validity of several sections of the Colorado River Compact, the Boulder Canyon Project Act and the water delivery contract between the United States and Arizona. At issue also is the effectiveness of Arizona's purported ratification of the Compact and the applicability of principles such as priority of appropriation and equitable apportionment.

Nevada, the other state which utilizes water from the mainstream, takes still a third approach. She does not regard the Project Act or the water delivery contracts made by the Secretary of the Interior as controlling rights to water. Rather, she views this action as a traditional suit for an equitable apportionment, in which she claims the right to approximately 500,000 acre-feet of water, based on needs projected to the year 2000.

A second major controversy involves claims to tributary water by the states in which diversions from the tributaries occur. The important tributaries involved in this controversy are:

(1) The Gila River System, over which New Mexico and Arizona are in conflict;

(2) The Little Colorado River System, contested by the same two states; and

(3) The Virgin River System, the waters of which are claimed by Utah, Arizona and Nevada.

As to all three stream systems, the upstream states pray for "confirmation" of existing uses and an apportionment of water to be reserved for future uses.

PART ONE

Another major controversy involves a dispute between mainstream and tributary states over water in the tributaries. The genesis of the conflict lies, of course, in the fact that uses on the tributaries diminish the mainstream supply.

Superimposed on all of these interstate controversies are the claims of the United States as against all of the states. The United States claims power to regulate and control the uses of Colorado River water pursuant to the Project Act and by reason of its ownership and control of Hoover Dam and the mainstream works below. The United States also claims that it has reserved the use of water for the benefit of some 25 Indian Reservations and dozens of other federal establishments located throughout the 132,000 square miles of the Lower Basin.

This summary description of the various controversies involved in this case indicates that the action is far from being the traditional equitable apportionment suit in which the Court is called upon to apportion water in a single river among two or three states. Nor is it comparable to other interstate litigation in the original jurisdiction that presents for decision a single, relatively narrow issue, such as the proper location of a boundary.[12] On the contrary, this action is a complex of interstate lawsuits, the resolution of which depends upon the interpretation and application of the Federal Constitution, treaties, statutes, contracts and decisional law, as well as a variety of state law. Its determination will inevitably have a profound effect upon a great and rapidly developing territory, considerably larger in area and population than many nations, and containing political subdivisions therein as diverse and distant as Phoenix and Los Angeles or Las Vegas and the Imperial Valley.

[12] In passing, it might be noticed that two of the minor issues in this case are raised by boundary disputes.

II. Prior Litigation

The present case is the fifth interstate suit affecting the Colorado River, although it is the first in which evidence has been taken. The four prior suits were as follows:

(1) On October 13, 1930, Arizona instituted an action against the Secretary of the Interior and the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming to enjoin construction of Hoover Dam and the All-American Canal as well as to enjoin performance of contracts for the delivery of stored water. In addition, the bill of complaint sought to have the Boulder Canyon Project Act and the Colorado River Compact declared unconstitutional. The Court, per Mr. Justice Brandeis, held, *inter alia,* that the Compact and Project Act were constitutional, that the River is a navigable stream and that the Secretary could construct the dam authorized by Section 1 of the Project Act. The bill was dismissed without prejudice to a future action for relief in the event that the dam was so operated as to interfere with Arizona's rights.[13]

(2) On February 14, 1934, Arizona moved for leave to file a bill to perpetuate the testimony of the negotiators of the Colorado River Compact. The parties named were the other six states of the Colorado River Basin, the California public agencies which are defendants in the present action and the Secretary of the Interior. A unanimous Court, speaking through Mr. Justice Brandeis, denied the application.[14] One of the alternate grounds for decision was the incompetence of the evidence sought to be perpetuated. It was held that oral statements of negotiators of a treaty or compact not communicated to the ratifying body were not admissible to establish meaning.[15]

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[13]Arizona v. California, 283 U. S. 423 (1931).
[14]Arizona v. California, 292 U. S. 341 (1934).
[15]292 U. S., at 359-360.

(3) On January 14, 1935, the United States sued to enjoin Arizona's interference with construction of Parker Dam, Arizona having threatened to use military force to prevent work on the dam. The Court, per Mr. Justice Butler, dismissed the complaint on the ground that there was no showing that the Secretary of the Interior was authorized to construct the dam.[16] Subsequently, Congress, by Act of August 30, 1935, specifically authorized erection of Parker Dam for the purpose, *inter alia*, of improving navigation.[17]

(4) In November 1935, Arizona filed a petition for leave to file a bill of complaint against California, Colorado, Nevada, New Mexico, Utah and Wyoming praying for a judicial apportionment of the unappropriated water of the Colorado River. The Court, per Mr. Justice Stone, denied the petition on the ground that the United States was an indispensable party.[18] Specifically left undecided was the question whether an equitable division of the unappropriated water of the River could be decreed in a suit in which the United States was a party.[19]

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[16]United States v. Arizona, 295 U. S. 174 (1935).
[17]49 Stat. 1039.
[18]Arizona v. California, 298 U. S. 558 (1936).
[19]298 U. S., at 572.

III. Geography of the Colorado River Basin

The Colorado River is a stream of continental proportions. From its headwaters in the high peaks of north central Colorado to its mouth in the Gulf of California it runs a course of approximately 1,300 miles. During its journey to the sea it travels within or on the boundaries of five states and one foreign nation, as follows: through western Colorado, 245 miles; across Utah, 285 miles; through Arizona, 295 miles; on the Arizona-Nevada boundary, 145 miles; on the Arizona-California boundary, 235 miles; on the Arizona-Mexico boundary, 16-20 miles; and within Mexico, 75 miles.[20]

Within the United States the River System drains an area of 242,000 square miles or one-twelfth of the continental United States exclusive of Alaska. This drainage basin is approximately 900 miles long and varies in width from about 300 miles in the northerly section to about 500 miles in the southerly section. It is bounded on the north and east by the Continental Divide, on the west by the Wasatch Range and other divides, and by minor divides on the south and southwest. Within this drainage basin are portions of Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada and California.[21]

The following table shows the relationship of each of these states to the Basin.[22]

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[20] Ariz. Ex. 1000, p. 9.
[21] Ariz. Ex. 1000, p. 7.
[22] Ariz. Ex. 1000, p. 8.

State	State's Total Square Miles	Square Miles Within Drainage Basin	Per cent of State's Total Area in Drainage Basin	Per cent of Drainage Basin in State	State's Square Miles in Lower Basin Drainage Area	Per cent of State's Total Area in Lower Basin Drainage Area	Per cent of Lower Basin Drainage Area in State
Arizona	113,909	107,242	94.1	44.3	100,306	88.5	75.8
California	158,693	3,599	2.3	1.5	3,599	2.3	2.7
Nevada	110,540	13,922	12.6	5.8	13,922	12.6	10.5
New Mexico	121,666	20,538	16.9	8.5	10,892	9.0	8.2
Utah	84,916	40,824	48.1	16.9	3,659	4.3	2.8
Colorado	104,247	38,501	36.9	15.9	none	none	none
Wyoming	97,914	17,210	17.6	7.1	none	none	none

Major tributary systems exist in every Basin state except California. The most important of these systems are: the Green in Utah, Colorado and Wyoming; the Gunnison in Colorado; the Dolores in Colorado and Utah; the San Juan in Utah, Colorado, New Mexico and Arizona; Johnson and Kanab Creeks in Utah and Arizona; the Little Colorado in Arizona and New Mexico; the Bill Williams in Arizona; the Gila in Arizona and New Mexico; and the Virgin in Nevada, Utah and Arizona. Of these, Johnson and Kanab Creeks, the Little Colorado, the Bill Williams, the Gila and the Virgin are within the Lower Basin of the Colorado River.[23] The Little Colorado River, which drains 26,930 square miles, Kanab Creek, which drains 2,200 square miles, and the Virgin River, which drains 11,000 square miles, all flow into the main Colorado River above Hoover Dam.[24] Both the Bill Williams, which drains 5,400 square miles, and the Gila, which drains 57,800 square miles, flow into the River below Hoover Dam.[25]

A canyon section, approximately 1,000 miles long in southern Utah and northern Arizona permits a convenient division of the Basin into two parts, an Upper Basin and a Lower Basin. The Colorado River Compact defines the Upper Basin as the parts of the Basin "within and from which waters naturally drain into the Colorado River System above Lee Ferry," and the Lower Basin as that part of the Basin "within and from which waters naturally drain into the Colorado River System below Lee Ferry." Lee Ferry is defined as a point on the mainstream of the Colorado River one mile below the mouth of the Paria River.[26]

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[23]Ariz. Ex. 1000, p. 9.
[24]Ariz. Ex. 1000, p. 11.
[25]Ariz. Ex. 1000, pp. 11-12.
[26]Colorado River Compact, Art. II.

The Upper Basin is comprised largely of the Great Colorado Plateau, a region of high elevations, high mountains and narrow valleys.[27] The Lower Basin is comprised primarily of basin and range province, a region of lower elevations, containing a series of northwest trending mountain ranges, intervening basins and desert.[28] The natural geographic dividing line between the plateau province and the basin and range province is the Mogollon Rim, a series of escarpments running from the head of Lake Mead in an easterly direction to the Continental Divide.[29] Lee Ferry is located in an area where the great cliffs of the upper plateau begin to spread out and where erosion from the Paria River has tended to level the topography.[30] From Lee Ferry to Hoover Dam, the Lower Basin is characterized by canyons, cliffs and deep gorges cut by the River. From Hoover Dam south, elevations decline, and the River runs into desert areas. On the west side of the River, the terrain remains rough and a chain of rocky desert mountains extends from the Dam to the international border.[31] Intermittent flat areas occur, suitable for habitation and agriculture.[32] One of these is the Palo Verde Valley,[33] which is 30 miles long and 5 to 8 miles wide, and in which is located the defendant Palo Verde Irrigation District.[34] On the east side of the River lies the basin and range province, the basins or valleys of which are suitable for habitation and agriculture if water is available.

West of the River and north of the international boundary, in the State of California, lies the Salton Basin. The

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[27]Ariz. Ex. 45—The Fall-Davis Report, p. 2.
[28]Tr. 1218 (Turner).
[29]Tr. 1209-1210 (Turner).
[30]Tr. 563-564 (Akin).
[31]Tr. 626 (Akin).
[32]Tr. 634 (Akin).
[33]*Ibid.*
[34]Tr. 6483-6484 (Dowd)

drainage area of this great basin is 7,500 square miles, 1,000 of which are in Mexico.[35] While not part of the natural drainage area of the Colorado River, this basin is proximate thereto and parts of it are irrigated therefrom. The Salton Basin is a great saucer-like depression with elevations near sea level at its outer rim and dropping below sea level towards the center.[36] The low point of the Basin is 273½ feet below sea level,[37] and the lowest portion of the Basin, now filled with water, is called the Salton Sea.[38] In 1956 the water level in the Sea was approximately 234 feet below sea level.[39] The Salton Basin is separated on the east from the Colorado River and Basin by a chain of desert mountains and sand hills running to the international border. The southernmost range is called the Chocolate Mountains. Within the Salton Basin, the natural drainage is into the Salton Sea.[40]

In both the Lower and Upper Basins, because of the prevailing arid and semi-arid conditions, most kinds of agriculture can be successfully practiced only by means of irrigation.[41] However, there are significant geographical and climatic contrasts between the two Basins. Above the canyon section the Colorado River Basin lies at relatively high elevations in contrast to the comparatively low elevations below the canyon section. Thus, in the Upper Basin the growing season is relatively short, 90-120 days; in the Lower Basin the growing season is much longer, lasting in many places throughout the year.[42] The extreme aridity of climate and the long growing season in the Lower Basin

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[35]Tr. 6461, 6468, 7411 (Dowd).
[36]Tr. 627-628 (Akin).
[37]Tr. 6444, 6469, 7410 (Dowd).
[38]Tr. 628 (Akin).
[39]Calif. Ex. 246.
[40]Tr. 626-629 (Akin).
[41]Ariz. Ex. 1000, p. 15.
[42]*Ibid.*, Tr. 570 (Akin).

make the annual water consumption per irrigated acre relatively high. Throughout the Basin, considerable quantities of water are lost by evaporation and transpiration but these losses are greater in the Lower Basin than in the Upper.[43]

The geology of portions of the Lower Basin may be briefly described. Within the range and basin province are found groundwater basins, which are merely valleys between the ranges of mountains. Over a period of time these valleys, which are rock-walled and rock-bottomed, were filled with alluvial fill washed in from surrounding mountains and carried in by streams. The alluvium formed strata capable of holding water. Most of the basins were subject to downfaulting so that one end of the basin is lower than the other. Underground water therefore flows from the upper end to the lower end, and out of the basin, except in the case of closed basins in which the lower end is sealed off. Some water remains in the strata in the upper end of basins, held there between sand grains by capillary attraction, and water is added by recharge. The quality of the ground water in various basins differs materially.[44]

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[43]Ariz. Ex. 1000, p. 15.
[44]Tr. 1216-1222 (Turner).

IV. History of the Colorado River

In large portions of the Lower Basin true desert conditions prevail and, without the resources of the Colorado River System, human life could not be maintained in these areas. Certainly settled habitation would become impossible. There is archaeological evidence that some 2,000 years ago irrigation canals were built and maintained by the ancient Hohokam tribe in the Salt River Valley in the vicinity of present-day Phoenix, Arizona. Indians practiced irrigation in this vicinity before and during the period of exploration of this region of the southwest by white men.[45]

The region of California in which large scale use of the Colorado River for irrigation purposes was first made was the Imperial Valley, located in the Salton Basin, just west of the Colorado River at the international boundary, and outside the natural drainage basin of the River. In 1876 the Bergland Survey was made to ascertain the feasibility of irrigating the Valley by diversions from the Colorado River.[46] Water was first brought into the valley by the California Development Company [hereinafter C. D. C.], a New Jersey corporation formed in 1896 by C. R. Rockwood and his associates.[47] Because it was found that a canal would have to traverse Mexican territory in order to irrigate the Valley with River water, *La Sociedad de Irrigacion y Terrenos de la Baja California, S. A.* [hereinafter *La Sociedad*], a Mexican corporation, was formed to hold title to the land, canal and works in Mexico. The stock of *La Sociedad* was held by the directors of C. D. C.[48] 1901 saw

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[45]Tr. 448-449, 2845-2846 (Ewing) (Turner).

[46]Tr. 6516, 6529 (Dowd).

[47]Title Ins. and Trust Co. v. California Development Co., 171 Cal. 173, 179-180, 152 Pac. 542, 545 (1915).

[48]171 Cal., at 180-181, 152 Pac., at 546.

the first Colorado River water brought to the Imperial Valley.[49]

Today it is perfectly clear that the viability of numerous communities in the Lower Basin is conditioned on and limited by the availability of Colorado River System waters.

It is thus manifest that in the Lower Basin the water of the Colorado River System is "more than an amenity"; it is more than a "treasure."[50] It is indispensable to life; no substitute for it has yet been invented or envisaged. Even under ordinary circumstances it is natural that grave conflicts should develop over the rationing of such a precious supply. But the circumstances of the past quarter century have not been ordinary. They were such as to intensify the competition for water by every class of demand. The southwest has witnessed an explosive growth of population and industry, accompanied by a sharp rise in every index of prosperity as the accompanying tables indicate.

POPULATION GROWTH[51]

State	1945	1955	Growth	Per Cent Gain
Arizona	594,000	980,000	386,000	65.0%
California	9,344,000	13,032,000	3,688,000	39.5%
Nevada	149,000	225,000	76,000	51.0%

GROWTH OF MANUFACTURING EMPLOYMENT[52]

State	1945	1955	Growth	Per Cent Gain
Arizona	11,200	32,700	22,500	192.0%
California	636,000	1,113,700	477,700	75.1%
Nevada	2,700	5,900	3,200	118.5%

GROWTH OF NON-FERROUS METALS OUTPUT[53]

State	1945	1955	Growth	Per Cent Gain
Arizona	$ 95,963,006	$ 351,631,254	$ 255,668,248	266.4%
California	11,152,081	13,882,100	2,730,019	24.5%
Nevada	24,186,294	62,436,160	38,249,866	158.1%

[49]Tr. 7381 (Dowd).
[50]See New Jersey v. New York, 283 U. S. 336, 342 (1931).
[51]Source: Ariz. Ex. 134; Calif. Ex. 528.
[52]Source: Ariz. Ex. 134; Calif. Ex. 528.
[53]Source: Ariz. Ex. 134; Calif. Ex. 528.

GROWTH OF PERSONAL INCOME[54]

State	1945	1955	Growth	Per Cent Gain
Arizona	$ 654,000,000	$ 1,468,000,000	$ 814,000,000	124.5%
California	15,194,000,000	27,026,000,000	11,832,000,000	77.8%
Nevada	233,000,000	507,000,000	274,000,000	117.6%

GROWTH OF BANK DEPOSITS[55]

State	1945	1955	Growth	Per Cent Gain
Arizona	$ 372,721,000	$ 762,799,000	$ 390,078,000	104.7%
California	13,255,770,000	19,532,281,000	6,276,511,000	47.3%
Nevada	156,368,000	290,622,000	134,254,000	85.9%

It is universally recognized that this rapid development is pressing hard against the ceilings imposed by the availability of water from the Colorado River System.

This circumstance united with another to accentuate the intensity of the competition for this life-giving water. Since 1930 the Colorado River has been in drought. Whether this drought cycle has come to an end has been a subject of some debate. It is noteworthy that since 1922 estimates of the Colorado River's capacity have steadily been revised downward.[56]

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[54]Source: Ariz. Ex. 134; Calif. Ex. 528.

[55]Source: Ariz. Ex. 134; Calif. Ex. 528.

[56]*Compare* Herbert Hoover's estimate that it would take 75 years before the Compact apportionment of 16,000,000 acre-feet would be fully appropriated (Special Master's Ex. No. 4, The Hoover Dam Documents, appendix 205, p. A32) *with* the following: (1) the Compact negotiators assumed a System supply of approximately 21 million acre-feet (*Id.*, at p. A36); (2) in Arizona v. California, 283 U. S. 423 (1931), the Arizona complaint indicated a total River supply of 18 million acre-feet; (3) in Arizona v. California, 298 U. S. 558 (1936), Arizona's complaint alleged an average annual undepleted flow at Imperial Dam of 16,840,000 acre-feet and further alleged that at that time 9,720,000 acre-feet were still unappropriated; and (4) in the present litigation, both Arizona and California have agreed that the average annual undepleted or virgin flow of the Colorado River at Lee Ferry is approximately 15,200,000 acre-feet. (Ariz. Ex. 366; Calif. Proposed Finding 5C:102)

A shrinking supply accompanied by an increasing demand have thus conspired to generate a very bitter law suit indeed.

A few brief remarks should now be made about the behavior of the River itself. It has not been well behaved. Its flows have been uneven and unpredictable, varying in historic times from a recorded flow measured at Lee Ferry of 4,396,400 acre-feet in 1934 to 22,003,000 acre-feet in 1907.[57] Before it was harnessed the River was given to violent floods causing great damage. It did not always stay on course.[58] Approximately 500 years ago most of the Salton Basin was filled with water from the Colorado River in one of its many breaks to the west. The body of water so formed was known as Lake Cahuilla. The River then broke east and emptied into the Gulf of California. Thus deprived of its source of replenishment Lake Cahuilla dried up, leaving great areas of silt deposit. At its largest the lake was 30 to 35 miles wide, 110 miles long, 300 feet deep and covered 1,400,000 acres.[59]

In 1905, following floods on the Colorado and Gila Rivers, the River again abandoned its bed and course to the Gulf of California and made its way swiftly over a steeper grade to the Salton Sink in Southern California threatening the whole Imperial Valley with destruction.[60] This disaster followed certain changes made in the diversion points of the C. D. C.[61] The break was closed temporarily in November, 1906, but in December the River broke loose again, causing additional flooding of the Valley.[62] Serious

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[57]Ariz. Exs. 77B, table A; 197, p. 56; Calif. Ex. 5582A. See also p. 117, *infra*.

[58]Tr. 8685-8689 (Seeley); Ariz. Ex. 45, pp. 8-9.

[59]Tr. 6449-6501 (Dowd).

[60]Ariz. Ex. 45, p. 72.

[61]*Ibid.*; Title Ins. and Trust Co. v. California Development Co., 171 Cal. 173, 181-82, 152 Pac. 542, 546 (1915).

[62]Tr. 7396-7397 (Dowd); Ariz. Ex. 45, p. 73.

damage to the Mexican canal and works was sustained. The western portion of the Imperial Valley was threatened with destruction. Through funds, equipment, labor and materials supplied by the Southern Pacific Railroad Company, whose tracks were in danger, the break was closed and the flow of the River re-diverted to the Gulf of California.[63] Remaining behind, in the Salton Basin, was the Salton Sea.

The C. D. C., in addition to becoming heavily indebted to the Southern Pacific as a result of the 1906 floods, was also obligated to the Title Insurance and Trust Company for money loaned in 1900 to finance construction of irrigation works and secured by a deed of trust on all C. D. C. property.[64] Moreover, the New Liverpool Salt Company, which in the late 1890's had established a salt works on the north end of the Salton Sink,[65] recovered a substantial judgment for the negligent destruction of its works.[66] Subsequently, the Mexican property of C. D. C. was sold at an execution sale pursuant to a judgment obtained by the Southern Pacific. The purchaser at the execution sale was *La Compania de Terrenos y Aquas de la Baja California, S. A.*, a Mexican corporation formed by the Railroad specifically for this purpose.[67] Thereafter, when the Title Insurance and Trust Company sought to foreclose its lien, the assets of C. D. C. were sold by the receiver, W. H. Holabird,[68] to the Southern Pacific and the claims of prior creditors were paid off.[69]

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[63]Tr. 7396-7404 (Dowd).

[64]Title Ins. and Trust Co. v. California Development Co., 171 Cal. 173, 181, 152 Pac. 542, 546 (1915).

[65]Tr. 6506 (Dowd).

[66]Title Ins. and Trust Co. v. California Development Co., 171 Cal. 173, 182, 152 Pac. 542, 546 (1915).

[67]171 Cal. at 183, 152 Pac. at 546.

[68]Tr. 7418.

[69]Calif. Ex. 149.

In 1911 the Imperial Irrigation District was formed to acquire the assets formerly held by C. D. C. and in 1916 all such assets were purchased from the Southern Pacific, except Mexican agricultural lands.[70]

The River broke westward again in 1909. Over a period of years thereafter, a system of levees was erected within Mexico which was paid for by landowners in the Imperial Valley through the Imperial Irrigation District, and by the United States. Approximately six million dollars were spent.[71] A highly qualified witness expressed the opinion that if these efforts to control the River had not been made it would have broken permanently into the Salton Basin.[72]

In another respect was the River ill behaved. It carried vast quantities of silt, estimated as being proportionately 17 times that of the Mississippi River.[73] The silt was brought down from the highlands and deposited on the irrigated lands below, clogging canals and works.

Considering the vast drainage area, the supply of water brought down into the Lower Basin is less than might be expected. The loss of water is explained by the very high rate of evaporation and by heavy channel losses on both the mainstream and tributaries as these waters traverse the hot desert lands of the Lower Basin.[74]

The erratic flows of the River, its propensity to violent and destructive floods, its high silt content, the desire for a gravity canal located wholly on American soil to serve the Imperial Valley, and other factors brought about a realization that a reservoir with large storage capacity on the mainstream of the Colorado River would have sub-

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[70]Tr. 6998, 7422 (Dowd).
[71]Tr. 7003-7007 (Dowd).
[72]Tr. 7009, 7017 (Dowd).
[73]Tr. 6495 (Dowd).
[74]See Ariz. Ex. 1000, p. 15.

stantial beneficial effects.[75] Congress thereupon passed the Kinkaid Act of May 18, 1920,[76] which directed the Secretary of the Interior to make a study of certain of the River's problems. The Fall-Davis Report,[77] submitted to Congress in February 1922, is a result of that legislation. Some of its relevant portions are recited in the footnote.[78]

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[75]See Department of the Interior, Report of The All-American Canal Board 22-29 (July 22, 1919), Calif. Ex. 185.

[76]41 Stat. 600.

[77]Sen. Doc. 142, 67th Cong., 2d Sess. (1922), Ariz. Ex. 45.

[78]The Report opens with the following statement:

> "The control of the floods and development of the resources of the Colorado River are peculiarly national problems for several good reasons:
>
> 1. The Colorado River is international.
> 2. The stream and many of its tributaries are interstate.
> 3. It is a navigable river.
> 4. Its waters may be made to serve large areas of public lands naturally desert in character.
> 5. Its problems are of such magnitude as to be beyond the reach of other than national solution." Ariz. Ex. 45 p. 1.

The recommendations of the Report were as follows:

> "1. It is recommended that through suitable legislation the United States undertake the construction with Government funds of a high-line canal from Laguna dam to the Imperial Valley, to be reimbursed by the lands benefited.
>
> 2. It is recommended that the public lands that can be reclaimed by such works be reserved for settlement by ex-service men under conditions securing actual settlement and cultivation.
>
> 3. It is recommended that through suitable legislation the United States undertake the construction with Government funds of a reservoir at or near Boulder Canyon on the lower Colorado River to be reimbursed by the revenues from leasing the power privileges incident thereto.
>
> 4. It is recommended that any State interested in this development shall have the right at its election to contribute an equitable part of the cost of the construction of the reservoir and receive for its contribution a proportionate share of power at cost to be determined by the Secretary of the Interior.
>
> 5. It is recommended that the Secretary of the Interior be empowered after full hearing of all concerned to allot the vari-

Despite general recognition of the need for a storage reservoir to regulate and control the River there was a political obstacle in the path of such a project. The Upper Basin states, Colorado, New Mexico, Utah and Wyoming, were apprehensive that construction of storage facilities on the mainstream would permit a rapid expansion of irrigation and other uses in the Lower Basin and form the basis for claims of appropriative rights in the water, which would preclude its availability for the more slowly developing needs of the Upper Basin.[79] The doctrine of prior appropriation governed water rights at the time, as it does now, in all Basin states except California, and there it was, and is, significant.[80]

To relieve the apprehension of the Upper Basin, the affected states requested and the Congress passed the Act

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ous applicants their due proportion of the power privileges and to allocate the cost and benefits of a high-line canal.

6. It is recommended that every development hereafter authorized to be undertaken on the Colorado River by Federal Government or otherwise be required in both construction and operation to give priority of right and use:

First. To river regulation and flood control.

Second. To use of storage water for irrigation.

Third. To development of power."

Ariz. Ex. 45, p. 21.

[79]Special Master's Ex. No. 4, The Hoover Dam Documents, pp. A65, A80, A123.

[80]See Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Jones v. Adams, 19 Nev. 78, 6 Pac. 442 (1885); Albuquerque Land and Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 Pac. 357 (1900), *aff'd sub nom.* Guiterrez v. Albuquerque Land and Irrigation Co., 188 U. S. 545 (1903); Stowell v. Johnson, 7 Utah 215, 26 Pac. 290 (1891); Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845 (1896). See also United States v. Gerlach Livestock Co., 339 U. S. 725, 746 (1950); California Oregon P. Co. v. Beaver Portland Cement Co., 295 U. S. 142, 154-157 (1935); Wyoming v. Colorado, 259 U. S. 419, 459 (1922). *Compare* Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113 (1855) *with* Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884). See also Calif. Const. art. XIV, § 3.

of August 19, 1921, whereby consent was given to the Basin states to negotiate and enter into a compact.[81] The text of that act appears in the footnote.[82] Its purpose was:

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[81] 42 Stat. 171.

[82] "[Sec. 1. Preamble—Apportionment of waters—Federal representative to be appointed—Expenses—Approval.]—Whereas the Colorado River and its several tributaries rise within and flow through or form the boundaries between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; and

"Whereas the territory included within the drainage area of the said stream and its tributaries is largely arid and in small part irrigated, and the present and future development necessities and general welfare of each of said States and of the United States require the further use of the waters of said streams for irrigation and other beneficial purposes, and that future litigation and conflict respecting the use and distribution of said waters should be avoided and settled by compact between said States; and

"Whereas the said States, by appropriate legislation, have authorized the governors thereof to appoint commissioners to represent said States for the purpose of entering into a compact or agreement between said States respecting the future utilization and disposition of the waters of the Colorado River and of the streams tributary thereto; and

"Whereas the governors of said several States have named and appointed their respective commissioners for the purposes aforesaid, and have presented their resolution to the President of the United States requesting the appointment of a representative on behalf of the United States to participate in said negotiations and to represent the interests of the United States: Now, therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into a compact or agreement not later than January 1, 1923, providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto, upon condition that a suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations, as the representative of and for the protection of the interests of the United States, and shall make report to Congress of the proceedings and of any compact or agreement entered into, and the sum of $10,000, or so much thereof as may be necessary, is hereby authorized to be appropriated to pay the salary and expenses of the representative of the United States appointed hereunder: *Provided,* That any such compact or agreement shall not be binding or obliga-

> "to permit the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to enter into an agreement for the equitable division and apportionment of the water supply of the Colorado River. The necessity for this grows out of the possibility of conflict in the diversion and use of the waters of the Colorado River in the various States through which the river and its tributaries flow. Without an agreement between the States interested respecting the division and apportionment of the waters for irrigation purposes, conflicts as to the amount of water which may be diverted on the various portions of the river and its tributaries, without interference with diversion and use elsewhere, are certain to occur and to lead to expensive litigation, in the meanwhile holding up and preventing development. Most irrigation projects on the Colorado River and its tributaries involve large expenditures, and complete or even considerably further development cannot be had or secured without an agreement under which development can be carried on without conflict and litigation."[83]

Commissioners were duly appointed and on November 24, 1922, after extensive meetings, agreement was reached in Santa Fe, New Mexico, among the Compact commissioners representing the seven states of the Colorado River Basin. The representative of the United States, Mr. Herbert Hoover, signed the agreement to indicate his approval. The agreement so reached is the Colorado River Compact. It was promptly ratified by the legislatures of all the signatory states except Arizona.[84] In 1925 these six states

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tory upon any of the parties thereto unless and until the same shall have been approved by the legislature of each of said States and by the Congress of the United States." (42 Stat. 171)

[83]H. R. Rep. No. 191, 67th Cong., 1st Sess. (1921).

[84]Special Master's Ex. No. 4, The Hoover Dam Documents, appendices 215-220, Ariz. Exs. 16, 18, 20, 22, 24.

waived the Compact requirement for seven-state approval and ratified the same to become effective upon approval by at least six of the states and consent of the United States.[85] Utah's 1925 act of ratification was repealed in 1927.[86]

By Section 13 of the Act of December 21, 1928,[87] commonly known as the Boulder Canyon Project Act, Congress gave its consent to the Colorado River Compact, waiving the Compact's requirement of seven-state approval, and provided that "this approval shall become effective when the State of California and at least five of the other states mentioned, shall have approved or may hereafter approve said Compact as aforesaid and shall consent to such waiver, as herein provided." Section 4(a) of the Act provides that the Act should not take effect and no authority should be exercised thereunder unless and until (1) all of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming had ratified the Compact, or (2) if all of said states failed to ratify the Compact within six months from the passage of the Act, until the same should be ratified by six of such states, including California, and California should agree to certain limitations upon the aggregate annual consumptive use (diversions less returns to the River) of water of and from the Colorado River for use in the State of California.

Ratification by Arizona did not occur within the six-month period specified in Section 4(a) of the Project Act. By an act of March 4, 1929,[88] the State of California again waived the Compact's requirement of seven-state approval and provided that the Compact should become binding and

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[85]Special Master's Ex. No. 4, The Hoover Dam Documents, appendices 221-226, Ariz. Exs. 17, 19, 21 and 25.

[86]Act of January 19, 1927 (Utah Laws 1927, p. 1).

[87]45 Stat. 1057.

[88]Special Master's Ex. No. 4, The Hoover Dam Documents, appendix 227, Ariz. Ex. 13.

obligatory upon the State of California when at least six of the signatory states should likewise have waived the requirement of seven-state approval and ratified the same without such approval and the United States should have consented thereto. By a separate act of the same date California agreed to the limitation upon aggregate annual consumptive use of Colorado River water for use in California required by Section 4(a) of the Project Act.[89]

By act of March 6, 1929, the State of Utah again waived the Compact's requirement of seven-state approval and agreed that the Compact should become binding upon Utah upon approval by at least six of the states and consent by the United States.[90]

Six states, including California, having ratified the Compact and having waived seven-state ratification, the President of the United States on June 25, 1929, issued Public Proclamation No. 1882,[91] the text of which is as follows:

> "Pursuant to the provisions of section 4(a) of the Boulder Canyon project act approved December 21, 1928 (45 Stat. 1057), it is hereby declared by public proclamation:
>
> "(a) That the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming have not ratified the Colorado River Compact mentioned in section 13(a) of said act of December 21, 1928, within six months from the date of the passage and approval of said act.
>
> "(b) That the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming have ratified said compact and have consented to waive

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[89]Ariz. Ex. 14. The complete text of the California Limitation Act appears in Appendix 4.

[90]Ariz. Ex. 23.

[91]46 Stat. 3000, Ariz. Ex. 3.

the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and that each of the States last named has approved said compact without condition, except that of six-State approval as prescribed in Section 13(a) of said act of December 21, 1928.

"(c) That the State of California has in all things met the requirements set out in the first paragraph of section 4(a) of said act of December 21, 1928, necessary to render said act effective on six-State approval of said compact.

"(d) All prescribed conditions having been fulfilled, the said Boulder Canyon project act approved December 21, 1928, is hereby declared to be effective this date."

Almost 15 years later the State of Arizona enacted a statute which purported unconditionally to approve, ratify, and confirm the Colorado River Compact.[92]

Between 1922 and 1927 three attempts were made to secure legislation authorizing the construction of a dam in the canyon section of the Colorado River and a canal (the All-American Canal) running wholly within the United States from the River to the Imperial Valley. These attempts were reflected in three Swing-Johnson bills.[93] The fourth attempt was successful[94] and became the Boulder Canyon Project Act of December 21, 1928.[95] Construction of the dam authorized by the Project Act was commenced in 1930 and completed in 1935. Originally named Boulder Dam, it is now known as Hoover Dam.

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[92]Special Master's Ex. No. 4, The Hoover Dam Documents, appendix 230, Ariz. Ex. 10.

[93]H. R. 11449, 67th Cong., 2d Sess. (1922); H. R. 2903 and S. 727, 68th Cong., 1st Sess. (1923); H. R. 6251, 69th Cong., 1st Sess. (1925); H. R. 9826 and S. 3331, 69th Cong., 1st Sess. (1926).

[94]H. R. 5773 and S. 728, 70th Cong., 1st Sess. (1927).

[95]45 Stat. 1057.

Between 1930 and 1934 the Secretary of the Interior, on behalf of the United States, contracted with the defendants Palo Verde Irrigation District,[96] Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California and the City of San Diego for the delivery of the water to be stored in Lake Mead, subject to the availability thereof for use in California under the Compact and Project Act.[97]

In response to a request from the Secretary of the Interior,[98] these California agencies entered into an agreement dated August 18, 1931, commonly known as the Seven-party Agreement which fixes the relative priorities, as among the signatories, to California's share of water from the mainstream of the Colorado River.[99] The terms of this agreement were recommended by the Division of Water Resources of the State of California, and the Secretary of the Interior incorporated the intrastate priorities stated therein in general regulations promulgated on September 28, 1931, relating to contracts for the storage and delivery of mainstream water impounded by Hoover Dam.[1] There is no contract between the United States and the State of California itself.

By contracts with Nevada dated March 30, 1942, and January 3, 1944, the United States agreed to deliver certain quantities of water to Nevada from storage in Lake Mead, subject to the availability thereof for use in Nevada under the Compact and Project Act.[2]

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[96]The text of this contract, which is representative of the California contracts, appears in Appendix 8.

[97]Ariz. Exs. 33, 34, 36-40.

[98]Calif. Ex. 1810.

[99]Ariz. Ex. 27. The Seven-party Agreement is reprinted as part of the Palo Verde Water Delivery Contract, Appendix 8.

[1]Calif. Ex. 1811.

[2]Special Master's Ex. No. 4, The Hoover Dam Documents, appendices 1018-1019, Ariz. Exs. 43, 44. The text of these contracts appears in Appendices 6 and 7.

By contract dated February 9, 1944, and effective February 24, 1944, the United States agreed to deliver certain quantities of water from storage in Lake Mead for use in Arizona, subject to the availability thereof for use in Arizona under the Compact and Project Act.[3]

Utah and New Mexico have no contracts with the United States for the delivery of Lake Mead water and, indeed, such water cannot be feasibly utilized in either of those states.

The prospect of a treaty between the United States and Mexico with respect to Colorado River water, which was envisioned in the Colorado River Compact, became a reality on February 3, 1944, when such a treaty was executed.[4] By its terms, the treaty became effective on November 8, 1945, after the Senate ratified it with eleven reservations. It guarantees delivery to Mexico "from any and all sources" of one and one-half million acre-feet of water per annum in the limitrophe section of the Colorado River at the United States-Mexican boundary. Under certain circumstances, these deliveries may be increased or diminished.[5]

In 1948 the Upper Colorado River Basin Compact among Arizona, Colorado, New Mexico, Utah and Wyoming was signed by representatives of those states, and after ratification by the respective legislatures, was approved by Congress in 1949.[6] This compact provided for the division of the waters of the Colorado River System in the Upper Basin among the Upper Basin States. No such compact has ever been made apportioning water of the Lower Basin.

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[3]Special Master's Ex. No. 4, The Hoover Dam Documents, appendix 1016, Ariz. Ex. 32. The text of this contract appears in Appendix 5.

[4]59 Stat. 1219 (1945), Ariz. Ex. 4.

[5]Ariz. Ex. 4, art. 10.

[6]Special Master's Ex. No. 4, The Hoover Dam Documents, appendix 231, Ariz. Ex. 2.

Following the execution of the contract between the United States and the State of Arizona, and Arizona's "ratification" of the Colorado River Compact,[7] the Bureau of Reclamation in cooperation with Arizona began investigation of a project, identified as the Central Arizona Project, designed to bring supplemental water from the mainstream of the Colorado River to a portion of the central Arizona area. The Commissioner of Reclamation submitted his report to the Secretary of the Interior on March 20, 1948, and on September 16, 1948, the Secretary of the Interior transmitted the report to Congress for its information and action.[8] The following is a quotation from the Secretary's letter of transmittal.

> "The project has engineering feasibility and the proposed reimbursable costs probably can be repaid in 78 years under the plan outlined. . . .
>
> "The showing in the report of the availability of a substantial quantity of Colorado River water for diversion to Central Arizona for irrigation and other purposes is based upon the assumption that the claims of the State of Arizona to this water are valid. It should be noted, however, as the regional director and the Commissioner of Reclamation pointed out, that the State of California has challenged the validity of Arizona's claims. If the contentions of the State of Arizona are correct, there is an ample water supply for this project. If the contentions of California are correct, there will be no dependable water supply available from the Colorado River for this diversion. While the necessary water supply is physically available at the present time in the Colorado River, the importance of the questions raised by the divergent views and claims of the States is apparent. The Bureau of Reclamation and the De-

[7]Ariz. Ex. 10.

[8]H. R. Doc. No. 136, 81st Cong., 1st Sess. (1949), Ariz. Exs. 65, 65A, 70.

partment of the Interior cannot authoritatively resolve this conflict. It can be resolved only by agreement among the States, by court action, or by an agency having jurisdiction.[9]

During the 79th, 80th, 81st and 82nd Congresses, Arizona sought congressional authorization for the construction of the Central Arizona Project by the Bureau of Reclamation. While some of her proposals passed the Senate, none passed the House.[10] On April 18, 1951, the Committee on Interior and Insular Affairs of the House of Representatives adopted a resolution that consideration of bills relating to the Central Arizona Project "be postponed until such time as use of the water in the lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the lower Colorado River Basin."[11] About a year later, this action was instituted by Arizona.

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[9]Ariz. Ex. 70, at pp. 140, 141.

[10]The following are bills which failed of enactment by the Congress. H. R. 4534, 79th Cong., 1st Sess. (1945); S. 1175, 80th Cong., 1st Sess. (1947); S. 75, 81st Cong., 2nd Sess. (1950); S. 75, 82nd Cong., 1st Sess. (1951); H. R. 1500, H. R. 1501, 82nd Cong., 1st Sess. (1951).

[11]*Hearings on H. R. 1500 and H. R. 1501 Before the Committee on Interior and Insular Affairs, House of Representatives,* 82nd Cong., 1st Sess., pt. 2, pp. 739, 740-756 (1951).

V. Major Works in the Lower Basin

Helpful to an understanding of the problems raised by this controversy is an awareness of the existence and function of the various works affecting the flow of water in the Lower Basin of the Colorado River System.

A. Mainstream Works

1. *Hoover Dam.* This is the principal structure in the Lower Basin, impounding the waters of the Colorado River to form Lake Mead. The reservoir has an active or usable storage capacity of about 27,200,000 acre-feet, a maximum length of 115 miles, a maximum width of 8 miles, and, at elevation 1229, a maximum surface area of 162,700 acres. Hoover Dam is situated in Black Canyon on the main channel of the Colorado River, 330 miles above the Mexican border. The middle of the channel at the site of the dam is the common boundary between the States of Arizona and Nevada.

It is the world's highest dam: a concrete arch, gravity type structure having a height of 726.4 feet and a hydraulic height of 575.8 feet. Two side-channel spillways, with a capacity of 400,000 cubic feet per second [hereinafter "c.f.s"],[12] have been constructed in connection with the dam. The outlet works have a capacity of 91,000 c.f.s. and the power plant discharge (17 turbines) is 30,560 c.f.s. The rating of the generators presently installed, including two small station-service units, is 1,249,800 kw.; ultimately the generator rating installation will be 1,354,300 kw.

Construction of Hoover Dam was initiated on September 17, 1930, and water was first impounded on February 1,

[12]One cubic foot of water is approximately 7.48 gallons. One c.f.s. flow is approximately 1.983 acre-feet per day or 646,317 gallons per day. Ariz. Ex. 1000, p. 17.

1935. Power was first generated on September 11, 1936. Title to the dam is in the United States and it is operated and maintained by the Department of the Interior.[13]

2. *Davis Dam.* This dam implements regulation of releases at Hoover Dam into the seasonal pattern required by downstream irrigation and domestic users. It is located 67 miles below Hoover Dam on the main channel of the Colorado River, directly west of Kingman, Arizona. The middle of the channel at the dam site constitutes the common boundary between Arizona and Nevada. Its reservoir, Lake Mohave, is 67 miles in length, has a total usable capacity of 1,820,000 acre-feet, and at elevation 647 has a surface area of 28,500 acres.

Davis Dam, with a height of 200 feet and a hydraulic height of 138 feet, is an earth and rock fill structure and has a bypass channel on the Arizona side for the spillway, outlets and power plant. The spillway capacity, at elevation 647, is 192,000 c.f.s. and the outlet capacity is 60,000 c.f.s. The five unit generating facilities have a total installed capacity of 225,000 kw.

Construction of the dam was initiated on July 29, 1942, water was first impounded on January 17, 1950, and power was first generated on January 12, 1951. Title to Davis Dam is held by the United States and it is operated and maintained by the Department of the Interior.[14]

3. *Parker Dam.* This structure, located on the main channel of the Colorado River below the mouth of the Bill Williams River, 17 miles above Parker, Arizona, and 155 miles below Hoover Dam, is the diversion point for the Colorado River Aqueduct of the Metropolitan Water District of Southern California. It also regulates the flow

[13]Ariz. Ex. 1000, pp. 18-19.
[14]Ariz. Ex. 1000, pp. 19-20.

of the Bill Williams in excess of local uses in Arizona. The middle of the channel at its site is the common boundary between Arizona and California. Its reservoir, Lake Havasu, has a surface area of 25,100 acres at elevation 450 and its original unsilted storage capacity was 717,000 acre-feet. Lake Havasu is the source of water pumped to the Southern California coastal plain for municipal, industrial and, in limited quantities, for agricultural purposes.

Parker Dam, with a structural height of 320 feet and a hydraulic height of 75 feet, is a concrete variable-radius arch structure with power plant intakes and penstocks through the abutments on the California end. The overflow spillway is controlled by five regulating gates and a power plant with four 30,000 kw. units has been constructed.

Construction of Parker Dam was initiated on October 1, 1934, water was first impounded on June 29, 1938, and the first power was generated on December 13, 1942. The Metropolitan Water District paid substantially all of the cost of Parker Dam and rights of way therefor, and one half the cost of Parker Power Plant. The aggregate cost to the District for these purposes was $14,883,732.[15] Title to the dam is held by the United States and operations are conducted by the Department of the Interior. The Metropolitan Water District receives approximately fifty per cent of the power generated, for use on the Colorado River Aqueduct.[16]

4. *Headgate Rock Dam.* Located 170 miles below Hoover Dam and 15 miles below Parker Dam on the main channel of the Colorado River, this dam, with a structural height of 115 feet, provides no appreciable storage capacity

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[15]Calif. Ex. 477, at p. 4; Calif. Ex. 483; Tr. 9669 (McKinlay).
[16]Ariz. Ex. 1000, pp. 20-21.

but is the diversion point for the Colorado River Indian Reservation in Arizona.

It is owned by the United States and is operated by the Department of the Interior, Bureau of Indian Affairs.[17]

5. *Palo Verde Weir.* This diversion point for the Palo Verde Irrigation District is a temporary rock-filled structure located on the Colorado River 212 miles below Hoover Dam and 42 miles below Headgate Rock Dam. It was constructed at the expense of the United States in 1944 and 1945 and provides no substantial storage capacity.

In authorizing the erection of a permanent dam on or near this site by Act of August 31, 1954,[18] the Congress required the Palo Verde Irrigation District to contribute a share of the cost of construction.[19]

6. *Imperial Dam.* Situated on the main channel of the Colorado River 303 miles below Hoover Dam, about 90 miles below Palo Verde Weir and 18 miles above Yuma, Arizona, this structure is the diversion point for the All-American Canal, the Yuma Project and the Gila Project in Arizona. The middle of the channel at the site of the dam constitutes the common boundary between Arizona and California.

Imperial Dam is a slab and buttress type concrete structure with a structural height of 31 feet at the overflow sections and a hydraulic height of 23 feet. At elevation 191 the overflow spillway has a capacity of 180,000 c.f.s. Extensive desilting works have been provided. The dam provides no appreciable storage capacity.

It was dedicated in October, 1938, but active operations were not instituted for some time thereafter. Title to Im-

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[17]Ariz. Ex. 1000, p. 21.
[18]68 Stat. 1045.
[19]Ariz. Ex. 1000, pp. 21-22.

perial Dam is in the United States and it is operated and maintained by the Department of the Interior.[20]

7. *Laguna Dam.* This structure is located on the main channel of the Colorado River 308 miles below Hoover Dam, 5 miles below Imperial Dam and approximately 13 miles above Yuma, Arizona. It was formerly used as the diversion point for the Yuma and Gila Reclamation Projects. The middle of the channel at its site is the common boundary between Arizona and California.

Laguna Dam is a rock-filled weir with a concrete surface. Its structural height is 43 feet and its hydraulic height is 10 feet. It provides no appreciable storage capacity.

Construction was initiated on July 19, 1905, and water was first diverted on March 14, 1910. Although the major portion of the construction cost of $1,600,000 has been repaid to the United States by the defendants Coachella Valley County Water District, Imperial Irrigation District and the City of San Diego, title is in the United States and it is operated and maintained by the Department of the Interior.[21]

8. *Morelos Dam.* Located just below Pilot Knob, between Arizona and Mexico, in the limitrophe section of the River, this structure was built under the Mexican water treaty and acts as a diversion point for Mexican works.[22] It provides no appreciable storage capacity.

9. *All-American Canal System.* The canal has its headworks at the California end of Imperial Dam.[23] These headworks discharge Colorado River water into a concrete

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[20]Tr. 2361-2365, 7767-7768 (Steenbergen) (Dowd); Ariz. Ex. 1000, p. 22.

[21]Ariz. Ex. 1000, pp. 22-23.

[22]Tr. 590, 7852-7853 (Akin) (Dowd).

[23]Tr. 584 (Akin).

lined channel approximately 360 feet in width which is divided into four channels directing water into desilting basins.[24] The initial capacity of the All-American Canal is 15,155 c.f.s (approximately 30,062 acre-feet per day) and it has a width of 232 feet at normal water surface, a bottom width of 160 feet and a depth of 21 feet.[25]

Its initial capacity remains unchanged for a distance of 14.7 miles to Siphon Drop at which point 2,000 c.f.s. can be delivered to the Yuma Project through the Siphon Drop Power Plant. From that point to Pilot Knob, approximately 6 miles distant, the capacity of the All-American Canal is 13,155 c.f.s. At Pilot Knob, the water may be discharged into the Colorado River through the Pilot Knob Wasteway. Pursuant to section 7 of the Boulder Canyon Project Act and Imperial's 1932 contract, Imperial is given the right to develop the hydroelectric power on the canal below Syphon Drop, including Pilot Knob. Pursuant to the 1952 supplement to this contract, Mexican Treaty water and other water which would otherwise pass over Imperial Dam may be diverted by the District through the All-American Canal to Pilot Knob, and there dropped through Pilot Knob Power Plant back to the Colorado River in the United States. From Pilot Knob, for a distance of 15.5 miles to Drop No. 1, the takeout point of the Coachella Canal, the All-American Canal has a capacity of 10,155 c.f.s. Continuing west, parallel to the Mexican border, for approximately 44 miles the canal gradually reduces in capacity from 7,755 c.f.s. to 2,655 c.f.s.[26]

Construction was initiated by the United States in August, 1934, and the first significant use of the canal was made in 1940.[27] Costs of construction have been allocated

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[24]Tr. 7771 (Dowd).
[25]Calif. Ex. 214.
[26]*Ibid.*
[27]Tr. 7767, 7774 (Dowd).

among the several irrigation districts and projects which utilize the facilities.[28] The canal is operated largely by the Imperial Irrigation District. However, the Coachella Valley County Water District operates the Coachella Canal from 6A Check to its terminal point, and the United States operates Imperial Dam, the California Sluiceway, and the Yuma Project turnouts from the canal.[29]

10. *Coachella Canal.* After turning out from the All-American Canal at Drop No. 1, the Coachella Canal proceeds in a northwesterly direction. At the turnout, the canal, which at this point is unlined, has an initial capacity of 2,500 c.f.s.[30] Of this capacity, 1,500 c.f.s. are for Coachella, and 1,000 c.f.s. are for Imperial for irrigation of lands therefrom from Drop No. 1 to 6A Check, a distance of 49 miles. The initial capacity at 6A Check is 1,500 c.f.s.[31] Further on, in the Coachella Valley County Water District, the canal is lined with concrete and has a capacity of 1,300 c.f.s. which is gradually reduced to 425 c.f.s. at its terminal point.[32] The total length of the Coachella Canal is 123 miles.[33] It is operated and maintained from Drop No. 1 to 6A Check by Imperial, with Coachella assuming and paying a proportionate part of the expense thereof. From 6A Check to its terminal point, the Coachella Canal is operated and maintained exclusively by Coachella at its sole expense. Construction on the Coachella Canal was initiated in 1938 and it was completed in 1948.[34]

11. *Colorado River Aqueduct.* This aqueduct diverts water through headworks situated at Parker Dam.[35] It is

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[28]Calif. Ex. 233.
[29]Tr. 7841-7846, 8033-8034 (Dowd).
[30]Tr. 8421 (Weeks); Calif. Ex. 214.
[31]Tr. 7784, 7792-7793, 8034 (Dowd); Calif. Ex. 214.
[32]Tr. 8443 (Weeks).
[33]Tr. 5189 (Meeker).
[34]Tr. 8033-8034 (Dowd); Tr. 8422 (Weeks).
[35]Tr. 632-633 (Akin).

242 miles long, with a designed carrying capacity of 1,605 c.f.s. and an estimated actual carrying capacity of 1,800 c.f.s.[36] It carries Colorado River water to the Metropolitan Water District of Southern California, the City of San Diego and the San Diego County Water Authority.[37] Both the County of San Diego and the San Diego County Water Authority receive this water through the San Diego Aqueduct which turns out from the Colorado River Aqueduct.[38]

Construction was initiated in 1932 and water was first delivered in 1941.[39] The Colorado River Aqueduct was financed, and title is held, by the Metropolitan Water District of Southern California which operates and maintains it.[40]

B. Gila River System Works

1. *Coolidge Dam.* Situated on the Gila River, 26 miles southeast of Globe, Arizona, this reinforced concrete multiple dome structure has a height of 250 feet and creates a reservoir with a capacity of 1,267,447 acre-feet. The water so impounded is utilized to irrigate lands of the Gila River Indian Reservation and privately owned lands adjacent thereto. In addition, the Dam has a generating capacity of 10,000 kw. Construction was completed in 1928 and title is held by the United States.[41]

2. *Ashurst-Hayden Dam.* Performing a purely diversionary function, this diversion point for the San Carlos Project is located on the Gila River approximately 10 miles east of Florence, Arizona.[42]

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[36]Tr. 9530-9531, 9590 (Elder). This translates into approximately 3,570 acre-feet per day, or 1,303,050 acre-feet per year.
[37]Calif. Ex. 455.
[38]Calif. Ex. 457.
[39]Tr. 9535 (Elder).
[40]Calif. Ex. 457.
[41]Ariz. Ex. 1000, p. 23.
[42]*Ibid.*

3. *Buckeye Dam.* This dam is situated on the Gila just below the confluence of the Agua Fria and Gila Rivers, at the lower end of the Salt River Project. It diverts the return flow re-entering the River below the upstream diversion structures.[43]

4. *Painted Rock Dam.* Located on the Gila River, slightly below Gila Bend, Arizona, this structure is designed for flood control in the lower Gila valley and in Mexico.[44]

5. *Roosevelt Dam.* This rubble masonry, arch gravity type dam, with a structural height of 280 feet and a hydraulic height of 225 feet, is situated on the Salt River 30 miles northwest of Globe, Arizona. The overflow spillways at both abutments have a capacity of 150,000 c.f.s. and a seven unit power plant with a generating capacity of 15,400 kw. is situated at the toe of the dam. Roosevelt Reservoir impounds 1,398,430 acre-feet of water and the waters so impounded are utilized to irrigate the Salt River Project. Construction of Roosevelt Dam was initiated in March 1904, water was first impounded in May 1909 and power was first generated on August 1, 1909.[45]

6. *Horse Mesa Dam.* Located on the Salt River 43 miles northeast of Phoenix, Arizona, this concrete variable-radius arch type dam has a structural height of 300 feet and a hydraulic height of 266 feet. Its reservoir, with a capacity of 245,138 acre-feet, is utilized to irrigate the Salt River Project. Over fall spillways at both abutments have a capacity of 150,000 c. f. s. and a 30,000 kw. power plant is located at the toe of the dam.

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[43]Tr. 603-604 (Akin).
[44]Tr. 617-618 (Akin).
[45]Ariz. Ex. 1000, pp. 23-24.

Construction was begun in August, 1924, and water was first impounded on May 27, 1927. Although built by the Salt River Valley Water Users' Association, title is in the United States.[46]

7. Mormon Flat Dam. Situated on the Salt River 37 miles northeast of Phoenix, Arizona, this concrete variable-radius arch type dam has a structural height of 224 feet and a hydraulic height of 142 feet. Its reservoir, with a capacity of 57,852 acre-feet, is utilized to irrigate the Salt River Project. The dam has an open channel spillway with a capacity of 150,000 c.f.s. and a 7,000 kw. power plant has been constructed at its toe.

Construction was initiated in February 1923, water was first impounded on January 13, 1925, and the first power was generated on May 19, 1926. Built by the Salt River Valley Water Users' Association, title is held by the United States.[47]

8. *Stewart Mountain Dam.* This concrete variable-radius arch type dam, with a structural height of 207 feet and a hydraulic height of 116 feet, is located on the Salt River 29 miles northeast of Phoenix, Arizona. Its reservoir, with a capacity of 69,765 acre-feet, provides irrigation water for the Salt River Project. The dam has a power plant with a capacity of 10,400 kw. and its open channel spillway has a capacity of 150,000 c.f.s.

Construction was initiated on October 1, 1928, water was first impounded on February 22, 1930, and power was first generated on March 8, 1930. Title to the dam, which was built by the Salt River Valley Water Users' Association, is held by the United States.[48]

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[46]Ariz. Ex. 1000, p. 24.
[47]Ariz. Ex. 1000, pp. 24-25.
[48]Ariz. Ex. 1000, p. 25.

9. *Granite Reef Diversion Dam.* This structure is located on the Salt River 22 miles east of Phoenix, Arizona. It is a concrete weir with a structural height of 29 feet and a hydraulic height of 18 feet.[49]

10. *Cave Creek Dam.* Situated on Cave Creek, a tributary of the Salt River, 20 miles north of Phoenix, Arizona, this concrete multiple arch dam, with a structural height of 109 feet and a hydraulic height of 57 feet, creates a reservoir with a capacity of 11,000 acre-feet. Cave Creek Dam is used primarily for flood control, but waters impounded thereby are utilized to irrigate the Salt River Project.

Construction by the Salt River Valley Water Users' Association was initiated on February 16, 1922, and water was first impounded on March 4, 1923. Title is held by the United States.[50]

11. *Horseshoe Dam.* Situated on the Verde River 55 miles northeast of Phoenix, Arizona, this earth and rock fill type dam has a structural height of 194 feet, a hydraulic height of 145 feet and a spillway capacity of 250,000 c.f.s. Its reservoir, with a capacity of 142,800 acre-feet, impounds waters which are utilized to irrigate the Salt River Project and for municipal purposes in the City of Phoenix.

Construction was initiated on November 30, 1943, and water was first impounded on November 16, 1945. Horseshoe Dam was built by the Phelps-Dodge Corporation under a cooperative agreement with the United States and the Salt River Valley Water Users' Association. Title is held by the United States.[51]

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[49]Ariz. Ex. 1000, p. 27.
[50]Ariz. Ex. 1000, pp. 25-26.
[51]Ariz. Ex. 1000, pp. 26-27.

12. *Bartlett Dam.* Located on the Verde River 36 miles northeast of Phoenix, Arizona, this concrete multiple arch type dam has a structural height of 287 feet, a hydraulic height of 188 feet and an open channel spillway with a capacity of 175,000 c.f.s. Its reservoir has a capacity of 179,480 acre-feet and waters impounded therein are utilized to irrigate the Salt River Project and Salt River Indian Reservation.

Construction was initiated on August 12, 1936, and water was first impounded on February 5, 1939.[52]

13. *Carl Pleasant Dam.* Situated on the Agua Fria River about 30 miles northwest of Phoenix, Arizona, this concrete multiple arch dam impounds the waters forming Lake Pleasant.[53] The dam was built by, and serves, Maricopa County Municipal Conservation District No. 1. Water was first impounded in 1928.[54]

C. Operation of Works on the Mainstream—River Control

The Office of River Control of the Bureau of Reclamation, located at Boulder City, Nevada, is responsible for release of water, river control and reservoir co-ordination on the Colorado River from Hoover Dam to the international boundary. Acting under the Boulder Canyon Project Act, the Office of River Control releases water from reservoirs on the mainstream according to the following priorities: First, flood control; second, irrigation and domestic uses; third, power.

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[52]Ariz. Ex. 1000, p. 26.

[53]The capacity of this reservoir appears to be a subject of dispute. At least two estimates have been given; one of 178,000 acre-feet (Ariz. Ex. 1000, p. 27) and another of 164,000 acre-feet (Tr. 1635-1636 [Raymc]).

[54]Ariz. Ex. 1000, p. 27

Flood control storage space varies during the year. In general, storage space is made available for anticipated floods by releasing water in accordance with the expected inflow at any given time.

Water for irrigation and domestic uses is ordered by the water user agencies. While there may be minor variations of practice from one water user to another, typically, the procedure is as follows. On Wednesday of any given week, the agency orders the daily quantity of water needed for the week beginning on the following Monday. When the water orders have been received, the Office of River Control totals them and then schedules the rate of release per day for the following week. This schedule must be put into effect over the weekend, for it takes 72 hours for water at Parker Dam to reach Imperial Dam. Records are kept of the amount of water ordered and the amount of water actually taken by each water user.

In addition to scheduling water releases for domestic and irrigation users in the United States, water is released for sluicing at Imperial Dam and to service the Mexican water treaty. Mexico is entitled to receive from 1,500,000 to 1,700,000 acre-feet annually depending upon the supply of water. The Mexican order is given one year in advance for delivery on a month by month basis. The monthly order can be changed upon thirty days' notice. Davis Dam is used for making water releases pursuant to the Mexican order.

The last priority for water releases is for generation of power. Prior to June 1, 1955, water in excess of that needed for irrigation and domestic uses was released for power purposes. However, as of that date this practice was discontinued and, as a result, only 62½ per cent of firm energy was delivered during that year.[55]

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[55]Tr. 823-895, 938 (Stanley).

VI. Irrigation Projects and Districts, Indian Reservations and Other Water Users in the Lower Basin

A. Arizona

1. *Salt River Project.* This project, which lies on both sides of the Salt River east of its confluence with the Gila River in central Arizona, is capable of serving 240,000 acres of land. Approximately 200,000 acres were under cultivation in 1955 and portions of the remaining acreage constitute town sites and residential property which are furnished water for domestic uses.[56] The northern portion of the Project, which includes the City of Phoenix, is bounded on the west by the Agua Fria River and on the east by the Arizona Canal. The southern portion is bounded on the south by the Gila Indian Reservation and on the east by the Roosevelt Water Conservation District.[57] The major dams serving the Project are Granite Reef Diversion Dam, Stewart Mountain Dam, Horse Mesa Dam, Mormon Flat Dam and Roosevelt Dam—all on the Salt River; Bartlett Dam and Horseshoe Dam on the Verde River; and a flood control dam on Cave Creek.[58]

The Project is operated by two agencies with a complex interrelation never fully explained in the evidence. It was initiated by the Bureau of Reclamation which conducted operations until 1917 when the Salt River Valley Water Users' Association, organized under Arizona law in 1903, assumed control. Subsequently a district was incorporated as a political subdivision of the State of Arizona; the officers and directors of the district and association are identical.[59]

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[56]Tr. 1806-1807 (Corbell).

[57]See Ariz. Ex. 140.

[58]Tr. 1763-1767 (Corbell). See also pp. 40-43, *supra.*

[59]Tr. 1770-1772, 1756-1757, 1815-1818 (Corbell).

Water supply is derived from both surface and underground sources. For the period 1945-1955 approximately 64% of the supply came from surface sources and 36% from pumping.[60] The Project makes storage water available to its members each year, quantity depending upon supply. From 1952 to 1955 members were allotted three acre-feet per acre.[61] Payment of assessments for project obligations entitled each member to two acre-feet per acre and, upon payment of an additional charge, the member could secure an additional acre-foot.[62] Some of the water used by the Project is subject to a water rights decree administered by a commissioner.[63]

The problem of an adequate water supply has become a serious one. Surface supply has been reduced by drought and by decreasing runoff caused by changed conditions in the watershed. Fire prevention activities have resulted in increased growth of phreatophytic plants which consume water otherwise available for irrigation and domestic uses.[64] As a result of the reduction in surface and ground water supplies, the water table has declined, and in 1955 the static water table reached a depth of 117 feet.[65] These declining water levels have increased pumping costs and necessitated expenditures for deepening wells.[66]

2. *Roosevelt Irrigation District.* Located directly west of the Salt River Project and bounded on the east by the Agua Fria River, on the west by the Hassayampa River and

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[60]Tr. 1884 (McMullin).
[61]Tr. 1788 (Corbell).
[62]Tr. 1808, 1834 (Corbell).
[63]Tr. 1866-1867 (Corbell).
[64]Tr. 2042-2048 (McMullin).
[65]Tr. 1995 (McMullin).
[66]Tr. 2013-2014 (McMullin).

on the south by the Buckeye Water Conservation and Drainage District, this project serves 38,000 acres, all of which are irrigable.[67]

The Roosevelt Irrigation District, because of the complete dearth of available surface water, depends solely on underground water. This water is supplied by 101 wells, 46 of which are located within the District and 55 of which are located within the Salt River Project.[68] Those located within the Salt River Project were purchased at a time when water-logged land was a problem in that project. By agreement, Roosevelt is limited in its pumping from these wells to 145,000 acre-feet per year on an average for a five year period and annual increases cannot exceed 10,000 acre-feet. There is no restriction on drawdown.[69] Thus, it is apparent that the amount of irrigation in the Salt River Project directly affects the water supply of Roosevelt. Water levels have remained stable in the Roosevelt Irrigation District but the water table of the wells located in the Salt River Project has declined substantially.[70]

3. *Maricopa County Municipal Water Conservation District No. 1.* Commonly known as the Beardsley District, Maricopa County Municipal Water Conservation District No. 1 is located in Maricopa County, Arizona, and is bounded on the east by the Agua Fria River and the City of Phoenix, on the west by the White Tank Mountains and on the south by the Roosevelt Irrigation District. The District was organized under Arizona law in 1925 to serve 40,000 acres but the service area was reduced to 35,000

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[67]Tr. 1714-1715 (Van Denburgh); Ariz. Ex. 147.

[68]Tr. 1715-1716 (Van Denburgh). In addition to these wells there are some private wells operated by individuals.

[69]Tr. 1732-1733, 1741 (Van Denburgh).

[70]Tr. 1745-1746 (Van Denburgh).

acres in 1946.[71] In 1955 26,000 acres were under cultivation and 9,000 lay fallow primarily for lack of water.[72]

Water supply is derived from surface and underground sources. The source of surface water is the Agua Fria River which is dammed by Carl Pleasant Dam to form a storage reservoir called Lake Pleasant.[73] One and one-half miles downstream is a diversion dam from which the District's main canal takes out. This canal, which is 34 miles long and is lined for approximately one-half of its length, runs along the west side of the Project. There are 120 miles of laterals in the distribution system. Pump water is supplied by wells, 60 of which were in operation in 1955.[74]

The District has been troubled by a decreasing supply of surface water and a declining water table. In 1955 the average pump lift for the 60 wells in operation was 419 feet. In addition, the static water level declined from 172 feet in 1940 to 329 feet in 1955.[75]

4. *San Carlos Project.* This project lies on both sides of the Gila River in Pinal County, Arizona, southeast of Phoenix and the Salt River Project. Although planned to serve 50,000 acres exclusively within the Gila River Indian Reservation, the Project was later expanded to include an additional 50,000 acres of non-Indian land because of financial considerations. Three agencies operate the facilities of the Project: the Indian Tribal Council operates distribution works on Indian lands; the San Carlos Irrigation and Drainage District operates facilities on non-Indian lands; and the Bureau of Indian Affairs operates facilities, such as dams and main canals, serving both types of land.[76] The

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[71]Tr. 1633-1635 (Raymond); Ariz. Ex. 140.
[72]Tr. 1661 (Raymond).
[73]Tr. 1635-1636 (Raymond). See also p. 43, *supra.*
[74]Tr. 1636-1638, 1641 (Raymond).
[75]Tr. 1658-1659 (Raymond); Ariz. Ex 145.
[76]Tr. 1485-1487, 1489 (Gookin).

full 100,000 acres which the Project was designed to serve have never been under irrigation in any one year. While irrigated acreage varies from year to year, depending upon water supply, the average annual irrigated acreage from 1934 to 1955 was 63,000 acres.[77]

The main works of the Project are Coolidge and Ashurst-Hayden Dams.[78] Coolidge Dam, which is located on the Gila River below its confluence with the San Carlos River, creates the San Carlos Reservoir which has a designed capacity of 1,285,000 acre-feet. This reservoir has never been more than two-thirds full. Ashurst-Hayden Dam is 63 miles further downstream and is a purely diversionary structure serving the Project's canals. Situated within the boundaries of the Project and utilized to catch flash flood waters, excess flows from Ashurst-Hayden Dam, and to regulate canal flow is Picacho Reservoir with a capacity of 18,000 acre-feet.[79]

Water supply is derived from both surface and underground waters.[80] From 1934 to 1955 average annual surface diversions were 187,000 acre-feet. In addition, approximately 99,000 acre-feet were pumped. Thus, about 35% of the water supply comes from ground water.[81] From total supply, the farmers have received 3 to 3½ acre-feet per acre for irrigation. The remainder is lost in transit in the canal system.[82] The Gila River is the primary source of surface water, although summer floods in the San Pedro River occasionally furnish some irrigation water. Pump water comes from wells operated by the Project, 108 of which were active in 1956. Natural flow surface

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[77]Tr. 1559 (Gookin).
[78]See p. 39, *supra*.
[79]Tr. 1492-1495 (Gookin).
[80]Tr. 1498 (Gookin).
[81]Tr. 1537 (Gookin).
[82]Tr. 3375-3377 (Gookin).

water in the Gila River and water stored by Coolidge Dam are subject to, and are administered under, a water rights decree.[83]

The San Carlos Project has been troubled by a shortage of surface water and declining water tables. If present agricultural and water supply conditions persist, some acreage will be forced out of cultivation and the project will eventually stabilize at 50,000 acres under annual cultivation.[84]

5. *Yuma Area.* Several Bureau of Reclamation irrigation projects and an irrigation district are operated on the Arizona side of the Colorado River in the vicinity of Yuma, Arizona. One of these is the Yuma Project, the Valley Division of which is located in Arizona and the Reservation Division in California. The largest of the projects, the Gila Project, has three irrigation units: North Gila Valley Irrigation District; Wellton-Mohawk Irrigation and Drainage District; and Yuma-Mesa Irrigation and Drainage District. Lying between the North Gila Valley and Yuma-Mesa units are privately irrigated lands known as South Gila Valley. Unit B Irrigation and Drainage District is the last of the projects in this area. At one time its lands were within the Yuma Project and it is still referred to as the Yuma Auxiliary Project. All of the surface water for these projects comes from the mainstream of the Colorado River.[85]

(a) *Yuma Project– Valley Division.* The lands within the Valley Division are located south of Yuma, Arizona, and

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[83]Tr. 1497-1501 (Gookin). Water rights are administered under the so-called "Gila River Decree" rendered in United States v. Gila Valley Irrigation District, et al. (Globe Equity No. 59) (D. Ariz. 1935), Ariz. Exs. 103, 300.

[84]Tr. 1539, 1562 (Gookin).

[85]Tr. 2196-2198 (Steenbergen).

run along the east side of the Colorado River to the Mexican Border.[86] Approximately 50,000 acres are served. Water from the Colorado River is diverted for this project at the west end of Imperial Dam through the All-American Canal. Before Imperial Dam was built, diversions had been made at Laguna Dam. Fifteen miles from Imperial the water is turned through Siphon Drop and passes under the Colorado River. On the east side of the River it is turned into the Yuma Project's main canal. This canal is divided into two channels, one running on the east side and the other on the west side of the Project, to the international border. Since 1951 the Yuma County Water Users' Association has been responsible for water deliveries to the Project lands.[87]

(b) *Gila Project.* The common works for the three units of this project are: Imperial Dam, the desilting basin at the east end of the dam and the Gila Gravity Canal, which takes out from the east end[88] and which was constructed between 1936 and 1938.[89] The canal, which has a capacity of 2,200 c.f.s.,[90] runs generally in a southerly direction from Imperial Dam, crosses the Gila River by siphon, and divides into ranches, one running south to Yuma-Mesa and then on to Unit B Irrigation District, and one running east along the Gila River to Wellton-Mohawk.[91] The three units of the Project are:

(i) *North Gila Valley Irrigation District.* This project, the lands of which lie along the east side of the Colorado River just north of its confluence with the Gila River, is

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[86]See Ariz. Ex. 110A.

[87]Tr. 2198-2199 (Steenbergen); Ariz. Ex. 1000, p. 22; Calif. Ex. 214.

[88]Tr. 2199-2200 (Steenbergen).

[89]Tr. 2327 (Steenbergen).

[90]Tr. 2283 (Steenbergen).

[91]See Ariz. Ex. 108.

designed to serve 7,000 acres. It receives waters from the Gila Gravity Canal at a turnout with a 150 c.f.s. capacity.[92]

(ii) *Wellton-Mohawk Irrigation and Drainage District.* Located east of the North Gila Project along both sides of the Gila River, this project is designed to serve 75,000 acres[93] although only 30,000 acres were irrigated in 1955.[94] It receives its water from the Gila Gravity Canal at a turnout with a capacity of 1,300 c.f.s. From this turnout the Wellton-Mohawk Canal runs east and southeast, using three pumping plants to lift the water. The last pumping plant lifts the water into the Mohawk Canal, which at this point has a capacity of 900 c.f.s. The District has approximately 300 miles of canal system most of which is lined.[95]

(iii) *Yuma-Mesa Irrigation and Drainage District.* This project, which is now constructed to serve approximately 20,000 acres,[96] is located south of the North Gila Valley Project and east of the Yuma Project. The 14,566 acres irrigated in 1955 had never been irrigated prior to organization of the Project.[97] The Project receives its water from the Gila Gravity Canal at the Yuma-Mesa Pumping Plant which lifts the water 52 feet on to the mesa. The plant has a capacity of 700 c.f.s. and the Mesa Canal has a capacity of 620 c.f.s. The canal network is concrete lined and operates as a closed system.[98]

(c) *Unit B Irrigation and Drainage District.* Also known as the Yuma Auxiliary Project, this district is sit-

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[92]Tr. 2200-2201 (Steenbergen).
[93]Tr. 2203 (Steenbergen).
[94]Tr. 2390 (Steenbergen); Ariz. Ex. 186.
[95]Tr. 2202-2203 (Steenbergen).
[96]Tr. 2206 (Steenbergen).
[97]Tr. 2385, 2387-2389 (Steenbergen); Ariz. Ex. 186.
[98]Tr. 2205-2206 (Steenbergen). A closed system is one in which no provision for regulatory waste is made.

uated between the Yuma Project on the west and the Yuma-Mesa Project on the east. It is designed to serve 3,305 acres. Water is received from the Gila Gravity Canal via the Yuma-Mesa Canal System at the north end of the Project. The District's main canal has an initial capacity of 100 c.f.s. and the closed canal system is partially lined.[99]

(d) *South Gila Valley.* Also known as the Yuma Irrigation District, this organized irrigation project is located between the North Gila Valley and Yuma-Mesa Projects. This district, which is not presently operated as a federal reclamation project, includes approximately 10,000 acres. This acreage is irrigated by private pumping and by Colorado River water obtained under Warren Act contracts.[1] The land so serviced is within the authorized limits of the Gila Project.[2]

B. California

1. *Imperial Irrigation District.* Formed in 1911, at which time it included 513,000 acres, this district lies in the Salton Basin and its southern boundary is the international boundary.[3] Until 1922 deliveries of water were made by the District to mutual water companies on a wholesale basis.[4] Beginning in 1922, however, the District took over the operations of the mutual companies and delivered water on a retail basis directly to the farmer.[5] As of 1956,

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[99]Tr. 2207-2208 (Steenbergen).

[1]Tr. 2209-2210 (Steenbergen).

[2]Tr. 1154-1155 (Lewis); Ariz. Exs. 108, 179; U. S. Ex. 9.

In addition to the projects described above, there are other irrigated lands in Arizona, either organized into districts or privately operated, which were mentioned incidentally in the testimony but which were never the subject of full presentation. Among these are Buckeye, Arlington, Queen Creek, and the Roosevelt Water Conservation District.

[3]Tr. 6468-6469, 6473-6474, 7474-7475 (Dowd).

[4]Tr. 7486 (Dowd).

[5]Tr. 7542, 7558 (Dowd).

there were 905,560 acres within the District[6] and ultimate gross area is expected to be nearly 1,000,000 acres[7]. 474,555 acres were irrigated in 1955.[8]

The area encompassed by the District is arid. It has an average annual rainfall of three inches and there has been less than one-half inch of rain in some years. The mean annual temperature is 72 degrees and 110 days a year, on the average, have maximum temperatures of over 100 degrees. The sole source of irrigation water has been the Colorado River. Availability of underground water for irrigation purposes is in dispute.[9]

Water deliveries from the Colorado River to the Imperial Valley were first made at the turn of the century[10] and, over the years, several diversion points in both the United States and Mexico were employed. In 1907 water was first diverted at Hanlon Heading into the Alamo Canal, which lay partly in Mexico and entered the United States near Mexicali.[11] In 1918 a new diversion point, Rockwood Gate, went into operation upstream from Hanlon Heading and remained the primary diversion point until the All-American Canal was constructed.[12] Construction of the canal was commenced in 1934. However, because of difficulties in the operation of Imperial Dam, which was

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[6]Calif. Ex. 238. For the acreage additions from 1911 to 1956 see Calif. Ex. 238.

[7]Tr. 7902-7903 (Dowd).

[8]Tr. 8115 (Dowd). For annual irrigated acreage figures see Calif. Exs. 270-271.

[9]Dowd, a well qualified California witness, testified that there is no supply of potable underground water in the District. Tr. 6475-6476. In this connection, it should be noted that Imperial Valley, a major portion of the District, is a part of the Colorado River Delta which is a large area of silt deposits sometimes reaching a depth of 1,000 feet. Tr. 6478, 6495 (Dowd).

[10]Tr. 7312-7315 (Dowd).

[11]Tr. 6917 (Dowd).

[12]Tr. 7491, 7799 (Dowd).

dedicated in 1938 and which is the diversion point for the canal, service through the All-American Canal was delayed until 1940 and full service did not occur until February 1942. After this date no further deliveries were made through the Mexican works.[13]

The main works serving the Imperial Irrigation District in 1955 were: Imperial Dam; All-American Canal; Siphon Drop Turnout, the delivery point for the Yuma Project; Pilot Knob Check, Power Plant and Wasteway;[14] Drop No. 1, the turnout for the Coachella Canal; Drop No. 2 and Power Plant; East Highline Canal; and Westside Main Canal.[15]

Diversions through the All-American Canal for the period 1951-1955 averaged 5,232,000 acre-feet per year.[16] On the average, 3,836,000 acre-feet were annually diverted for Imperial Irrigation District and Coachella Valley County Water District and 1,396,000 acre-feet were diverted for the Yuma Project.[17] Deducting canal losses and diversions to Coachella, the total diversion for Imperial Irrigation District at Drop No. 1 on the All-American Canal averaged 3,129,000 acre-feet per year.[18]

2. *Coachella Valley County Water District.* Located in the Salton Basin northwest of the Salton Sea, Coachella Valley lies partly in Riverside County and partly in Imperial County, California. The Valley is surrounded on all sides save the south by mountains and is approximately

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[13]Tr. 7767, 7776, 7783 (Dowd).

[14]Beyond this point drainage is to the Salton Sea rather than to the Colorado River. Tr. 7787 (Dowd).

[15]See Calif. Ex. 212.

[16]Tr. 8096 (Dowd).

[17]Tr. 8103 (Dowd).

[18]Calif. Ex. 268; see Tr. 8089-8107 (Dowd).

50 miles long, one mile wide at the north end and eleven to twelve miles wide in the center.[19] The soil is fertile, light, sandy loam. The Valley enjoys low humidity helpful to agriculture, but its average rainfall of three inches per year falls mostly in cloudbursts harmful to growing crops.[20] Crops raised in the Valley include citrus fruits, grapes, specialty crops[21] and dates.[22] In fact, Coachella Valley is the only locality in the United States where dates are grown commercially.[23] As of 1956 double cropping was practiced on approximately 20% of the land.[24]

Total gross acreage within the District is 267,620 acres. The gross area of the Coachella Service Area, a division of the District, is 161,153 acres and the net area to be irrigated from the Colorado River is approximately 137,900 acres.[25] At the time of trial all irrigation occurred within Improvement District No. 1, the gross acreage of which is 135,275 acres,[26] although only 53,026 acres of this land were actually irrigated in 1955.[27] Approximately 10,500 unirrigated acres in Improvement District No. 1 are Indian lands which can be served by the system should laterals be installed.[28]

Ground water is present in the Valley and almost all farmsteads have private wells for domestic use. The sole

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[19]Tr. 8407 (Weeks).

[20]Tr. 8410-8411 (Weeks).

[21]Specialty crops are vegetables and other truck produce grown out of season which fetch premium prices.

[22]Tr. 8410, 8473 (Weeks).

[23]Tr. 8410 (Weeks).

[24]Tr. 8476-8477 (Weeks).

[25]Tr. 8488-8491 (Rowe); Calif. Ex. 318. The Coachella Service Area is land which is to be served by Colorado River water. The Area is defined in a contract with the United States dated October 15, 1934. Tr. 8377-8378 (Weeks); Ariz. Ex. 36.

[26]Tr. 8377-8379 (Weeks).

[27]Calif. Ex. 318, Table 4.

[28]Tr. 8397 (Weeks).

supply of water for the District as a distributor of water, however, is the Colorado River, and most irrigation is done with water from this source.[29]

The Coachella District is served by the Coachella Branch of the All-American Canal. The Coachella Canal, which was completed in 1947 and 1948, runs in a generally northwesterly direction to the end of Improvement District No. 1 where it swings around the north end of the Valley and follows a southwesterly direction for a short distance.[30] It turns out of the All-American Canal at Drop No. 1, and between Drop No. 1 and Check 6-A the canal is unlined and is shared by both Coachella and Imperial. At Check 6-A complete responsibility for operation and maintenance is assumed by Coachella.[31] For 37 miles after Check 6-A the canal remains unlined but the final 37 miles have been lined with concrete.[32] A settling basin for the removal of debris that accumulates in the unlined portion has been constructed where the canal enters Improvement District No. 1.[33] Beyond this point, on the east side of the canal, levees and detention basins protect the canal from intrusion of storm water.[34]

Distribution of water from the canal is made by an underground closed system of pipelines of which there are 470 miles in Improvement District No. 1. In addition, a high pressure lateral takes water from the canal and traverses the Valley to deliver water to the Oasis Area,

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[29]Tr. 8516-8517 (Rowe); Calif. Ex. 318, Table 4.

[30]Tr. 8387 (Weeks); see Calif. Ex. 306.

[31]Tr. 8422 (Weeks).

[32]Tr. 8424 (Weeks). The capacity of the canal at various points is as follows: Drop No. 1, 2500 c.f.s., 1500 c.f.s. for Coachella and 1,000 c.f.s. for Imperial; Check 6-A, 1500 c.f.s.; beginning of lined portion, 1300 c.f.s.; end of canal, 425 c.f.s. Tr. 8422, 8426, 8443 (Weeks).

[33]Tr. 8388 (Weeks).

[34]See Calif. Ex. 306.

which contains approximately 9,000 acres. Water deliveries to the farmer are measured by meter at each farm turnout.[35] In general, water is distributed by a gravity system, but in a few areas it is pumped to higher elevations.[36] It is the practice in the District, and thought to be a necessity, to deliver water to farmers on demand.[37]

The District's drainage system must account for storm water, discharge from farms and other waste water. Coachella Valley Storm Water Channel is an extension of White Water River and runs through the central part of the District into the Salton Sea. It carries both flood and drainage waters.[38] Open drains and an underground closed system emptying into the Salton Sea constitute the balance of the drainage system. Approximately 25% to 30% of the proposed underground closed drainage system was competed at the time of trial.[39]

3. *Palo Verde Irrigation District.* Palo Verde Valley, in which the defendant Palo Verde Irrigation District is located, is geographically part of a larger valley which also includes the Cibola Valley. Palo Verde Valley lies west of the Colorado River approximately midway between Parker and Imperial Dams[40] and is about 30 miles long and six miles wide. Its principal city is Blythe.[41] On January 1, 1956, there were 103,707 acres of land in the Valley and 17,459 acres on the Mesa within the District[42] Crop reports for 1956 show 72,200 acres under cultiva-

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[35]Tr. 8392-8395 (Weeks).
[36]Tr. 8439 (Weeks).
[37]Tr. 8467 (Weeks).
[38]Tr. 8386 (Weeks).
[39]Tr. 8460-8464 (Weeks).
[40]See Calif. Ex. 301.
[41]Tr. 8552 (Tabor).
[42]Tr. 8549 (Tabor).

tion in that year and a crop value of $20,000,000 exclusive of livestock.[43]

The irrigation history of the Valley goes back to some time before the turn of the century. One witness observed irrigation in the Valley in 1908 and ground conditions indicated to him that irrigation had been practiced at an earlier date.[44] In 1908, when the population of the Valley was approximately 1,100, irrigation water was obtained by direct diversions from the Colorado River, pumping ground water and diversions from sloughs regularly flooded by river overflows.[45] The construction of Laguna Dam aggravated two recurring problems: annual flooding, which was worsened by water backing up above Laguna Dam; and a rising water table, which caused serious drainage problems.[46] Moreover, construction of dams upstream reduced the level of the Colorado River, causing difficulty with the diversion works.[47]

The primary water supply for irrigation in the District is the mainstream of the Colorado River, although two areas on the Palo Verde Mesa are irrigated by wells.[48] Colorado River water is obtained by orders placed by the District with the Office of River Control, Bureau of Reclamation.[49]

The principal diversion work serving the District is Palo Verde Weir, a temporary diversion structure on the Colorado River.[50] Erected in 1944 and 1945, the Weir was made necessary by the lowering of the River's surface due

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[43]Tr. 8715, 8719-8720 (Tabor).
[44]Tr. 8702-8704 (Seeley).
[45]Tr. 8673-8676 (Seeley).
[46]Tr. 8686, 8694 (Seeley).
[47]Tr. 8695-8698 (Seeley).
[48]Tr. 8751 (Tabor).
[49]Tr. 8755-8756 (Tabor).
[50]Tr. 8555 (Tabor); see p. 35, *supra.*

to scouring attributable to construction of upstream dams. It is maintained by the District and the Bureau of Reclamation. The intake at the Weir is a reinforced concrete structure with a capacity of 2100 c. f. s. or more, depending on the height of the River's water surface.[51] The District's main canal takes out at the Weir and carries the water to a settling basin.[52] From the settling basin the water is distributed through 280 miles of canals and laterals and approximately 400 miles of privately owned and maintained ditches. Distribution is effected partly by gravity and partly by pumping canal water to higher elevations. The canal and lateral system is unlined.[53] Drainage from the District is to the Colorado River at a point about eight miles south of the Riverside-Imperial County line. There are approximately 120 miles of drains, very few of which are tiled.[54]

4. *Yuma Project—Reservation Division.* Located wholly within the State of California, this portion of the Yuma Project is located north of, and across the Colorado River from, Yuma, Arizona.[55] Although not a party to this litigation, evidence was nonetheless presented on its behalf by the State of California. Total acreage in the general area of the Reservation Division—the area between the All-American Canal and the Colorado River—is roughly 28,000 acres. At the time of trial approximately 15,700 acres were under the Reservation Division water distribution system. Of this amount, 8,200 acres were Indian land and 7,500 acres non-Indian land. Some land within the Division is irrigated by well water and other lands, although irrigable,

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[51]Tr. 8705-8707 (Tabor).
[52]Tr. 8555 (Tabor).
[53]Tr. 8708-8710 (Tabor).
[54]Tr. 8710-8711 (Tabor).
[55]Tr. 8813 (Steenbergen); see Calif. Ex. 50.

are not served at all. Irrigable acreage under distribution system in 1957 was 14,610 acres.[56] The net area actually irrigated in 1956 was 9,460 acres.[56a]

The Reservation Division receives its surface irrigation water from the Colorado River by means of the All-American Canal. Prior to the construction of this canal, diversions were made at Laguna Dam through the Yuma Main Canal.[57]

The principal works of the water distribution system are a network of canals and laterals taking out from the All-American Canal.[58] In 1957 the wholly unlined distribution system comprised 76.5 miles of canals and laterals.[59] Operation and maintenance are conducted by the Bureau of Reclamation which delivers water to the farmers' headgates.[60]

5. *Metropolitan Water District.* The Metropolitan Water District is located on the coastal plain of Southern California, which is outside the drainage area of the Colorado River. Water is brought into the District from the River by means of trans-mountain diversions.[61] The principal mountain ranges east of the general coastal plain area are the Santa Monica, San Bernardino, San Jacinto, Santa Ana and Laguna Mountains. There is no range of mountains on the coast in Southern California, however, and this factor accounts in part for the tremendous population growth in the area.[62]

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[56]Tr. 8824 (Steenbergen).

[56a]Calif. Ex. 375. Later figures are not in evidence.

[57]Tr. 8817-8818 (Steenbergen).

[58]See Calif. Ex. 371.

[59]Tr. 8833, 8840 (Steenbergen).

[60]Tr. 8819 (Steenbergen).

[61]See Calif. Ex. 401.

[62]Tr. 9404-9406 (Morris).

Seventy per cent of the rainfall in the southern coastal plain occurs during January, February and March and 70% of the run-off occurs in these months and the month of April. Average annual rainfall at Los Angeles is 15 inches and at San Diego it is 10 inches. Precipitation in the upper valleys to the east increases to 15 to 20 inches per annum and annual rainfall in the mountainous areas may be 30 to 40 inches or more. There are, however, great fluctuations from year to year in the rainfall of the area. Indeed, there have been years when Los Angeles has received less than five inches of rain.[63]

A number of streams rise in the mountains to the east of Los Angeles and flow southerly and westerly to the Pacific Ocean. The Los Angeles River System rises in the San Gabriel Mountains and flows out of the San Fernando Valley through the narrows near Elysian Park and thence to the Ocean. The San Gabriel River drains the area north of the San Gabriel Valley, runs through the Valley and then divides, one branch discharging into the sea at Alamitos Bay and the other flowing into the Los Angeles River which discharges at Long Beach, California. The stream with the largest drainage area in the coastal plain is the Santa Ana River, which drains the San Bernardino Mountains and a portion of the San Gabriel Mountains and flows through the Santa Ana Canyon and thence to the Ocean near Newport.[64]

The major ground water basins in the southern California coastal basin are the Orange County and central basin (divided into an easterly and westerly portion, respectively, by the county line between Orange and Los Angeles Counties), and westerly of this basin, the west basin. As water is pumped from these basins, the water level falls

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[63]Tr. 9407-9408 (Morris).
[64]Tr. 9417-9419 (Morris).

below sea level, and the ground water tends to slope downward inland away from the ocean. As a result, salt water intrudes into the basin and moves inland so that portions of these basins nearest the ocean have already been lost. In order to protect the basins, Colorado River water is spread on the ground and percolates to the ground water where it helps to raise the elevation of the ground water table so that the barrier against the salt water intrusion is maintained.[65]

A number of works have been constructed to conserve and store water in the southern coastal plain. Approximately sixty storage reservoirs have been built in the four counties of Los Angeles, San Bernardino, Orange and Riverside, the total storage capacity of which is roughly 620,000 acre-feet. The area is not well suited to the erection of storage reservoirs because of the lack of satisfactory dam sites and because of the friable quality of the mountains which permits substantial accumulation of debris.[66]

The local water supply of the southern coastal plain has been augmented by importation of water from other areas. The first of these trans-basin diversions came with completion in 1913 of construction on the Owens Valley Aqueduct which transports water 240 miles from the Owens River to Los Angeles. Prior to that year the Los Angeles River was virtually the sole source of supply for the City of Los Angeles.[67] The Owens River diversion proved to be inadequate because there was less water in the Owens River than had been expected and because the Los Angeles population became greater than had been anticipated. The water shortage was met by pumping ground water in the Owens Valley Basin, the City of Los Angeles having purchased

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[65]Tr. 9595-9602 (Elder).

[66]Tr. 9421-9422 (Morris).

[67]Tr. 9425 (Morris). For a full description of the Owens River Project see Tr. 9427 *et seq.*

nearly 300,000 acres of land in the basin in order to guarantee its supply of ground water. In addition, Los Angeles extended the Owens Valley Aqueduct into the Mono Basin and took water therefrom through Owens Valley into the City. The local supply in Los Angeles, added to the supply made available by the Owens Valley and Mono Basin diversions, provided an adequate supply for approximately 2,000,000 persons.[68] In 1928 it became apparent that this water supply was no longer adequate and the Metropolitan Water District was formed to obtain a greater supply.[69]

The area of the District, which in 1957 was approximately 3,000 square miles, has expanded steadily and is expected to expand still further in the future. It embraces the territory from a point north of Los Angeles to the Mexican border south of San Diego and includes cities and other municipal corporations lying along the southern coastal plain of California. As of 1957 the following entities were members of the District: in Los Angeles County—Beverly Hills, Burbank, Compton, Glendale, Los Angeles, Long Beach, Pasadena, Santa Monica, San Marino, Torrance, West Basin Municipal Water District, Pomona Valley Municipal Water District, Foothill Municipal Water District, Central Basin Municipal Water District; in Orange County—Anaheim, Fullerton, Santa Ana, Coastal Municipal Water District, Orange County Municipal Water District; in San Diego County—San Diego County Water Authority; in Riverside County—Eastern Municipal Water District, Western Municipal Water District; and in San Bernadino County—Chino Basin Municipal Water District.[70] The Metropolitan Water District acts exclusively as a wholesaler of water, which it

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[68]Tr. 9429-9435 (Morris).
[69]Tr. 9494-9504 (Elder).
[70]See Calif. Ex. 447.

delivers to these constituent members who in turn act as retailers to the consumer.[71]

The principal works serving the Metropolitan Water District are Parker Dam, the Colorado River Aqueduct, Lake Mathews and the distribution system below Lake Mathews.

Parker Dam has been described earlier.[72] Its most important functions from the point of view of the District are: removal of silt to permit pumping of water through the aqueduct to the coastal plain; raising the water level of the Colorado River and thus decreasing the lift necessary to bring water to the aqueduct; and generation of part of the power required to pump the water through the aqueduct. The Metropolitan Water District receives approximately 50% of the electrical energy generated at Parker Dam and all of the power so received, as well as power received from Hoover Dam, is used to lift water through the aqueduct.[73]

Preliminary plans for construction of the Colorado River Aqueduct commenced in 1923 when the chief engineer of the Los Angeles Water and Power Department traveled to the Colorado River for the purpose of locating a suitable diversion point for an aqueduct to carry water to Los Angeles. The early surveying of possible routes and diversion points, which began in 1923, was attended by extreme hardship due to the nature and climate of the country through which the aqueduct was to pass.[74] Enginering and surveying work on the proposed route took place from 1923 to 1933 during which time 50 to 250 men were continually employed on the project.[75]

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[71]Tr. 9565 (Elder).

[72]See pp. 33-34, *supra.*

[73]Tr. 9609-9612 (Elder). For additional details on Parker Dam and its related works see Calif. Ex. 477.

[74]Tr. 9451-9457 (Parratt).

[75]Tr. 9467 (Parratt).

The Colorado River Aqueduct was completed in 1940 and the first actual delivery of water occurred in June, 1941. The 18-month lapse between completion and delivery was attributable to the filling of the reservoirs.[76] The aqueduct as finally constructed diverts water at Lake Havasu, the reservoir created by Parker Dam. Water passes through an intake pump lift of 295 feet at the lake and flows two miles west to the Gene Wash Pump Lift which has an approximate lift of 296 feet. The aqueduct then proceeds 60 miles to the Iron Mountain Pump Lift of 140 feet, thence by gravity, through tunnels and canals, to the Eagle Mountain Pump Lift, which raises the water 440 feet, and finally to the Hayfield Pump Lift of 441 feet. Thus, the total lift of the Colorado River Aqueduct is approximately 1,612 feet. From the Hayfield Pump Lift to the end of the aqueduct water travels by gravity.[77]

Ninety-eight per cent of the length of the aqueduct lies on a right of way obtained from the Federal Government and 2% traverses private land. Its nominal designed capacity is 1,605 c.f.s. but its actual carrying capacity is only 93% of that, or roughly 1,500 c.f.s. The 7% difference is accounted for by operational shutdowns, inspections, cleanups and repairs. As of 1957 actual carrying capacity with the pumps then installed on the aqueduct was 1,000 c.f.s. However, at that time additional pumps were being installed to increase the capacity.[78]

There are a number of small reservoirs and wasteways along the route of the aqueduct. The Gene Wash Reservoir, used for canal regulation to avoid wasting water, is two miles from the Colorado River and has a usable active

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[76]Tr. 9535 (Elder).

[77]Tr. 9527-9528 (Elder); see Calif. Ex. 449.

[78]Tr. 9528-9531 (Elder). For a detailed description of the Aqueduct see Calif. Ex. 455.

capacity of 3,000 acre-feet.[79] Cooper Basin Reservoir has a capacity of 20,000 acre-feet.[80] The aqueduct's wasteways are used for emergencies such as emptying the canal because of a drowning or desert rainstorm. It has been estimated that in recent years losses have never exceeded 50 acre-feet annually.[81]

In addition to reservoirs and wasteways, there are a series of so-called inverted siphons along the aqueduct. These inverted siphons are pipes that dip below the hydraulic gradient of the aqueduct system so that the water is under sufficient pressure to be pushed down one side of a hill and up the side of another. The term "siphon" is inappropriate since these pipes produce no siphonic action at all.[82]

Except for a one-mile section at the east end of Lake Mathews where water is gained by percolation, the entire aqueduct is lined.[83]

Lake Mathews serves as a storage reservoir at the end of the aqueduct and performs two functions: it regulates the fairly uniform inflow in order to supply peak demands occurring in July and August; and it also provides an emergency supply. Lake Mathews is never permitted to have less than 50,000 acre-feet of storage so that a reserve always exists in case of major disaster such as earthquake or fire. The present storage capacity of Lake Mathews is 103,000 acre-feet. The District plans to double this capacity in the near future.[84]

Distribution of Colorado River water brought into the southern coastal plain at Lake Mathews is effected

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[79]Tr. 9537 (Elder).
[80]Tr. 9543 (Elder).
[81]Tr. 9560-9562 (Elder).
[82]Tr. 9540-9542 (Elder).
[83]Tr. 9557 (Elder).
[84]Tr. 9567-9568 (Elder).

entirely by a closed pipeline system operated primarily by gravity. From Lake Mathews a pipeline known as the Upper Feeder follows a northerly course to Fontana, California, at which point it turns west through Ontario and Pomona to the Laverne Softening and Filtration Plant where it divides. From Laverne the main line proceeds northwesterly and westerly through Pasadena, Burbank, Glendale, Beverly Hills and Santa Monica. Just west of Pasadena this line divides again and the other branch takes a southerly direction terminating at the Palos Verdes Reservoir. The other pipeline taking out at the Laverne Softening and Filtration Plant proceeds south to service the main cities of Orange County.[85] The capacity of the Laverne plant is 200,000,000 gallons per day (approximately 614 acre-feet) and water is treated to render it more suitable for industrial and domestic use.[86]

The water distribution system below Lake Mathews includes a number of small regulatory and storage reservoirs. The Orange County Reservoir, which has a capacity of 200 acre-feet, is chiefly used to regulate the flow of the pipeline carrying water from Lake Mathews by equalizing the difference between supply and demand occurring during night and day, summer and winter. The Corona Del Mar Reservoir at the south end of the Orange County pipeline is a small regulatory reservoir designed to prevent waste at the terminus of the pipeline. Morris Dam Reservoir has a capacity of about 35,000 acre-feet which is held solely for emergency use in case of major catastrophe. It is not filled with Colorado River water and under ordinary circumstances neither supplements nor diminishes the supply in the distribution system. The Palos Verdes Reservoir is another regulatory reservoir at the end of one branch of the

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[85]Tr. 9566-9567 (Elder); see Calif. Ex. 447.
[86]Tr. 9574 (Elder).

pipeline and is designed to prevent waste resulting from uneven supply and demand. Finally, Garvey Reservoir in the Monterey Hills just east of the center of Los Angeles has a capacity of 1,500 acre-feet and is used for regulatory and emergency purposes in the downtown area of metropolitan Los Angeles and in the Harper area of Long Beach.[87]

As of 1957 the distribution system of the Metropolitan Water District was not complete; many portions were still under construction and still others were being planned. It has been estimated that the ultimate construction would be finished in 1960.[88]

As noted previously, water supply for the members of the District comes from local sources and from the Owens River, the Mono Basin and the Colorado River. It is clear that the greatest part of the Colorado River water is used for industrial, municipal and domestic purposes.[89] It has been estimated that only 15% of water from the River is used for irrigation.[90] Total diversions from the River to the Colorado River Aqueduct in 1956 were 481,493 acre-feet.[91]

6. *San Diego County Water Authority.* San Diego County is situated on a plateau which begins near the coastline and which rises slightly until it reaches the foothills of a range of mountains whence it rises steeply to a point approximately 40 miles from the coast. At the highest point of this ridge of mountains drainage is to the east into the Imperial Valley. Most of the County's habitable land is found in a belt that begins at the coast and extends 20 or 25 miles inland; further east the terrain is rough. Rainfall

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[87]Tr. 9576-9583 (Elder).
[88]Tr. 9591-9592 (Elder).
[89]Tr. 9594 (Elder).
[90]Tr. 9647 (Elder).
[91]See p. 128, *infra.*

in the County is erratic, varying from 4½ to 26 inches annually.[92]

The San Diego County Water Authority was incorporated in 1944. In 1956 it had 17 member agencies, an area of 678.6 square miles and a population of 754,500. In 1946 the Authority became a member of the Metropolitan Water District by annexation. The Authority obtains water from two sources: local supply and the Colorado River. Approximately 75% of all water used comes from the River and, in 1956, 115,094 acre-feet were received from this source.[93] There are no undeveloped sources of local water in the San Diego area that can be economically exploited and, therefore, present and projected water requirements can be satisfied only by imported water.[94]

Colorado River water reaches the San Diego County Water Authority through the Colorado River Aqueduct and the San Diego Aqueduct. The Colorado River Aqeduct has been described above[95] The San Diego Aqueduct consists of two installations or barrels; the first barrel was installed from 1945 to 1947 and the second in 1954. Both barrels take out of the Colorado River Aqueduct at the San Jacinto Tunnel and follow a southerly course terminating at the San Vicente Reservoir in San Diego County. The capacity of both barrels is 180 c.f.s. at Rainbow, California, and 165 c.f.s. at the terminal point. There are no pumping plants on the aqueduct; water flows by gravity from the Colorado River Aqueduct at San Jacinto to the San Vicente Reservoir. In general, the terrain over which the aqueduct runs is hilly and this factor necessitated the construction of a number of tunnels through which the conduit passes. Title to the aqueduct remains in the United

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[92]Tr. 9676-9681 (Beerman).
[93]Tr. 9715-9721 (Holmgren).
[94]Tr. 9683, 9695-9696 (Beerman).
[95]See p. 38-39, 65-67, *supra.*

States but is presently being purchased by the Authority under a lease-purchase contract. The northerly portion of the aqueduct lying between the San Jacinto take-out and the San Louis Rey River was financed and is operated by the Metropolitan Water District; the portion of the aqueduct south thereof is operated by the San Diego County Water Authority.[96]

Important reservoirs in the system include the San Jacinto Reservoir and the San Vicente Reservoir. The former, which is located two miles below the take-out of the San Diego Aqueduct, has a storage capacity of 1,800 acre-feet and acts as a balancing reservoir between the Colorado River and San Diego Aqueducts. San Vicente Reservoir has a capacity of 90,230 acre-feet and stores water for use in the County.[97]

C. Nevada

1. *Virgin River Drainage Basin.* Irrigation is practiced along the Virgin River in the vicinity of Littlefield, Arizona and Mesquite and Bunkerville, Nevada. In 1954, approximately 2,800 acres in Nevada were irrigated by Virgin River water.[98] During the low flow of the Virgin River from May to October, river flow is derived primarily from saline springs just north of Littlefield and this water has an extremely high salt content—2,500 parts per 1,000,000.[99] Because of the poor quality of the water during these months farmers have found it necessary to use Virgin River water during other parts of the year for leaching purposes.[1]

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[96]See Calif. Ex. 523.
[97]Tr. 9678-9680 (Beerman); see Calif. Ex. 523.
[98]Tr. 16221 (Shamberger).
[99]Tr. 16209-16210, 16368 (Shamberger).
[1]Tr. 16954-16956 (Shamberger).

Main diversions for use in Nevada are made through the Mesquite and Bunkerville Canals; in 1954, 18,100 acre-feet were diverted through the former and 10,530 acre-feet through the latter.[2] The large amount of these diversions, which approximate 10 acre-feet per acre annually, it attributed to the poor quality of the water diverted during much of the year.[3] Some of the waters of the Virgin River used in Nevada are allocated under judicial decrees;[4] decreed rights, together with other established rights, cover 22,430.3 acre-feet of water and 2,834.59 acres of land.[5]

2. *Muddy River Drainage Basin.* The Muddy River drains approximately 1,650 square miles, excluding the drainage area of Meadow Valley Wash. Its permanent flow originates in a series of springs located eleven or twelve miles above Glendale, Nevada. These springs provide a uniform monthly flow which averages approximately 34,000 acre-feet per year. There is no permanent flow above the springs. The water quality is fairly good, containing approximately 700 parts of dissolved solids per 1,000,000.[6] In 1954 roughly 5,240 acres in Nevada were irrigated from the Muddy River. Of this amount, 1,860 acres were irrigated in the Upper Moapa Valley, 3,030 acres in the Lower Moapa Valley and 350 acres in the Overton Wildlife Management Area.[7] Some of the waters of the Muddy River are subject to a court decree.[8]

3. *Meadow Valley Wash.* A dry creek tributary of the Muddy River, Meadow Valley Wash drains an area

[2]Nev. Ex. 6.
[3]Tr. 16885-16886 (Shamberger).
[4]See Nev. Ex. 7.
[5]Tr. 16224 (Shamberger).
[6]Tr. 16231-16232 (Shamberger).
[7]Tr. 16237 (Shamberger).
[8]Nev. Ex. 14.

of 2,540 square miles. Its flow originates in springs but the water is either consumed or lost prior to its reaching the lower reaches of the Wash.[9] Approximately 5,000 acres in the area known as Upper Meadow Valley Wash were under irrigation in 1958 but no acreage was irrigated in the Lower Meadow Valley Wash.[10] In the opinion of the state engineer, the use of water for irrigation on the Upper Meadow Valley Wash has no effect on stream flow conditions in the channel of the Meadow Valley Wash at Glendale or on the amount of water that ultimately reaches the Muddy River because of the great losses that occur in the lower reaches of the Wash.[11] There is no decree adjudicating water rights on the Meadow Valley Wash or its tributaries.[12]

4. *Las Vegas Valley.* Las Vegas Valley runs in a northwesterly-southeasterly direction and is bounded on the west by the Spring Mountains, on the northeast by portions of the Desert, Sheet and Las Vegas Ranges, on the east by Franklin Mountain and on the south by the River Mountains and the northern extremities of the McCullough Range. The Valley embraces approximately 400 square miles.[13] Situated in its center is the principal residential and trading area of Southern Nevada—the City of Las Vegas. Covering an approximate area of 24 square miles the City had a population of 48,500 on January 1, 1956. Other important municipalities in the Valley are North Las Vegas, with an area of 6.25 square miles and a population of 12,900 in 1956, and Henderson, 12 miles southeast of Las Vegas and adjacent to converted war production plants, with an area of 13 square miles and a population of 14,000 in 1956.

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[9]Tr. 16252-16253 (Shamberger).
[10]Tr. 16255-16256 (Shamberger).
[11]Tr. 16287-16288 (Shamberger).
[12]Tr. 16256 (Shamberger).
[13]Tr. 16295-16296 (Shamberger).

In addition, there are several military and defense establishments in the vicinity of Las Vegas.[14]

As of July 1956, approximately 130,000 acres in the Valley were privately owned. The remaining land in the Valley was part of the public domain, some 86,000 acres of which were classified by the Bureau of Land Management as open for small home sites. Since 1956 a number of these home sites have been taken up.[15]

Until recently the primary source of water for most of Las Vegas Valley has been ground water. Since 1945 the ground water supply has been greatly overdrawn. Although estimated average annual replenishment of ground water in the Valley is 27,000 acre-feet,[16] estimated withdrawals were 31,700 acre-feet in 1946, 36,700 acre-feet in 1950, 43,150 acre-feet in 1955 and 47,000 acre-feet in 1956.[17] Pumping of underground supply is regulated in Las Vegas Valley and issuance of well permits has been restricted.[18]

Pursuant to 1947 legislation, the Las Vegas Water District was formed to obtain water from Lake Mead and to provide an expanded water service. In 1956 a total of 21,700 acre-feet of water was pumped from Lake Mead through the Basic Management Industries' pipeline. Of this amount, 1,769 acre-feet were delivered to the Las Vegas County Water District's distribution system. In the same year a total of 68,700 acre-feet of water was used in the Valley.[19]

5. *Boulder City.* Boulder City is located in Nevada, southwest of Hoover Dam. Its water supply is from Lake

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[14]Tr. 16299-16301 (Shamberger).
[15]Tr. 16303-16304 (Shamberger).
[16]Tr. 16307-16308 (Shamberger).
[17]Tr. 16309 (Shamberger); Nev. Ex. 33. See also Nev. Exs. 29-32, 34-36.
[18]Tr. 16324-16326 (Shamberger).
[19]Tr. 16327-16333 (Shamberger).

Mead and, in 1953, 2,400 acre-feet were pumped into the City from that source. The pump lift between the Lake and the City is approximately 1,300 feet.[20]

6. *Miscellaneous Small Areas in Nevada.* These areas are presently undeveloped. However, they are briefly described below in order to complete the picture of actual and potential Nevada water uses.

(a) *Eldorado Valley.* This valley is located to the south and west of Boulder City, Nevada. The State of Nevada is presently negotiating for the purchase of these lands from the United States. Approximately 30,000 acres are suitable for home sites and roughly 19,000 acres can be commercially irrigated. There is no local water supply; water for this area would have to come from Lake Mead.[21]

(b) *Apex Dry Lake Valley.* Situated about 15 miles northeast of Las Vegas, Nevada, this valley embraces between 100,000 and 150,000 acres of land.[22]

(c) *California Wash Area.* This land adjoins the Apex Dry Lake Valley on the north and extends to the Muddy River. Owned by the United States, it contains approximately 77,000 acres below Contour 2300. Water from Apex Valley would flow by gravity into this area.[23]

(d) *Mormon Mesa Area.* This area is located northeast of Glendale, Nevada, between Glendale and Mesquite. Nevada hopes to apply Lake Mead water here to develop irrigated farmland and small home sites.[24]

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[20]Calif. Ex. 2716.
[21]Tr. 16355-16361 (Shamberger).
[22]Tr. 16364 (Shamberger).
[23]Tr. 16365-16366 (Shamberger).
[24]Tr. 16366-16367 (Shamberger).

D. New Mexico

Approximately 10,900 square miles of New Mexico territory lie within the Lower Colorado River Basin, of which roughly 830 square miles lie within a closed basin in the Carrizo area. Thus, about 10,000 square miles in New Mexico are drained by the Lower Colorado River System. This represents almost one-twelfth of the total area of the State. This part of the Lower Basin lies along the western border of New Mexico, measures approximately 312 miles from north to south and has a maximum width east to west of 72 miles.[25] It is divided into two sub-basins: the Little Colorado River sub-basin on the north; and the Gila River sub-basin on the south.

The Little Colorado River sub-basin contains about 4,200 square miles. Its northern portion is characterized by low mesas, desert cliffs and dry washes. Its southern portion is covered by recent lava flows except in the vicinity of the Gallo Mountains where older lava flows predominate. The principal tributaries of the Little Colorado River in New Mexico are Black and Carrizo Creeks, Rio Puerco and the Zuni River.[26]

The Gila River sub-basin contains approximately 5,800 square miles. It is generally characterized by high mountains, deep canyons and small open valleys. In addition, its southernmost portion is desert-type country. The principal streams of this sub-basin are the Gila River and its tributaries—the San Francisco River and San Simon Creek. The primary sources of water supply for the mainstream of the Gila in New Mexico are several high mountain ranges with elevations up to 10,000 feet.[27]

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[25]Tr. 17264 (Hale).
[26]Tr. 17265-17268 (Hale).
[27]*Ibid.*

A more detailed description of the various areas of the Lower Basin in New Mexico is best effected by separate treatment of the drainage areas of each of the seven principal streams tributary to the Colorado River.[28]

1. *Area 1—Black Creek.* The drainage area of the streams located here, Black Creek and Todilto Wash, is 229 square miles. Area 1 is partly mountainous and Black Creek flows from mountains into rolling, mountain-valley country with elevations of 6,000 to 8,837 feet. Mean average temperature is 48.1 degrees, mean annual precipitation is 12.74 inches and the summer frost-free period is 130 days. The principal occupation in Area 1 is farming and cattle and sheep ranching; there is only one community of any size—the small town of Crystal.[29]

2. *Area 2—Rio Puerco.* The only important stream in this area, Rio Puerco, is fed by numerous dry washes and its flow depends primarily upon occasional rainfall. Its drainage area is 1,083 square miles. The terrain is rolling, dry, hill and cliff country with elevations ranging from 6,000 to 8,837 feet. Mean annual temperature is 50 degrees, annual average precipitation is 13.99 inches and the frost-free period is 153 days. The only substantial city in the area is Gallup, New Mexico, with a population of 11,500.[30]

3. *Area 3—Zuni.* The principal streams here are Atarque Creek and the Rio Pescado and Rio Nutria which form the Zuni River. These streams, which in certain reaches are spring fed, form on the western slope of the Zuni Mountains and flow in a southwesterly direction. After flowing from the mountains they traverse a high, rolling

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[28]See Tr. 17263 (Hale); N. M. Ex. 400.
[29]Tr. 17269-17270 (Hale).
[30]Tr. 17271-17272 (Hale).

plateau. Elevations run from 6,000 to 8,600 feet. Their drainage area is 1,075 square miles. Mean annual temperature in the area is 50 degrees, mean annual precipitation is 12.65 inches and the average frost-free period is 151 days. The principal community is the town of Zuni, with a population of 3,000. In general, the economy is based on cattle and sheep ranching and some irrigation farming. In addition, Indians from the Zuni Reservation manufacture jewelry.[31]

4. *Area 4—Carrizo.* Major streams in this area are the Carrizo, Largo and Agua Fria Creeks which have a drainage area of 1,815 square miles. The land is high rolling plateau country similar to that in Area 3 (Zuni) except for lava flows and a closed basin of 830 square miles in the area. Elevations range from 6,000 to 9,200 feet. Mean annual temperature is 47 degrees, precipitation is 12.76 inches and the frost-free period is 116 days. Quemado, located in the center of the area, is the largest community, with an approximate population of 250. The area's economy is based primarily on lumbering and cattle and sheep ranching.[32]

5. *Area 5—San Francisco.* There are a number of streams in this area, including the San Francisco River and Center Fire, Apache, Tularosa, Mogollon, Mineral, Deep and Mule Creeks. Their drainage area is 1,917 square miles. The area consists of high, mountainous terrain with some sloping hills and valleys. In the Luna area, at elevation 7,050, mean annual temperature is 46 degrees, mean annual precipitation is 16.35 inches and the frost-free period is 94 days. In the lower elevations of Area 5, in the vicinity of Glenwood, elevation is 4,717 feet, mean annual tempera-

[31]Tr. 17273-17274 (Hale).
[32]Tr. 17274-17275 (Hale).

ture is 58 degrees, mean annual precipitation is 17.05 inches and the frost-free period is 168 days. Towns are small; the largest is Reserve, New Mexico, with a population of approximately 500. Stock raising, farming, lumbering and a few recreational enterprises constitute the basis of the economy.[33]

6. *Area 6—Gila.* Of the many streams in this area the most important is the upper reach of the main Gila River. The total drainage in Area 6 is 3,363 square miles. The Gila rises in high mountains, flows through narrow valleys for about 70 miles, traverses Cliff Valley and then flows through intermittent canyons to the Virden Valley at the state line. Elevations range from 3,800 to 10,778 feet. At Cliff Valley elevation is 4,800 feet, mean annual temperature is 56 degrees, mean annual precipitation is 15.12 inches and the frost-free period is 158 days. In addition to Cliff-Gila, population 400, the other center of population in the area is Virden with a population of less than 1,000. Other towns nearby, but outside the basin, are Silver City, population 8,500, and Lordsburg, population 4,000. The area is serviced by railroads and highways and the primary occupations of its inhabitants are mining, cattle raising and irrigation farming.[34]

7. *Area 7—San Simon.* The San Simon Creek in this area is an ill-defined stream draining only 383 square miles. The drainage area is a dish-shaped valley between two mountain ranges and Rodeo is its one village. Mean annual temperature is 55.5 degrees, mean annual precipitation is 18.52 inches and the frost-free period is 178 days.[35]

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[33]Tr. 17275-17277 (Hale).
[34]Tr. 17277-17278 (Hale).
[35]Tr. 17279 (Hale).

E. United States

1. *Indian Reservations—Little Colorado River Area.*

(a) *Navajo Reservation.* Located in the northeast corner of Arizona, the northwest corner of New Mexico and the southeast corner of Utah, this Reservation contains approximately 14,000,000 acres of land. It is an area of very high plateaus, flat-top mesas, inaccessible buttes and deep canyons. Because of this topography, about 1,500,000 acres are inaccessible even to livestock. Elevations range from approximately 2,800 feet at the mouth of the Little Colorado River to 9,000 feet along the drainage divide between the San Juan and Little Colorado Rivers. The climate is very dry, vegetation is sparse and the winters are long and extremely cold, some temperatures dropping as low as 30 degrees below zero. Summer temperatures are also extreme, ranging upwards to 100 degrees. Average annual rainfall over the whole Reservation is about eight inches, most of which falls in torrential summer rains.[36]

The Navajo Indians do not live in villages. Because of the poor range conditions and intermittent arable areas they are scattered over the Reservation and, in some cases, they lead a semi-nomadic existence, moving where water is available for farming and stock raising. The Navajo economy is based largely on subsistence farming, stock raising and seasonal labor off the Reservation. In addition, some of these Indians earn supplemental income as rug weavers and silversmiths.[37]

The Navajo tribe is increasing at the rate of 2.5% per year, and so has doubled within the last thirty years.[38] The population of the Reservation itself is unclear. In 1956, 82,000 Indians were listed on the tribal rolls but 6,000 of

[36]Tr. 12633-12635 (Head).
[37]Tr. 12635-12636 (Head).
[38]Tr. 12636 (Head).

these lived on the Hopi Reservation and others lived off any reservation.[39] Since 1952, it has been the policy of the Bureau of Indian Affairs to relocate some members of the Navajo tribe and approximately 1,000 Indians have been annually relocated in other areas of the United States, some being absorbed by private economy.[40]

A statutory rehabilitation program for the Navajo and Hopi Indians, enacted by Congress in 1950[41] and administered by the Bureau of Indian Affairs, is known as "The Hopi-Navajo Long Range Program" and authorizes expenditure of $88,000,000 for the development of the Hopi and Navajo Reservations. Expenditures of $9,000,000 were authorized for the development of irrigation on the Reservations and, as of 1957, approximately $4,000,000 had been spent. In administering the Long Range Program attempts have been made to improve soil conditions and to institute a moisture conservation program. In furtherance of these ends, water spreading has been used and stock watering ponds and detention dams have been constructed. In addition, range reseeding has been practiced as well as contouring and brush control. Income from oil and gas lease bonuses and rentals and from royalties on uranium mining has been spent by the Navajo tribe in furtherance of the program. The tribe has deposited about $50,000,000 with the United States, most of which is income from oil and gas leases.[42]

Irrigation water for lands in the Navajo Reservation lying in the Lower Colorado River Basin is derived from springs, seeps and small, permanent and intermittent stream flows. Many small storage reservoirs and diversion structures have been constructed together with appurtenant

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[39]Tr. 12699, 12717-12718 (Head).
[40]Tr. 12639 (Head).
[41]64 Stat. 44.
[42]Tr. 12657-12661, 12668-12668A, 12692 (Head).

canals for distribution. Apparently, irrigation on the Reservation is conducted by means of many small irrigation units, each with its separate source of supply.[43]

(b) *Hopi Reservation.* The Hopi Reservation is situated in the northeast portion of Arizona within the exterior boundaries of the Navajo Reservation and includes approximately 2,500,000 acres. Its topography and climate are similar to that of the Navajo Reservation. The Hopi Indians live in a number of small villages most of which are located on high mesas, although in recent years some of the younger Hopis have built homes in the valleys.[44]

Hopi population has grown at a moderate pace and, as of 1957, approximately 5,000 Indians were living on the Reservation. In general, there has been little movement away from the Reservation. Hopi economy is basically agricultural although some income is derived from trading, silver work and other handicraft.[45] As indicated above, the Hopi Reservation is included within the Hopi-Navajo Long Range Program. Irrigation systems in the Reservation are similar to those in the Navajo Reservation.[46]

(c) *Zuni Reservation.* Located in the State of New Mexico, on the boundary line between New Mexico and Arizona, the Zuni Indian Reservation is approximately thirty-two miles south of Gallup, New Mexico. It has an approximate area of 404,000 acres. Elevations in this high plateau country range from 5,900 to nearly 7,000 feet, and high mesas and small valleys spread throughout the Reservation create a broken terrain. Climate is extreme in each season and winter temperatures fall as low as 20

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[43]See Tr. 12815-12856 (Keesee). See also U. S. Exs. 276-295.
[44]Tr. 12640-12642 (Head).
[45]Tr. 12642-12643 (Head).
[46]See Tr. 12795-12814 (Keesee). See also U. S. Exs. 293, 413-421.

degrees below zero. Average rainfall is twelve inches annually, most of which falls within the months of July and August. Most of the Zunis live in small villages or in the Zuni Pueblo and during the farming season they move out to the irrigation projects.[47]

The population of the tribe, which has increased by about 1,000 in twenty years, is approximately 3,000 Indians, most of whom live on the Reservation. Although these Indians engage in silver work and seasonal labor off the Reservation, their economy is primarily based on subsistence farming and stock raising.[48]

Water for irrigation of Reservation land is obtained from the Zuni, Nutria and Pescado Rivers as well as from springs located throughout the Reservation. The irrigation system comprises a number of separate irrigation units which are serviced by various small diversion dams, reservoirs and canal distribution networks.[49]

2. *Indian Reservations—On or Near the Colorado River.*

(a) *Kaibab Reservation.* Inhabited by the Kaibab band of the Paiute Indians, this Reservation, with an approximate area of 120,000 acres, is located just south of, and adjacent to, the northern border of the State of Arizona, about half way between Lee Ferry and the northwest corner of Arizona. The Reservation, lying north of the Grand Canyon, has desert-type terrain. The population of the Kaibab tribe is approximately 100, but the number actually living on the Reservation is not in evidence. Gardening and wage earning in nearby towns constitute the basis of the economy.[50]

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[47]Tr. 12628-12630 (Head).
[48]Tr. 12631-12632 (Head).
[49]Tr. 12775-12793 (Keesee). See also U. S. Exs. 119-147.
[50]Tr. 13760-13761 (Haverland).

Irrigation water for Reservation land is obtained from Moccasin Springs and a stream known as Two Mile Wash.[51] Water from these sources is diverted into several small storage reservoirs and, when enough has accumulated, it is distributed through a system of laterals.[52]

(b) *Havasupai Reservation.* Covering an approximate area of 3,000 acres, this Reservation is located south of the Kaibab Reservation and the Grand Canyon. A portion of its lands is situated at the bottom of the Canyon. The terrain is extremely rugged, desert-type country. No evidence was introduced as to the number of Indians living on the Reservation. The tribe has a population of approximately 250. Tribal economy consists of subsistence gardening in the bottom of the Grand Canyon and wage earning in surrounding communities.[53]

Water for irrigation purposes is diverted from Cataract Creek or Havasu Creek. Two diversion dams serve the two main canals of the distribution system.[54]

(c) *Hualapai Reservation.* The Hualapai Indian Reservation in Arizona consists of three sections, the largest of which abuts on the Colorado River and extends south to the town of Peach Springs, Arizona. The second section, known as the Hualapai School Reserve, is located directly south of the largest section. Finally, the Hualapai Indian Reserve is situated further south on the Big Sandy River. Total combined area is approximately 1,000,000 acres, most of which has a very arid climate and a desert-valley-type of topography. It is unclear how many of the 700 Hualapai Indians live on the Reservation. Although there are a few

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[51]Tr. 14455-14456 (Fortier).
[52]Tr. 14005-14006 (Rupkey). See also U. S. Exs. 604-614.
[53]Tr. 13761-13762 (Haverland).
[54]Tr. 14011 (Rupkey). See also U. S. Exs. 704-717.

business enterprises, Hualapai economy is based primarily on the raising of livestock.[55]

Irrigation water for lands in the Big Sandy area comes from the Big Sandy River and Trout Creek. Water for the other areas comes from springs and wells and is distributed through a system of pipes and laterals.[56]

(d) *Moapa Reservation.* Situated in the southern portion of Nevada 40 to 50 miles northeast of Las Vegas, this Reservation contains about 1,200 acres—most of which are located in the bottom of a valley with desert-type topography. The Reservation is inhabited by the Moapa band of the Paiute Indians whose total population in 1957 was approximately 100. The actual number residing on the Reservation is unclear.[57] Moapa economy consists of subsistence gardening and wage earning in nearby towns.[58] Practically all irrigable land in the Moapa Indian Reservation has been leased to non-Indians.[59]

(e) *Fort Mohave Reservation.* This Reservation is situated in the States of Arizona, California and Nevada in the general area of their common borders. Embracing approximately 38,000 acres, the Reservation's climate and topography are that of an arid desert valley. The total number of the Fort Mohave tribe living on the Reservation is unknown. The tribe's total population in 1957 was approximately 450. The majority of these Indians work for the Santa Fe Railroad in the town of Needles, California.[60]

Irrigation on this Reservation is negligible. Plans have been proposed for a modern irrigation system using both

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[55]Tr. 13762-13763 (Haverland).
[56]Tr. 14014-14015 (Rupkey). See also U. S. Exs. 811-818.
[57]Tr. 13787 (Haverland).
[58]Tr. 13763 (Haverland).
[59]Tr. 13788-13789 (Haverland).
[60]Tr. 13764-13787, 14069 (Haverland) (Rupkey).

surface water from the Colorado River and underground sources.[61]

(f) *Chemehuevi Reservation.* The Chemehuevi Indian Reservation is situated in an arid desert valley area in California, on the west bank of the Colorado River between Parker Dam and the Fort Mohave Indian Reservation. Its total area is approximately 28,000 acres. There are no Indians presently inhabiting the reservation.[62] Tribal population in 1957 approximated 300 Indians.[63]

As of 1957, irrigation was not practiced on the Reservation. However, the Bureau of Indian Affairs has tentatively planned to introduce irrigation systems on the Reservation.[64]

(g) *Colorado River Reservation.* This Reservation, situated on both sides of the Colorado River in Arizona and California, is bounded on the south by Ehrenburg, Arizona. Its approximately 260,000 acres, which extend to the mesas and mountains on the east and northwest, are primarily arid desert valley country. The inhabitants of the Reservation, the Colorado River Indian tribes, have an agricultural economy.[65] It is estimated that 1,100 or 1,200 of the 1957 tribal population of approximately 1,300 live on the Reservation.[66]

Irrigation water for the Arizona portion is diverted from the Colorado River at the northern part of the Reservation. The diversion dam, called Headgate Rock Dam, has been described at pages 34-35, *supra.* It creates a lake

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[61]Tr. 14072-14078 (Rupkey). See also U. S. Exs. 258, 260, 1307-1314.

[62]Tr. 14030 (Rupkey).

[63]Tr. 13765 (Haverland).

[64]Tr. 14023-14031 (Rupkey). See also U. S. Exs. 516, 1204-1205.

[65]Tr. 13765-13766 (Haverland).

[66]Tr. 13792-13793 (Haverland).

which is used for recreational purposes. There is no power plant. Depth of the water in the canal intake is considerably less than the depth of the River so that only top water flows into the diversion works, thus minimizing the silt problem. The dam was completed in 1941 at a cost of approximately $5,000,000. The main canal for this part of the Reservation takes out at the diversion works and proceeds westerly and southwesterly, entering the valley just west of the town of Parker, Arizona. Its total length is approximately 17 miles and it has a capacity of 2,100 c.f.s. at the heading. The canal, which is partially lined, ends in a wasteway. Complete lining of the canal has been planned and the resulting increased capacity will be able to serve approximately 105,000 acres. Water is regulated by a complex distribution and drainage system.[67]

Construction of several irrigation systems on the California side of the Colorado River Indian Reservation has been planned,[68] and some surveying has been completed.[69] It is estimated that over 70,000 acres in the Reservation have been leased to non-Indians.[70]

(h) *Yuma Reservation.* The Yuma Reservation is located in California across the Colorado River from Yuma, Arizona. It also includes the so-called "Yuma Homesteads" situated south and west of Yuma, in Arizona. Its total area, including the "Yuma Homesteads" is approximately 9,000 acres. The topography is typical Colorado River desert land and the climate is arid. The Reservation is inhabited by the Quecham Indians. As of 1957, about 900 of the estimated

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[67]Tr. 13981-14001 (Rupkey).

[68]Tr. 14054-14055 (Rupkey); see U. S. Exs. 558, 562.

[69]Tr. 14127 (Rupkey).

[70]Tr. 13776 (Haverland); see U. S. Ex. 568. See also U. S. Exs. 507-558. Leasing of lands on Indian Reservations is governed by 69 Stat. 539 (1955), U. S. Ex. 564; and 69 Stat. 725 (1955), U. S. Ex. 565.

total tribal population of 1200 lived on the Reservation. Most of these Indians are engaged in agriculture or wage earning.[71]

Irrigation water for these Indian lands was first diverted from the Colorado River at Laguna Dam. When Imperial Dam and the All-American Canal were completed, however, the Reservation was served by these facilities. Water delivered from the River is distributed through a system of canals and laterals.[72]

(i) *Cocopah Reservation.* The Cocopah Reservation is composed of two tracts of land located southwest of Yuma in Arizona. Total approximate area is 500 acres and the climate of this typical Colorado River Valley land is arid. The number of the Cocopah Indian tribe living on the Reservation is unclear. The 1957 tribal population was about 90 Indians. Primary sources of income are agriculture and wage earning.[73]

Both tracts of the Cocopah Reservation receive irrigation water from the Colorado River through the facilities of the Valley Division of the Yuma Project. One tract receives water from the Valley Division's east main canal and the other tract receives water from the west main canal. Reservation laterals distribute water directly to the irrigated lands.[74]

3. *Indian Reservations—Central Arizona Area.*

(a) *Gila Bend Reservation.* Situated on the Gila River about 40 miles southwest of Phoenix, Arizona, this Reserva-

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[71]Tr. 13766-13767, 13791, 13821A (Haverland).

[72]U. S. Ex. 1116. See also U. S. Exs. 258, 510, 1105-1115, 1117.

[73]Tr. 13767-13768 (Haverland).

[74]Tr. 14020-14021 (Rupkey). See also U. S. Exs. 508, 511, 1002-1003, 1005.

tion has an approximate area of 10,000 acres of arid desert valley land and is inhabited by members of the Papago tribe. In 1957, approximately 250 of the total tribal population of 7,500 lived on the Reservation and sustained themselves by working for the railroad serving the area.[75]

Originally, irrigation water was diverted from the Gila River and distributed through the Papago Canal and Indian Lateral. Because of decreasing flows in the Gila these works were discontinued and wells were drilled to provide most of the water supply. Underground water so obtained is distributed through a system of laterals.[76]

(b) *Papago Reservation.* Located in the south central part of Arizona adjoining the Mexican border, this Reservation comprises roughly 2,800,000 acres. Approximately one-half of the Reservation, the northern portion, lies within the Colorado River Basin.[77] The Reservation's climate is arid and it lies in a desert area with rocky, rugged hills on the edge of the valley. It is inhabited by the Papago Indians, some 6,700 of whom live on the Reservation. Their economy is based primarily on cattle raising and wage earnings.[78]

Irrigation water for these Indian lands is provided primarily by wells. Water is discharged into a reservoir or directly into the distribution system which is composed of laterals and partially lined canals.[79]

(c) *San Xavier Reservation.* This Reservation is located on the southwestern edge of the City of Tucson and contains about 71,000 acres. In 1957, it was inhabited

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[75]Tr. 14640-14641 (Haverland).
[76]Tr. 14713-14715 (Rupkey). See also U. S. Exs. 1403-1407.
[77]See Tr. 14540; U. S. Ex. 100.
[78]Tr. 14641-14642 (Haverland).
[79]Tr. 14717-14718 (Rupkey). See also U. S. Exs. 1504-1517.

by 500 to 550 Papago Indians. Its climate and topography are similar to that of the Papago Reservation. These Indians have an agricultural and wage earning economy.[80]

Formerly, irrigation water was obtained from three sources; wells, infiltration galleries, and the Santa Cruz River. Because of flood damage and erratic river flow the diversion dam and canal on the Santa Cruz are no longer in use. Additional wells were drilled to compensate for the diminished surface supply and for the declining water table which rendered the infiltration galleries inoperative.[81]

(d) *Gila River Reservation.* The Gila River Reservation, which includes two small irrigation districts and the Indian lands of the San Carlos Project, is situated approximately 20 miles south of Phoenix, in Arizona, and contains about 370,000 acres of land. Its topography and climate are typical of southwest desert country. In 1957, it was inhabited by approximately 5,700 members of the Pima and Maricopa Indian tribes. Their economy is based upon agriculture and wage earning.[82]

The irrigation system of the Gila Crossing District of the Gila River Reservation includes two diversion dams on the Gila River. Declining surface flow has rendered them almost inoperative, however, and wells have been drilled to compensate for the loss of supply. Well water is distributed through a system of ditches. The Maricopa District of the Reservation has for some time obtained its irrigation water exclusively from wells. A network of ditches serves as a distribution system.[83]

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[80]Tr. 14642-14643 (Haverland).

[81]Tr. 14723-14725 (Rupkey). See also U. S. Exs. 258, 512, 1702-1724.

[82]Tr. 14644 (Haverland).

[83]Tr. 14727-14733 (Rupkey).

(e) *Ak Chin-Maricopa Reservation.* This Reservation is located in Arizona at the southwest corner of the Gila River Reservation and contains approximately 21,000 acres of land. In 1957, it was inhabited by some 140 members of the Ak Chin-Maricopa tribe whose economy is primarily based on agriculture and wage earning.[84] Portions of the Reservation are irrigated by well water distributed through laterals. Other portions are irrigated, in part at least, from surface water which is partially derived from desert runoff and surplus water from irrigation on non-Indian lands.[85]

(f) *San Carlos Reservation.* The 1,600,000 acres of this Reservation lie in eastern Arizona between the Gila and Salt Rivers. Its eastern portion is quite mountainous, its northern portion also has relatively high elevations and its southern portion is low elevation desert land. Climate is hot and arid. The inhabitants are of the San Carlos-Apache tribe whose population in 1957 was approximately 4,500. Their economy consists of stock raising, agriculture and wage earning.[86]

Irrigation water for these Indian lands is primarily obtained from wells which discharge into a distribution system of laterals and pipelines. Two ditches with headings at the San Carlos River provide some surface water.[87]

(g) *Salt River Reservation.* The Salt River Reservation is located in Arizona about 10 miles east of the City of Phoenix on both sides of the Salt River. Its area is approximately 47,000 acres and topography and climate are typical of the Salt River Valley. It is inhabited by members of the Pima and Maricopa Indian tribes. Their

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[84]Tr. 14644-14645 (Haverland).

[85]Tr. 14720-14721 (Rupkey). See also U. S. Exs. 1604-1614.

[86]Tr. 14645-14646 (Haverland).

[87]Tr. 14758-14759 (Rupkey). See also U. S. Exs. 2023-2047.

combined population in 1957 was approximately 1500. The economy is based on agriculture and wage earning.[88]

Irrigation water is obtained from surface and underground sources. The primary source of water is the Salt River from which water is diverted to flow by gravity to the Reservation. The Arizona and South Canals of the Salt River Valley Water Users' Association, which take out at Granite Reef Diversion Dam, bring Salt River water to the edge of the Reservation where pipes and concrete conduits conduct the water on to Indian lands to be distributed through laterals.[89]

(h) *Fort McDowell Reservation.* Located in Arizona along both sides of the Verde River, this Reservation abuts on the northeast corner of the Salt River Indian Reservation and contains about 25,000 acres. Its eastern and western sides are hilly but the central portion lies in the Verde Valley. It is inhabited by the Fort McDowell-Mohave-Apache tribe which numbered approximately 300 in 1957. Their economy is based on stock raising, agriculture and wage earning.[90]

Irrigation water is diverted from the Verde River and conducted to the Indian land by two ditches. At one time, four ditches served the area but flooding destroyed the headings of two of them and they are no longer in use. Consequently the area in the southern portion of the Reservation on each side of the River is not used.[91]

(i) *Camp Verde Reservation.* The Camp Verde Indian Reservation is located in Arizona approximately 40 miles east of Prescott and contains about 500 acres of land.

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[88]Tr. 14646 (Haverland).

[89]Tr. 14768-14770 (Rupkey). See also U. S. Exs. 2109-2119.

[90]Tr. 14646-14647 (Haverland).

[91]Tr. 14775-14776A (Rupkey). See also U. S. Exs. 2206-2210.

Although situated in the Verde Valley, its topography is that of arid desert country. It is inhabited by the Yavapai-Apache tribe, the 1957 population of which approximated 650. Tribal economy is based on agriculture and some wage earning.[92]

The Verde River is the primary source of irrigation water supply. Two ditches conduct water to various turnouts which discharge water into a system of laterals.[93]

(j) *Fort Apache Reservation.* Situated in east central Arizona north of the Salt River, this Reservation contains 1,660,000 acres of land. Its eastern portion is a heavily timbered area of high elevations and both the eastern and northern portions enjoy a temperate climate and good rainfall. The Salt River portion is desert and the climate is arid. The Reservation is inhabited by the White Mountain-Apache tribe, the 1957 population of which was approximately 4,000. This Indian economy is diversified: it includes timber operations, stock raising and subsistence agriculture.[94]

Several ditches and headings divert irrigation water from the North Fork of the White River and from Diamond Creek. Some portions of the Reservation receive North Fork water which is pumped by a pumping plant located on the west bank of the River. The White Mountain section of the Reservation obtains irrigation water through a series of ditches taking out of the East Fork of the White River.[95]

Despite objections by the Salt River Valley Water Users' Association and a lawsuit pending at the time of the hearings in this case, a dam has recently been constructed within

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[92]Tr. 14647-14648 (Haverland).
[93]Tr. 14779-14781 (Rupkey).
[94]Tr. 14648-14649 (Haverland).
[95]Tr. 14783-14788 (Rupkey).

the Fort Apache Indian Reservation which creates the Smith Park Reservoir. It is used for recreational purposes. The dam was constructed with tribal funds with the approval of the Secretary of the Interior. Its capacity is 5,000 acre-feet.[96] Recreation potential of the Reservation is great, particularly along the White River. Indeed, the area is currently popular with vacationers and increased facilities are planned for the future.[97]

4. *Indian Reservations—Coachella Valley.* There are three small Indian Reservations in the Coachella Valley: the Cabazon Reservation, located near Indio, California; the Augustine Reservation; and the Torres-Martinez Reservation. The whole of the Cabazon and Augustine Reservations and part of the Torres-Martinez Reservation are within Coachella Valley Improvement District No. 1. In 1957, the Cabazon tribe listed 17 to 20 Indians on the tribal rolls, the Augustine tribe listed 5; and the Torres-Martinez tribe included approximately 250 Indians. Although these Indians did not, as of 1957, receive water from the Coachella Valley Water District, the District's distribution system is capable of serving the Indian land should proper laterals be installed. It is anticipated that some or all of these lands will be be furnished water in the future.[98]

5. *Fish and Wildlife Service.* Wildlife refuges maintained by the United States are operated for the protection of migratory birds and mammals, for recreation and for the prevention of crop depredations on adjoining farm land. Three of these exist in the Lower Colorado River Basin.[99]

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[96]Tr. 14689-14695 (Haverland). See also U. S. Exs. 2416-2433.
[97]Tr. 15121-15147 (Davis).
[98]Tr. 14969-14986 (Warnock). See also U. S. Exs. 2504-2506, 2510.
[99]Tr. 15656-15657 (Taylor); see U. S. Ex. 2613.

(a) *Havasu Lake National Wildlife Refuge.* This Refuge is the largest in the Lower Colorado River Basin; it extends along both sides of the Colorado River from Needles, California to Parker Dam. The Bureau of Reclamation is channelizing the River in this area and when channelization is complete the natural marsh areas which have served as wildlife refuges will have been destroyed. The Fish and Wildlife Service has formulated a plan to substitute controlled marsh and irrigated land for areas drained by the channelization program.[1]

(b) *Imperial National Wildlife Refuge.* Situated along the Colorado River from a point south of Imperial Dam to the Cibola Valley to the north, this Refuge contains approximately 4,000 acres. The channelization program of the Bureau of Reclamation will also affect this Refuge and substitute marsh areas are planned by the Fish and Wildlife Service. These plans include the development of substitute food plots. Some 35 food plot areas have been selected which range from 20 to 300 acres in size. The plots will be leveled and irrigated and crops will be grown.[2]

(c) *Salton Sea National Wildlife Refuge.* This Refuge was established in 1930 and includes public and leased private lands.[3] It is operated primarily to prevent depredation in the Imperial Valley. This is accomplished by putting approximately 4,000 acres a year to grain which is available for migratory birds just prior to or during the harvesting season on adjacent farm lands. Water for this purpose is purchased from the Imperial Irrigation District.[4]

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[1]Tr. 15671-15672 (Taylor); see U. S. Ex. 2618.
[2]Tr. 15693-15694 (Taylor); see U. S. Ex. 2621.
[3]See U. S. Exs. 2604, 2611-2612.
[4]Tr. 15796-15797 (Taylor).

6. *National Parks, Monuments, and Recreation Areas.* There are twenty-one National Parks and Monuments located within the Lower Colorado River Basin.[5] Local water supplies are used for recreation, stock and wildlife watering, various domestic uses, power and, occasionally, for irrigation.[6] Because of the number of National Parks and Monuments and because of the relatively small amount of water used by them, detailed discussion of their water supply and uses is not set forth herein.

7. *National Forests.* There are eleven National Forests in the Lower Colorado River Basin.[7] They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Water is used for recreation, domestic purposes, irrigation and stock watering.[8]

8. *Bureau of Land Management.* The Bureau of Land Management is the United States agency in charge of public lands. It has instituted livestock grazing and water spreading programs on public lands. The latter activity is designed to increase the production of forage and to prevent erosion. Flood flows in normally dry washes are diverted and applied as irrigation water to the range. The application of this water increases the growth of forage and prevents erosion by discouraging the concentration of cattle at watering holes.[9]

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[5]See U. S. Ex. 2800.
[6]Tr. 15840 (Dunn).
[7]See U. S. Ex. 2700.
[8]Tr. 16014-16015 (Lyon).
[9]Tr. 16076-16078 (DeJulio).

F. Utah

The portion of the Lower Basin located in Utah lies in the extreme southwest corner of the State in part or all of four counties: Washington, Iron, Kane, and Garfield. This area is situated at the conjunction of the Colorado plateau country and the basin and range province of Nevada. In the lower parts, near the town of St. George, elevations are about 2,500 feet while in the higher portions elevations rise to 10,000 feet. On the upside and to the east of the Hurricane Fault, which runs through the Toquerville-Hurricane area, lies a high plateau. Drainage from this plateau is through narrow, deep, canyon-like channels. Population of the Utah portion of the Lower Basin exceeds 12,000. The principal city is St. George and other towns include Hurricane and Kanab.[10]

The principal streams and drainage basins in the area are: Johnson Creek, which flows into Kanab Creek in Arizona; Kanab Creek; the Virgin River System, which includes the Santa Clara River; and Beaver Dam Wash, which flows into the Virgin River in Arizona.[11] Irrigation was first practiced in the area in the middle of the 19th Century by Mormon colonists.[12]

The main reservoir on the Santa Clara River is Baker Reservoir, which has a capacity of 1,150 acre-feet.[13] The principal diversions on this stream are made from Windsor Dam through the Upper Santa Clara Bench Canal and the Santa Clara Fields Canal. Other smaller canals serve additional acreage along the River. The only trans-basin diversion in the region diverts part of the headwaters of the Santa Clara to the Great Basin area.[14]

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[10]Tr. 17812-17813, 17816 (Bingham); see Utah Ex. 1.
[11]Tr. 17814-17816 (Bingham).
[12]Tr. 17827 (Criddle).
[13]Tr. 17922-17923 (Bingham).
[14]Tr. 17819-17821 (Bingham); see Utah Ex. 8.

Kolob Reservoir, capacity 5,586 acre-feet, is located northeast of the town of Virgin on a tributary of the Virgin River. Diversions from the River are made by: St. George and Washington Fields Diversion Dam and Canal, serving lands near St. George; La Verkin Canal, serving lands in the vicinity of the Town of La Verkin; and Hurricane Canal, serving lands south and west of the Town of Hurricane. Further to the east the Kanab Canal diverts from Kanab Creek to serve lands south of the Town of Kanab.[15]

Some of the waters of the Santa Clara River, the main Virgin River, Leeds or Quail Creek and Kanarra Creek are subject to court decrees.[16] There are no decrees affecting Johnson and Kanab Creeks.[17]

The Bureau of Reclamation has twice reported on a proposed Dixie Project in the Utah portion of the Lower Colorado River Basin. Neither of these reports, dated 1949 and 1953 respectively, had been approved by the Commissioner of Reclamation at the close of hearings in this case. The essential difference between the two is that the latter is designed to serve less land with fewer works. The proposed project is planned to serve the Hurricane Division on the Virgin River and the Santa Clara Division on the Santa Clara River. In addition, the Dixie Project would make possible a trans-basin diversion from Kolob Reservoir to the Cedar City area by providing a substitute water supply.[18]

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[15]Tr. 17818, 17922-17923 (Bingham).
[16]See Utah Exs. 9-19.
[17]Tr. 17871 (Criddle).
[18]Tr. 17923-17928, 17937-17945 (Bingham).

VII. Mainstream Supply

During the course of the hearings in this case evidence was introduced of estimates of future supply of mainstream water which will be available for consumptive use in the Lower Basin. Arizona and the United States take the position that it is neither necessary nor useful to attempt to predict the future Lower Basin supply in order to adjudicate this case. California, on the other hand, urges that supply should be estimated and this estimate used as the basis for decision. Nevada has also presented an estimate of future supply.

I have concluded that a prediction of the future supply of Lower Basin mainstream water would be irrelevant to the legal issues involved in this case, and, moreover, would not be sufficiently accurate to shed light on any equitable considerations which might bear on the decision. Thus no attempt is made to predict future supply in this Report.

A. The Future Supply of Mainstream Water in the Lower Basin is Irrelevant to the Legal Issues in This Case

As will be developed in Part Two of this Report, Congress and the Secretary of the Interior have established a formula for the apportionment of mainstream water among the three states of the Lower Basin with geographic access to the Colorado River; namely, Arizona, California and Nevada.[19] This formula allocates certain percentages of the available supply in any given year to each of the three states. Since the formula is not derived from supply and since it operates on whatever the supply happens to be in any given year, there is no need to predict future supply in order to determine how that supply is to be

[19]This apportionment does not apply to water diverted upstream from Lake Mead. See pp. 183, 225-228, *infra*.

apportioned. In other words, the recommended decree states exactly how water is to be divided among the three states in the future, and it provides for any supply situation which may develop. Thus it is unnecessary to predict future supply conditions in order to adjudicate this case.

California emphasizes that the Supreme Court, in several earlier equitable apportionment cases, has based its decision on an estimate of future supply.[20] She argues that the same procedure should be followed in this case. But in those cases, unlike this case, the Supreme Court did not have a flexible formula, established by Congress and the Secretary of the Interior, which could be used to apportion whatever water supply happened to be available in any particular year in the future. Future supply was estimated in those cases, even though, as the Court specifically recognized, the estimates would necessarily be inaccurate, because the Court considered a finding as to supply useful to its decision. Because a flexible formula authorized by Congress and effectuated by the Secretary of the Interior controls this case, the Report does not estimate a supposedly static total supply and allocate fixed amounts of it to each state. Whether the Court itself could have established a flexible formula as an equitable matter to control the interstate apportionment in those prior cases is of no concern here. This case involves a statutory, not an equitable, apportionment and that statutory apportionment applies irrespective of supply. Given the very erratic flow of the Colorado River, which makes it highly unlikely that the supply of water available for consumption each year will be constant, see pages 107-109, 116-118, *infra*, a percentage allocation not dependent on a fixed supply is more

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[20] *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945); *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

practicable to apply than a mass allocation based on a supposedly fixed future supply.

The only other suggestion advanced by California to support its contention that a prediction of future supply is relevant to the legal issues in this case is that such a prediction might shed light on the Congressional intention embodied in the Boulder Canyon Project Act. California argues that Congress intended Los Angeles to receive a substantial amount of water from the Colorado River and that the interpretation of the Project Act suggested in this Report is incorrect because, when applied to the future supply of water as estimated by California, it does not provide any mainstream water for Los Angeles. But the supply of water which will actually be available in the future for any state or any project does not provide the slightest insight into the intention of Congress when it passed the act in 1928. Obviously the relevant factor in determining Congressional intention is the supply of mainstream water which Congress thought would be available at the time it enacted the Project Act, not the supply which will in fact be available after 1960. Thus, assuming hypothetically the validity of California's argument that Congress intended Los Angeles to receive a substantial amount of Colorado River water which she would not receive under the interpretation of the Project Act proposed in the Report, this would not cast doubt on the proposed statutory interpretation if Los Angeles would have received the water which Congress intended had the supply conditions which Congress anticipated in 1928 actually prevailed. The Court could not rewrite the Project Act to compensate for an erroneous congressional estimate of water supply. And, for all of the uncertainty over the actual supply of water in the Colorado River, one thing that is clear is that the estimates of supply in 1928 were uniformly and substan-

tially larger than even the most optimistic estimates made today.[21]

B. It is Impossible to Predict Future Mainstream Supply Accurately Enough to Shed Light on the Equities in This Case

California contends that the record in this case supports a finding of fact that the "safe annual yield or dependable supply of water available for mainstream projects in the Lower Basin is probably not less than 5,400,000 nor more than 5,850,000 acre-feet per annum."[22] She contends that application of the apportionment formula recommended in this Report to this supply of water would seriously curtail existing uses of mainstream water in California and might eliminate all diversions by the Metropolitan Water District, which serves Los Angeles and other cities on the Southern California coastal plain.[23]

While legally irrelevant, such a result, if at all probable, would arouse the gravest apprehension. However, the record in this case gives no indication that the "chaotic disaster"[24] which California fears will, or is likely to, materialize. Her dire predictions appear to be unfounded.

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[21]See p. 17, note 56, *supra*. The Colorado River has been in a drought period since 1930. There is a dispute among the experts as to whether this period has now ended.

[22]Cal. Proposed Finding of Fact 5B:101(4).

[23]Metropolitan, under Sections 8 and 9 of the Seven-party Agreement among California water users, may be able to claim some of California's allotment as against other users in the state with a senior priority, but this does not derogate from the validity of California's argument that some existing projects would have to suffer curtailment of their present supply.

[24]Calif. Comment on the Draft Report, p. 20.

1. *The evidence will not support a sufficiently accurate prediction of future supply to determine the effect of the recommended decree on existing uses in California*

The evidence in this case simply does not permit a prediction of future Lower Basin supply with that refined degree of accuracy necessary to show whether existing California uses can be satisfied from the percentage of future supply apportioned to California. On the contrary, the mass of evidence which has been presented shows only that the science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question.

California contends that future Lower Basin mainstream supply will not exceed 5,850,000 acre-feet per annum and that the proposed apportionment to California will result in severe curtailment of her existing uses. Since California deducts evaporation and channel losses to arrive at her estimate of 5,850,000 acre-feet, this quantity seems to refer to water available for diversion at the various diversion works along the mainstream. Even assuming that such a supply would result in this curtailment,[25] a supply sufficient to satisfy 7,667,770 acre-feet per annum

[25]The supply of available water in the Colorado River has in the past been substantially larger than the demand for it; in short, every project received all the water it requested. In such circumstances it is not surprising that a great deal of water has been wasted, as is apparent, for example, from the very large unused runoff each year into the Salton Sea. Undoubtedly when and if water becomes scarce in this area, its use will be regulated much more efficiently than at present. It appears that such practices as lining canals, reducing over-ordering of water, re-using runoff water, reducing evaporation, and improving channels can be instituted in the future and will effect a substantial reduction in the amount of water needed to satisfy existing California uses. It is impossible to determine exactly how much more efficiently water will be used if the present condition of abundance turns into one of shortage, but it is clear that savings will be such that California's existing uses could be satisfied by substantially less water than is presently diverted.

of consumptive uses in the Lower Basin would fulfill all of California's existing uses.[26] Although it is impossible to determine exactly how much of a supply at the diversion gates is necessary to satisfy 7,667,770 acre-feet of consumptive uses, it will be approximately this same figure, *i.e.*, 7,667,770 acre-feet of supply. This is so because consumptive use is defined as water diverted less return flow to the River which can be used by another project in the Lower Basin or in satisfaction of the Mexican Treaty. See pp. 185-187, 225, *infra*. Since consumptive use is all water diverted less return flow, and return flow becomes available for consumption once it returns to the mainstream, supply and consumptive use will be approximately equal.

This means that a difference in the annual supply of less than two million acre-feet per annum (7,667,770 minus 5,850,000) will mean the difference, even under California's reasoning, between complete satisfaction of all of California's existing uses and serious curtailment of those uses. This simply does not leave enough of a margin of error to make a prediction of future supply useful. On the basis of the evidence received in this case, I cannot determine with any confidence whether the future annual supply will be more or less than 7,667,770 acre-feet.

Accurate determination of future supply in a stream system is difficult in any case,[27] and is especially so in the case of the Colorado River. The reasons are not hard to discover. Determination of future supply is

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[26]According to the evidence presented in this case, existing California projects presently consume 4,483,885 acre-feet of water per annum from the mainstream. See page 128, *infra*. This means, under the apportionment formula proposed in this Report, that a total supply of mainstream water sufficient to satisfy 7,667,770 acre-feet of consumptive uses in the Lower Basin per annum would satisfy all of California's present uses.

[27]See Nebraska v. Wyoming, 325 U.S. 589, 593, 598-599, 604-605 (1945).

at best a prediction—an estimate based on the past. The reliability of the estimate is, of course, conditioned upon the accuracy of the historical data and upon the probability that the past will to a substantial degree repeat itself.

With regard to the historical data, there is the difficulty of measuring stream flow,[28] which always involves a degree of inaccuracy.[29] The reason for the inaccuracy becomes apparent when one considers the measurement process. Stream flow at any particular gauging point is determined by a series of measurements and calculations which involve engineering judgment. It is necessary to determine the cross-sectional area of the stream at the gauging point and to obtain the velocity of the flow for a given stage (*i.e.*, surface level of water) at that point. Some gauging stations have a continuous stage recorder, which gives a continuous measurement of the fluctuating stream level, but others do not. When stages are measured infrequently, some error is necessarily introduced. The calculation of the cross-sectional area depends on the width, depth and contour of the stream bed. Securing of these data involves some uncertainty, partly because of the fact that the cross-sectional area is unstable, since it changes with sedimentation and scouring. Even the determination of flow velocity by current meters is inexact, because of variations in readings depending upon the depth of the meter below the water surface. The United States

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[28]For example, Ariz. Ex. 64 (House Document 419, 80th Cong.) at p. 283 states:

> "Throughout the Gila River Basin the securing of streamflow records is made difficult by violent floods, shifting channels, and sand and silt. Except in the Phoenix area, where extensive irrigation development has been made, there are no reliable long-time records of the Gila River and its tributaries."

[29]Tr. 4285 (Tipton). The witness also said that even delivery of water through a pipe to municipal water users cannot be measured with complete accuracy.

Geological Survey, which maintains and publishes records of stream flow data, rates its records from excellent (error of 5% or less) to poor (error in excess of 15%).[30]

Determination of diminution of supply resulting from reservoir evaporation loss entails similar inexactitude. Without detailing the methods of measuring reservoir evaporation loss, it is sufficient to say that the process is also one of estimate and calculation, with attendant inaccuracies. One witness characterized the often-used land pan method as reliable only to the extent of "general application on an annual basis."[31] Determining channel losses presents similar problems.

In addition, there is the problem of incomplete stream flow records. Historical flow records suffer not only from the infirmities just described but also from the fact that they often are derived, not from actual measurements on the stream, but from correlations with flows of other streams. In some instances, records were never kept or were lost. In such cases it is common to estimate flows by correlating such records of the stream that do exist with longer records of "adjacent" streams thought to have a relationship to the one in question.[32]

Prediction of future supply depends upon repetition of past conditions in future years. In making these estimates, experts select some portion of the historical record which they expect will recur. But the experts do not agree on which portion of the record to select. Certainly

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[30]Tr. 3836-3845 (Dugan). At the time Mr. Dugan gave his testimony, he was Assistant Chief Development Engineer of the United States Bureau of Reclamation.

[31]Tr. 3914 (Dugan). For a full description of methods used to calculate evaporation losses on Lake Mead, see Tr. 3907-3915A (Dugan).

[32]Tr. 4286 (Tipton). For a detailed account of the technique of correlating two streams, see Tr. 5456-5486 (Dugan).

the period chosen as "representative" determines in large measure the ultimate conclusion regarding supply. In this case, at least four different periods were put forth as the proper standard for analysis. Arizona and California chose the period 1909-1956;[33] Nevada selected 1930-1956.[34] In addition, the periods of 1914-1956[35] and 1922-1956[36] were suggested as appropriate for study. Such disagreement indicates the difficulty in arriving at any reliable conclusion as to which period will be repeated, if any.

The disagreement over the proper period for study is actually merely a reflection of the fundamental difficulty in determining supply of the Basin, namely, the erratic character of the rivers therein. In all of the representative periods selected, there were, from year to year, extreme variations in flow. The tables reproduced at the end of this section show, for example, a flow at Lee Ferry in 1953 of 8,805,000 acre-feet, less than half that of the previous year. Such an erratic supply pattern makes it extremely difficult to predict, even within a very broad range of accuracy, the supply which will be available in any particular year.

In order to overcome the uncertainty of predicting yearly supply, the experts predicted the average annual supply for various periods and assumed that this average would be the actual yearly supply for the period. There is no doubt that Hoover Dam was designed and may be used, to some extent, to translate an uneven yearly inflow into Lake Mead into stable yearly releases of water from Lake Mead. But there is a definite limit on the effectiveness of the dam in this regard. The evaporation losses on stored water in the Lower Basin are substantial, see pp. 124-125, *infra*, and, of

[33]See Ariz. Exs. 352, 353; Calif. Proposed Finding 5E:101.
[34]See Nev. Proposed Finding XXIX; Nev. Brief, p. 130.
[35]Tr. 21275-21278, 21282-21285, 21331 (Riter).
[36]Tr. 21755-21759 (Hill).

course, the more water that is stored in Lake Mead the more that evaporates. Also, a reservoir must be operated at below its full capacity so that it can be used to impound excessive unexpected flows which may occur in any particular year and thus prevent flooding. Because of considerations such as these Hoover Dam cannot be used to even out fluctuating yearly flows over any considerable period of time.

For example, assume, hypothetically, that the average inflow into Lake Mead over a fifty year period could be predicted as 10,000,000 acre-feet per year. In a year in which 17,000,000 acre-feet flowed into the Lake, only 10,000,000 would be released and the remainder stored to offset future dry years if the purpose was to establish an actual yearly outflow equal to the average yearly inflow during the fifty year period. However, if the reservoir were almost full, prudence would require that more than 10,000,000 acre-feet be released so that the dam could be used to impound any unusually heavy inflows which might occur in the succeeding few years.

In a converse situation, if only 8,000,000 acre-feet flowed into Lake Mead in one year, 10,000,000 acre-feet would still have to be released in order to maintain a yearly outflow equal to average inflow. However, if the reservoir were low, it might be wise to release only 8,000,000 acre-feet so as to reserve a supply for the next few years in case the drought conditions worsened.

The point is that it is unrealistic to take the average yearly inflow into Lake Mead for a thirty or fifty year period and assume that this, less evaporation losses, will in fact be the actual yearly supply released from Lake Mead. Even if the average for the last fifty years were repeated over the next fifty years, which itself is uncertain, nothing supports the conclusion that the yearly average would or could be translated into actual yearly releases.

It might be that over a short period of less than ten years Hoover Dam could be operated flexibly enough to translate the total inflow into an average yearly release. But it is most unlikely that this can be done over a longer period. And the fact is that it is almost as difficult to predict the average flow into Lake Mead for any ten-year period as it is to predict the flow into the Lake for any particular year, for the average flows for ten year periods during the recorded history of the Colorado River have been as erratic and unpredictable as the yearly flows. For example, the ten-year cumulative flow at Lee Ferry for the period 1941-1950 was 130,473,700 acre-feet. Five years later, the cumulative flow for the period 1946-1955 was only 111,401,200 acre-feet.[37] The difference in the *average annual* flow between the two periods is nearly 2,000,000 acre-feet. Even greater variations occur if ten or more consecutive years of record are used as a basis for averaging yearly supply. The following table illustrates the variations in flow depending upon the period selected.

COLORADO RIVER AT LEE FERRY[38]

Stream Flow in Acre-Feet

Period	10 Years	20 Years	30 Years
1899-1908	144,870,000		
1909-1918	165,873,700	310,743,700	464,360,200
1919-1928	153,616,500		
1929-1938	117,328,400	270,944,900	
1939-1948	121,532,800	238,088,700	355,417,100
1949-1958	116,555,900		

[37]See note 14, p. 146, Part Two, *infra.*

[38]Source: Ariz. Exs. 77B, table A, p. 25, 197; Calif. Ex. 5582A. Arizona Exhibit 77B is commonly called the White Book Supplement. It is a water supply study of the Lower Colorado River Basin by the Bureau of Reclamation, covering the period 1946-1951. The White Book itself (Ariz. Ex. 77) covered the period 1914-1945.

These figures demonstrate that whatever period is selected, the flows of such period have not been repeated in a later comparable period. There is no basis for assuming that flows of any of these periods will be repeated in a comparable period in the future.

Lastly, Lower Basin supply is affected by Upper Basin uses. Increased Upper Basin uses will diminish the Lower Basin supply except as the Upper Basin is limited by Article III of the Compact. Yet no one can say with certainty what increase may occur in Upper Basin uses or at what time.

In support of her prediction of future mainstream supply in the Lower Basin, California relies on two studies which were received in evidence. One, by Thomas M. Stetson, a California witness, concluded that future Lower Basin mainstream supply will be 6,175,000 acre-feet per annum.[38a] The other, by John R. Erickson, an Arizona witness, predicted a future supply of 6,100,000 acre-feet per annum.[39] The apparent concurrence of the Arizona and California witnesses is deceptive, however. Far from supporting California's position, these studies demonstrate that predictions of future supply are necessarily based on so many significant but unknowable factors that they cannot be accurate enough to be helpful in this case.

Both the Erickson and the Stetson studies are based on a number of assumptions which the witnesses made, either on the instruction of counsel or for some other reason, without any attempt to justify the assumptions and, indeed, without ever stating that they agreed with the assumptions. While each one of these assumptions has a significant effect on the ultimate supply prediction in each

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[38a]Calif. Ex. 2216-A; Tr. 21836 (Stetson).
[39]Tr. 18913-15 (Erickson).

study, no probative evidence was presented to demonstrate that any of the assumptions were correct.

First of all, both Erickson and Stetson based their predictions on the expected repetition of the succession of the annual virgin flows of the Colorado River at Lee Ferry during the period 1909-1956. It is highly unlikely that future yearly flows will even approximately repeat the 1909-1956 pattern. As previously noted, Hoover Dam may, to some extent, permit the translation of unequal yearly inflows into relatively equal yearly releases. But, because of the limits on its storage capacity, the large evaporation losses on stored water, demands of flood control and river regulation and other factors, Hoover Dam has limited utility in this regard. Unless the general pattern of supply conditions on which the studies were based repeats itself in the future, the studies cannot provide a useful guide to future supply. However, as I have pointed out, there is no evidence to indicate that the virgin flow during the period studied, even assuming its accuracy, will repeat itself in the future.

A second and controlling assumption made in the Erickson and Stetson studies on which California relies is that the Upper Basin will deplete the virgin flow at Lee Ferry by between 6,500,000 and 6,800,000 acre-feet per annum. Yet there is nothing to indicate that the Upper Basin depletions, which have never exceeded 2,200,000 acre-feet per annum measured at Lee Ferry,[40] will expand to anywhere near 6,500,000 acre-feet. Again, the witnesses assumed this amount of depletion on instruction from counsel; they did not express the opinion that it would occur. In sharp conflict with this assumption is the estimate expressed in

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[40]The approximate Upper Basin depletion is shown by comparing the historic flow with the virgin flow figures at Lee Ferry in the tables printed at the end of this section. See also Ariz. Ex. 197.

the Report of the Senate Committee which studied the Colorado River Storage Project and potential reservoir construction in the Upper Basin. That Report estimates that future Upper Basin consumptive use will not exceed 4,800,000 acre-feet per annum (depletion of the flow at Lee Ferry would be less), even if the extensive storage capacity envisaged but not as yet authorized for the Upper Basin were eventually constructed.[41]

Other unsupported assumptions on which the Erickson and Stetson studies are based include the manner in which the reservoirs will be operated by the United States in the future,[42] and the extent of the delivery obligation imposed on the states of the Upper Division under Article III(c) of the Colorado River Compact.[43]

The very great significance of each of these assumptions to the prediction of future supply is demonstrated

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[41]Senate Report No. 128, 84th Cong., 1st Sess. (1955), p. 4. See also House Report No. 1087, 84th Cong., 1st Sess. (1955), p. 6.

After the close of oral argument on the Draft Report, California moved to re-open the trial for the taking of evidence on the expected future depletion of the Colorado River at Lee Ferry by the Upper Basin. None of the other parties supports this motion. It is clear that the extent of such future depletion will depend primarily on the action of Congress in authorizing new projects in the Upper Basin, see pp. 114-115, *infra*. It would not prove useful to take evidence on this issue. The only probative evidence as to what action Congress may take in the future is the reports of congressional committees such as the ones referred to in this footnote and other official congressional documents. It is not necessary to conduct a trial to enable the Special Master or the Supreme Court to take cognizance of such documents. Moreover, it would not be expedient to make a finding as to what Congress may or may not do in the future. Therefore, California's motion is denied.

[42]The smaller the amount of water which is kept in storage in a reservoir, the less that is lost to evaporation and spillage, but the greater becomes the risk of inadequate storage to meet future needs. It is impossible to determine how the United States will strike a balance between these competing considerations in the operation of the Colorado River reservoirs in the future.

[43]In the absence of the Upper Basin states this delivery obligation cannot be determined in this case.

by the Erickson study itself. The study on which California relies,[44] which shows the future Lower Basin mainstream supply to be 6,100,000 acre-feet per annum, is only one of a series prepared by Mr. Erickson. His other studies varied certain of the assumptions, such as Upper Basin storage and the interpretation of Article III(c) of the Colorado River Compact. One of these other studies showed future supply to be 6,500,000 acre-feet per annum;[45] another showed it to be 7,400,000 acre-feet per annum.[46] And none of the Erickson studies assumed an Upper Basin depletion at Lee Ferry of less than 6,200,000 acre-feet per annum despite a maximum depletion to date of only 2,200,000 acre-feet and the Senate Committee prediction of less than 4,800,000 acre-feet.

2. *Existing California Uses Cannot Be Jeopardized Except by Congressional Action*

In discussing equities, California's contention that existing uses in that state will be curtailed under the apportionment proposed in this Report must be put in perspective. Her contention involves an assumption that Arizona and Nevada will be using all of the water apportioned to them and that the Upper Basin depletion of the flow at Lee Ferry will increase to more than 5,000,000 acre-feet per annum.[47] Even accepting the correctness of all of the other assumptions on which California's estimate of a future annual supply of 6,100,000 acre-feet is based,

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[44]This study is detailed in the Transcript at pp. 18913-18915.

[45]This study is detailed in the Transcript at pp. 18812-18819.

[46]This study is detailed in Ariz. Ex. 366.

[47]A depletion of the Lee Ferry flow of 5,000,000 acre-feet per annum instead of the depletions assumed in the Erickson and Stetson studies would mean a supply of water for the Lower Basin above what those studies predict of approximately 1,500,000 acre-feet per annum.

there is no possibility whatsoever that existing California uses might be curtailed, until these increased uses actually occur.

At the present time Arizona and Nevada are capable of utilizing only a small part of their apportionments, and the Upper Basin depletion at Lee Ferry is less than 2,200,000 acre-feet per annum. It will require construction of enormous new projects for Arizona and Nevada to fully consume their apportionments. Similarly, many new projects will have to be constructed in the Upper Basin before the flow at Lee Ferry can be depleted to such an extent that California projects would be endangered. Undoubtedly, it will be many decades before all such construction can be authorized, financed and completed. It is impossible to foretell how supply conditions may have changed or what new advances in the conservation or even production of water may have been developed by the time this occurs.

Moreover, if ever the equities between California's existing uses and new uses in the Colorado River Basin have to be resolved, it will be for Congress to resolve them. No new projects, whether in the Lower or Upper Basin, which would affect Lower Basin mainstream supply can be constructed in the Colorado River Basin without Congressional action or acquiescence. Rivers and Harbors Act, 33 U. S. C. §§ 401 *et seq.* See *United States* v. *Arizona,* 295 U. S. 174 (1935); *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 890 (1899); *Oklahoma* v. *Atkinson,* 313 U. S. 508 (1941); *United States* v. *Grand River Dam Authority,* No. 503-Oct. Term, 1959; *Wisconsin* v. *Illinois,* 278 U. S. 367, 411 (1929); *United States* v. *Republic Steel Corp.,* No. 56-Oct. Term, 1959. Furthermore, as a practical matter, it is virtually impossible to finance such projects without the help of Congress.

No new mainstream projects have been authorized by Congress in Arizona or Nevada, and California herself

recognizes that the Upper Basin depletion at Lee Ferry will not exceed, under existing and presently authorized projects, 3,840,000 acre-feet per annum.[48] Thus unless Congress authorizes new projects, even on California's own assumptions, her existing uses cannot be endangered. It is for Congress to determine the limits of new construction in the Basin and thus the extent to which California's existing uses risk curtailment.

3. *Conclusion*

On the basis of all of the evidence and argument presented in this case, I am convinced that California's apprehension of "chaotic disaster" resulting from the recommended decree is unfounded. Existing California uses are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed. And even if these projects are eventually constructed, there may well be enough water apportioned to California to satisfy the scale of her existing uses, although greater efficiency may be required. This being the case, there is no justification for California's argument that the legal conclusions discussed in Part Two should be modified because of equitable considerations.

C. Tables

For the convenience of the Court, I append on the following pages several tables showing the erratic flows of streams in the Lower Basin and the annual losses from reservoir evaporation and other causes.

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[48]California's motion to reopen the trial for the taking of evidence of depletion of the Colorado River at Lee Ferry by the Upper Basin, p. 24.

Historic Flow of the Colorado River One Mile Below Hoover Dam[49]

(Stream flow in Acre-feet)

Water Year[50]	Stream flow
1935	5,556,100
1936	6,281,700
1937	5,826,400
1938	6,167,600
1939	8,473,300
1940	7,694,400
1941	11,782,200
1942	17,876,400
1943	12,495,000
1944	14,451,000
1945	12,938,500
1946	11,290,000
1947	10,665,000
1948	12,753,000
1949	13,199,100
1950	12,937,300
1951	9,981,400

[49]Source: Ariz. Ex. 77B, table D, p. 30.

[50]A water year begins on October 1 and ends the following September 30 and is designated by the calendar year in which it terminates.

Historic Flow of the Colorado River at Lee Ferry[51]

(Stream flow in acre-feet)

Water Year	Stream Flow	Water Year	Stream Flow
1896	9,760,000	1928	15,323,300
1897	17,500,000	1929	19,223,400
1898	13,300,000	1930	13,070,100
1899	15,250,000	1931	6,387,500
1900	12,600,000	1932	15,286,300
1901	12,900,000	1933	9,745,400
1902	8,740,000	1934	4,396,400
1903	13,950,000	1935	9,912,100
1904	14,700,000	1936	11,970,300
1905	15,000,000	1937	11,896,900
1906	17,964,000	1938	15,440,000
1907	22,003,000	1939	9,393,700
1908	11,763,000	1940	7,081,600
1909	21,706,000	1941	16,052,000
1910	12,969,000	1942	17,029,400
1911	14,622,000	1943	11,263,000
1912	18,880,000	1944	13,221,400
1913	12,994,000	1945	11,545,400
1914	19,334,800	1946	8,744,700
1915	12,500,400	1947	13,514,400
1916	17,324,800	1948	13,687,200
1917	21,893,100	1949	14,359,000
1918	13,649,600	1950	11,057,200
1919	10,858,400	1951	9,830,700
1920	19,738,700	1952	17,980,000
1921	20,714,800	1953	8,805,000
1922	16,302,400	1954	6,116,000
1923	16,261,300	1955	7,307,000
1924	12,481,100	1956	8,754,000
1925	11,341,100	1957	17,347,000
1926	14,008,500	1958	15,000,000
1927	16,586,900		

[51]Sources: Ariz. Exs. 77B, table A, p. 25, 197; Calif. Ex. 5582A.

Undepleted or "Virgin" Flow of the Colorado River at Lee Ferry[52]

(In acre-feet)

Water Year	"Virgin" Flow	Water Year	"Virgin" Flow
1909	23,275,000	1933	11,356,000
1910	14,248,000	1934	5,640,000
1911	16,028,000	1935	11,549,000
1912	20,520,000	1936	13,800,000
1913	14,473,000	1937	13,740,000
1914	21,222,000	1938	17,545,000
1915	14,027,000	1939	11,075,000
1916	19,201,000	1940	8,601,000
1917	24,037,000	1941	18,148,000
1918	15,364,000	1942	19,125,000
1919	12,462,000	1943	13,103,000
1920	21,951,000	1944	15,154,000
1921	23,015,000	1945	13,410,000
1922	18,305,000	1946	10,426,000
1923	18,269,000	1947	15,473,000
1924	14,201,000	1948	15,613,000
1925	13,033,000	1949	16,376,000
1926	15,853,000	1950	12,894,000
1927	18,616,000	1951	11,647,000
1928	17,279,000	1952	20,290,000
1929	21,428,000	1953	10,670,000
1930	14,885,000	1954	7,900,000
1931	7,769,000	1955	9,150,000
1932	17,243,000	1956	10,720,000

Annual Averages for Selected Periods

Period	"Virgin" Flow
1909-1956	15,211,000
1914-1956	14,920,000
1922-1956	14,008,000
1930-1956	13,085,000

[52]Source: Calif. Ex. 2201A.

Historic Flow of the Little Colorado River at Grand Falls, Arizona—96 Miles Upstream From Confluence With Colorado River[53]

(Stream flow in acre-feet)

Water Year	Stream Flow	Water Year	Stream Flow
1914	190,200	1933	129,200
1915	338,800	1934	71,000
1916	859,400	1935	215,300
1917	303,900	1936	165,000
1918	103,700	1937	339,400
1919	261,500	1938	170,200
1920	461,000	1939	83,200
1921	170,600	1940	132,200
1922	308,900	1941	586,900
1923	271,600	1942	149,000
1924	221,800	1943	103,000
1925	150,400	1944	129,100
1926	181,500	1945	159,500
1927	393,800	1946	116,400
1928	87,600	1947	127,000
1929	510,800	1948	182,300
1930	189,300	1949	268,400
1931	165,000	1950	41,100
1932	465,900	1951	48,800

[53]Source: Ariz. Ex. 77B, table B, pp. 26-27.

Historic Flow of the Virgin River at Littlefield, Arizona, Approximately 36 Miles Above Confluence With Lake Mead[54]

(Stream flow in acre-feet)

Water Year	Stream Flow	Water Year	Stream Flow
1914	307,300	1933	127,500
1915	258,900	1934	78,000
1916	527,700	1935	164,900
1917	277,800	1936	131,000
1918	266,100	1937	240,300
1919	187,100	1938	278,600
1920	279,100	1939	154,900
1921	261,400	1940	173,700
1922	522,300	1941	400,000
1923	286,600	1942	214,900
1924	120,600	1943	178,100
1925	150,000	1944	182,700
1926	138,500	1945	166,300
1927	254,000	1946	121,300
1928	171,600	1947	192,300
1929	226,500	1948	116,400
1930	188,100	1949	155,900
1931	119,300	1950	127,000
1932	381,900	1951	99,900

[54]Source: Ariz. Ex. 77B, table C, pp. 28-29.

Historic Flow of the Bill Williams River at Planet, Arizona, Approximately 6 Miles Above Confluence With Colorado River[55]

(Stream flow in acre-feet)

Water Year	Stream Flow	Water Year	Stream Flow
1914	78,200	1933	13,300
1915	115,800	1934	11,600
1916	312,400	1935	110,200
1917	120,800	1936	21,800
1918	94,800	1937	253,000
1919	202,200	1938	112,900
1920	254,000	1939	231,500
1921	83,000	1940	30,800
1922	209,800	1941	436,800
1923	164,200	1942	26,800
1924	52,400	1943	14,200
1925	115,200	1944	114,400
1926	139,400	1945	60,100
1927	432,400	1946	12,300
1928	21,300	1947	18,600
1929	31,200	1948	7,300
1930	33,000	1949	48,700
1931	108,900	1950	7,900
1932	319,600	1951	56,900

Historic Flow of the Gila River Near Dome, Arizona, 12 Miles Upstream from Mouth of the Gila River[56]

(Stream flow in acre-feet)

Water Year	Stream Flow	Water Year	Stream Flow
1914	179,800	1933	1,100
1915	2,324,500	1934	200
1916	4,361,100	1935	5,900
1917	1,458,300	1936	0
1918	326,900	1937	153,700
1919	227,000	1938	45,900
1920	1,293,800	1939	3,500
1921	437,700	1940	0
1922	685,800	1941	589,700
1923	329,100	1942	0
1924	686,500	1943	0
1925	64,900	1944	0
1926	270,100	1945	0
1927	763,900	1946	0
1928	24,300	1947	400
1929	3,000	1948	0
1930	15,600	1949	0
1931	102,700	1950	0
1932	266,300	1951	6,000

[56]Source: Ariz. Ex. 77B, table G, p. 33.

Estimated Historic Net Gain to the Colorado River, Lee Ferry to Hoover Dam[57]

(Net gain in acre-feet)

Water Year	Net Gain	Water Year	Net Gain
1909	1,596,000	1933	694,000
1910	1,365,000	1934	475,000
1911	1,949,000	1935	865,000
1912	829,000	1936	725,000
1913	962,000	1937	1,292,000
1914	1,316,000	1938	1,237,000
1915	1,133,000	1939	737,000
1916	1,724,000	1940	756,000
1917	993,000	1941	1,505,000
1918	1,018,000	1942	1,060,000
1919	817,000	1943	792,000
1920	1,030,000	1944	865,000
1921	975,000	1945	731,000
1922	2,053,000	1946	530,000
1923	1,687,000	1947	713,000
1924	609,000	1948	560,000
1925	701,000	1949	725,000
1926	749,000	1950	615,000
1927	975,000	1951	457,000
1928	694,000	1952	1,316,000
1929	822,000	1953	482,000
1930	682,000	1954	658,000
1931	518,000	1955	658,000
1932	1,370,000	1956	457,000

[57] Source: Calif. Ex. 2207. See also Ariz. Exs. 353, 366.

Lake Mead Evaporation[58]

Water Year	Usable Content of Lake Mead at End of Water Year (Acre-feet)	Annual Evaporation (Acre-feet)
1935	4,140,000	106,500
1936	6,414,000	325,100
1937	12,432,000	542,700
1938	21,065,000	737,000
1939	21,749,000	847,300
1940	21,144,000	853,000
1941	26,150,000	938,600
1942	25,430,000	944,400
1943	24,070,000	916,200
1944	22,860,000	879,100
1945	21,620,000	834,600
1946	19,010,000	829,400
1947	21,625,000	794,500
1948	22,002,000	859,700
1949	22,827,000	787,000
1950	19,738,000	825,900

[58]Source: Ariz. Ex. 98, table 645, pp. 571-572; Ariz. Ex. 77B, table D, p. 30. These figures include evaporation from minor upstream reservoirs.

Lake Mohave Evaporation[59]

(Evaporation in acre-feet)

Water Year	Gross Evaporation
1951	144,800
1952	156,800
1953	159,900

Lake Havasu Evaporation[60]

(Evaporation in acre-feet)

Water Year	Gross Evaporation
1951	139,300
1952	138,100
1953	143,100

Channel Losses Between Hoover Dam and the International Boundary[61]

Period	Historic Average Annual Flow Below Hoover Dam (acre-feet)	Historic Average Annual Gross Channel Losses (acre-feet)
1914-1945	13,694,000	1,168,000
1946-1951	11,804,300	971,700

[59]Source: Calif. Ex. 2211.
[60]*Ibid.*
[61]Source: Calif. Ex. 2213A.

VIII. Present Uses on the Mainstream

The tables printed hereafter show the scale of uses of water from the Colorado River in the Lower Basin as of the taking of evidence in this action. These tables would be most helpful if they showed the use of Colorado River water in Arizona, California and Nevada measured in terms of consumptive use (diversions from the mainstream less return flow thereto), since the recommended decree apportions water in those terms. The figures for California and Nevada are given in terms of consumptive use. However, the evidence presented as to uses in Arizona is in terms of diversions which cannot, on this record, be translated into consumptive use. Substantially all the Arizona uses (other than uses on Indian Reservations) occur in the general vicinity of Imperial Dam and are supplied with water diverted by that dam. Figures are available for total diversions.[62] No figures are available, however, for return flow. The Arizona witness who testified regarding these uses said on cross-examination that he had no knowledge of the magnitude of return flow.[63] However, on re-direct examination, the witness estimated return flow from drains to be approximately 150,000 acre-feet.[64] Apparently, even this figure does not purport to be the total return flow from water diverted for use in Arizona at Imperial Dam.

California's method of calculating consumptive use of these Arizona projects is no more helpful. For example, for Wellton-Mohawk, she takes the figure for irrigated acreage from Arizona Exhibit 186. She then applies a consumptive use rate of 3.76 acre-feet per acre. This figure was derived "by dividing minimum project consumptive use requirements . . . of 282,100 acre-feet by 75,000" acres of

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[62]See Ariz. Ex. 186.
[63]Tr. 2376, 2403-2407, 2412-2413, 2525-2534 (Steenbergen).
[64]Tr. 2621-2623 (Steenbergen).

land.[65] These figures depend upon engineering estimates, and are adjusted for certain omissions.[66] No testimony supports the proposed consumptive use figure of 3.76 acre-feet per acre. Even assuming the consumptive use figure of 3.76 acre-feet per acre to be correct, it does not purport to measure consumptive use in terms of diversions less return flow to the mainstream.

Therefore the Arizona figures are given in terms of gross diversions.

APPROXIMATE DIVERSIONS OF MAINSTREAM WATER IN ARIZONA

User	Amount (Acre-Fee)	Year
Yuma Project—Valley Division Yuma Auxiliary Project (Unit B)[67]	330,130	1955
Gila Project[68] (plus deliveries to Special use and Warren Act contractors)[69]	578,860	1955
City of Yuma[70]	7,650	1955
Colorado River Indian Reservation[71]	322,500	1955
Total	1,239,140	

[65]See Calif. Proposed Finding 4D:108, note 5.

[66]See Calif. Proposed Finding 4D:106, notes 3-4.

[67]Ariz. Ex. 186.

[68]*Ibid.*

[69]Tr. 2611 (Steenbergen).

[70]Ariz. Ex. 190, table 1.

[71]U. S. Ex. 575. This exhibit contains an incomplete statement of return flow in the amount of 119,600 acre-feet. Thus, maximum consumptive use would be 202,900 acre-feet. Irrigation from the mainstream on the other two Indian reservations in Arizona, Ft. Mohave and Cocopah, is negligible. U. S. Ex. 1319 shows only 23 acres irrigated on the Ft. Mohave Reservation. For the Cocopah Reservation, U. S. Ex. 1009 shows a computed diversion requirement of 1,890 acre-feet for net irrigated acreage of 300 acres. It does not appear from the evidence when, if ever, this amount of mainstream water was actually applied to the land. See Tr. 14483; 14505-14506; 14508 (Criddle).

APPROXIMATE CONSUMPTIVE USE OF MAINSTREAM WATER IN CALIFORNIA

User	Amount of Consumptive Use (Acre-Feet)	Year
All-American Canal Project[72] ..... (Coachella and Imperial Districts)	3,662,000	1955
Metropolitan Water District[73]	481,493	1956
Palo Verde Irrigation District[74]	296,000	1957
Yuma Project—Reservation Division[75]	36,392	1955
Miscellaneous[76]	8,000	1957
Total	4,483,885	

APPROXIMATE CONSUMPTIVE USE OF MAINSTREAM WATER IN NEVADA

User	Amount of Consumptive Use (Acre-Feet)	Year
Boulder City[77]	2,750	1956
Others[78]	21,700	1956
Total	24,450	

[72]Calif. Ex. 275 shows diversions for Imperial and Coachella in 1955 of 3,642,000 acre-feet. Added to this is 20,000 acre-feet of losses chargeable to the districts. See Calif. Ex. 279.

[73]Ariz. Ex. 429. Counsel stated at Tr. 19968 that the Metropolitan diversion for 1957 was 584,000 acre-feet and this was not challenged.

[74]This figure is claimed in Calif. Proposed Finding 4C:102(2) and is based on the consumptive use per acre in 1955, derived from Calif. Ex. 356, multiplied by the irrigated acres in 1957, which increased from 1955. Irrigated acreage in 1957 was approximately 74,000 acres. Tr. 8772. The figure is computed, actual diversion being much greater. California contends that all water diverted by Palo Verde returns to the river except for that consumptively used and that the computed figure accurately represents consumptive use. I have accepted the contention for present purposes.

[75]This figure is also computed and the contention is that the remainder of the water used returns to the River. The figure is taken from Calif. Ex. 376.

[76]Calif. Proposed Finding 4C:110—unspecified non-contractual uses.

[77]U. S. Ex. 35.

[78]Nev. Ex. 502; Tr. 16329.

PART TWO

PART TWO

I. Jurisdiction and Justiciability

None of the parties in this case questions the jurisdiction of the Supreme Court either over the parties or over the subject matter of the controversies which concern the mainstream of the Colorado River. Moreover, either explicitly or implicitly, all of the parties concede that it is appropriate for the Supreme Court to exercise its jurisdiction and adjudicate these mainstream controversies at this time. I agree with the parties that the Supreme Court has jurisdiction over the mainstream controversies which ought to be exercised in this case.[1]

The judicial power of the United States is extended by Article III, Section 2, of the Constitution to "all Cases . . . arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a party . . . [and] to Controversies between two or more States. . . . In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." It is settled beyond dispute that, under these provisions, a case such as the present one among several states and the United States over the use of water flowing in an interstate stream is within the original jurisdiction of the Supreme Court. *E.g., Colorado* v. *Kansas,* 320 U. S. 383 (1943); *Kansas* v. *Colorado,* 206 U. S. 46 (1907); *Kansas* v. *Colorado,* 185 U. S. 125 (1902); *Missouri* v. *Illinois,* 180 U. S. 208 (1901).

It is also well settled, however, that the Supreme Court will not exercise its original jurisdiction in suits between

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[1] I have concluded, however, that it would not be appropriate to adjudicate in this litigation controversies among the parties over the tributaries of the Colorado River in the Lower Basin, except for the controversies which concern the Gila River System. The reasons for these conclusions are explained *infra,* at pages 318-321, 323-325.

sovereign states unless there are compelling reasons for doing so. The Court has often reiterated the strict standard which must be met before it will adjudicate an interstate controversy. Thus in *New York* v. *New Jersey,* 256 U. S. 296, 309 (1921), the Court stated:

> "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

See also *Colorado* v. *Kansas,* 320 U. S. 383 (1943); *Washington* v. *Oregon,* 297 U. S. 517, 522 (1936); *Arizona* v. *California,* 283 U. S. 423 (1931).

There are compelling reasons which justify an adjudication of the various claims presented in this case to water flowing in the Colorado River. On September 16, 1948, the Secretary of the Interior transmitted to the Congress a report from the Bureau of Reclamation which concluded that a proposed Central Arizona Project, designed to transport water from the Colorado River to an area in central Arizona, was feasible from both an engineering and a financial point of view. However, the Secretary's letter of transmittal warned that if Arizona's claims to mainstream water were not well founded, as was contended by California, then "there will be no dependable water supply available from the Colorado River for this diversion."[2] As previously noted, *supra,* pages 30-31, Arizona sought congressional authorization for this Central Arizona Project during the 79th, 80th, 81st and 82nd Congresses. Although some of Arizona's proposals were adopted by the Senate, none of them passed the House, and,

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[2]Ariz. Ex. 70.

on April 18, 1951, the House Committee on Interior and Insular Affairs adopted a resolution that consideration of bills relating to the Central Arizona Project "be postponed until such time as use of the water in the lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the lower Colorado River Basin."[3] About a year later Arizona instituted the present law suit.

It is apparent from these circumstances that Arizona will not be able to develop the Central Arizona Project without an adjudication by the Supreme Court as to the rights of the several parties to the water in the mainstream of the Colorado River. Congress has indicated it will not authorize construction of the Project until rights to mainstream water are adjudicated; nor can it be financed privately until such rights are fully established. In short, Arizona's utilization of the mainstream water which she argues has been apportioned to her in the Boulder Canyon Project Act is being frustrated by the conflicting claims of the other parties to this suit. This is reason enough for the Supreme Court to exercise its original jurisdiction. If the Supreme Court does not exercise its jurisdiction in this case on the ground that Arizona is not presently in a position to divert the water which she claims, Arizona will be faced with a dilemma: Congress will not authorize the Central Arizona Project until Arizona's right to mainstream water is determined, and the Supreme Court will not determine Arizona's right to the water until Congress authorizes the Project.

Moreover, without the Central Arizona or a similar project, Arizona will not be able to fully utilize the water

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[3] *Hearings on H. R. 1500 and H. R. 1501 Before the Committee on Interior and Insular Affairs, House of Representatives,* 82nd Cong., 1st Sess., pt. 2, pp. 739, 740-756 (1951).

which she claims has been set aside for her in the mainstream. Indeed, Arizona claims that California is already using some of the water to which Arizona is entitled. By increasing the water uses of existing facilities, California will be able to increase substantially her uses of this claimed water in the future. On the other hand, Arizona cannot use the water she claims without the construction of new facilities and she cannot develop new facilities unless her rights in the water are first established. Thus, refusal of the Supreme Court to adjudicate Arizona's rights in the mainstream water will, as a practical matter, have the effect of a decision in favor of California since Arizona will not be able to utilize the disputed water and California will. If Arizona's interpretation of the Boulder Canyon Project Act, which the United States substantially agrees with, is correct, and if California has *de facto* taken part of the water which was forever apportioned to Arizona, then Arizona can remedy the situation only by suit in the Supreme Court.

The circumstances related above are merely illustrative of conditions generally prevalent in regard to the Colorado River in the Lower Basin. The Basin has experienced a veritable population explosion in the past thirty years, accompanied by a comparable development in industry and agriculture.[4] Water uses have expanded rapidly; but the point has now been reached where increased use of water from the Colorado River is being frustrated by a bitter dispute as to the legal availability of such water for use in the several states. That dispute is now before the Court. There appears to be sufficient mainstream water available to satisfy the scale of present uses and enough to satisfy some degree of expansion. But, despite a present unsatis-

[4]A more detailed description of the conditions in the Lower Basin, summarized in this section of the Report, will be found in Part One.

fied demand for water in the Lower Basin, it is impossible to develop further uses of the water because of the cloud on its legal availability.

Because of the topography and geography of the region, Colorado River water can feasibly and economically be utilized only by the construction of great projects consisting of dams, pumping facilities, desilting basins, canals and other works, the cost of which is enormous. Needless to say, such projects cannot be financed unless there is assurance that water will be not only physically, but legally available for their operation. No such assurance of the legal availability of mainstream water for use in any particular state can today be given. This uncertainty can be removed only by an interstate compact or by the adjudication of the Supreme Court. Congress, in the Boulder Canyon Project Act, encouraged Arizona, California and Nevada to agree to a compact apportioning mainstream water among them, and even suggested a division which it approved in advance. For over thirty years, however, these states have been unable to agree. Time has not cooled the controversy among them, and it seems very unlikely that they will be able to agree in the foreseeable future.

Thus, adjudication of the present action is indispensable to a determination of the legal availability of mainstream water in the Lower Basin. It is an inescapable fact that unless this controversy among the three states and the United States is adjudicated, the full utilization of the Colorado River will be indefinitely delayed. Such a result would frustrate the purposes of Congress in authorizing the construction of Hoover Dam and would seriously hinder development of the entire area.

In addition, the Supreme Court's jurisdiction ought to be exercised in this case for another, related reason. There are a number of existing projects in the Lower Basin for

which plans have been developed calling for the increased use of mainstream water. These projects are already constructed, have irrigable but presently unirrigated lands within their service areas, and, at least some of them, already have delivery contracts with the Secretary of the Interior which provide for enough water to satisfy increased uses if such water is legally available under the interstate apportionment. No further governmental authorization and little additional financing is necessary to enable these projects to increase their mainstream uses. For example, the Imperial Irrigation District embraced 905,568 acres in 1956, of which only approximately 475,000 were irrigated. The District plans to irrigate a substantial part of these unirrigated lands primarily through existing facilities and pursuant to its existing water delivery contracts.[5] Similarly, the Coachella Valley County Water District and Palo Verde Irrigation District presently contain unirrigated land which can be irrigated largely through existing facilities and pursuant to existing delivery contracts.[6] Moreover, as of the close of the evidence in this case, the Metropolitan Water District planned a substantial increase in its diversions of mainstream water, under an existing water delivery contract. Arizona, however, argues that California is presently consuming more than its apportionment of mainstream water under the Project Act, and that existing uses in California should be limited and increased uses forever enjoined. Certainly Arizona's claim should be adjudicated so that the California agencies can make intelligent plans for their future development and operation.

Increased uses of mainstream water would also be rapidly developed in Arizona if the question of legal availability were resolved in her favor, although, as stated above,

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[5]Tr. 8216-8217 (Dowd); Calif. Exs. 275, 285.
[6]Calif. Ex. 318; Tr. 8771-8772 (Tabor); Calif. Ex. 356.

the full amount of the water she claims could not be utilized without a large new project. For example, the United States plans to contract for the delivery of mainstream water pursuant to the federal reclamation laws to the South Gila Valley near Yuma, Arizona. This area, serviced by the Yuma Irrigation District, is presently within the authorized limits of the Gila Reclamation Project. Additional congressional authorization and an appreciable expansion of existing works would not be necessary in order to develop new water uses in the South Gila Valley. California, however, argues that additional diversions of mainstream water for use in the State of Arizona are forbidden by the Colorado River Compact, the Boulder Canyon Project Act and principles of priority of appropriation. As in the case of the California projects, there is a natural reluctance to develop the land when there is a danger that users may be legally barred from applying water to its irrigation.

Manifestly, then, the various claims to mainstream water urged by the parties to this litigation ought to be decided by the Supreme Court so as to remove this controversy as the major obstacle to full development of the Lower Basin of the Colorado River.

II. Arizona's Motion for Leave to File Amended Pleadings

One question of pleading has survived the hearing. On August 13, 1958, shortly before conclusion of the hearing, Arizona moved before the Special Master for leave to file: (1) an amended bill of complaint; (2) an amended reply to the answers of the California defendants; (3) an amended answer to Nevada's petition of intervention; (4) an amended response to the appearance and statement of New Mexico; and (5) an amended response to Utah's complaint and answer in intervention. In short, Arizona desired leave to file substitute pleadings with respect to all parties except the United States.

This motion was opposed by California, Nevada, New Mexico and Utah.[7] The Solicitor General's view that the Special Master "probably does not have jurisdiction to finally rule on a motion to amend the original petition" was reported on his behalf by government counsel.[8] Arizona expressly disavowed any desire to offer any additional proof in support of its amended pleadings.

It is unnecessary to pass on the question of power raised by the view attributed to the Solicitor General. Since Arizona would not be prejudiced by rejection of the proposed amendments, it is unnecessary to receive them. Close inspection reveals that the proposed changes are intended to accomplish two purposes: (1) to conform the pleadings to the proof; and (2) to state legal theories different from those espoused in the original pleadings.

The first objective is superfluous. In a litigation of this character it would be strange to hold the parties strictly to their pleadings. See *Kansas* v. *Colorado,* 185 U. S. 125 (1902), wherein the Court said:

[7]Tr. 22557-22582.
[8]Tr. 22582-22583.

> ". . . we are unwilling, in this case, to proceed on the mere technical admission made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation."[9]

The second objective is likewise superfluous. The relevant legal principles govern the decision in the light of the facts established, regardless of the law pleaded by the parties.

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[9]185 U. S., at 147. See also United States v. Louisiana, 363 U. S. 1, 84 (1960); United States v. Texas, 339 U. S. 707, 715 (1950).

III. The Claims of the States to Water in the Mainstream of the Colorado River

I have concluded that the claims of Arizona, California and Nevada to water from Lake Mead and from the mainstream of the Colorado River below Hoover Dam are governed by the Boulder Canyon Project Act, 45 Stat. 1057 (1929), the California Limitation Act, Act of March 4, 1929, and the several water delivery contracts which the Secretary of the Interior has made pursuant to the authority vested in him by Section 5 of the Project Act. The Colorado River Compact, the doctrine of equitable apportionment, and the law of appropriation are all irrelevant to the allocation of such water among the three states.

A. The Colorado River Compact

Extensive argument was had on the origin, purposes and meaning of the Colorado River Compact. Some of the parties labored under the conviction that prolonged and faithful exegesis of the text of this historic instrument would somehow yield a solution to the problems of this litigation. The sentiment which promoted this line of thinking seemed to rise from a profound faith that the Compact, venerated for its great contribution to the growth of the Southwest, would in some unexpected manner come to the aid of the disputing states. Reflection has not confirmed these hopes. The Compact does not answer any of the vital questions which must be answered in the disposition of this suit. The Compact contributes some light on the supply of mainstream water, insofar as it regulates the extent to which the River may be depleted by the Upper Basin. Beyond that the Compact has no utility in the adjudication of this case.

The Colorado River Compact represents an accommodation of the conflicting interests of Upper and Lower Basins for the mutual benefit of both. The Lower Basin, especially California, was interested in reaching agreement over water rights among all the states in the entire River Basin so that congressional action could be obtained authorizing a dam on the Colorado River to control floods and to assure a constant supply of water (Ariz. Exs. 48, 51-53). Congress had expressed an interest in the problems of the Imperial Valley, Kincaid Act, 41 Stat. 600 (1920), and was aware of the flood control problems of the area (Fall-Davis Report, Ariz. Ex. 45). The Upper Basin, sympathetic as it may have been with the Lower Basin in its problems downstream, was nevertheless concerned lest construction of such a dam permit the Lower Basin to obtain a disproportionate amount of the water in the River by operation of the law of prior appropriation (Ariz. Exs. 49, 51). An agreement among the affected states could afford protection against this likely development. Thus, both the Upper and Lower Basins had an incentive to enter into a compact to achieve their respective desires (See Ariz. Ex. 51).

The main bone of contention between the two Basins was the division of water. It was foreseen that, once the River was regulated, the Lower Basin would develop more rapidly than the Upper Basin. The problem of the Compact commissioners, therefore, was to safeguard the Upper Basin against this rapid development with its threat of vesting in the Lower Basin appropriative rights enforcible against the Upper Basin, and at the same time to allow sufficient water to the Lower Basin to ensure development there (Ariz. Exs. 49, 55).

This brief history explains why the provisions of the Compact are addressed solely to the relations of basin to basin and not of state to state (See Ariz. Exs. 51, 55). Any

interpretation of the Compact must be confined by this limiting factor. And from this it also follows that the Compact offers no solution to this controversy among states with respect to their Lower Basin interests.[10]

The text of the Compact makes it abundantly clear that inter-basin, not interstate, relations were the subject matter of agreement. Article II of the Compact divides the entire Colorado River Basin into Upper and Lower Basins, and Article III(a) and (b) apportions the use of water between the two Basins and not among states. This apportionment is accomplished by establishing a ceiling on the quantity of water which may be appropriated[11] in each Basin as against the other. Although Article III(a) and (b) is not expressed in terms of appropriative rights, this is the purport of that Article. For example, it is clear that the Lower Basin may utilize and consume more than the 8,500,000 acre-feet of water per annum apportioned to it by subdivisions (a) and (b) of Article III of the Compact, if the water is actually available, but against the Upper Basin it can acquire appropriative rights to no greater quantity than is sufficient to satisfy a consumptive use of that magnitude. This becomes clear from the historical background of the Compact. Throughout the Colorado River Basin, when the Compact was negotiated, the law of prior appropriation governed acquisition of water rights. In 1922, before the opening of the Sante Fe meetings of the Compact commissioners, the Supreme Court had applied the law of prior appropria-

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[10]The extent to which the Compact governs this litigation by reason of references thereto in the Project Act and the water delivery contracts is discussed *infra*.

[11]"To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually, forever subject only to the right of prior appropriations." Arizona v. California, 283 U. S. 423, 459 (1931).

tion as the guiding principle in an equitable apportionment suit on an interstate stream. *Wyoming* v. *Colorado*, 259 U. S. 419, decided June 5, 1922. As appears from the commissioners' reports, Article III(a) and (b) is intended to prevent the application of the priority rule between the two Basins, a result accomplished by placing limits on the acquisition of appropriative or other water rights in each Basin (Ariz. Exs. 49, 51). These limitations, which are 7,500,000 acre-feet and 8,500,000 acre-feet per annum for the Upper and Lower Basins respectively, are controlling until a further apportionment is had pursuant to Article III(f) and (g), which can in no event occur, under the terms of the Compact, prior to October 1, 1963.

Other provisions of the Compact also make clear that it governs inter-basin relations exclusively. Article III(c) divides between the two Basins the burden of delivering water to Mexico pursuant to a prospective treaty obligation of the United States. Article III(d) forbids the states of the Upper Division[12] to cause the flow of the River to be depleted below an aggregate of 75,000,000 acre-feet of water at Lee Ferry, the division point between the two Basins established in Article II(f), for any period of ten consecutive years. Similarly, Articles I and VIII contemplate inter-basin and not interstate operation of the Compact. Nothing in the Compact prescribes a division of water among the Lower Basin states.

I therefore conclude that the provisions of the Compact, unless made operative by relevant statutes or contracts, do not control the disposition of this case. Nevertheless, in view of the urgent arguments of the sovereign parties and against the eventuality that the Court may take a different view of the matter, I set forth my views regarding the meaning of some provisions of the Compact.

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[12]Those states are Colorado, New Mexico, Utah, and Wyoming.

The limits established by the Compact on the acquisition of appropriative rights are applicable to the mainstream of the Colorado River and to its tributaries. Arizona has contended otherwise, claiming that the Compact relates to the mainstream exclusively. To support this contention, Arizona advances a number of arguments:

1. That the events leading to the adoption of the Compact, already mentioned in this Report, reveal an intention to deal with mainstream problems rather than with problems on the tributaries;

2. That the Upper Basin could physically control and acquire rights, against the Lower Basin, in mainstream and Upper Basin tributary water only, and hence was not interested in Lower Basin tributaries;

3. That the Compact purports to apportion only part and not all of the water in the River System;

4. That the obligation specified in Article III(d) necessarily refers to mainstream water only;

5. That subdivisions (a) and (d) of Article III are correlative and that III(b) refers to additional mainstream water;

6. That Article VIII deals with mainstream water.

At best, these arguments suggest two things: (1) that some provisions of the Compact relate to mainstream water exclusively, and (2) that the Compact might have been limited to the mainstream in all of its provisions if the negotiators had chosen to have it so confined. However, the plain words of the Compact permit only one interpretation —that Article III(a), (b), (c), (f) and (g) deal with both the mainstream and the tributaries. Article II(a) states: "The term 'Colorado River System' means that portion of the Colorado River and its tributaries within the United States of America." Article III(a) apportions "from the Colorado River System . . . the exclusive bene-

ficial consumptive use . . . of water." Article III(b) allows the Lower Basin "to increase its beneficial consumptive use of *such waters*. . . ." "Such waters" can only refer to System waters, that is, to mainstream and tributary water as defined in Article II(a). In Article III(c), (f) and (g) System water is specified by name.

The various arguments of Arizona fail before this unmistakable language of the Compact. The historical fact that the Upper Basin was primarily concerned with the mainstream will not nullify language of the Compact that subjugates both mainstream and tributaries to its rule. Nor is the argument persuasive that because some provisions deal only with the mainstream, all provisions are so limited. It is certainly true that the second sentence of Article VIII deals with the mainstream only. It very clearly says so. The preceding and the following sentences, however, speak of the Colorado River System, indicating the draftsmen's intent to distinguish the two terms.

Article I states that "an apportionment of the use of part of the water of the Colorado River System is made" by the Compact, and Article VI speaks of "waters of the Colorado River System not covered by the terms of this Compact". From this Arizona would have me infer that tributaries are not subject to the limitations of Article III(a) and (b). The provisions of Articles I and VI can be given full effect without thus overriding the plain language of Article II(a). Article I is consistent with Article III(f) and (g) which provides for further equitable apportionment of the use of System water. The 1922 Compact apportioned the use of 16,000,000 acre-feet of water to the two Basins; a later compact could make a "further equitable apportionment" of remaining System water. Article VI demonstrates that the Compact governs inter-basin and not interstate relations. If a controversy should arise, for example, between two Lower Basin states over the mainstream, or over a tributary, that Article provides for alter-

native modes of adjusting the dispute. As between Lower Basin states "the waters of the Colorado River System [are] not covered by the terms" of the Compact. (Colorado River Compact, Art. VI(a); see Ariz. Exs. 46, 49.)

Lastly, Arizona argues that Article III(a) relates to the mainstream only because III(a) and III(d) are correlative, III(d) being III(a) multiplied by ten, and Article III(d) is clearly a mainstream measurement. This argument is unacceptable. Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. Since a substantial quantity of water is lost through reservoir evaporation and channel losses as it flows from Lee Ferry, the point where the III(d) obligation is measured, to the diversion points downstream from Hoover Dam, where most of the appropriations are made, 7,500,000 acre-feet of water at Lee Ferry will supply a considerably smaller amount of appropriations below Hoover Dam. Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantitative measurement of the flow of water at Lee Ferry.

The Compact does affect the supply of water available to the Lower Basin. Two provisions of the Compact relate to supply, Article III(c) and Article III(d). Article III(d) presents no questions of interpretation. Under it, the Upper Division states may "not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years, reckoned in progressive series beginning with the first day of October . . . ."

With the storage provided by Lake Mead, and barring a drought unprecedented in the recorded history of the River, the Lower Basin has, under the guarantee of the Compact, available for use at Hoover Dam a minimum of 7,500,000 acre-feet of water per year, less transit losses

between Lee Ferry and the dam, evaporation loss from Lake Mead, and its share of the Mexican treaty obligation.

The Compact provides for the delivery of water by the states of the Upper Division at Lee Ferry, in addition to the supply guaranteed by III(d), when the obligation to Mexico cannot be satisfied "from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b) [of Article III of the Compact] . . . ." In that event, "the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the states of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)" of Article III. At the time the Compact was signed (1922) and when it became effective (1929), the United States was under no treaty obligation to Mexico and the Compact created no obligation. However, in 1944 the United States and Mexico negotiated a treaty, proclaimed in 1945, under which the United States has the duty to deliver 1,500,000 acre-feet annually to the United States of Mexico at the international boundary.[13]

Several questions arise regarding the effect of Article III(c), and the parties have offered various suggestions regarding its interpretation. These questions include: (1) what is the meaning of the word "surplus"? (2) If surplus is not sufficient to supply Mexico, how should the Upper Basin's further delivery obligation be measured under the language of Article III(c)? In my judgment, the various questions advanced by the parties concerning construction of this subdivision ought not to be answered in the absence of the states of the Upper Basin; nor need they be answered in order to dispose of this litigation affecting only Lower Basin interests. Under the interpretation which I propose of the Boulder Canyon Project Act and the water delivery contracts made by the Secretary of the Interior pursuant

[13]This obligation is subject to several qualifications; the treaty is discussed *infra* at pages 295-296.

thereto, it is unnecessary to predict the supply of water in the mainstream, in the Lower Basin, in order to adjudicate the present controversy.[14]

Arizona argues that Article III(b), relating exclusively to appropriations in the Lower Basin, imposes an additional delivery burden on the Upper Basin. She reasons that after the III(a) apportionment is exhausted, the Lower Basin

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[14]Stream flow at Lee Ferry has historically exceeded the maximum delivery obligation under III (c) and III (d). Whether this condition will continue upon full development of the Upper Basin is a subject of dispute among the experts which need not be resolved here. Historic stream flows at Lee Ferry were as follows:

TEN-YEAR TOTALS OF COLORADO RIVER WATER AT LEE FERRY
(In Acre-Feet)

Ten-Year Period	Stream Flow in Acre-Feet	Ten-Year Period	Stream Flow in Acre-Feet
1896-1905	133,700,000	1923-1932	139,969,500
1897-1906	141,904,000	1924-1933	133,453,600
1898-1907	146,407,000	1925-1934	125,368,900
1899-1908	144,870,000	1926-1935	123,939,900
1900-1909	151,326,000	1927-1936	121,901,700
1901-1910	151,695,000	1928-1937	117,211,700
1902-1911	153,417,000	1929-1938	117,328,400
1903-1912	163,557,000	1930-1939	107,498,700
1904-1913	162,601,000	1931-1940	101,510,200
1905-1914	167,235,800	1932-1941	111,174,700
1906-1915	164,736,200	1933-1942	112,917,800
1907-1916	164,097,000	1934-1943	114,435,400
1908-1917	163,987,100	1935-1944	123,260,400
1909-1918	165,873,700	1936-1945	124,893,700
1910-1919	155,026,100	1937-1946	121,668,100
1911-1920	161,795,800	1938-1947	123,285,600
1912-1921	167,888,600	1939-1948	121,532,800
1913-1922	165,311,000	1940-1949	126,498,100
1914-1923	168,578,300	1941-1950	130,473,700
1915-1924	161,724,600	1942-1951	124,252,400
1916-1925	160,565,300	1943-1952	125,203,000
1917-1926	157,249,000	1944-1953	122,745,000
1918-1927	151,942,800	1945-1954	115,639,600
1919-1928	153,616,500	1946-1955	111,401,200
1920-1929	161,981,500	1947-1956	111,410,500
1921-1930	155,312,900	1948-1957	115,243,100
1922-1931	140,985,600	1949-1958	116,555,900

may, under Article III (b), increase its uses by 1,000,000 acre-feet and that the Upper Basin is obliged to furnish water for this increased III(b) use, subject only to the Upper Basin's first right to 7,500,000 acre-feet of water under Article III(a).

Article III(b) cannot be stretched so far. Whatever may account for its segregation as a separate provision of the Compact, there is nothing to suggest that III(b) imposes an affirmative duty on the Upper Basin. Rather, it imposes for the benefit of the Upper Basin, a ceiling on Lower Basin appropriations, albeit that the Lower Basin is privileged to have a higher ceiling than the Upper Basin.

It is my conclusion that Article III(b) has the same effect as Article III(a), and this conclusion is supported by the reports of the Compact commissioners, who spoke of III(a) and III(b) as apportioning 7,500,000 acre-feet to the Upper Basin and 8,500,000 acre-feet to the Lower Basin. (See Ariz. Exs. 46, 49, 53, 55, 57).

"Beneficial consumptive use" is a term used throughout the Compact although, regrettably, it is not defined in Article II or elsewhere in the document. In the early stages of the hearing, Arizona spent a vast amount of effort in seeking to establish the term as a word of art. She now contends that it has no special meaning and never did.

California argues that the term is used in the Compact as a word of art and means:

> "the loss of Colorado River System water in processes useful to man by evaporation, transpiration or diversion out of the drainage basin, or otherwise, whereby such water becomes unavailable for use within the natural drainage basin in the United States, or unavailable for delivery to Mexico in satisfaction of requirements imposed by the Mexican Treaty. The term includes but is not limited to incidental consumption of water such as evaporation and transpiration from water surfaces and banks

> of irrigation and drainage canals, and on or along seeped areas, when such incidental consumption is associated with beneficial consumptive use of water, even though such incidental consumption is not, in itself, useful."[15]

Further refinements of this definition are contained in a 70-page brief, labeled Appendix 1 of California's Opening Brief. Other parties have contributed suggestions for construing the term.

As used in the Compact, beneficial consumptive use was intended to provide a standard for measuring the amount of water each Basin might appropriate. This was necessary since Article III(a) and (b) imposed limits on appropriative rights. In early applications of the western law of appropriation, diversions were regarded as the measure of water use.[16] By 1922, however, it was recognized that the amount of water diverted for irrigation purposes was not necessarily the amount consumed and lost to the stream. Some water applied to the ground would usually reappear in the stream as return flow. The term beneficial consumptive use as employed in the Compact was intended to give each Basin credit for return flow. Thus whether the limits fixed by Article III(a) and (b) have been reached or exceeded is to be determined by measuring the amount of each Basin's total appropriations through the formula, diversions less return flows. In the Compact, "beneficial consumptive use" means consumptive use (as opposed to non-consumptive use, *e.g.* water power) measured by the formula of diversions less return flows, for a beneficial (that is, non-wasteful) purpose. This understanding of the term is reflected

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[15]Calif. Brief, Vol. II, p. A1-4.

[16]See Hutchins, Selected Problems in the Law of Water Rights in the West 331 (1942).

in several of the commissioners' reports. (See Ariz. Exs. 46, 52, 54, 57.)[17]

As the foregoing discussion indicates, I regard Article III(a) and (b) as a limitation on appropriative rights and not as a source of supply. So far as the Compact is concerned, Lower Basin supply stems from Article III (c) and (d). There are, of course, other sources of supply, for example, Lower Basin tributary inflow, but these are not dealt with as supply items in the Compact. Thus when referring to the Compact, it is accurate to speak of III(c) and III(d) water, but it is inaccurate and indeed meaningless to speak of III(a) and III(b) water. For Compact purposes, Article III(a) and (b) can refer only to limits on appropriations, not to the supply of water itself.

It is true that Congress in Section 4(a) of the Project Act, treated Article III(a) as a source of supply rather than as a limitation on appropriations. The Act speaks of "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact . . . ." Later in this Report I shall develop at some length the meaning of this language and the confusion it has produced in this litigation. Suffice it now to say that the congressional meaning is different from the Compact meaning. One may properly speak of III(a) water in the Project Act sense, but not in the Compact sense. Much of the confusion in this case may be traced to this difference between the two writings, for the parties speak of III(a) water without differentiating between the Compact and the Project Act.

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[17]The term has since been adopted by branches of the engineering profession to express highly sophisticated formulae useful in the planning of irrigation projects. One such is the Blaney-Criddle formula U=KF—R. For an explanation of this formula, see Tr. 13417—13428 (Criddle). Such meanings have no bearing on the term as used in the Compact.

One other contention relating to the Compact may be noticed here. Under Section 4(a) of the Project Act, California, in addition to consuming a part of the so-called III(a) water, may share in "excess or surplus waters unapportioned by said Compact." California contends that III(b) uses are unapportioned by the Compact. The argument is based primarily on the fact that Article III(b) does not use the word "apportioned" which appears in Article III(a). Article III(b) gives the Lower Basin "the right to increase its beneficial consumptive use of" water by 1,000,000 acre-feet per annum. I have already indicated my view that subdivisions (a) and (b) of Article III operate in identical fashion; that the net effect of the two sections is to limit appropriations in the Upper Basin to 7,500,000 acre-feet and in the Lower Basin to 8,500,000 acre-feet. That both sections effect an apportionment is made clear by Article III(f), which provides for "further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c)" of Article III. California argues that apportionment has no precise or consistent meaning in the Compact, since in the foregoing provision Article III(a) and (b) are lumped together with Article III(c) which, according to the argument, clearly does not apportion water to Mexico. California's argument has no merit. Article III(c), while apportioning no water to Mexico, does apportion the burden of a deficiency resulting from the Mexican obligation between the Upper and Lower Basins, and hence effects an apportionment. Moreover, as I have previously had occasion to observe, the reports of the Compact commissioners describe Article III(b) as an apportionment (See Ariz. Exs. 46, 49, 53, 55, 57).

By these observations I do not mean to rule on California's rights under Section 4(a) of the Project Act. That III(b) uses are apportioned for Compact purposes does not

control the interpretation of the statute, and I shall discuss its interpretation in this regard later in the Report.

B. The Boulder Canyon Project Act: Sections 1, 5, 6 and 8

The Boulder Canyon Project Act is in my view the source of authority for the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead.[18] That the Congress intended the statute to be a source of such authority is made manifest in several sections. Section 1 of the Act authorizes the Secretary of the Interior "to construct, operate, and maintain" Hoover Dam for several purposes, including "for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses. . . ."

More specifically, Section 5 authorizes the Secretary "under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and domestic uses. . . ." To make its intention abundantly clear the Congress declared in Section 5 that: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract as herein stated." The intention to exert authority over the allocation and distribution of water stored in Lake Mead can likewise be derived from Section 8(b) of the Act. That section contemplates that Arizona, California and Nevada, or any two of them, might negotiate a compact for the equitable division of Colorado River water but provides that such a compact shall be subject to water delivery contracts made by the Secretary of the Interior prior to congressional approval of such compact.

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[18]The Project Act does not govern the mainstream of the Colorado River above Lake Mead. See page 183, *infra*.

These provisions, together with the general operational scheme established in the Act and the purposes of the Act explicated in the legislative history, make it clear that the Project Act was designed by Congress to establish the authority for an allocation of all of the available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead among Arizona, California and Nevada, the only states having geographic access to this water. As to this water, principles such as equitable apportionment or priority of appropriation which might otherwise have controlled the interstate division of the River in its natural flow condition were rendered inapplicable by the Project Act.[19]

The Act itself clearly reserves to the United States broad powers over the water impounded in Lake Mead and delegates this power to the Secretary of the Interior, as agent of the United States. He is specifically authorized to impound the water of the Colorado River in Lake Mead and to exercise custody over the water so impounded through his control, management and operation of the dam and reservoir. No user, whether it be a state or an individual, may receive the impounded water unless the Secretary, by contract, agrees to release it for delivery to that user. Nothing in the Act purports to require the Secretary to agree to deliver specific quantities of water to any particular state or user, except that Section 6 requires him to satisfy water rights perfected as of June 25, 1929.[20] On the con-

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[19]Since the Project Act does not affect rights to water flowing in the Colorado River upstream from Lake Mead, see page 183, *infra*, the application of these principles to this reach of the River has not been abrogated by the Project Act.

[20]Section 6 of the Project Act directs that Hoover Dam be operated in "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact. . . ." Article VIII states: "Present perfected rights . . . are unimpaired by this compact." The phrase "present perfected rights" means rights perfected when the Act became effective. A statute speaks as of its effective

trary, the Act clearly contemplates that water unappropriated as of that date is to be made available for use within a state only if the Secretary, within his discretion, contracts for the delivery of the water to that state. In short, no contract, no water, and the Secretary determines how much water he will contract to deliver to each state subject only to the limitations on his discretion expressed in the Project Act itself. Since Congress realized that the dam authorized by the Project Act would impound substantially all the water of the mainstream,[21] Congress legislated that the Project Act was to be the new source of power for the allocation of water so impounded. In Sections 8(b) and 4(a), Congress provided that the water could be divided by compact among the interested states. But failing such a compact, the water need not run to the sea nor be indefinitely stored in Lake Mead; in such event the water was to be divided by the Secretary of the Interior.

This conclusion, that the allocation of unappropriated water impounded in Lake Mead is governed by the Secretary's water delivery contracts, comports with the basic scheme established by Congress in the Project Act. It was

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date. See Cabunac v. National Terminals Corp., 139 F. 2d 853 (7th Cir. 1944); Zimmerman v. United States, 277 Fed. 965 (7th Cir. 1921). Under the terms of the Act, it became effective only when the conditions of Section 4(a) were satisfied and the President so proclaimed. The Presidential Proclamation was made on June 25, 1929.

It has been suggested that "present perfected rights" should be construed to mean rights perfected as of the date the Compact was signed, namely, November 22, 1922. This argument must be rejected. A compact, like a statute, speaks as of its effective date. The Colorado River Compact became effective only upon congressional consent thereto, and such consent was given in the Boulder Canyon Project Act. Thus, the Compact became effective when the Act took effect, which, as noted, was June 25, 1929.

[21] *See Hearings on H. R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 163-164 (1926); Legislative History of Sections 4(a), 5 (1st Paragraph), and 8, Boulder Canyon Project Act as compiled by the State of Arizona [hereinafter cited as "Ariz. Legis. Hist."] p. 6.

apparent that water from Lake Mead would be utilized for a great variety of purposes in three different states, as well as on United States projects and in satisfaction of United States treaty obligations. A great many conflicting interests, as between different sovereigns and competing uses, would have to be resolved in order to operate the reservoir and dam. In this context, it is understandable that Congress designed the Project Act itself as the source of the authority and guiding standards necessary for the operation of the dam and reservoir, including the interstate division of the unappropriated water to be impounded by the dam, except only as the Act itself expressly provided otherwise. Congress obviously felt that once the water was within the custody and control of the United States, in default of interstate agreement, the duty would devolve upon the United States, and particularly the Secretary of the Interior, to provide for the allocation of the water.

This conclusion is also supported by the legislative history of the Project Act. The congressional debates are almost unintelligible except on the premise that the legislators considered that they were providing, in the Project Act itself, the authority for the allocation of impounded water among the states. Thus Senator Pittman of Nevada carefully pointed out on the floor of the Senate that Section 4(a) of the Project Act provided the basis for an apportionment of the water stored in Lake Mead. See pages 176-177, *infra*. Section 4(a) authorized the three interested states themselves to enter into the compact therein defined for the division of this water. Alternatively, the states could, if they chose, formulate a different scheme of allocation subject to congressional approval. Section 8(b). But if the states would not agree to the one or the other, then Congress clearly intended that the limitation on California in Section 4(a) and the Secretary's water delivery contracts made pursuant to Section 5 would impose a federal apportionment on the states.

Senator Pittman explained why it was necessary for Congress to provide authority for the allocation of the water among the three states.

> "Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason."[22]

Senator Hayden of Arizona who, like Senator Pittman, was one of those most interested in the Proje t Act, emphasized a number of times that the bill provided a basis for the apportionment of water among Arizona, California and Nevada regardless of state law and interstate priorities, but that it would not affect intrastate water rights. Senator Hayden stated:

> "The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts."[23]

The amendment referred to was the basis for a substitute amendment by Senator Phipps of Colorado which, in turn, was enacted as the first paragraph of Section 4(a) of the Project Act.

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[22]70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. p. 84.

[23]70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. p. 30. For similar statements by Senator Hayden see 70 Cong. Rec. 163 (1928), Ariz. Legis. Hist. p. 18.

The following colloquy also makes clear that Congress intended that the Secretary of the Interior, in the exercise of the discretion vested in him by Section 5, could, by means of water delivery contracts, effectuate an interstate allocation, in default of allocation by the states themselves.

> "Mr. Walsh of Montana. If the city of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation of [*sic*] an inchoate appropriation, does it follow; if the Government erects this dam across the Colorado River and creates a great storage basin, that it must yield up that amount of water to the city of Los Angeles?
>
> "Mr. Johnson. I rather think so, just exactly as if it were a perfected right for irrigation purposes.
>
> "Mr. Walsh of Montana. Yes; but I always understood that the interest that stores the water has a right superior to prior appropriations that do not store.
>
> "Mr. Johnson. Possibly so. What is the point?
>
> "Mr. Walsh of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.
>
> "Mr. Johnson. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.
>
> "Mr. Walsh of Montana. A contract with whom?
>
> "Mr. Johnson. With those who utilize and take and appropriate the water.
>
> "Mr. Walsh of Montana. That is to say, the Government may dispose of the stored water as it sees fit?
>
> "Mr. Johnson. Yes; under the terms of this bill.
>
> "Mr. Walsh of Montana. Then how can it be said that the city of Los Angeles has a perfected interest?

"Mr. Johnson. It has a perfected right there unquestionably, but the bill requires the city of Los Angeles to conform to it, and the city of Los Angeles is perfectly willing to conform to it just exactly as if it had no perfected right.

"Mr. Walsh of Montana. Am I correct in the assumption, that the Government of the United States must distribute the water to the various appropriators in accordance with their several appropriations?

"Mr. Johnson. If they contract.

"Mr. Walsh of Montana. Yes; but to contract means a liberty of contract. That is what I want to know. Can the Secretary give the water to them or withhold it from them as he sees fit?

"Mr. Johnson. Certainly, because before he begins work upon the dam he has to have the contract in his possession for its payment, and he is the one who is to fix the sums that are to be paid.

"Mr. Walsh of Montana. Yes, but that is quite contradictory. It seems to me that the city of Los Angeles has no rights by virtue of this appropriation.

"Mr. Johnson. Certainly it has, but those rights unquestionably will be controlled by this bill.

* * *

"Mr. Walsh of Montana. I directed the inquiry merely for the purpose of trying to find out, if I can, under what kind of obligation the Government of the United States, should it build this dam, would be to those who have the appropriations.

"Mr. Johnson. The Government would be under no obligations until it makes its terms. I seem unable to make that plain. But here is everything in this scheme, plan, or design: Everything is dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction, and he is not to undertake any expenditure nor to undertake any construction until that shall have been accomplished.

"Mr. Walsh of Montana. Let us suppose the Arizona people are perfectly willing to meet the requirements and that the Los Angeles people are perfectly willing to meet the requirements and other people who have not even attempted to make any appropriation are perfectly able and willing to meet the requirements. Who then has the right?

"Mr. Johnson. The Secretary of the Interior and the Government have the right.

"Mr. Walsh of Montana. The Secretary of the Interior may utterly ignore those appropriations?

"Mr. Johnson. Possibly so.

"Mr. Walsh of Montana. That is what I am curious to find out about."[24]

Arizona v. *California*, 283 U. S. 423 (1931), does not, as California urges, conflict with the conclusion here recommended. In that case Arizona filed an original bill of complaint to enjoin the construction of the dam authorized by the Project Act on the ground, *inter alia*, that the Secretary of the Interior would operate the dam in such a manner as to invade "Arizona's quasi-sovereign right to prohibit or to permit appropriation, under its own laws, of the unappropriated water of the Colorado River flowing within the State." 283 U. S., at 451. The bill was dismissed "without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." 283 U. S., at 464. The Court's reason for dismissing the bill, stated at page 464, was:

"As we hold that the grant of authority to construct the dam and reservoir is a valid exercise of

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[24]70 Cong. Rec. 168 (1928), Ariz. Legis. Hist. pp. 26-29. See also the statements of Senator Pittman at 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. pp. 13-14; and Senator Hayden at 70 Cong. Rec. 382, Ariz. Legis. Hist. pp. 56-56c.

> Congressional power, that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries, and that there is now no threat by Wilbur, or any of the defendant States, to do any act which will interfere with the enjoyment of any present or future appropriation, we have no occasion to consider other questions which have been argued."

I interpret *Arizona* v. *California* as holding nothing more than that the United States could, under the Constitution, construct a dam on the territory of Arizona and Nevada and impound the waters of the Colorado River, a navigable stream. Arizona's objections, that the dam might be operated in such a way as to trespass on her sovereignty, were dismissed as premature since it was by no means certain that the dam and other works would be so operated as to invade Arizona's rights. This is the only explanation of the dismissal without prejudice to a new application for relief if the dam were operated so as to adversely affect Arizona's appropriations from the Colorado River. The Court reasoned that the constitutional issues which might be raised, depending on how the Secretary operated the dam, were best left to await the outcome of its construction and operation. The Court recognized that when the dam impounded water this might affect Arizona's rights to appropriate it by reducing the supply which would flow on her borders, but the Court held that such an infringement was justified under the constitutional power of the Federal Government to regulate navigable streams. Thus the Court stated, at pages 462-463 of the opinion:

> "There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right . . . . to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights

> so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion."

Beyond this the Court considered it unnecessary to go. The Court thus decided not to deal with the question, which must be answered in this litigation, of the extent of the Secretary's authority under the Project Act to control the allocation of water among the states. The fact that this and other questions are ripe for decision now, although they were not in 1931 when *Arizona* v. *California* was decided, gives some indication of the vast difference between the two cases. The prior case was decided before Hoover Dam was built and the sole issue was whether construction of the dam should be enjoined. The present case, of course, necessarily involves an adjudication of the claims and interests of the several states and the United States as they have developed during some twenty-five years of operation of Hoover Dam. For example, one of Arizona's primary fears in 1931 was that she would be required to conform to the Colorado River Compact in order to receive stored water; but she has since ratified the Compact, and, indeed, has relied on that ratification in this litigation. In short, *Arizona* v. *California* was concerned with different issues and different circumstances from those presented in this case.

The argument has been advanced that the Project Act, as I would construe it, constitutes an unconstitutional assumption of power by the United States. The argument does not survive scrutiny. Clearly the United States may construct a dam and impound the waters of the Colorado River, a navigable stream. *Arizona* v. *California,* 283 U. S. 423 (1931); see *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956); *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53 (1913); *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690 (1899). Clearly, also, once the United States impounds the water and thereby obtains

physical custody of it, the United States may control the allocation and use of unappropriated water so impounded. *Ivanhoe Irrigation District* v. *McCracken,* 357 U. S. 275 (1958); *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725 (1950). Since Section 6 instructs the Secretary to satisfy property rights in mainstream water perfected as of June 25, 1929, the effective date of the Act, these rights are not in jeopardy. Rights that might be recognized as of that date under state law but that do not qualify as perfected rights under Section 6 do not receive this protection. See pages 306-309, *infra.* Despite this fact, however, there is no need to pass on questions of ownership of water in navigable streams or of the validity against the United States of rights therein recognized by state law. There has been no showing that non-perfected rights recognized by state law as of June 25, 1929, if any, have not been satisfied since Hoover Dam was constructed. If it develops that such rights are not satisfied in the future, that will be time enough to determine whether they are of such character as require compensation for their taking.

In order to sustain the Project Act as applied in this case, it need only be held that the United States may, under the Commerce clause of the Constitution, impound waters in a navigable stream and regulate the disposition thereof so long as perfected rights are satisfied, leaving open the question whether non-perfected rights recognized under state law must be compensated if they are not satisfied.

Not much can be said of the argument that the Project Act constitutes an unconstitutional delegation of legislative power to the Secretary of the Interior because there are insufficient standards to govern his allocation of the water impounded in Lake Mead. The premise is wrong. The Act imposes substantial limitations on the Secretary's discretion. He may not contract with California for more than 4,400,000 acre-feet out of 7,500,000 acre-feet of consumptive use of mainstream water nor for more than one-half

of surplus. Section 4(a). He must satisfy present perfected rights. Section 6. Contracts for water for irrigation and domestic uses must be for permanent service. Section 5. The Secretary, his permitees, licensees and contractees, "shall observe and be subject to and controlled by" the Colorado River Compact. Sections 8(a), 13(b) and 13(c). The Secretary and those claiming under him are subject to any compact between Arizona, California and Nevada, or any two of them, approved by Congress. Section 8(b).[25] The Secretary is subject to the provisions of the reclamation law in the operation and management of the works authorized by the Project Act, except as otherwise provided therein. Section 14.

The Secretary has in fact exercised his discretion, as will be more fully explained later, by making contracts which apportion the water available in Lake Mead substantially along the lines which Congress proposed in Section 4(a) of the Project Act as a fair and equitable division among Arizona, California and Nevada.

For these reasons I have concluded that the delegation of authority to the Secretary of the Interior to apportion Lake Mead water is constitutional and that the Secretary has exercised this authority in a reasonable manner.

Only two other contentions of the parties regarding the proper interpretation of the Secretary's authority under the Project Act need be discussed at this point. Arizona, while agreeing with the United States that the Project Act constitutionally delegates to the Secretary of the Interior the power to allocate mainstream water among the claimant states, argues that the second paragraph of Section 4(a) establishes a formula for the allocation which the Secretary is required precisely to follow, and that those clauses in her water delivery contract which deviate from the for-

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[25]Compacts approved by Congress after January 1, 1929, are subject to contracts made by the Secretary prior to congressional approval of such compacts.

mula are void. This argument is premised on the language in Section 5 that "contracts respecting water for irrigation and domestic uses . . . shall conform to paragraph (a) of section 4 of this act." The second paragraph, Arizona points out, is included within Section 4(a). But the second paragraph of Section 4(a) is plain in that it merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory.[26] The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected.

Nevada contends that the congressional consent to the Colorado River Compact embodied in the Project Act includes consent to Article IV (a) of the Compact which declares that the Colorado River is no longer navigable. From this premise, she contends that Section 5 cannot empower the Secretary to divide and allocate water and that such a division can be accomplished in two ways only, by compact or adjudication. If Section 5 purports to provide a third method of apportionment, by contract, it is unconstitutional. Accordingly, Nevada argues that she is not bound by her contract limit of 300,000 acre-feet per annum and she seeks an equitable apportionment of the waters of the Lower Basin. This contention does violence to the Act. Section 1 of the Project Act authorized the construction

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[26]See 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. pp. 83-84.

of the dam for the purpose of "improving navigation" and Section 6 provides that the dam is to be used "First, . . . for improvement of navigation . . ." Congress thus rejected the declaration of non-navigability in Article IV (a) of the Compact. That Article specifically provides that: "If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding."

C. The Boulder Canyon Project Act: Section 4(a) and the California Limitation Act

The first paragraph of Section 4(a) establishes a limitation on California's consumptive use of mainstream water, and, as will be developed later, this limitation forms an integral part of the interstate allocation which the water delivery contracts have made. Section 4(a) provides, in part, that the Act shall not take effect and the proposed dam shall not be constructed unless and until (1) all seven of the interested states had ratified the Colorado River Compact, or:

> "(2) [I]f said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage

> of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

The reason that Congress imposed this limitation on California's consumptive use of mainstream water in the event that all seven states did not agree to the Colorado River Compact within six months of the date of enactment of the Project Act is apparent from the statutory language itself. It was for the benefit of the other six states.

Absent seven-state ratification of the Compact, the Upper Basin required protection against appropriations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the non-ratifying state.

Similarly, Arizona and Nevada were concerned that California's rapid development would enable that state to appropriate most of the mainstream water available in the Lower Basin. The California limitation afforded these states protection against this eventuality. Unless California

agreed with them to an acceptable division of mainstream water such as that suggested in the second paragraph of Section 4(a), they could, simply by delaying ratification for six months, bring the limitation into effect.

Seven states did not ratify the Colorado River Compact within six months of the date of enactment of the Project Act. California, in compliance with the statutory condition, passed its Limitation Act on March 4, 1929.[27] The California Limitation Act recites that it was enacted in order to comply with Section 4(a) of the Project Act, and it limits California's diversions of Colorado River water in language that is substantially identical to the Project Act limitation.

The limitation on California's use of Colorado River water, contained in the Project Act and the California Limitation Act, and incorporated into the Secretary's water delivery contracts with California users, is valid and binding on California. California argues that if it be held that Arizona effectively ratified the Compact, then California should be absolved of the limitation upon her. California's argument is based upon the premise that her act of self-limitation was exacted of her only in the event of a six-state compact, not of a seven-state compact. However, the natural reading of the language of the statute does not support her contention. The condition stated is the failure of seven states to ratify within six months. That contingency occurred.

Nor is there much to be said for California's alternative argument that Arizona did not effectively ratify the Compact. This is founded on the premise that the Compact, having been proclaimed as a six-state compact, could not fifteen years later become a seven-state compact. The premise is unsound. It was not proclaimed as a six-state compact. It never became a six-state compact. Article XI

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[27]Calif. Stats. and Amendments to the Codes, ch. 16, pp. 38-39 (1929). For the complete text of the Limitation Act, see Appendix 4.

of the Compact was never stricken or amended. The Congress and six of the states "waived" compliance with Article XI. Certainly Congress contemplated the future adherence of Arizona. Section 13(a) of the Project Act provides: "[T]his approval shall become effective when the State of California and *at least* five of the other States mentioned, shall have approved or *may hereafter* approve said compact as aforesaid and shall consent to such waiver, as herein provided." (emphasis added) Nothing has been called to my attention to indicate that California or any of the other signatory states expressed itself differently.

Under ordinary contract law it may be that fifteen years is too long a time within which an invitation to agree may be said to remain open. But that is always a question of fact to be determined from all the circumstances reflecting the understanding of the parties. 1 Williston on Contracts § 54 (3rd ed. 1957); 1 Corbin on Contracts § 36 (1950). Considering what has already been said, coupled with the perpetual character of the Compact and the very long-range interests which it embraced, I do not think Arizona outwaited her invitation.

Interpretation of the limitation on California.

We turn now to the construction of the language of Section 4(a) of the Project Act and the substantially identical phraseology which appears in California's Limitation Act. Although the problems inherent in those words do not leap to the eye, nevertheless so troublesome are they, that each of the parties which has dealt with then has construed them quite differently, and none of the parties advocates a literal reading of all the statutory language.

What is meant by the words "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"?

Article III(a) of the Compact reads as follows:

> "(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Read literally, the phrase in Section 4(a) limiting California to 4.4 million acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III" means that, of the 7,500,000 acre-feet apportioned to the entire Lower Basin, California's aggregate annual consumptive use shall not exceed 4,400,000 acre-feet.

What is meant by the words "excess or surplus waters unapportioned by said compact"?

Article III(f) reads as follows:

> "(f) Further equitable apportionment of the beneficial use of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October 1, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)."

The word "surplus" occurs in Article III(c) where it is used as follows: ". . . waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)."

Thus read literally, the phrase limiting California to one-half of any "excess or surplus waters unapportioned by said compact" means that California may consume half of any water above that referred to in Article III(a) and (b).

California would have us read the first phrase literally so that all uses, both from the mainstream and the tributaries, in the Lower Basin will be included in the accounting.

But not so the second phrase, for if the second is read literally she has no share in the uses specified in Article III(b).[28]

Arizona would have us read the second phrase literally so as to exclude California from the 1,000,000 acre-feet allotted, or as she says, apportioned, by Article III(b). But not so the first phrase. Arizona argues that Article III(a) of the Compact, despite its plain language to the contrary, was construed by the Congress and should now be construed as apportioning to the Lower Basin not System water but mainstream water.

Nevada reads the language so that it makes no difference how the "surplus" language in California's limitation is construed. She argues that California can have no more than 4,400,000 acre-feet out of the available water in the mainstream, and since there is in fact no surplus, which Nevada defines as the excess over 10,000,000 acre-feet (8,500,000 acre-feet for the Lower Basin and 1,500,000 for Mexico), the question of how the language is to be read is moot. Nevada overlooks that her reasoning has in fact excluded California from so-called III(b) water.

The United States once suggested a totally different reading. It construed the first mentioned phrase as if it read "apportioned to the lower basin states by paragraph (*d*) of Article III." Such a construction relates the phrase to the obligation of the states of the Upper Division not to cause a depletion of the River at Lee Ferry below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years. The United States considers "surplus" to be "the waters in the main stream available for use in the Lower Basin in excess of 7,500,000 acre-feet per year."[29]

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[28]That Article reads: "(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum."

[29]U. S. proposed conclusion 11.17.

The reason for such diversity of opinion is that the words of Section 4(a), despite their superficial simplicity, cannot bear their literal meaning. This becomes apparent in the attempt to apply the language of Section 4(a) to the factual situation in the Colorado River Basin.

First of all, Section 4(a), if read literally, authorizes a compact which would deprive two states, New Mexico and Utah, of the use of Lower Basin tributary waters which are presently being consumed in those states and which were being consumed there in 1928 when the Project Act was enacted. Section 4(a) contemplates the division of the water referred to therein only among the three states of the Lower Basin which have geographic access to water flowing in the mainstream of the Colorado River, namely, Arizona, California and Nevada. This becomes clear when we read the first and second paragraphs of Section 4(a) together. The first paragraph limits California to not more than "four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact. . . ." The second paragraph authorizes a compact between Arizona, California and Nevada "which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact. . . ." These two paragraphs are clearly correlative and contemplate allocation of all the available water among the three states. See pages 174-175, *infra*. Reading the two paragraphs together, it becomes apparent that the pro-

posed compact to which Congress gave advance approval in the second paragraph was for a division of the available annual supply of water so that of the first 7,500,000 acre-feet of consumptive use, 4,400,000 is allocated to California, 2,800,000 to Arizona and 300,000 to Nevada; any excess is divided half to California and half to Arizona. There is no water left for any other states.

Yet, if read literally, Section 4(a) applies to all of the water "apportioned to the lower basin states by paragraph (a) of Article III of the Colorado River compact." The water apportioned to the Lower Basin by Article III(a) of the Compact is water in the "Colorado River System," which is defined in Article II(a) of the compact as "that portion of the Colorado River and its tributaries within the United States of America." New Mexico and Utah are presently consuming water, as they were in 1928, from tributaries of the Colorado River in the Lower Basin. Thus, a literal reading of Section 4(a) would authorize Arizona, California and Nevada to enter into a compact for the division among themselves of all of the Lower Basin system water, including the water being used by New Mexico and Utah. The unlikelihood of such a congressional intention indicates that Section 4(a) should not be given its literal meaning.

Secondly, Section 4(a), if read literally, authorizes a compact which would prohibit the states of the Upper Basin from utilizing any of the water unapportioned by the Colorado River Compact despite the fact that Article III(f) of the Compact specifically contemplates a future apportionment of this water between the two Basins and Congress purported to ratify the Compact in the Project Act. The tri-state compact authorized by Congress in Section 4(a) provides for the division of all "waters unapportioned by the Colorado River compact" among Arizona and California. Yet that phrase, if given its literal Compact meaning, includes all unapportioned water throughout the entire

Colorado River Basin, in both the Upper and Lower Basins. See pages 194-195, *infra*. It is unlikely, particularly in view of Article III(f) of the Compact, that Congress intended to authorize Arizona and California to agree to divide among themselves all of the water in the Colorado River System unapportioned by the Compact, thus leaving nothing for the Upper Basin beyond its III(a) apportionment.

Finally, Section 4(a), if read literally, would prohibit California from consuming water from the Colorado River in excess of 4,400,000 acre-feet of consumptive uses per annum until consumptive uses throughout the Colorado River Basin totaled 16,000,000 acre-feet per annum, a figure which is approximately twice the present total of consumptive uses. Thus, California is limited by Section 4(a) to 4,400,000 acre-feet per annum plus "not more than one-half of any excess or surplus waters unapportioned by" the Colorado River Compact. Surplus waters unapportioned by the Compact, if taken literally, means water in excess of that "apportioned" in Article III(a) and (b), which means water in excess of 16,000,000 acre-feet of consumptive use in the Colorado River Basin.[30] Again it is extremely unlikely that Congress intended this literal result to apply.

For the reasons stated above, Section 4(a) of the Project Act cannot be given a literal interpretation. Such an interpretation would fly in the face of what must have been the congressional intention; it would make no practical sense whatsoever. This being the case, I have construed Section 4(a) so as to comport with the purposes of Congress in enacting it and to effectuate a result which makes sense when the section is applied to the factual situation existing in the Colorado River Basin.

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[30]See p. 195, *infra*.

Interpretation of the phrase, waters apportioned by Article III(a).

I have concluded that Congress intended, in limiting California to 4.4 million acre-feet of "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," simply to limit California's annual uses[31] of water to 4.4 out of 7.5 million acre-feet. Congress referred to Article III(a) of the Compact solely as a shorthand way of saying "7,500,000 acre-feet per annum." This inappropriate reference to the Compact has been the cause of seeming inconsistency in the Act and of much confusion in its interpretation. Reflection has led to the conviction that the statutory language does not accurately express the true congressional intention.

Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries.

It is clear that Congress intended Section 4(a) of the Project Act to apply only to the mainstream, where the works authorized by the Act were to be constructed.[32] The United States cannot by its operation and control of Hoover

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[31]Measured by diversions less returns.

[32]It is true that certain sections of the Project Act apply to the Colorado River System. The explanation for this is that in those sections Congress was dealing with problems which had system-wide application. Thus Section 13 applies system-wide because it approved the Colorado River Compact, which itself applies system-wide. Similarly, Section 16 applies to the entire river system because it deals with a possible *future* comprehensive development plan for the entire river system. But it is clear that many other sections of the Project Act apply only to the mainstream, and this is understandable because in them Congress was dealing only with mainstream problems.

Dam regulate the flow of water in the tributaries, nor can it deliver water on any of these streams.

Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. The very language of the Section—it refers to the Colorado River and not to the System—points in this direction. But more important, the second paragraph of Section 4(a) demonstrates that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in that Section among three states only: of the first 7.5 million acre-feet—4.4 to California, 2.8 to Arizona, and .3 to Nevada; the balance to California and Arizona equally. This intention is clearly stated in the legislative history. Thus Senator Hayden of Arizona made the following comments about an amendment to the Project Act which he offered and which subsequently became the second paragraph of Section 4(a). The Phipps Amendment, which is referred to in the quotation, became the first paragraph of Section 4(a).

> "MR. HAYDEN. Mr. President, an examination of the amendment offered by the Senator from Colorado [Mr. Phipps] will disclose that it proposes that the State of California shall agree with the United States, for the benefit of the States of Arizona and Nevada, that the aggregate annual consumptive use of water from the Colorado River by the State of California shall not exceed 4,400,000 acre-feet. Further, that the State of California may have one-half of any excess of [*sic*] surplus waters unapportioned by the Colorado River compact.
>
> "The first part of my amendment is a mere corollary to the amendment offered by the Senator from Colorado. It provides that of the remainder of the seven and one-half million acre-feet there

shall be apportioned to the State of Nevada 300,000 acre-feet, and to the State of Arizona 2,800,000 acre-feet, which, combined with 4,400,000 acre-feet which the State of California will use, completely exhausts the seven and one-half million acre-feet apportioned in perpetuity to the lower basin.

"The second proposal in my amendment is that the State of Arizona may annually use one-half of the surplus or unapportioned water, which is likewise a corollary to the proposal made by the Senator from Colorado, which likewise disposes of the total quantity of surplus or unapportioned waters in the lower basin."[33]

To maintain that Congress intended to adopt, in Section 4(a), the Compact concept of apportioning all of the water uses in the entire Colorado River System, in the Lower Basin, requires that I attribute to Congress an intent to deprive two of the states having Lower Basin interests of any participation in the Lower Basin apportionment. Such a deprivation would have divested even perfected rights in New Mexico and Utah. In the light of the fact that Congress expressly protected perfected rights in Section 6, it is extremely unlikely that Congress intended to divest such rights in Section 4(a). Moreover, it is preposterous to suggest that such a result would have been accomplished with the active support of Senator Bratton [34] of New Mexico, one of the principal architects of Section 4(a). If Congress had intended to adopt the system wide method of accounting used in the Compact, it would have divided the III(a) and (b) apportionment of appropriative rights made by the Compact among all five states

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[33]70 Cong. Rec. 459-460 (1928), Availability of Article III(b) Waters For Use in California: Legislative History of Section 4(a) (submitted by the California Defendants) [hereinafter cited as "Calif. Legis. Hist."] pp. 148-149.

[34]In 1933 Senator Bratton was appointed to the Court of Appeals for the Tenth Circuit and, in 1953, he became Chief Judge.

having Lower Basin interests. Thus, Congress would have said: "The Lower Basin is entitled to a total appropriation in the amount of 8,500,000 acre-feet. This apportionment is divided among the *five* states having Lower Basin interests as follows," giving ceilings on appropriations within the Lower Basin for each of the five states. But Congress did no such thing. It dealt only with three of the five Lower Basin states, the three states which, significantly, are geographically accessible to mainstream water. This strongly indicates that the congressional intention was to provide only for the apportionment of mainstream water.

Furthermore, Senator Pittman made it perfectly clear that Section 4(a) of the Project Act was designed by Congress to apply only to the mainstream and to apportion water only among the three states that could utilize mainstream water. Thus Senator Pittman, in discussing the Phipps amendment, stated:

> "The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only . . . 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get . . . ."[35]

This statement by Senator Pittman obviously reflected the congressional understanding that the limitation on California in the first paragraph of Section 4(a), along with the fact that Nevada could use no more than 300,000 acre-feet of water from the mainstream because of physical limitations, as her representatives continually stated to the Congress, would leave the remaining water available to Ari-

[35]70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. p. 80.

zona, the only other state having access to mainstream water. Since the first paragraph limited California to 4,400,000 acre-feet of the 7,500,000 acre-feet of water "apportioned . . . by paragraph (a) of Article III," and Nevada could only use 300,000 acre-feet, there would be left 2,800,000 of the 7,500,000 acre-feet for Arizona if the apportionment were intended to be only of mainstream water among these three states. Senator Pittman confirmed this when he concluded that:

> ". . . Arizona today has practically allocated to it 2,800,000 acre-feet of water in the *main Colorado River.*"[36] (emphasis added)

Similarly, since California was limited to one-half of "excess or surplus waters," and since Nevada represented that she could not utilize any of this water, Arizona became the inevitable beneficiary of the other half.

This construction of Section 4(a) as applying only to the mainstream of the Colorado River requires rejection of California's principal contention. The crux of her case lies in the view that the Project Act adopts and applies the Compact method of accounting. Thus California would total all uses of System water in the Lower Basin until the sum of 7,500,000 has been reached, after which she would assign all remaining uses to "excess or surplus waters unapportioned by said compact." There being no tributaries in California, the effect of this thesis is, of course, to exhaust the 7,500,000 apportionment with the help of tributary uses outside of California and to leave a large supply of mainstream water which California shares as "surplus." The effect of California's accounting system is disclosed in Part XII of her Proposed Findings and Conclusions. The California position is there revealed as follows:

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[36]70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. p. 82.

1. Art. III(a) of the Compact apportioned 7,500,000 acre-feet of uses to the Lower Basin;

2. Congress limited California to not more than 4,400,000 acre-feet of uses from this apportionment;

3. California is using all of the 4,400,000 acre-feet;

4. Thus, 3,100,000 acre-feet of uses remain for other Lower Basin states out of the III(a) apportionment;

5. The 3,100,000 acre-feet of uses are exhausted in other states, as follows:

(1) Gila River	1,750,000
(2) Other tributaries	200,000
(3) Mainstream, other than California	1,150,000
Total	3,100,000;

6. Any water remaining in the *mainstream* in excess of 5,550,000 acre-feet (4,400,000 for California and 1,150,00 for others) is surplus, of which California may take as much as one-half.

Under this hypothesis California argues that she is privileged to take as surplus up to 978,000 acre-feet[87] from the mainstream in addition to taking 4,400,000 acre-feet, also from the mainstream, out of what she interprets to be the Article III(a) System apportionment. The effect of this argument is to give California 5,378,000 acre-feet out of the first 7,500,000 acre-feet available from the mainstream, leaving only 2,122,000 acre-feet for Arizona and Nevada.

[87]California arrives at this figure by dividing her contract amount of 5,362,000 acre-feet between 4,400,000 acre-feet of III(a) water and 962,000 acre-feet of surplus and by adding to the latter 16,000 acre-feet of other uses. See note 71, page 208, *infra*.

Nothing in the words or the legislative history of Section 4(a) lends countenance to this hypothesis. The second paragraph of Section 4(a) contemplates that Arizona could receive 2,800,000 acre-feet of the 7,500,000 acre-feet *in addition* to the exclusive use of the Gila River within her boundaries.[38] Under the California hypothesis, over one-half of Arizona's 2,800,000 acre-feet is used up by appropriations on the Gila.

After the prolonged dispute between Arizona and California, which was uniformly described as a difference over whether California should be limited to 4,200,000 or

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[38]The second paragraph of Section 4(a) authorizes a compact among Arizona, California and Nevada which would allocate 2,800,000 acre-feet plus one half of surplus to Arizona. It then further provides that "the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State. . . ." This language must mean that Arizona may consume Gila River water *in addition* to the 2,800,000 plus half of surplus. California's explanation of the language, that it ensures Arizona exclusive use of Gila River water *as part of* her 2,800,000 plus half of surplus, makes it redundant since that would necessarily be the result even without this language.

This is so because Gila River water flowing in Arizona can, as a matter of geography, be consumed only in that state, California or Mexico. California had no diversion works as of 1928 capable of diverting Gila River water for use in that state nor were there any contemplated at that time. Indeed, California has not used Gila River water since 1928, and she has no facilities for the diversion of that water today. Also another clause in the second paragraph of section 4(a), clause (4), specifically provides that Gila River water shall never be used to satisfy the Mexican treaty. Thus, even without the above quoted language, Gila River water could be consumed only in Arizona, and the language, if it is to be given some effect, must mean that Arizona may consume this water *in addition* to the 2,800,000 plus half of surplus allocated to it from the mainstream.

This necessary interpretation of the second paragraph of section 4(a) was recognized by Senators Johnson and Hayden during the debates in the Senate. Senator Johnson was interpreting the second paragraph when he stated that: "When Arizona says that she has but 2,800,000 acre-feet of water, to that must be added the Gila River with its 3,500,000 acre-feet. . . ." And Senator Hayden agreed with Senator Johnson that Arizona's use of Gila River water would be in addition to its allocation of mainstream water under the language of the second paragraph of section 4(a). 70 Cong. Rec. 466, Calif. Legis. Hist. p. 175.

4,600,000 out of the first 7,500,000 acre-feet of mainstream water, it would be remarkable indeed to discover at this late date that Congress intended to give California up to 5,378,000 acre-feet of the first 7,500,000 acre-feet of mainstream water and to assure Arizona of only 1,822,000 acre-feet.[39]

The one claim that can be made for the California contention is that it makes the congressional reference to the III(a) apportionment consistent with the Compact meaning, but at the expense of inconsistency between the first and second paragraphs of Section 4(a) of the Project Act itself, and in the face of every expression of intent made by any Senator who had anything to do with the legislation.[40] Accordingly, the California hypothesis is rejected.

California advances one more argument to support her contention that Section 4(a) should be interpreted as applying to both the mainstream and the tributaries. She strenuously urges "the contractual character of the California Limitation Act."[41] On the premise that Section 4(a) of the Project Act is "an offer to the Legislature of California of a statutory compact,"[42] California states that "the issue must be what the California Legislature understood from the words used [in Section 4(a)]."[43] California's conclusion then follows:

> "In enacting it [the Limitation Act], the California Legislature accepted a communicated offer plain on its face."[44]

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[39]Congress contemplated that the other 300,000 acre-feet would go to Nevada.

[40]In addition, California's position on Article III(a) is incompatible with her position on III(b). If the Project Act reference to III(a) is to be read literally, in a Compact sense, then "surplus" and "unapportioned" must be read literally, and California would be excluded from III(b) uses, since they are apportioned by the Compact. See pages 147, 150-151, *supra,* and 197-200, *infra.*

[41]Calif. Comment on Draft Report, p. 2.

[42]*Id.* at p. 5.

[43]*Id.* at p. 40.

[44]*Id.* at p. 5.

The plain meaning California ascribes to Section 4(a) is, of course, the adoption in the Project Act of the Compact method of system-wide accounting.

I cannot accept California's premise, nor if I did would I reach her conclusion.

California's premise is faulty in that it characterizes Section 4(a) as an offer and the California Limitation Act as an acceptance, which together constitute a binding contract or compact between the United States and California. This analysis misreads both the Project Act and the Limitation Act.

Properly analyzed, Section 4(a) is not an offer but a condition precedent to the effectiveness of the Project Act. Section 4(a) provides: "This Act shall not take effect and . . . no work shall be begun . . . in connection with the works or structures provided for in this Act . . . unless and until [California enacts the required legislation]." The meaning of the condition is necessarily determined by the congressional intent, just as the interpretation of other provisions of the statute is governed by such intent.

Whether the condition has been satisfied is determined by examining the California Limitation Act to see whether it meets the congressional requirement. The wording of the Limitation Act is substantially identical to the limitation provision of Section 4(a). But California did not stop with the enactment of the congressional words. It went further to provide that the statute was intended to satisfy the congressional condition and should be so construed. Specifically Section 2 of the California Limitation Act provides:

> "By this Act the State of California intends to comply with the conditions respecting limitation on the use of water specified in subdivision 2 of Section 4(a) of the said 'Boulder Canyon Project Act' and this act shall be so construed."

This language reflects an understanding that the construction of the dam and other works depended on California's compliance with the terms of the condition as imposed by Congress and as understood by Congress. The language "and this act shall be so construed," can have no other purpose.

However, even if the Project Act can be interpreted as an offer, it does not follow that the Limitation Act and Section 4(a) must be construed as adopting the Compact method of accounting. California contends that the intent of the California Legislature controls. But there is no evidence whatsoever that the California Legislature understood the Limitation Act to adopt the Compact accounting system. Indeed, there is no evidence of the California Legislature's understanding of the meaning of the Section 4(a) "offer" nor of its intention in its acceptance of that "offer". To fill this void, California argues that the Legislature "accepted a communicated offer plain on its face."[45] Thirty years of unabated controversy give unchallenged testimony that the language is *not* plain on its face.

As explained at pages 170-172, *supra,* it is impossible to interpret the language of Section 4(a) literally, and none of the parties in this case has suggested a literal interpretation. That the California Legislature was aware of this ambiguity in the statutory language is suggested by Section 2 of the California Limitation Act. Section 2 provides, in effect, that the Limitation Act is to be interpreted in the same way that Section 4(a) of the Project Act is ultimately interpreted, hardly a necessary clause if the California Legislature understood the Project Act to be "plain on its face".

Whether the congressional limitation be regarded as an offer or as a condition, California bound itself by that limitation when it adopted the California Limitation Act. It did so, aware of the risks of litigation, in return

[45]Calif. Comment on Draft Report, p. 5.

for a dam that would regulate the river and eliminate the threat of disastrous floods and for a canal wholly within the United States, free from control by a foreign power.

The water to a portion of which California is limited by Section 4(a) is that part of the mainstream which consists of Lake Mead and the River below. Water consumed from the mainstream above Lake Mead is not relevant in computing the limit that Section 4(a) places on California's use of mainstream water. The Project Act was concerned primarily with the construction and operation of Hoover Dam, and most of its provisions relate to this basic purpose. Hoover Dam gives the United States physical control over the water stored in Lake Mead and over the use of substantially all of the water in the mainstream below, but it does not enable the United States physically to control the use of water from the mainstream above Lake Mead. Consistently with this physical fact, the provisions of the Project Act do not purport to govern the mainstream above Lake Mead. Section 5 authorizes the Secretary of the Interior to contract for the delivery of water stored in Lake Mead at points which may be agreed upon along the Lake and the mainstream below; that section specifically applies only to water in Lake Mead and to water released therefrom. Also Sections 6 and 8 of the Project Act apply in terms to water controlled by the United States by means of Hoover Dam.

Section 4(a) must be interpreted within the context just described. Consistent with the other provisions of the Project Act, I interpret Section 4(a) as applying only to Lake Mead and the mainstream below. Water in the mainstream above Lake Mead is treated precisely like water in the tributaries above Lake Mead; it is a potential source of supply and is not within the scope of the Project Act unless and until it finds its way into Lake Mead.[45a]

[45a] Consistent with this interpretation of Section 4(a), the water delivery contracts of the Secretary of the Interior effectuate an apportionment of water in Lake Mead and the mainstream below. See pp. 225-228, *infra*.

The only water available for diversion from the mainstream of the Colorado River below Hoover Dam is the water released from Lake Mead and the tributary inflow from the Bill Williams River.[46] The annual inflow from the Bill Williams River, which varied during the period 1944 to 1951 from a minimum contribution to the mainstream of 7,300 acre-feet to a maximum contribution of 114,400 acre-feet,[47] is stored by Parker Dam, and is available for use in Arizona and California. Consumption of this water, after it reaches the mainstream, is chargeable to the state within which it is consumed under the Section 4(a) limitation and the Arizona water delivery contract. As an administrative matter, it would be impossible to reach a different result, for water from the Bill Williams commingles with water released from Lake Mead in the mainstream, and diversions of water below Parker Dam could not be broken down into water which was supplied from Lake Mead and water which was supplied from the Bill Williams. Since it is impossible to segregate water supplied from each source, it is impractical to treat the two sources differently.

Furthermore, even if such a demarcation were possible, Section 4(a) and the Arizona water delivery contract provide that consumption of the inflow from the Bill Williams is charged to the states. Article 7(1) of the Arizona contract specifically provides for this result. The Project Act treats the Bill Williams inflow as *de minimis* in comparison to releases from Lake Mead, and assumes that this inflow will not be accounted for separately. Indeed, the Section 4(a) limitation specifically limits Cali-

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[46]The Gila River is the only other tributary which has its confluence with the mainstream below Lake Mead. It is already overappropriated, however, and the occasional inflow which it does supply to the mainstream cannot be captured for use in the United States by any existing works.

[47]See Part One, page 121.

fornia's use of water diverted from the Colorado River without excluding the water supplied from the Bill Williams River.

For these reasons I have concluded that the limitation on California's consumption of water from the Colorado River contained in Section 4(a) of the Project Act and the correlative apportionment of this water among Arizona, California and Nevada effectuated by the water delivery contracts, which apportionment is discussed *infra*, apply only to water diverted from Lake Mead and from the mainstream of the Colorado River below Lake Mead. Hereafter, reference to the "mainstream", except where otherwise specifically indicated, means Lake Mead and the Colorado River downstream from Lake Mead within the United States.

The limitation on California is measured at points of diversion.

The foregoing conclusion leaves open the question of the points of measurement for the application of the California limitation. The United States, as will more fully appear, once suggested Lee Ferry as the point of measurement. I come to a different conclusion.

The language of Section 4(a) of the Project Act makes plain its intention that the limitation on California's use of water from the Colorado River is to be measured in terms of consumptive use of water, which is defined as diversions from the River less return flow thereto. Thus Section 4(a) provides:

> ". . . the aggregate annual consumptive use (diversions less returns from the river) of water of and from the Colorado River for use in the State of California . . . shall not exceed four million four hundred thousand acre-feet . . . plus not more than one-half of any excess or surplus. . . ."

This language clearly states that California is limited to 4,400,000 acre-feet, not of water, but of the consumptive use of water measured by diversions less return flow. Congress did not purport in Section 4(a) to limit California to a portion of the water flowing at Lee Ferry or stored in Lake Mead. While Congress could have limited California to 4,400,000 acre-feet of consumptive use out of a body of water at some point along the River, no such point is specified in Section 4(a), and the more natural reading of the language is that Congress limited California to a portion of the total amount of consumptive uses made of mainstream water in the United States each year.

The most rational way to measure consumptive use of water as defined in Section 4(a) is to measure diversions made from the mainstream and to measure or calculate how much of the diverted water returns to the mainstream. Segregating water at Lee Ferry or Lake Mead cannot contribute to the measurement of "diversions less returns to the river." And the consistent administrative interpretation of Section 4(a) supports the conclusion that the limitation on California is not to be measured at Lee Ferry or at Lake Mead, but rather at points of diversion. All of the water delivery contracts entered into by the Secretary of the Interior on behalf of the United States, including the contracts with California users which incorporate the Section 4(a) limitation and the contracts with other states which are correlated to it, provide that the delivery obligation under each contract shall be measured at the points of diversion.

For the reasons stated, I interpret Section 4(a) as limiting California annually to 4,400,000 acre-feet of consumptive use of mainstream water out of the first 7,500,000 acre-feet of consumptive use annually of such water in Arizona, California and Nevada. Consumptive use is to be measured by diversions at each diversion point on the mainstream less returns to the mainstream, meas-

ured or estimated by appropriate engineering methods, available for use in the United States or in satisfaction of the Mexican treaty obligation.

Section 4(a) as here interpreted does not charge California for evaporation and channel losses on water in the mainstream which occur before the water is diverted for use within the state. California is charged only for the amount of water which she actually diverts and which does not return to the mainstream. Losses of water which occur before diversion are a diminution of the available supply under Section 4(a), not a consumptive use.

The United States at one time urged a different conclusion, namely, that Section 4(a) limits California to a part of the water flowing at Lee Ferry.[48] It would necessarily follow that this water must be segregated for California at Lee Ferry and traced downstream, through Lake Mead, to California's diversion works. This interpretation measures the Section 4(a) limitation, not to a portion of aggregate consumptive use, but to a portion of a body of water 650 miles upstream from some of California's diversion works, and 355 miles upstream from Hoover Dam, the operation of which the Project Act was designed to regulate. Furthermore, it charges California for evaporation and channel losses which occur before the water is diverted from the mainstream for use in California, despite the statutory language which limits California to a quantity determined by the measurement of "diversions less returns to the river."

The argument to justify overriding the statutory language in this manner is that Congress, in limiting California's consumption to a part of "the waters apportioned . . . by paragraph (*a*) of Article III of the Colorado River compact," really meant to say "paragraph (*d*) of

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[48]The United States, in its Comment on the Draft Report, although it recognizes that this position is fairly implied from its opening brief, says that it altered its position in its reply brief.

Article III" of the Compact, which refers to the flow at Lee Ferry. The support for interpreting III(a) to mean III(d) is (1) that the 7.5 million acre-feet per annum, which is the figure found in Article III(a), is one-tenth of the 75 million acre-feet mentioned in Article III(d), and (2) that the Upper Basin governors, in a meeting held in Denver in the summer of 1927, recommended a division of III(d) water at Lee Ferry among Arizona, California and Nevada.

While there is some basis for this interpretation of Section 4(a), I have after careful reflection rejected it, for it requires that "Article III(a)" be interpreted to mean "Article III(d)," and I do not believe there is sufficient support for rewriting the statutory language in this manner.

As I have pointed out before, subdivisions (a) and (d) of Article III are not correlative despite the coincidence that the number mentioned in (d) happens to be ten times the number mentioned in (a). See page 144, *supra*. Moreover, the legislative history tends to demonstrate that Congress did not intend Article III(a) to mean Article III(d). It is true that the Upper Basin governors recommended a division of water at Lee Ferry in the following language:

> "1. Of the average annual delivery of water to be provided by the States of the upper division at Lees [*sic*] Ferry under the terms of the Colorado River compact: (a) To the State of Nevada, 300,000 acre-feet. (b) To the State of Arizona, 3,000,000 acre-feet. (c) To the State of California, 4,200,000 acre-feet."[49]

The recommendations of the governors' conference designated a body of water out of which the allocation would be made by reference to the contemplated deliveries

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[49]70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. p. 34.

derived from the Upper Division performance of its obligation under Article III(d) of the Compact.

However, Congress never clearly understood this, and, indeed, seems never to have considered the relationship of the limitation on California to some actual body of water. Thus Senator Pittman of Nevada reported the governors' recommendation as follows:

> ". . . when we assembled at Denver the governors of the four upper Colorado River basin states, trying to reconcile the differences on water between California and Arizona, finally made this proposition. California 4,200,000 acre-feet of water, Arizona 3,000,000, Nevada 300,000"[50]

This report by Senator Pittman did not adopt, or perhaps failed to grasp, that portion of the governors' resolution which expressly found the source of the allocated waters in the Article III(d) obligation of the Upper Division. Instead, Senator Pittman related the limitation to Article III(a), not III(d), as appears from the very next sentence of his statement, which reads as follows:

> "How did they get at that? Under what is called the seven-state agreement, we find this clause in Article III:
>
> "'(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.'
>
> "In other words, those State governors believed that there was only 7,500,000 acre-feet of water to divide, and they proposed to divide it, as I have said

[50] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. p. 14.

4,200,000 acre-feet to California, 3,000,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada."[51]

Thus Senator Pittman used Article III(a) to define the area against which the limitation was to operate. He did this in apparent misunderstanding of the governors' recommendation. All subsequent discussion in the Senate flowed in the same channel.

One of the major issues in the Senate debates (Section 4(a) was adopted on the floor of the Senate and was not debated in the House) was whether California should be limited to 4.6 or 4.2 out of 7.5 million acre-feet per annum. This dispute was finally compromised at the enacted limitation of 4.4 million acre-feet. Throughout the debates on this subject the Senators clearly revealed an understanding that this limitation was to be applied against the 7.5 million acre-feet which they identified by reference to Article III(a). "Article III(a)" became a shorthand expression for the quantitative measurement of 7.5 million acre-feet. Similarly, the Senators participating in the debate used "Article III(b)" as a shorthand method of designating a quantity of one million acre-feet of water. The debates indicate that the Senate considered the water designated by "Article III(a) and (b)" as being undifferentiated. For example, Senator Hayden stated:

> "Mr. Hayden. I shall offer the amendment in a few moments.
>
> "At the time to which I have just referred the Senator from Nevada stated that at a conference held in the city of Denver during the summer of 1927, at the instance of the Governors of the States of New Mexico, Colorado, Utah, and Wyoming, there were present governors and commissioners from the States of Nevada, Arizona, and California. The subject of paramount importance, the subject

[51] *Ibid.*

that was the most discussed at that conference, was an adjustment of the differences between the States of Arizona and California with respect to an apportionment of the waters of the lower Colorado River Basin, in order that, if those two States might be brought into accord, the Colorado River compact, which affected the entire seven States, might be ratified and approved by all of the States.

"Each of the States in the lower basin was called upon to submit to the Denver conference a statement of the quantity of water they desired to obtain out of the Colorado River. At the time the conference was held it was thought that there were but seven and a half million acre-feet of water to divide, and upon that basis the senior Senator from Nevada stated to the Senate that the governors of the upper-basin States recommended that there be awarded to the State of California 4,200,000 acre-feet, to the State of Arizona 3,000,000 acre-feet, and to the State of Nevada 300,000 acre-feet.

"The Senator explained in his remarks how the four governors arrived at that apportionment, and said that it was done under article 3 of the Colorado River compact, paragraph (a) of which reads as follows:

* * * *

"The Senator then stated that subsequently it was discovered that there was an additional million acre-feet of water apportioned to the lower basin which could be divided. The idea of dividing that additional apportionment of water did not occur to the governors and the representatives of the lower basin States at the time of the Denver conference.

"The Senator then read to the Senate this provision of the compact, which is paragraph (b) of article 3:

'In addition to the apportionment in paragraph (a), the lower basin is hereby given the

right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.'

"Senator Pittman stated further that at conferences held in his office during the last session of Congress the suggestion had been made that the additional million acre-feet be divided equally between Arizona and California, and that if that were done the total quantity of water apportioned to the State of California under the Colorado River compact out of the total amount allocated to the lower basin would be 4,700,000 acre-feet, or 100,000 acre-feet more than California had asked for at Denver, and that by adding 500,000 acre-feet to the 3,000,000 acre-feet apportioned to Arizona on the basis recommended by the four upper basin governors that State would receive 3,500,000 acre-feet, or within 100,000 acre-feet of what had been requested by her commissioners at Denver.

"The Senator from Nevada then stated that, based upon the recommendations made by the upper basin governors plus an equal division of the additional 1,000,000 acre-feet, Mr. Francis B. Wilson, interstate river commissioner of the State of New Mexico, had prepared an amendment which the Senator asked to have printed in the Record. He did not offer it at that time, but merely asked to have it printed for the information of the Senate. I now offer that amendment to the bill."[52]

That amendment clearly stated that the limitation was 4.2 out of the 7.5 million acre-feet referred to in Article III(a) plus 500,000 out of the million acre-feet referred to in Article III(b). The Hayden amendment provided that California should be limited to:

"... 4,200,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of Article III of said compact, ... 500,000 acre-feet of the water apportioned by the compact to the lower basin by

[52]70 Cong. Rec. 161-162 (1928), Calif. Legis. Hist. pp. 55-57.

> paragraph (b) of said Article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus water. . . ."[58]

Senators Pittman and Hayden could not have referred to an extra million acre-feet of water to be divided among Arizona and California if they were thinking of Article III(d), which can be said to guarantee only an average of 7.5 million acre-feet of water per year. Since the Senators equated Article III(a) and III(b), they could not have equated III(a) and III(d), because III(d) has no relationship to III(b).

Furthermore, this suggested interpretation would create very difficult administrative problems. Even after each state's share of the flow at Lee Ferry and the Lower Basin tributary flow into the mainstream were segregated, it would be necessary to determine the channel and evaporation losses sustained by such water, as it flowed in the mainstream and was stored in Lake Mead, in order to calculate the amount left for each state to divert below Lake Mead. An accurate determination of the total losses on all the water flowing in the mainstream and stored in Lake Mead is extremely difficult if not impossible to make. Yet, even if such a determination were possible, it would not be possible to calculate the losses on each state's share of water simply by allocating total losses among the states in the same proportions as the total water is allocated among them. This is so because the amount of loss depends on such factors as volume and flow of water, and because the allocation of water among the three states varies depending on whether or not particular water is surplus.

On the other hand, it is unnecessary to compute losses on water flowing in the mainstream above Lake Mead

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[58]70 Cong. Rec. 162 (1928), Ariz. Legis. Hist. p. 17.

or stored in Lake Mead, much less to allocate these losses among the states, if the California limitation and the correlative apportionment among the three states are measured by consumptive use and applied at the diversion points.

Interpretation of the phrase, excess or surplus waters.

I turn now to a consideration of the phrase "plus not more than one-half of any excess or surplus waters unapportioned by said compact." Our task of defining "excess or surplus waters unapportioned by said compact" is not aided by looking at the Compact. It uses the word "surplus" just once, in Article III(c), which provides that the Mexican burden "shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III. Article III(f) makes equally clear the uses of water that are "unapportioned" for Compact purposes, by providing for "further equitable apportionment of the beneficial uses of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c)" of Article III. Thus by a literal Compact reading, the phrase would mean System water in excess of the aggregate of the apportionments of Article III(a), (b) and (c). But such a literal meaning is unacceptable.

In the Compact sense, surplus is System water; that is, it is water in both the mainstream and the tributaries, and is water in both the Upper and Lower Basins. If the Project Act is given a literal Compact meaning, one-half of such surplus could be appropriated by California. Moreover, the proposed tri-state compact authorized Arizona to agree with California and Nevada for Arizona to take the other half. It is incredible that the Senators of the other five states in the Basin intended this act of generosity. Not one word of the legislative history suggests such an intention. The Upper Basin Senators, who originated the first para-

graph of Section 4(a), and who supported the second paragraph, obviously did not intend to divide surplus in the entire System between two Lower Basin states.

It might be thought that appropriations of surplus would not be firm rights since these appropriations are subject to divestment in the event of a further equitable apportionment by compact after 1963, and therefore that Congress was not concerned about the matter. But congressional concern can not be brushed off so lightly. There is nothing to compel any state to ratify a compact making such further apportionment. Moreover, in answer to questions about the Compact propounded by Senator Hayden, Herbert Hoover stated that appropriations from surplus would doubtless be recognized in a future equitable apportionment.[54] Whether or not this position is, in fact, correct, it could hardly be expected that the Upper Basin Senators were willing to run the risk that it would prevail.

Surplus in a Compact sense means, in quantitative terms, water in the System in excess of appropriations of 16,000,000 acre-feet in the United States plus 1,500,000 acre-feet of water delivered to Mexico. Hence, appropriations from surplus could not commence until the 17,500,000 acre-feet were exhausted. Even putting aside the Mexican burden because it did not exist in 1928, it is not credible that Congress considered surplus in the Project Act sense to be water in the System in excess of 16,000,000 acre-feet. To attribute this view to Congress would ascribe to it an intent that no surplus would be available to Arizona and California until there were 16,000,000 acre-feet of appropriations, which, of course, did not exist in 1928 and seemed unlikely to occur in the foreseeable future.[55]

This is not to say that "surplus" and "unapportioned water" have no rational meaning as used in the Compact.

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[54]Special Master's Ex. No. 4, The Hoover Dam Documents, p. A36, Ariz. Ex. 55.

[55]*Ibid.*

On the contrary, their meaning is clear and consistent with other Compact provisions. The Compact puts an embargo upon the acquisition of appropriative rights in excess of the limits set by Article III(a) and (b). The first call upon any remaining water goes to supply Mexico. Thereafter, any remaining water anywhere in the System is available for further equitable apportionment after 1963. Thus a new compact might raise the III(a) and (b) limits from 16 million acre-feet as they presently stand to, for example, 20 million acre-feet. The Compact thus makes sense when it deals with surplus unapportioned water of the Colorado River System, although it specifies no point of measuring this water, because, for Compact purposes, the accounting is made at the point of diversion. In effect, Article III(a) and (b) establishes quotas of allowable appropriations. When these quotas have been exhausted, any remaining water in the System (surplus) may be further apportioned by compact so as to increase the quotas. But the phrase as used in the Compact makes no sense in the Project Act, and thus the Compact interpretation must be rejected.

Since I rejected the Compact definition of the phrase "excess or surplus waters unapportioned by said compact," its meaning must be derived from the Act itself and in harmony with the construction of the phrase "waters apportioned to the lower basin States by paragraph (a) of Article III." On the basis of my interpretation of the latter phrase, the words "excess or surplus waters" must necessarily mean all consumptive use in the United States in any year from the mainstream in the Lower Basin in excess of 7.5 million acre-feet. This is so because Congress intended that any consumptive uses in addition to the first 7.5 million acre-feet should be disposed of under the surplus accounting. In short, surplus was intended by Congress to complete the universe, the first part of which was the 7.5 million acre-feet. This universe consists of all consumptive

use of water diverted from Lake Mead or the mainstream below.

Arizona and Nevada disagree. They argue that Section 4(a) bars California from any share of what is described as Article III(b) water. This argument is based on an interpretation of the words "excess or surplus waters unapportioned by said compact" as meaning water above the 8,500,000 acre-feet referred to in Article III(a) and (b) of the Compact. Thus Section 4(a), Arizona and Nevada contend, permits California to consume 4,400,000 of the 7,500,000 acre-feet "apportioned" in Article III(a), none of the million acre-feet "apportioned" in Article III(b), and half of the "excess or surplus" above the 8,500,000 acre-feet "unapportioned by" Article III(a) and (b).

This contention must be rejected. Questions regarding the proper interpretation of the words "surplus" and "apportioned" as used in the Compact aside, the legislative history of the Project Act makes it crystal clear that Congress did not intend to delimit an amount of water above 7.5 million acre-feet per annum which was not "excess or surplus water" and thus to which California could have no access. Rather, Congress intended that once the 7.5 million acre-feet of consumptive use were allocated, the surplus accounting would commence and California would be eligible to receive 50% of all other allocations.

As explained at pages 190-193, the amendment proposed by Senator Hayden, based on the suggestion of Senator Pittman, clearly apportioned half of the million acre-feet referred to in Article III(b) to California. So did an amendment suggested by Senator Bratton of New Mexico,[56] which was similar to the Hayden amendment. The amendment offered by Senator Phipps of Colorado,[57] which was ultimately enacted as the first paragraph of Section 4(a),

[56]Calif. Ex. 2013.
[57]70 Cong. Rec. 324 (1928), Ariz. Legis. Hist. pp. 48-48A.

was intended to adopt this feature of the Hayden and Bratton amendments. Indeed, it was recognized by all of the Senators participating in the debates that the only major difference between the three amendments having relevance to this case was the amount of water to which California would be limited out of the first 7,500,000 acre-feet; the Hayden amendment limited California to 4,200,000, the Bratton amendment to 4,400,000, and the Phipps amendment to 4,600,000. Thus Senator Bratton observed that, other than the difference of 200,000 acre-feet, his amendment and Senator Phipps' were "quite similar."[58] This is also made clear by the parliamentary maneuver in the Senate, carried out without opposition, substituting the Phipps amendment for the Hayden amendment in order to permit a vote on whether California should be limited to 4,200,000 acre-feet or 4,600,000 acre-feet.[59] Senators Hayden and Phipps specifically agreed that there were only three substantive differences between their amendments: (1) the difference between 4,200,000 and 4,600,000 acre-feet; (2) a provision, unrelated to this litigation, involving the Federal Power Commission; and (3) whether Congress would approve a six-state ratification of the Colorado River Compact. This definitively excludes the possibility that the Phipps amendment, unlike the Hayden amendment, could have been intended to exclude California from any part of the million acre-feet referred to in Article III(b). Since, under the Phipps amendment, California was limited to 50% of all water above 7.5 million acre-feet of consumptive use, and Nevada disclaimed any intention of taking more than her share of the 7.5 million acre-feet, the language of that amendment had exactly the same effect as the language of the Hayden amendment which specifically

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[58] 70 Cong. Rec. 333 (1928), Calif. Legis. Hist. p. 87.

[59] 70 Cong. Rec. 382 (1928), Ariz. Legis. Hist. pp. 56-56C.

Senator Hayden's motion to change 4.6 to 4.2 lost; Senator Bratton's motion to change the figure to 4.4 carried. 70 Cong. Rec. 384-387 (1928).

gave California 500,000 acre-feet and Arizona 500,000 acre-feet of the million acre-feet referred to in Article III(b). The intended effect of the Phipps amendment, like the Hayden amendment, was to limit California to 4.4 out of the 7.5 million acre-feet referred to in Article III(a), plus 50% of the million acre-feet referred to in Article III(b), plus 50% of any additional water that might be available above 8.5 million acre-feet. In order to clarify that his amendment limited California to 4.4 out of 7.5 million acre-feet, not out of 8.5 million acre-feet as Arizona and Nevada in effect contend, Senator Phipps perfected his amendment, by adding the italicised language, to specify that the 4.4 million acre-foot limitation on California was from the water "apportioned to the lower basin States by *paragraph (a) of Article III of* the Colorado River compact."[60]

This conclusion is also supported by the following colloquy between Senator King of Utah and Senator Johnson of California:

> "MR. KING. If I may have the attention of the Senator from California and the Senator from Colorado, I direct attention to line 5, page 3, of the amendment offered by the Senator from Colorado. Let me read back a few words:
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> > plus not more than one-half of any excess or surplus waters unapportioned by said compact.
>
> I was wondering if there might not be some uncertainty as to what surplus waters were therein referred to. I think it was the intention to refer to the surplus waters mentioned in paragraph (b) of article 3 of the compact, being the 1,000,000 acre-feet supposed to be unappropriated.
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> MR. JOHNSON. No; that is not quite my understanding. It is by no means certain that there is any other, and it is by no means certain that there

[60] 70 Cong. Rec. 459-460 (1928), Ariz. Legis. Hist. pp. 64-67.

is the 1,000,000; but the language referred to any other waters.

MR. KING. Speaking for myself, I have no objection; but I was under the impression that the purpose was to link it with paragraph (b) so as to be sure that California was to receive one-half of the 1,000,000 acre-feet.

MR. JOHNSON: Not necessarily. This gives one-half of the unapportioned water, and I think it is a better way to leave the matter.

MR. KING. If it is sufficiently certain to suit the Senators of the lower basin, I have no objection.

MR. JOHNSON. I think it is."[61]

Whatever Senator Johnson may have meant by his replies, he obviously was not suggesting that Senator King was incorrect in his assumption that California could share in so-called III(b) water.

This is apparent also from the second paragraph of Section 4(a) which allocates to Arizona half of the "excess or surplus waters unapportioned by the Colorado River compact." As pointed out by Senator Hayden, this language was corollary to the limitation on California in the first paragraph. See pages 174-175, *supra*. Thus if Article III(b) water was barred to California under the first paragraph, neither was it allocated to Arizona in the second paragraph. Since Nevada represented that she could not utilize this water, Arizona's and Nevada's construction would impute to Congress an intention to have one million acre-feet go to waste.

The reasons given compel the conclusion that "excess or surplus waters unapportioned by said compact" as used in Section 4(a) includes all consumptive use above the first 7.5 million acre-feet of mainstream water in the Lower Basin, in the United States, in one year.

[61] 70 Cong. Rec. 459 (1928), Ariz. Legis. Hist. pp. 64-65.

D. Water Delivery Contracts Made By the Secretary of the Interior

Since Arizona, California and Nevada have not entered into compacts for the allocation of mainstream water pursuant to Sections 4 and 8 of the Project Act, the several water delivery contracts made by the Secretary of the Interior, on behalf of the United States, govern this allocation. The Secretary has contracted with the states of Arizona and Nevada. He has also entered into contracts with California users which incorporate a so-called Seven-party Agreement setting forth priorities among them. The Secretary has further contracted with a number of water users in Arizona and California for the delivery of water to federal reclamation projects, lands bordering these projects and special users in the Yuma, Arizona, area. All of the Secretary's contracts, except one Special Use contract, recite that deliveries under them are subject to the availability of the water under the Colorado River Compact and the Boulder Canyon Project Act.

After consideration of the arguments bearing on the validity of the Secretary's water delivery contracts, I am persuaded that, with the exception of a provision in the Arizona and Nevada contracts[62] and one Special Use contract,[62a] they are valid and binding both on the United States and the other contracting parties.

The contentions of the parties respecting the contracts may be divided into two categories: those respecting their own contracts; and those respecting the contracts of other parties.

Arizona contends that her contract is unenforceable to the extent that it departs from the statutory formula

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[62]Article 7(d) of the Arizona Contract and Article 5(a) of the Amended Nevada Contract, discussed *infra*, at pp. 237-247.

[62a]This contract, between the United States and the Arizona-Edison Company, Inc., is discussed at pp. 220-221, *infra*.

of the second paragraph of Section 4(a) of the Project Act. The provisions she regards as invalid are Article 7(b), (f) and (g), which provide for Arizona's recognition of rights in Nevada, New Mexico and Utah, and Article 7(d), which in effect reduces the quantity of water available for consumption in Arizona below Lake Mead by the amount that diversions in Arizona on tributaries and the mainstream itself above Lake Mead deplete the flow of water into the reservoir.[63]

I have rejected the contention that the second paragraph of Section 4(a) of the Act established a mandatory formula governing the amount of water Arizona must receive. See pages 162-163, *supra*. The contention respecting Article 7(d) is dealt with hereafter at pages 237-247.

Arizona does not contest the validity of the contracts of other parties except as she seeks to aid Nevada in contending that Nevada's contract is invalid to the extent that it reduces Nevada's diversions of Lake Mead water by the amount of Nevada's tributary uses.[64]

With respect to the California contracts, Arizona argues only that they must be read according to Arizona's construction of the limitation provision in Section 4(a) of the Project Act. This contention presents the same issues already disposed of by the discussion of the Act in the next preceding section of this Report.

California does not contest the validity of her contracts and indeed pays scant attention to them. California's view is that appropriative rights are decisive of the case and the contracts do not amount to appropriative rights but constitute only licenses to appropriate, which licenses must be perfected by beneficial use of the water. Similarly, California contends that the Arizona contract does not establish a water right in Arizona, is not a muniment of title,

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[63] Ariz. Opening Brief, pp. 55-56.
[64] *Id.*, at 55.

and cannot be the basis of a decree in this suit. California's contentions appear in Appendix 4 of her brief, and in summary present these three points:

(1) The Arizona contract is dependent upon Arizona's ratification of the Colorado River Compact and Arizona has not effectively ratified the Compact. The reasons for the rejection of this contention appear *supra,* at pages 166-167 of this Report.

(2) No water right exists under the Arizona contract because "no right to the use of water can be acquired in the absence of a specific project, or use lawfully initiated and diligently prosecuted."[65] If this argument means that the possession of a water right is necessary before one is eligible for a delivery contract, it puts the cart before the horse. In effect it says, no contract without a water right. Under the Act, however, the reverse is true: no new water right without a contract. Congress certainly understood in 1928 that all of the water to be impounded in Lake Mead was not then appropriated. I cannot ascribe to the Congress an intention to bring all further development in the Lower Basin to a halt, as this contention would require me to do. On the other hand, if the California contention means only that a water delivery contract does not amount to a perfected water right, then it is not an attack on the contract at all. I do not think it necessary to decide whether the various contractees have water rights in addition to their contractual rights for the delivery of water from Lake Mead; I have not been shown any situation in which the distinction, if any, is material in this case. Since interstate rights and priorities are controlled by the delivery contracts themselves (see pages 151 *et seq., supra*) and since intrastate rights and priorities, including the question whether a contractual right constitutes a water right, are controlled by state law, with

[65] Calif. Appendix 4, p. 5.

which we are not concerned in this litigation (see pages 216-218, *infra*), there is no need to decide the question. California asserts a similar objection to the Nevada contract,[66] and it is overruled for the same reasons.

(3) A third objection to the Arizona contract raised by California rests on Article 7(1), which provides that deliveries of the water allocated to Arizona by her master contract will be made only to users who contract therefor with the Secretary. California argues that this exposes the contract merely as an agreement to agree and accordingly that is unenforceable. She also claims that the contract is unenforceable for vagueness, since essential terms are yet to be agreed upon. This argument will be considered when I reach my discussion of the terms of each of the contracts, at pages 206-207, *infra*.

Nevada complains about her water delivery contracts, but does not contest those of the other parties. Nevada's theory, if adopted, would, however, nullify all of the contracts, at least so far as they purport to fix the quantities of water to which the parties are entitled. As was pointed out earlier in this Report, Nevada regards the Project Act as an unconstitutional delegation of judicial power if construed to empower the Secretary to make contracts fixing the allotment of water to each state. See pages 163-164. She avoids the constitutional problem by regarding the contracts as "neither floors nor ceilings. The contracts are merely service or delivery contracts for such amounts of water as each of the states shall ultimately be judicially determined to be entitled, in the absence of a compact among the states."[67] The answer to this contention was given in upholding the Project Act and sustaining the power of the Secretary to allocate the unappropriated water impounded in Lake Mead.

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[66]Calif. Response to Nevada, pp. 51-53.
[67]Nev. Answering Brief, p. 46.

In the alternative, Nevada argues that if the contracts are held to govern, Nevada is not bound by the amendment to Article 5(a) contained in her supplemental contract of 1944. That amendment provides for delivery from Lake Mead of "so much water, *including all other waters diverted for use within the State of Nevada from the Colorado River system,* as may be necessary to supply the state a total quantity not to exceed three hundred thousand (300,000) acre-feet each calendar year." Nevada contends that the debit imposed by the italicized words for use of tributary water was beyond the Secretary's authority to impose on Nevada under the Project Act.[68] This contention is considered *infra,* at pages 237-247.

Finally, the United States asserts the validity of all of the water delivery contracts and declares that Arizona and Nevada are bound by the provisions to which they object.[69] The only reservation made by the United States is its claim that the contracts are subject to certain paramount rights of the United States. These claims of superiority are dealt with in the section of the Report commencing at page 254.

1. *The Arizona Contract.* A water delivery contract between the United States and the State of Arizona was entered into on February 9, 1944.[69a]

Subdivisions (a) and (b) of Article 7 specify the quantity of water Arizona is to receive, subject to certain deductions set forth in Article 7(d), (f) and (g). Article 7(a) promises the delivery, from storage in Lake Mead, of so much water as may be necessary to supply a maximum of 2,800,000 acre-feet of consumptive use in the state each year, and Article 7(b) grants an additional amount denominated as one-half of surplus, both subject to the availability thereof

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[68]Nev. Reply Brief, pp. 9-12.

[69]U. S. Brief, pp. 7-22.

[69a]The complete text of the contract appears in Appendix 5, page 399.

for use in Arizona under the Colorado River Compact and the Boulder Canyon Project Act. Article 7(f) reserves to the United States the right to contract with Nevada for the delivery to her of 4% of surplus with a consequent reduction in Arizona's share. The contract nowhere defines "surplus," and I construe the word as used in the contract to mean the same thing as it does in Section 4(a) of the Boulder Canyon Project Act. In addition, by Article 7(g), Arizona recognizes rights in New Mexico and Utah to "equitable shares" of Lower Basin water, but no amount is specified in the contract. Article 7(d) provides in part that the obligation to deliver water "shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act." As I construe this provision, questions of allocation of losses are expressly left undetermined by the contract; such determination is to be made on the basis of the Compact and Project Act, without reference to other terms of the contract.

Article 7(1) contemplates the making of further contracts between the Secretary of the Interior and the users of the water allocated for use in Arizona under the master contract with the State. California contends that this provision renders the agreement illusory, that it becomes an unenforceable agreement to agree. I do not think Article 7(1) has this far-reaching effect. The Secretary's water delivery contracts should not be viewed as ordinary, private agreements for the sale of goods. Indeed, none of the contracts satisfies the elementary rules governing private agreements. For example, the Imperial Irrigation District contract does not obligate the District to take any water at all, nor is any charge made for the water delivered. What then, is the consideration for the Secretary's promise to deliver the water? Something of the same difficulty is encountered in the Nevada contract. Although that agreement specifies a

charge of 50 cents per acre-foot, it does not oblige Nevada to take any water. Such an agreement might fail for lack of consideration under the principles governing ordinary private contracts. The *Restatement of Contracts* illustrates the point in Section 79, illustration 3:

> "A offers to deliver to B at $2 a bushel as many bushels of wheat, not exceeding 5,000, as B may choose to order within the next thirty days. B accepts, agreeing to buy at that price as much as he shall order of A within the specified time. B's acceptance involves no promise by him and is not sufficient consideration."

If the *Restatement* requirements were to apply to the contracts made by the Secretary, many, if not all of them, would fail.

The answer then to the California contention is that Section 5 water delivery contracts are not contracts in the ordinary sense. They are arrangements whereby the Secretary, acting for the United States, consents to the release of water from his custody. The contracts set the terms upon which the Secretary will release the water. The Secretary is bound by those terms, as are the contractees, not because of the legal chemistry of offer, acceptance and consideration, but because they are part of the statutory scheme provided for in the Boulder Canyon Project Act. Hence, Article 7(1) does not render the Arizona contract nugatory, any more than failure of consideration destroys the Imperial Irrigation District contract or the Nevada contract.

I hold that the Arizona contract is valid, except for a provision in Article 7(d) which is discussed hereafter at pages 237-247.

2. *The California Contracts.* There is no water delivery contract between the United States and the State of Cali-

fornia. Rather, the Secretary of the Interior has contracted with a number of agencies within the State, incorporating in each such contract the so-called Seven-party Agreement among all the users which governs their priorities *inter sese* to California's share of water from the Colorado River.[70]

In her answer to the bill of complaint, California alleges that the Secretary's contracts with the California users call for the delivery of sufficient water to satisfy 5,362,000 acre-feet of consumptive use per year.[71] No party contests this allegation.[72] Since all of the California contracts contain the proviso that the Secretary's water delivery obligation is "subject to the availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act," the amount of water legally available to California depends upon the interpretation of Section 4(a) of the Project Act. California can in no event demand more water than her contracts permit, and she may receive less under Section 4(a) of the Project Act.

No other questions are raised by the parties regarding the California contracts, and they need not be further considered.

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[70]The Seven party Agreement is incorporated in Article (6) of the Palo Verde contract, printed in Appendix 8, page 423.

[71]California's Answer to the Bill of Complaint, pp. 1, 33.

The California Proposed Findings of Fact barely mention the California contracts, but it may be inferred from California's Proposed Conclusion of Law 7A:201, Table 2 at Note 4, that California adheres to the allegation of the answer that the contracts call for a total of 5,362,000 acre-feet of water. California claims, in addition, 16,000 acre-feet of "water for existing projects . . . for which no water right, either under state law appropriations or federal water delivery contracts, was proved but which is chargeable to the state" and for United States wildlife refuges.

[72]Ariz. Proposed Finding of Fact No. 122: "Those contracts call for delivery for use in California of an aggregate of 5,362,000 acre-feet of water." See also United States Proposed Conclusion of Law No. 1.4.

I hold that the California contracts are valid and that the California defendants are entitled to demand water in the amounts specified in the recommended decree.

3. *The Nevada Contract.* The United States entered into a contract with the State of Nevada and its Colorado River Commission on March 30, 1942.[72a] Therein the United States undertook "subject to the availability thereof for use in Nevada under the Colorado River Compact and the Boulder Canyon Project Act" to deliver from storage in Lake Mead "so much water as may be necessary to supply the state a total quantity not to exceed 100,000 acre-feet each calendar year."

On January 3, 1944, the same parties entered into a supplemental contract which increased the quantity of water to be delivered to 300,000 acre-feet described in the following words: "so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year."[72b]

I have heretofore noted various contentions respecting this contract and it is unnecessary to review them here.

Nevada would disavow her contract, claiming that the Supreme Court, in an equitable apportionment suit, can award her water in excess of the contract maximum of 300,000 acre-feet. Projecting her needs to the year 2,000, Nevada prays for an apportionment of approximately 530,000 acre-feet of water per year.[73] Having determined that a contract with the Secretary of the Interior is a pre-

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[72a]The complete text of the contract appears in Appendix 6, page 409.

[72b]The complete text of the contract appears in Appendix 7, page 419.

[73]Nev. Petition of Intervention, p. 25. See also Nev. Answering Brief, pp. 26-27, 94-96.

requisite for the delivery of water from Lake Mead, and that to the Secretary has constitutionally been delegated power to allocate the unappropriated water impounded in Lake Mead, I must reject Nevada's prayer for water in excess of 300,000 acre-feet, unless and until the Secretary sees fit to amend the Nevada contract to allow an increase in the amount of water delivered to her.

It should be noted that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior. On the contrary, the State of Nevada is free to determine who shall use the water, subject only to the Secretary's approval of the points of diversion.

I hold the Nevada contract to be valid, with the exception of a provision in Article 5(a) which is discussed hereafter at pages 237-247.

4. *Contracts For Reclamation Projects, Adjoining Lands and Miscellaneous Special Uses.* The United States has entered into water delivery contracts with various users in Arizona and California pursuant to the Reclamation Act of 1902, 32 Stat. 388, and acts amendatory thereof, 43 U. S. C. §§ 371 *et seq.* (1958), which obligate the United States to deliver water from the mainstream to lands on federal reclamation projects. The United States has also contracted with users in the Yuma, Arizona, area to deliver water to lands bordering federal reclamation projects pursuant to the Warren Act, 36 Stat. 925 (1911), 43 U. S. C. §§ 523-525 (1958), and to various special users pursuant to the Miscellaneous Special Use Act of February 25, 1920, 41 Stat. 451, 43 U. S. C. § 521 (1958).

There are four federal reclamation projects located within the Lower Basin to which the Secretary is obligated to deliver water from the mainstream. These projects are described in detail at pages 50-58, 60-61, *supra.*

One is the Yuma Reclamation Project which is located on both sides of the Colorado River downstream from Yuma, Arizona; the Valley Division is on the Arizona side of the River and the Reservation Division on the California side. The Valley Division is serviced by the Yuma County Water Users' Association. The non-Indian landowners on the Reservation Division have entered into individual water right application contracts with the United States for the irrigation of the particular acreage which they severally own.

A second project is the Yuma Auxiliary Reclamation Project which is located in Arizona, south of Yuma and east of the Valley Division of the Yuma Project. The Yuma Auxiliary Project is serviced by the Unit B Irrigation and Drainage District.

A third is the Gila Reclamation Project located in Arizona near the confluence of the Gila and Colorado Rivers. It contains three areas: North Gila Valley, Yuma Mesa, and Wellton-Mohawk. The North Gila Valley Unit is serviced by the North Gila Valley Irrigation District, the Yuma Mesa Division by the Yuma Mesa Irrigation and Drainage District, and the Wellton-Mohawk Division by the Wellton-Mohawk Irrigation and Drainage District. The South Gila Valley, while not presently operated as a federal reclamation project, is within the authorized limits of the Gila Project. It is serviced by the Yuma Irrigation District.

The fourth federal reclamation project constitutes the All-American Canal System and the Coachella Distribution System in California. The All-American Canal System is serviced by the Imperial Irrigation District; the Coachella Distribution System by the Coachella Valley County Water District.

The contracts which the United States has made for delivery of water to these Reclamation Act projects, to lands bordering these projects and to special users are as follows:

(1) Contract dated June 15, 1951 between the United States and the Yuma County Water Users' Association for delivery of water to the Valley Division of the Yuma Project in such quantities "as may be ordered by the Association and as may be reasonably required and beneficially used for the irrigation of the irrigable lands situate within the division . . . subject to the availability of such water for use in Arizona under the provisions of the Colorado River Compact and the Act of December 21, 1928 (45 Stat. 1057). . . ."[74]

(2) Water right application contracts providing for the delivery of water to non-Indian users on the Reservation Division of the Yuma Project located in California.[75] Substantially all of the non-Indian users on the Reservation Division have so contracted with the United States.

(3) Contract dated December 22, 1952 between the United States and Unit B Irrigation and Drainage District for the delivery of water to the Yuma Auxiliary Project in such quantities "as may be reasonably required and beneficially used for the irrigation of those irrigable lands which are situate within the . . . limited auxiliary project . . . subject to the availability of such water for use in Arizona under the provisions of the Colorado River Compact and the Act of December 21, 1928 (45 Stat. 1057). . . ."[76]

(4) Contract dated May 12, 1953 between the United States and the North Gila Valley Irrigation District for the delivery of water to the North Gila Valley Unit of the Gila Reclamation Project in such quantities "as may be ordered by the District and as may be reasonably required and beneficially used for the irrigation of the irrigable land situate within the District . . . subject to the

[74]Ariz. Ex. 92.
[75]Calif. Ex. 379.
[76]Ariz. Ex. 94.

availability of such water for use in Arizona under the provisions of the Colorado River Compact and the Act of December 21, 1928 (45 Stat. 1057) and subject to: (a) The availability of the water for the division under the provisions of . . . the Act of July 30, 1947 (61 Stat. 628). . . ."[77]

(5) The United States is planning to enter into a contract with the Yuma Irrigation District providing for the delivery of water from the Colorado River for use in the South Gila Valley.

(6) Contract dated May 26, 1956 between the United States and the Yuma Mesa Irrigation and Drainage District providing for the delivery of water to the Yuma Mesa Division of the Gila Project in such quantities "as may be ordered by the District . . . and as may be reasonably required and beneficially used for the irrigation of not to exceed 25,000 irrigable acres situate therein; subject to the availability of such water for use in Arizona under the provisions of the Colorado River Compact and the Act of December 21,1928 (45 Stat. 1057) and subject to: (a) The availability of the water for the division under the provisions of . . . the Act of July 30, 1947 (61 Stat. 628). . . ."[78]

(7) Contract dated March 4, 1952 between the United States and the Wellton-Mohawk Irrigation and Drainage District for the delivery of water to the Wellton-Mohawk Division of the Gila Project in such quantities "as may be ordered by the District . . . and as may be reasonably required and beneficially used for the irrigation of not to exceed 75,000 irrigable acres . . . subject to the availability of such water for use in Arizona under the provisions of the Colorado River Compact and the Act of December 21, 1928 (45 Stat. 1057) and subject to: (a) The availability

[77]Ariz. Ex. 95.
[78]Ariz. Ex. 96.

of the water for the division under the provisions of . . . the Act of July 30, 1947 (61 Stat. 628). . . ."[79]

(8) Contracts concluded between 1951 and 1956 under the Warren Act for the delivery of water from the facilities of the Yuma, Yuma Auxiliary, and Gila reclamation projects by the United States to individual users on lands bordering the reclamation projects.[80]

(9) Contracts concluded between 1945 and 1956 under the Miscellaneous Special Use Act of February 25, 1920 for the delivery of water from the facilities of the Yuma, Yuma Auxiliary, and Gila reclamation projects by the United States to various special users in the Yuma, Arizona, area.[80a]

(10) Contracts between the United States and the Imperial Irrigation District and between the United States and the Coachella Valley County Water District for delivery of water to those districts in the amounts and with the priorities stated in the Seven-party Agreement among various California users, subject to the availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act.[81]

The United States seeks a decree adjudging that it has the right and power to release for diversion from the mainstream of the Colorado River the amount of water necessary to fulfill the contractual obligations detailed above. Arizona objects. She argues that, under the Project Act, the Secretary of the Interior must contract for the delivery of water directly with each state, and that the division of each state's allotment of water among individual users is controlled by the state. Arizona says that the

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[79]Ariz. Ex. 93.
[80]Ariz. Exs. 163, 165.
[80a]*Ibid.*
[81]Ariz. Exs. 34, 35.

Secretary has contracted to deliver certain amounts of water to Arizona and it is for the State to decide which projects within Arizona will receive the State's allotment of water. Thus Arizona argues that the Secretary of the Interior cannot deliver water from the mainstream pursuant to his Reclamation Act delivery contracts unless the State agrees to the intrastate allotment.

California joins Arizona in seeking to accomplish the same result, but on different grounds. California suggests that the Reclamation Acts give the Secretary of the Interior power only to build dams and diversion works, not to vest rights to water in individual owners of land on the reclamation projects. California argues that even though the contracts be valid, they, by themselves, do not give individual landowners, water users' associations, or project lands the right to receive water. That right, California states, vests under state law, and it would not be appropriate to decide in this case the various rights and priorities under state law.

Arizona's objection to the United States' claims is not well taken. I interpret the Boulder Canyon Project Act as empowering the Secretary of the Interior to contract for delivery of mainstream water to states and to individual users, whether private or public. The Project Act does not require or even suggest that the delivery contracts must be made only with states. It is certainly within the discretion of the Secretary, under the Project Act, to contract directly with individual users in the various states for the delivery of water. He is not confined to contracting with each state and permitting the state to allocate its share of the water to various individual users. Section 5 of the Project Act states that "no person" shall receive water without a contract. Assuming that the word "person" includes a state, it certainly includes entities other than states. If additional support were necessary for this proposition,

the action of the Secretary in entering into contracts with political subdivisions in California[82] immediately after enactment of the Project Act is evidence of the contemporaneous understanding. Indeed, in the case of California, the Secretary has made no contract with the State itself.

The Secretary's contract with Arizona obligates him to deliver a certain quantity of water for use within the state, but this contract leaves it to the Secretary to decide with which users within Arizona he will contract for the delivery of all or part of Arizona's allotment. Article 7(1) of that contract specifically provides that deliveries of water to Arizona users "shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions . . . as may contract therefor with the Secretary, and as may qualify under the Reclamation Law. . . ." In other words, the Secretary has agreed with the State of Arizona that he will deliver a certain amount of water to Arizona users, but he has reserved to himself discretion to decide with which users he will contract. This being the case, the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for delivery to them of certain amounts of water out of the total amount allocated to Arizona. This is precisely what the Secretary has done in the contracts which are before us in this case.

California's objection to the United States claims is on a different footing. For reasons hereinafter stated, I am of the view that state law governs intrastate rights and priorities to water diverted from the Colorado River. The application of such law presents issues which have not been tried and it would be inappropriate in any event to determine in this litigation the water rights of the various federal reclamation projects, adjoining lands and special users under the relevant state law.

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[82]For a representative California contract see Appendix 8.

Section 18 of the Project Act provides:

> "Nothing herein shall be construed as interfering with such rights as the states now have either to the waters within their borders or to adopt such policies or enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

Under this section, Congress has specifically declined to give the Secretary of the Interior authority to deliver water to users within a state in disregard of the state's water law. Although a contract with the Secretary is necessary under Section 5 of the Project Act for a user to receive mainstream water, the user must also, under Section 18, be under no disability to receive such water under the applicable state law. And, state law governs priorities between various users within a state who have delivery contracts with the Secretary.[83] This is apparent from the language of Section 18 and is corroborated by the legislative history. See page 155, *supra*.

This scheme is similar to the one employed by Congress in the federal reclamation laws, to which the Project Act is specifically stated to be supplementary. Section 8 of the Reclamation Act of 1902 provides:

> ". . . that nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation . . . and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws. . . ."

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[83] All I hold is that under the Project Act state law governs intrastate water rights; I do not pass on whether other federal statutes such as the Gila Project Reauthorization Act, 61 Stat. 628 (1947), supersede state law in particular cases.

Under the Reclamation Acts the Secretary is authorized to build dams and irrigation canals and to store and deliver water. Nobody may receive the stored water without a delivery contract. But the water rights of lands in reclamation projects are, under Section 8, governed, at least to some extent, by state law. *Ickes* v. *Fox,* 300 U. S. 82 (1937), on remand, *Fox* v. *Ickes,* 137 F.2d 30 (D.C. Cir. 1943); *Nebraska* v. *Wyoming,* 325 U.S. 589, 612-615 (1945). And, as the Supreme Court has but recently indicated, the water rights and priorities as between a reclamation project and other users within the same state are governed by state law. See *Ivanhoe Irrigation District* v. *McCracken,* 357 U. S. 275, 291 (1958). The fact that the Project Act is denominated as a supplement to the Reclamation Acts buttresses the conclusion, apparent from the plain language of Section 18 itself, that state law governs rights and priorities among intrastate users.

The various delivery contracts made by the Secretary for delivery of water to reclamation projects, adjoining lands and special users are, with one exception, authorized by the Reclamation Acts, the Miscellaneous Special Use Act and the Project Act and are therefore valid. How much water a particular project or user may receive out of a state's total apportionment as against other users in the state who also have or may in the future obtain delivery contracts with the Secretary of the Interior must be decided under state law. The relevant issues for such a decision have not been tried and it would be impossible to determine here all of the relevant rights and priorities under the applicable state laws which would affect a project's water rights. Furthermore, persons who are the most concerned with this decision are other users or potential users in the states, who are not parties to this suit. Therefore, I have declined to accept the United States' invitation to determine the right of any reclamation

project or other user to receive water as against competing users in the same state.

California contends that the Warren Act contracts and the Special Use contracts described at page 214, *supra,* are invalid because they are not for permanent service as required by Section 5 of the Project Act.[83a] All of the Warren Act contracts and all but three of the Special Use contracts recite that they are made pursuant to the Project Act and further recite that they are for permanent service.[84] Nothing in the Warren Act or in the Miscellaneous Special Use Act prevents contracts made pursuant thereto from being for permanent service. Hence, as to all but three Special Use contracts, no problem is presented with respect to the requirements of Section 5.

Of these three Special Use contracts, one, dated June 12, 1951, is between the Bureau of Reclamation and the Department of the Army and provides that the Bureau will supply water from the Gila Gravity Main Canal of the Gila Project for the use of an Army test station.[84a] This contract states, in paragraph 4, that it "shall extend so long as the Army requires said service." Another of the three contracts, dated November 1, 1953, is between the Bureau of Reclamation and the Department of the Air Force and provides that the Bureau will supply water from the facilities of the Gila Project for the use of the Air Force base at Yuma, Arizona.[84b] This contract states, in paragraph 8, that it "shall extend from the date hereof until such time as Air Force no longer requires said service and so advises Bureau." Both of these contracts conform to Section 5 and are valid. Both specifically state that they are made pursuant to the Project Act and that deliveries of water under

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[83a]The permanent service requirement of Section 5 is discussed at pp. 237-240, *infra.*

[84]The contracts are reproduced in Ariz. Ex. 165.

[84a]Ariz. Ex. 165, Contract No. 176r-696.

[84b]Ariz. Ex. 165, Contract No. 14-06-300-330.

them are governed and limited by the Project Act. Furthermore, although neither specifically uses the words "permanent service", both provide for continued deliveries for as long as the user needs water. As is true of all Warren Act and Special Use contracts, the contractees' rights to receive water are "subordinate to the rights of" lands within the reclamation project, but this merely establishes priority; it does not violate the permanent service requirement of Section 5.

The third contract, dated June 12, 1945, is between the United States and the Arizona Edison Company, Inc. and provides for the delivery of water from the Yuma Main Canal of the Yuma Project for the municipal water supply of Yuma, Arizona.[84c] This contract is the only one of all of the Warren Act and Special Use contracts in evidence which does not state that it was made pursuant to the Project Act. It provides, in paragraph 13, that "the term of this contract shall extend from the date hereof to and including December 31, 1970." Paragraph 14 provides:

> "It is understood and agreed that the furnishing of water hereunder to the Company shall not be taken or construed as binding the United States after the termination of this contract to furnish water to the said Company or to any one claiming through or under it, nor shall it under any circumstances become the basis of a permanent water right."

It is clear that this contract between the United States and the Arizona Edison Company, Inc. is not for permanent service; it unequivocally states that deliveries of water under it shall end on December 31, 1970, and that the United States shall be under no obligation to continue deliveries beyond that date. It is equally clear that it is a con-

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[84c]Ariz. Ex. 165, Contract No. 176r-40.

tract for the delivery of water stored in Lake Mead and flowing in the mainstream below. The only water in the Yuma Main Canal of the Yuma Project, and thus the only water which can be delivered under this contract, is mainstream water which has been diverted at Imperial Dam. See pages 35, 50-51, *supra*. Since Section 5 of the Project Act commands that no person may receive mainstream water "except by contract made as herein stated", and since the Arizona Edison contract is not "as herein stated" because it is not for permanent service, the contract is invalid and the Secretary may not deliver water pursuant to it.

Water deliveries under the Arizona Edison contract have constituted a "supplemental water supply" for the City of Yuma. If the city requests a Section 5 contract to replace the deliveries which have been made under the Arizona Edison contract nothing has been called to my attention which would prevent the Secretary of the Interior from entering into such a contract if he so desired.

5. *The Contractual Allocation System.* The water delivery contracts into which the Secretary has entered with the states of Arizona and Nevada and with the California users constitute an allocation of mainstream water. Although the Arizona contract is written in terms of the "maximum" amount to be delivered and the Nevada contract in terms of "a total quantity not to exceed" the specified amount, I think that the Secretary has delivery obligations under these contracts. Otherwise they would be illusory and would make little sense. Of course, the Secretary is not required to drain Lake Mead dry in fulfilling demands for delivery of water. In the exercise of a reasoned discretion he will decide how much water is to be released from the reservoir each year, and his decision may be based on any reasonably relevant factors. Clearly he has this power under Sections 1, 5 and 6 of the Project Act, and I can find nothing in the

water delivery contracts to indicate that he has surrendered it. But once water is released for consumption in the United States, the delivery contracts oblige the Secretary to apportion certain quantities to each state.

The aggregate delivery obligation under the Secretary's contracts with California users constitutes a duty similar to the one which the Secretary has undertaken to Arizona and Nevada. Those contracts call for total deliveries of sufficient water to satisfy 5,362,000 acre-feet of consumptive use per annum, subject to the availabilty thereof for use in California under the Project Act. These contracts mean that the Secretary is required to apportion to California users, in accordance with the system of priorities stated in all of the California contracts, 4.4 million acre-feet of the first 7.5 million acre-feet of consumptive use of water from the mainstream in one year, plus one-half of any additional uses apportioned in that year, until a maximum of 5,362,000 acre-feet per annum is consumed in California. As in the case of the Arizona and Nevada contracts, however, I find nothing which indicates that the Secretary has relinquished his discretion to determine in the light of his multiple obligations how much water is to be released from the reservoir for consumptive use in the United States.

The water delivery contracts substantially effectuate the apportionment contemplated by Congress in Section 4(a) of the Project Act. It can be no accident that the obligation to deliver 2.8 million acre-feet per annum found in Arizona's contract and the obligation to deliver .3 million acre-feet found in Nevada's contract, when added to the 4.4 million acre-feet to which California is limited out of 7.5 million acre-feet, total that 7.5 million acre-feet. Similarly, it is more than fortuitous that Arizona and Nevada, under their contracts, may share in the half of surplus which California cannot receive under the Section 4(a) limitation. The Secretary's intention must have been that Ari-

zona's 2.8, Nevada's .3 and the 4.4 to which California is limited would all come from the same 7.5 million acre-feet, and that Arizona's 46% of surplus, Nevada's 4% and the 50% to which California is limited would come out of any available water in addition to the 7.5 million acre-feet per annum. This is precisely the way that Senator Pittman interpreted Section 4(a) on the floor of the Senate; he assumed that California would receive the full 4.4 million acre-feet which was the maximum she could receive out of 7.5 million acre-feet and that Arizona would receive 2.8 and Nevada .3 million acre-feet to round out the full 7.5. Senator Pittman also assumed that California would receive all of the 50% of surplus that she was eligible to receive and that Arizona would receive the rest. See pages 176-177, *supra*. This seems also to have been the understanding of Senator Hayden and of other Senators who participated in the debate. See pages 174-175, *supra*. This correlation demonstrates that the Secretary obligated himself in his contracts with the California agencies to satisfy 5,362,000 acre-feet of consumptive use out of the water allocated to California under the three-state apportionment.

It is true that the California contracts do not in terms call for the delivery of half of surplus and therefore that they do not expressly apportion to California the maximum amount of water she can receive under her limitation. This does not impugn the conclusion that the water delivery contracts substantially effectuate the apportionment contemplated by Congress. The fact that the Secretary based the contractual apportionment on Section 4(a) and that he was careful to ensure that Nevada's 4% of surplus was to come from Arizona's share demonstrates that he intended to reserve 50% of surplus for California in making the contractual apportionment. The Secretary made no master contract with the State of California, but rather made a number of contracts for specific quantities of water with

the several California users. So far as appears, California users have not requested contracts for additional water out of surplus, probably for the reason that they have never been in a position to utilize the full amount of their present allotments. This explains why California's share of surplus has not yet been fully contracted for. In years in which "surplus" exceeds twice 962,000 acre-feet,[85] the Secretary is not required by his existing contracts with California users to deliver to them out of such surplus more than the 962,000 acre-feet. New contracts can, of course, change this situation.

Since the Secretary has intentionally bound himself to a contractual apportionment substantially (although not precisely) along the lines suggested by Congress as fair and equitable in the two paragraphs of Section 4(a) of the Project Act, that section has been used as a guide for interpreting and defining the contractual allocation. Applying this gloss to the contracts, I interpret them as establishing the following water delivery scheme: The Secretary, in his discretion, decides how much water is to be released from mainstream reservoirs in any particular period. The amount available for consumption in the United States in any one year will be the amount so released less the amount necessary to satisfy higher priorities. The contracts do not limit the Secretary's discretion; they operate only upon mainstream water which is available for consumption in the United States. They require that this water be apportioned as follows: of the first 7.5 million acre-feet of consumptive use in one year, 4.4 for use in California, 2.8 in Arizona and .3 in Nevada; of the remaining consumptive uses during that year, 50% for use in California and 50% in Arizona, subject to the possibility that Arizona's share

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[85]The 5,362,000 acre-feet for which California users have contracted must be satisfied as follows: 4,400,000 acre-feet out of the first 7,500,000 acre-feet; and 962,000 acre-feet out of surplus.

may be reduced to 46% if the Secretary contracts to allocate 4% of surplus for use in Nevada.

The Section 4(a) limitation which is incorporated into the California contracts measures California's apportionment in terms of consumptive use, see pages 185-187, *supra,* and the delivery contract between the United States and Arizona also specifies that Arizona's apportionment is measured by consumptive use. The Nevada delivery contract is not so specific, but it must be interpreted in the same manner since it was intended to correlate to the California contract and the prospective Arizona contract and also to approximate the apportionment suggested in Section 4(a). Consumptive use means, in all of the contracts, diversions from the mainstream less return flow thereto. Thus a state is not charged for water diverted by it which ultimately finds it way back to the Colorado River and which is available for use within the United States or which is available for delivery to Mexico in satisfaction of obligations imposed by the Mexican treaty.

It should also be pointed out that the apportionment made by the delivery contracts applies to water stored in Lake Mead and flowing in the mainstream below Lake Mead. In other words, a state is charged for consumption of water released from Lake Mead and water which flows into the mainstream below Lake Mead from the Bill Williams River. The Section 4(a) limitation which is incorporated in the California contracts clearly provides for this result, see pages 184-185, *supra,* as does Article 7(1) of the Arizona delivery contract. Nevada, of course, does not have access to the inflow from the Bill Williams River; under her contract she is charged for all the mainstream water she utilizes.

Furthermore, it is clear that the mainstream apportionment among Arizona, California and Nevada effectuated by the Secretary's water delivery contracts in conjunction

with Section 4(a) applies only to water diverted from Lake Mead and the mainstream below. The argument advanced by the United States and California, that diversions from the mainstream between Lake Mead and Lee Ferry are chargeable under the apportionment, cannot be sustained.

As heretofore explained, page 183, *supra*, diversions from this reach of the River are outside the scope of the Section 4(a) limitation on California. Furthermore, Section 4(a), even if applicable to the mainstream above Lake Mead, cannot limit diversions by Arizona and Nevada because it is solely a limitation on California. Since Arizona and Nevada are the only states geographically in a position to divert water from the mainstream between Lake Mead and Lee Ferry, the water delivery contracts between those states and the United States are the only authority on the basis of which diversions from this reach of the river could be limited.

But the Arizona and Nevada contracts do not limit diversions in those states above Lake Mead. This is consistent with Section 5 of the Project Act which authorizes the Secretary to enter into contracts only for the delivery of "water in said reservoir," *i.e.*, Lake Mead.

Thus the Arizona water delivery contract, in paragraph 7(a), purports to affect only deliveries of water "from storage in Lake Mead," not diversions above Lake Mead. It is true that paragraph 7(d) of the Arizona contract provides that the United States' obligation to deliver water from Lake Mead or the mainstream below "shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead. . . ." But even this paragraph does not purport to limit Arizona's diversions from the mainstream above Lake Mead. If, for example, Arizona diverted 3,000,000 acre-feet from this stretch of

the mainstream this would not be a violation of paragraph 7(d) although the Secretary could reduce Arizona's consumptive uses of water below Lake Mead to the extent of such uses. At any rate, for the reasons detailed at pages 237-247, *infra,* paragraph 7(d) is invalid, and thus it cannot limit Arizona's diversions from the mainstream above Lake Mead. Similarly, nothing in the Nevada water delivery contract purports to limit diversions by that state above Lake Mead, except for part of Article 5(a) which is invalid for the same reasons that Article 7(d) of the Arizona contract is invalid.

One of the proposed plans for the Central Arizona Project contemplated the diversion of water at Bridge Canyon or Marble Canyon, both of which are on the mainstream between Lake Mead and Lee Ferry. California and the United States are concerned lest Arizona be permitted to divert a substantial quantity of water for the Central Arizona Project from one of these sites in addition to the water apportioned to her from Lake Mead and the mainstream below. But this cannot occur without the specific authorization of Congress. First of all, there is no indication that the Central Arizona Project can be financed other than by Congress. Secondly, under the Rivers and Harbors Act, 33 U. S. C. §§ 401 *et seq.* (1958), the dam necessary for the Project could not be constructed in the Colorado River without the approval of Congress. *United States* v. *Arizona,* 295 U. S. 174 (1935); *Wisconsin* v. *Illinois,* 278 U. S. 367, 411-414 (1929).

When Congress, in the Project Act, authorized the construction of Hoover Dam, it focused its attention on the problem of how the water impounded and released by that dam should be distributed, authorizing the Secretary of the Interior to apportion that water among the interested states. Congress did not focus its attention on the diver-

sion of water above Lake Mead. If Congress authorizes a dam and diversion works on the mainstream above Lake Mead, its attention will then be directed to the problem of apportioning the water diverted by those structures. At that time Congress can determine whether or not Arizona's diversions above Lake Mead shall be chargeable to her under the present contractual apportionment.[86]

California strenuously urges that the contractual apportionment explained in this section of the Report is contrary to the "bargain" she made with Congress in enacting the California Limitation Act. According to California, she was assured of 4.4 million acre-feet out of the first 7.5 million acre-feet of consumptive uses of water diverted throughout the entire Colorado River System in the Lower Basin. She calls this "III(a) water," referring to the allocation of 7.5 million acre-feet of system-wide consumptive uses made to the Lower Basin by Article III(a) of the Colorado River Compact. The apportionment suggested in this Report, of course, allocates to California 4.4 million acre-feet out of 7.5 million acre-feet of mainstream uses only. Since California, which has no tributaries, would receive substantially more water under a system-wide apportionment, see pp. 177-178, *supra,* she claims that the suggested mainstream apportionment diminishes the fruits of her bargain. Since consumptive use of water from the Gila River System in Arizona accounts for most of the tributary uses in the Lower Basin, the real thrust of California's argument is that Arizona's mainstream uses should be curtailed, for the benefit of California uses, to the extent of Arizona uses on the Gila River.

California has never clearly designated the ground on which she bases her claim to 4.4 million acre-feet out of a

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[86]The doctrine of equitable apportionment may affect diversions in this reach of the River. See pages 316-318, *infra.*

Lower Basin system-wide apportionment. There are only four possible sources for this claim: (1) the law of prior appropriation or equitable apportionment, (2) the Colorado River Compact, (3) the Boulder Canyon Project Act, or (4) the water delivery contracts executed by the Secretary of the Interior under Section 5 of the Project Act. None of these sustains California's position.

(1) Prior Appropriation and Equitable Apportionment. Since the doctrines of prior appropriation and equitable apportionment were rendered inapplicable to the Colorado River below Lake Mead by the Project Act, see pp. 151-162, *supra,* California's claim to Colorado River water cannot be grounded on them. But even if those doctrines did apply, they would not support California's claim.

The appropriation doctrine holds merely that a junior appropriator can neither demand nor withhold water required for beneficial use by a senior appropriator. Under this rule, the total quantity of uses in any state is immaterial to the rights of appropriators in other states. It is true that junior appropriators on tributaries can be shut down if the water they would consume has been appropriated by senior appropriators on a mainstream. But that rule of the law of appropriation does not justify California's claim that Gila River water uses are to be charged to Arizona so as to reduce Arizona's claims to the mainstream, since it does not appear that California users have any appropriative rights in waters of the Gila River, their points of diversion all being upstream from the confluence of the Gila with the mainstream.

This result is not changed by the modification of strict priority of appropriation that has been made by the Supreme Court in equitable apportionment suits. None of the equitable apportionment cases establishes an accounting system

comparable to the one that California urges for adoption here. Perhaps the simplest way to demonstrate this is to assume that the Project Act and the Colorado River Compact do not exist. In an equitable apportionment suit over mainstream water between Arizona and California, the Gila River would not be in issue because its waters have not been appropriated by California and there are no diversion works in California which permit the utilization of this water in that state. The Supreme Court has never yet based an apportionment of one stream on the water available to one party but not to the other, from another stream. Presumably the apportionment would be based on the supply in the main Colorado River, not that river and the Gila, which California cannot use.

(2) The Colorado River Compact. As explained at pp. 139-141, *supra,* the Compact operates inter-basin and not interstate. It does not purport on its face and it cannot be construed to affect rights between Arizona and California. Although the Compact in Article III(a) and (b) apportions system waters to each Basin, it gives no direction regarding which uses are III(a) or III(b) or some other category, as among states of either Basin. The Upper Basin states recognized that the Compact did not control the intra-basin division of water when, in 1948, they apportioned by compact their share of Colorado River Basin water among themselves. How the Lower Basin states should divide their Compact apportionment, their surplus and the water not covered by the Compact was left to those states, as they themselves recognized in their various efforts to reach agreement and as Congress recognized in the second paragraph of Section 4(a).

(3) The Boulder Canyon Project Act. Nothing in the Project Act establishes an apportionment of all Lower Basin

uses, both mainstream and tributary. The only section which purports to effect a specific allocation of water is Section 4(a), and that, as explained at pp. 173-183, *supra*, applies only to the mainstream. But even if Section 4(a) applied to the entire river system, it would not support California's claim.

The first paragraph of Section 4(a) is a limitation on California, not a grant to her, and hence cannot be a source of her rights to water as against the other Lower Basin states. The critical words in the first paragraph state that consumptive uses of water in California "shall not exceed" certain quantities per annum. This provision, that California's uses "shall not exceed" the specified quantity, does not mean that she is entitled to that quantity. California relies on the language in the first paragraph which states that the amount of water to which she is limited shall include "all water necessary for the supply of any rights which may now exist. . . ." She argues that this is a grant to her. But even if it were a grant, the language would give California only water to which she had rights derived from another source and would not constitute an independent basis for claiming water as against the other Lower Basin states. Furthermore, the natural reading of these words indicates not a grant, but a double limitation: California's consumptive uses shall not exceed 4.4 million acre-feet of 7.5 million acre-feet, and this is true despite her claims in 1928 that her existing rights exceeded 4.4 million acre-feet.

The second paragraph of Section 4(a) authorizes a compact which was never consummated and hence it cannot be a source of California's right to water as against the other Lower Basin states. Moreover, that paragraph makes clear that Arizona uses of Gila River water are in addition to the apportionment authorized therein. See note 38, p. 179.

(4) The Water Delivery Contracts. The water delivery contracts which the Secretary of the Interior has entered into with the California defendants constitute the only possible basis for California's claim to mainstream water. Those contracts do allocate water to California, see pp. 221-225, *supra*, but only from a three-state apportionment limited to the mainstream.

The California contracts, together with the Arizona and Nevada contracts, constitute an apportionment among the three states. California's major contention, that Arizona is to be charged for her uses of Gila River water under the tri-state apportionment, fails before the clear language of the Arizona water delivery contract. Paragraph 7 of that contract explicitly apportions to Arizona "from storage in Lake Mead at a point or points of diversion on the Colorado River" 2.8 million acre-feet plus half of surplus. Paragraph 7(1) also provides that: "All consumptive uses of water by users in Arizona, *of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam* . . . shall be deemed, when made, a discharge pro tanto of the obligation of this contract." (Emphasis added) Nothing in the Arizona water delivery contract can be interpreted, even with the most vivid imagination, as charging Arizona for her consumptive uses of Gila River water. Rather, the language of that contract explicitly and unmistakably allocates water to Arizona only from the mainstream, leaving her free to consume water from the Gila in addition to the contractual apportionment.

Thus far the Report has described that part of the contractual allocation scheme that governs two distinct supply situations: (1) where there is sufficient mainstream water to satisfy 7.5 million acre-feet of consumptive use in the United States in one year; and (2) where there is surplus because of sufficient water to satisfy uses in excess of the

7.5 million acre-feet. The contractual allocation scheme also determines each state's apportionment in the event of insufficient mainstream water to supply 7.5 million acre-feet of consumptive use in one year. In such event, the allocation scheme requires each state to share the burden of the shortage ratably. This is to say that the contracts, executed by the Secretary in conformity with the apportionment contemplated by Congress in Section 4(a), apportion to each state a pro rata share of the available water. The interstate ratios are determined by the contractual apportionment to each state of the first 7.5 million acre-feet of consumptive uses. Thus in the event of shortage, to Arizona is apportioned by her contract $\frac{2.8}{7.5}$ of the aggregate consumptive use in the three states; to California is apportioned by her contracts $\frac{4.4}{7.5}$ of such use; and to Nevada is apportioned by her contract $\frac{.3}{7.5}$ of such use. Priority of appropriation is nullified by the Project Act and by the contracts, and this ratable apportionment is substituted in lieu thereof.[87]

It is demonstrable that the Project Act and the water delivery contracts contemplate a pro rata allocation of mainstream water among Arizona, California and Nevada in times of short supply. As explained above, the three states' apportionments are on a parity whenever the annual supply is sufficient to satisfy 7.5 million acre-feet or more of consumptive use in the United States. Thus California and Arizona are each allocated 50% of surplus, under existing contracts, and necessarily without regard to priority of appropriation. Even if, hypothetically, California were to

[87] As is explained hereafter (pp. 306 *et seq., infra*) Section 6 of the Act makes an exception to this rule.

have appropriations of 5 million acre-feet which are prior in time to any of Arizona's and some of these California appropriations were unsatisfied, the two states would nevertheless share surplus equally. And there is, with one exception, nothing in the Project Act or the Secretary's delivery contracts which suggests that a similar parity as between the states does not prevail if there is less than 7.5 million acre-feet of consumptive use to be apportioned among them.

That single exception, the command in Section 6 that "present perfected rights" shall be satisfied, further emphasizes that Congress did not intend that principles of priority of appropriation should apply in times of short supply to control the interstate allocation of mainstream water. The purpose of Section 6, as explained more fully at pages 306 *et seq.*, is to protect mainstream uses in existence at the time the Project Act was enacted against the possibility that their water would be impounded by the proposed dam and delivered to other uses developed after the dam was constructed. Since these early uses are prior in time to uses developed in reliance on Hoover Dam, there would be no need to protect them against this possibility if priority of appropriation governed the interstate delivery of water in periods of short supply.

Furthermore, the priority scheme established by Section 6, which is based on "perfected rights," is in certain particulars inconsistent with principles of priority of appropriation. Thus, it is quite possible that a right "perfected" as of June 25, 1929, and thus protected by Section 6 is junior in priority to a right recognized under state law but not "perfected" as of that date. In such a case, Section 6 would reverse the order of state priorities. If Congress had intended priority of appropriation to retain interstate significance after the enactment of the Project Act, it might

be expected that it would have suggested that priority of appropriation was still to govern in circumstances in which it was not inconsistent with Section 6.

Moreover, the Project Act approved the Colorado River Compact, and thus the Compact provides the background for the enactment of the Project Act. The Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water; priority of appropriation is not an operative factor under the Compact. Thus subdivisions (a) and (b) of Article III apportion consumptive use of water to each Basin in fixed quantities with the manifest intention that priority of appropriation as between Basins shall be irrelevant to the apportionment. It is true that the greater development in the Lower Basin may have been taken into account when that Basin was apportioned an extra million acre-feet, but, the division having been made, each Basin's apportionment is, under the Compact, of the same quality, regardless of priority of appropriation. This is made clear by Article III(c) which provides that, if there is not enough water in excess of the III(a) and (b) apportionment to fulfill United States treaty obligations to Mexico, "then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin . . . ." The respective Basins do not bear the loss of water in such a period of short supply on the basis of priority of appropriation, but on the basis of parity.

As I have pointed out, the second paragraph of Section 4(a) gives advance approval to a compact among Arizona, California and Nevada containing an allocation of water which was substantially effectuated by the contractual allocation established by the Secretary. Under this proposed compact, each state's apportionment would be of equal quality, precisely like the inter-basin apportionment in the Colorado River Compact. Surely Congress did not intend

that such an interstate compact would give California superior priorities to water because of the earlier dates of her uses. A compact is ordinarily thought of as an agreement between sovereigns with the rights of each standing on equal footing. The sensible interpretation of the proposed compact is that California's more advanced development was taken into account in allocating to her a larger share of water than to her sister states, and that once the ratio of 4.4 to 2.8 to .3 was established, it would be applied to all of the water consumed, regardless of dates of appropriation. Since Congress intended the second paragraph of Section 4(a) to be correlative to the first paragraph, the latter must be interpreted in the same manner as the former, to provide for a pro rata apportionment in periods of shortage.

In short, Congress contemplated inequality in the quantities allocated to each of the states, but parity in their rank. Interstate priorities were rejected. The principle of sovereign parity was established.

As pointed out above, it is patent that the Secretary was profoundly influenced in his water delivery contracts by the apportionment suggested in Section 4(a). Therefore, it must be concluded that these contracts embody the pro rata system of apportionment that is incorporated in Section 4(a). None of the contracts suggests that a system other than pro rata distribution is to be applied. Although the Secretary's contracts with California users specify a system of priorities among them, they do not mention interstate priorities, nor do any of the Secretary's other water delivery contracts. Indeed, in order to apply an interstate priority system it would be necessary for the Secretary to establish the priority date for each use diverting water from the mainstream as against all of the other uses diverting such water. So far as appears, the

Secretary has not considered it necessary to compile such a complicated list in order to deliver water pursuant to his contracts. Furthermore, as noted at pages 233-234, *supra*, the contracts adopt a pro rata system of distribution of surplus.

6. *Deductions for Uses above Lake Mead Invalid.* The contractual allocation scheme detailed above, which has been deduced from the Secretary's water delivery contracts, does not take into account the provisions of Article 7(d) of the Arizona contract and Article 5(a) of the amended Nevada contract which reduce the Secretary's obligation to deliver water from Lake Mead for use in those states to the extent that consumption of water in those states diminishes the flow of water into Lake Mead.[88] These provisions are in violation of the Project Act; they are unenforceable. They are contrary to the command of Section 5 that "contracts respecting water for irrigation and domestic uses shall be for permanent service . . .," they violate Section 18, which directs that state law shall govern intrastate water rights and priorities, and they result in an allocation of mainstream water totally out of harmony with the limitation on California contained in Section 4(a).

These contract provisions require that deliveries of water from the mainstream to users in Arizona and Nevada be reduced as depletions in those states above Lake Mead increase, regardless of the supply of water in Lake Mead. For example, assume that annual deliveries from Lake

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[88]Article 7(d) of the Arizona contract clearly states that the Secretary's delivery obligation is reduced to the extent that consumption diminishes the flow into Lake Mead. Article 5(a) of the Nevada contract is worded differently, however, and could be interpreted as reducing the delivery obligation to Nevada by the total amount of tributary diversions in that state regardless of the effect on the flow into Lake Mead. Since I have concluded that these provisions are unenforceable, it is unnecessary to differentiate between the two versions, and I have treated Article 7(d) and Article 5(a) as synonymous for purposes of the following discussion.

Mead to users in Nevada aggregate 300,000 acre-feet of consumptive use, the full contract allotment. It will be noted that the present Nevada contract does not call for delivery of any surplus. If thereafter a consumptive use from the Virgin River in Nevada were to occur which reduced the flow into Lake Mead by 50,000 acre-feet, the Secretary's obligation, under his contract to deliver water to Nevada from Lake Mead, would be reduced by this amount, and this would result in the cancellation of deliveries to those junior-most Nevada users who had been receiving the last 50,000 acre-feet under the contract, even though the supply of Lake Mead water was sufficient to satisfy all demands.[89] This would be true despite the fact that the Secretary has absolutely no control over consumptive uses on the Virgin River. For these junior Nevada users, the Nevada contract cannot be regarded as one for permanent service.

Since Section 5 requires the Secretary's water delivery contracts to be "for permanent service," the contract provisions in question are in violation thereof. The requirement of permanent service has no antecedent in the prior Reclamation Acts, and the legislative history sheds very little light on its meaning. Clearly a contract for a stated term of years would not be for "permanent service." However, the general context suggests that Congress intended to do more than outlaw term contracts. This requirement was placed in the Project Act also to ensure that deliveries of water from Lake Mead would be on a stable and annually re-

[89]Consumption of water on any particular tributary above Lake Mead affects the supply of water in Lake Mead and hence the amount of water that can be released for consumption each year. But it is only one of many factors that affect supply, and is clearly not among the most important ones, which are the mainstream flow into Lake Mead and storage from prior years. Thus, it is quite likely that the Secretary would be able to release the same amount of water for consumption from the mainstream in successive years despite an intervening project which depleted the flow into Lake Mead from one of the tributaries.

curring basis, insofar as this is possible under the physical conditions existing in the River Basin. Because of the topography and geography of the Lower Basin, water from the mainstream can be feasibly diverted and utilized for irrigation only by the construction of immense projects consisting of dams, pumping facilities, canals and other necessary works. Needless to say, the cost of such projects is enormous, and they can be financed only if a relatively constant and dependable supply of water seems likely to be available once they are completed. Similarly, existing projects cannot be economically operated unless a dependable supply of water is available.

There will necessarily be some uncertainty of supply of mainstream water because of the very large fluctuation in the flow of water into Lake Mead each year.[90] Legislation could not, of course, affect the geography of the region or the amount of precipitation. But the primary purpose of the Project Act in providing for the construction of Hoover Dam was to regulate this erratic flow so as to provide, so far as physically possible, a stable supply of water on the basis of which the economy of the Lower Basin could be developed.[91] While Congress could not legislate away the uncertainties of supply created by nature, it could reduce them by means of the great reservoir and by pursuing a policy of permanent service contracts. In conformity with this purpose, the requirement of permanent service in Section 5 seems to have been intended to instruct the Secretary to contract for water deliveries in such a way as to assure users, as far as is physically possible, of a stable supply of water. Having authorized the dam to overcome the physical conditions which resulted in uncertainty of supply, Congress did not want the Secretary's contracts

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[90]See Part One, pp. 117-120.

[91]Hoover Dam cannot be entirely successful in this regard. See Part One, pp. 107-110.

to generate new causes of uncertainty. Congress undoubtedly realized that unless Hoover Dam and Lake Mead were operated so as to make deliveries of water as dependable as possible it would be extremely difficult to develop new projects, existing projects might fail, and the effective utilization of the River would be seriously impaired.

But the provisions charging Arizona and Nevada for depletions above Lake Mead create this very uncertainty of supply that Hoover Dam and the Section 5 command were explicitly designed to avoid. For under these provisions, deliveries to projects below Lake Mead would be reduced on the basis of fluctuating factors which neither the Secretary nor the downstream users can control.[92]

It is true that deliveries to users in a particular state below Lake Mead are reduced, under Articles 7(d) and 5(a), only as consumption within that state on the System above Lake Mead increases, and thus, in a sense, the total amount of water used within the state remains relatively constant. But Section 5 clearly requires that individual users be assured permanent service, regardless of overall state allocations. Furthermore, Section 5 deals with the mainstream only and thus it must have been intended to require permanent service in regard to mainstream deliveries regardless of consumption on the tributaries.

These provisions also violate Section 18 of the Project Act. That section, set forth and discussed at pages 216-218, *supra,* provides in effect that state law shall govern water rights and priorities intrastate. The example given above illustrates the violation of Section 18. The example assumed

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[92]It may be that in some instances a user below Lake Mead could obtain an injunction under state law prohibiting consumption of water above Lake Mead because of the collateral effect on deliveries to that user. However, nothing has been brought to my attention to indicate that this would be true in all, or even some, cases. Besides, Section 5 requires that the Secretary's contracts themselves must ensure permanent service.

that, after the full 300,000 acre-feet of Nevada's Lake Mead water had been appropriated and put to beneficial use, a project was developed on the Virgin River in Nevada that depleted the flow into Lake Mead annually by 50,000 acre-feet. Under the law of prior appropriation, the Virgin River project would be junior to all users of the 300,000 acre-feet. The contract provisions, if enforced, would reverse this order of priority. The users of the last 50,000 acre-feet of mainstream water under the Nevada contract would be deprived of water, while the Virgin River project continued to use water, despite the fact that the tributary user was, under state law, junior to the mainstream users. No more flagrant violation of Section 18 can be conceived. The Secretary has attempted, by his contracts, to intervene within the States of Nevada and Arizona to dictate who shall receive water and in what order of priority. Moreover, in this attempt, the Secretary has adopted a rule of priority exactly the reverse of the state rules; the contract provisions would displace senior downstream users for the benefit of junior upstream users.

Since the Secretary's power to make water delivery contracts under Section 5 of the Project Act is limited by Section 18 of the Act, and since the provisions in question violate Section 18, those provisions must be stricken on this ground also.

In addition to violating Sections 5 and 18 of the Project Act, Articles 7(d) and 5(a) are inconsistent with the Section 4(a) limitation on California's use of mainstream water, and indeed, defeat the basic purpose of the delivery contracts themselves; namely, to provide for the allocation in fixed proportions among Arizona, California and Nevada of all the mainstream water released for use in the United States.

Congress intended, in Section 4(a), to provide for an apportionment of the first 7,500,000 acre-feet of consump-

tive use of mainstream water plus a further apportionment of surplus water in the mainstream. Consumption of water diverted from the Lower Basin tributaries is irrelevant to the Section 4(a) apportionment. The Secretary's water delivery contracts, except for the provisions in question, substantially adopt and effectuate the congressional apportionment. Except for these provisions, the several water delivery contracts provide for the disposition of all the 7,500,000 acre-feet and all surplus. See pages 222-224, *supra*. But Articles 7(d) and 5(a) defeat the mainstream allocation, otherwise completely provided for in the contracts, by introducing System, *i.e.*, tributary, considerations in a mainstream apportionment. To enforce these provisions would distort the mainstream apportionment and leave some mainstream water undisposed of.

The resulting incomplete allocation may be demonstrated by the following example: Assume that the Secretary decided to release in a particular year enough mainstream water to permit consumption of 7.7 million acre-feet in the three states. Assume, also, that Arizona's diversions from the Little Colorado River depleted the flow into Lake Mead by .1 million acre-feet. Under the interstate apportionment established by the Section 4(a) limitation on California and the delivery contracts with Arizona and Nevada, of the first 7.5 million acre-feet of mainstream consumption, Arizona would be allocated 2.8 million acre-feet, California 4.4, and Nevada .3. Of the .2 million acre-feet constituting surplus, Arizona and California would each be allocated one-half. Thus to California would be apportioned a total consumption of 4.5 million acre-feet for the year in question. She could not consume more than this amount because of the Section 4(a) limitation, which is based on mainstream considerations only. To Nevada would be apportioned a total consumption of .3 million acre-feet, and she could not utilize more than this since that constitutes

her full contractual allotment. To Arizona would be apportioned a total consumption of 2.9 million acre-feet. But if Article 7(d) of her contract were applied in this situation, the Secretary's delivery obligation of 2.9 million acre-feet would be reduced by the amount of the depletion of the flow into Lake Mead, and Arizona could consume only a total of 2.8 million acre-feet from the mainstream. Thus, although 7.7 million acre-feet were released for consumption within the three states for the year, only 7.6 million acre-feet could be utilized under the statutory and contractual limitations. 100,000 acre-feet of water released for consumption could not be used.

The United States suggests that the solution for this dilemma is simply to consider the uses above Lake Mead as part of the total supply of available consumptive uses under the apportionment, and to charge them to Arizona and Nevada. Thus the United States, in the example, would add the 100,000 acre-feet of depletions from the Little Colorado to the total of available consumptive uses from the mainstream, giving a total of 7.8 million acre-feet of available consumptive uses, and 300,000 acre-feet of surplus. The United States then would allocate this total supply among the three states according to the apportionment formula, giving California 4,550,000 acre-feet of consumptive uses, Arizona 2,950,000 (including the 100,000 from the Little Colorado), and Nevada 300,000.[93]

There are two flaws in this suggestion. First of all, the United States would equate consumptive use measured by diversions less returns, which is the apportionment measurement, with depletion of the flow into Lake Mead, which is the measurement under Article 7(d) of the Arizona contract. But the two measurements are not similar; for example, 100,000 acre-feet of consumptive use on the Little

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[93]Letter of the Solicitor General commenting on the Draft Report, p. 8

Colorado will result in a depletion of the flow into Lake Mead by a substantially smaller quantity of water.

Secondly, the United States' suggestion would violate the interpretation of Section 4(a) proposed in this Report, an interpretation to which the United States herself agrees. Thus Section 4(a) limits California to 4.4 plus half of surplus out of the total consumptive use of water diverted from the *mainstream;* it establishes a mainstream, not a system-wide, method of accounting. But the United States' suggestion would import tributary considerations into the Section 4(a) limitation. In the example, there are only 7.7 million acre-feet of consumptive uses of water diverted from the mainstream and Section 4(a) would limit California to 4,500,000 acre-feet of this. However, the United States' solution, because it takes tributary uses into account, would result in California receiving 4,550,000 acre-feet of consumptive use, 50,000 acre-feet more than she is permitted to take under Section 4(a).

The reason for the existence of this body of available water which cannot be utilized by any of the interested states under the contractual apportionment created by the provisions in question is quite clear. Articles 7(d) and 5(a) dictate that Arizona and Nevada cannot receive mainstream water to the extent that they deplete the tributaries above Lake Mead. But California cannot use this water that is denied to her sister states because the statutory limitation on her consumption is based on consumption of mainstream water only. Under Section 4(a), California cannot receive more mainstream water because of depletions on the tributaries even though, under the Arizona and Nevada contracts, those states receive less. In other words, because of the lack of correlation between the Arizona and Nevada contracts on one hand and the California contracts on the other, all of the apportioned water physically available for consumption cannot be legally utilized.

It is significant that under the apportionment suggested in Section 4(a) itself all of the available water could be consumed in the three states. This is because Congress intended the limitation on California in the first paragraph and the allocations to Arizona and Nevada in the second paragraph to correlate perfectly; both were to apply to mainstream water only. Indeed, it seems that the Secretary himself intended the delivery contracts to provide for the apportionment of all of the available mainstream water among Arizona, California, and Nevada, since that apportionment was based on the one suggested by Congress in Section 4(a) of the Project Act.

It is unlikely that the Secretary intended that the formula established by his contractual apportionment would call for the delivery of water to California which California could not receive under the Section 4(a) limitation, and, conversely, that Arizona and Nevada would not be able to receive, under their contracts, water which California could not use under the statutory limitation. But this is precisely the result of applying the provisions in the Arizona and Nevada contracts which inject System considerations into the scheme for apportioning mainstream water. Rather, the Secretary seems to have intended that California should receive, out of the available supply, all of the water she was eligible to receive under the statutory limitation, at least until the 5,362,000 acre-feet of consumptive uses per annum called for in the existing delivery contracts with California users is provided, and that Arizona and Nevada would receive all of the rest.

Perhaps it was not apparent at the time that the Arizona and Nevada contracts were entered into that, because of Articles 7(d) and 5(a), they would not correlate with the California contracts. Certainly it is clear that none of the interested parties intended that the Arizona and Nevada contracts would waive the limitation on California's con-

sumption contained in the Project Act, or that they would operate so as to prevent Arizona and Nevada users from eventually consuming the full amount of water that was barred to California. The Arizona and the amended Nevada contracts were executed within six weeks of each other, and Article 10 of the Arizona contract specifically provides that the entire contract, and Article 7 in particular, "is without prejudice to, any of the respective contentions of said states [which term includes Nevada] and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act . . . (5) what limitations on use, rights of use and relative priorities exist as to the waters of the Colorado River system. . . ." And in a memorandum issued by Secretary of the Interior Ickes on February 10, 1944, the day following the execution of the Arizona contract, he stated that "Article 10 was purposely designed to prevent Arizona, or any other state, from contending that the proposed contract, or any provision of the proposed contract, resolves any issue on the amounts of waters . . . available to the respective states under the compact and the act. It expressly reserves for future judicial determination any issue involving the intent, effect, meaning and interpretation of the compact and act."[94]

Whatever the reason for the incorporation of Articles 7(d) and 5(a) into the contracts, it is apparent that, in light of the interpretation here proposed for Section 4(a), those provisions defeat the basic purpose of the delivery contracts in that they, and they alone, prevent the contracts from establishing a rational and easily administered scheme for the apportionment of all the available mainstream water among the three interested states.

In this posture, failure to give effect to the provisions charging Arizona and Nevada for depletions above Lake

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[94]Special Master's Exhibit No. 4, The Hoover Dam Documents, p. A568.

Mead is consistent with the general scheme of the delivery contracts and enables the Secretary to operate Lake Mead efficiently. It would be unconscionable to uphold a delivery scheme which required, on a permanent basis, that water flowing in the mainstream and available for use could not be consumed in any of the three states.

As a final matter, it should be pointed out that voiding these provisions does not impair the Secretary's control and management of Hoover Dam and Lake Mead, nor does it leave California helpless to protect her interests. The Secretary will still be able to control the supply of water in Lake Mead since it is within his reasoned discretion to determine how much water is to be released for use in the three states each year. And California will be able to protect herself against undue depletions on the tributaries and the mainstream above Lake Mead by compact, or, if the necessity arises, by suit.

7. United States Uses Charged to States. All consumption of mainstream water within a state is to be charged to that state, regardless of who the user may be. Thus, consumption of mainstream water on United States Indian Reservations, National Parks, Forests, Monuments, and Recreation Areas, lands under the control of the Bureau of Land Management, reclamation projects, wildlife refuges, and other United States projects within the Lower Basin, all of which will be treated subsequently, is chargeable to the state within which the use is made. All of the parties seem to agree to this accounting, and it is required by the contracts and the Project Act. Article 7(1) of the Arizona contract specifically provides that Arizona's apportionment includes the consumptive use of all water diverted from the mainstream "whether made under this contract or not." Similarly, Section 4(a) of the Project Act limits diversions of water "for use in the

State of California" and nothing indicates that this language does not include all uses, including federal uses. The Nevada contract was intended to be correlative with the Arizona and California contracts and hence should be interpreted in the same manner. Furthermore the Nevada contract provides for the delivery of "so much water . . . as may be necessary to supply the state a total quantity not to exceed [300,000 acre-feet per annum]." Clearly this "total quantity" includes all mainstream water consumed in Nevada by any user.

E. California's Offer of Proof.

In connection with the oral argument on the Draft Report, California made an Offer of Proof, consisting of about 60 papers, which, she asserts, show thirty years of legislative and administrative interpretation of the Project Act contrary to the conclusions reached in the Report. California contends that these papers, if admitted in evidence, would establish:

> (1) That state and federal officials concerned with the administration of the Project Act construed Section 4(a) to be applicable to the tributaries as well as to the mainstream, as California contends, see pp. 177-178;
>
> (2) That the Secretary of the Interior had no intention of apportioning water when he entered into water delivery contracts with the several California defendants and with Arizona and Nevada.

Careful consideration of the Offer of Proof leads to the conclusion that the papers proffered do not establish either of these contentions.

First, as to the correct interpretation of Section 4(a), the papers tend to show only that Arizona and California have for over thirty years disagreed over the meaning of

this provision, and that neither of the states, through its officials, has exhibited a uniform consistency in positions taken regarding its meaning. Arizona's changes of position are fully documented in the several litigations affecting the River. Similarly, the exigencies of the moment seem to affect the interpretation of the Project Act advanced by California. For example, in opposing ratification of the Mexican Water Treaty, Mr. James H. Howard (then as now counsel for Metropolitan Water District) advanced these contentions:

> MR. HOWARD. Section 5 of the Boulder Canyon Project Act announced that the Secretary of the Interior was authorized to contract for the storage and delivery of water from the Boulder project, and it provided that those contracts should be for permanent serivce. It was also provided that no right in the stored waters of Boulder should be acquired by a method other than contract with the Secretary of the Interior. The value of that clause to the State of California may not be immediately apparent, but I want to develop that it is important.[95]
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> MR. HOWARD. No. The statement is, in fact, that California will never claim more than 4,400,000 acre-feet plus one-half of the waters apportioned by the compact.
>
> THE CHAIRMAN. You are right. There is nothing in this act, as I see it, in that clause, that guarantees to give California that; it merely requires California to acquit anybody of any claim in connection with that; is not that true?
>
> MR. HOWARD. Yes; the act does not give California any water.
>
> THE CHAIRMAN. How much water of that 4,400,000 acre-feet——

[95] Senate Hearings on Mexican Water Treaty, Committee on Foreign Relations, vol. 8, 79th Cong., 1st Sess. (1945), pp. 865-66.

SENATOR JOHNSON of California. Let him answer.

THE CHAIRMAN. He has already answered, but I will let him answer again.

MR. HOWARD. *That is a limitation, I take it, not a grant. The grant to California came in contracts with the Secretary of the Interior, authorized by the Boulder Canyon Project Act. It is upon those contracts that we rely for our affirmative right to water.*[96] (Italics added.)

* * *

THE CHAIRMAN. I do not like to interrupt you, but this contract with the Secretary of the Interior is more in the nature of a license to use so much water, is it not?

MR. HOWARD. No, sir; these are contracts.

THE CHAIRMAN. Is there any binding obligation on the Secretary to deliver that amount of water?

MR. HOWARD. Yes; there is.[97]

* * *

SENATOR MILLIKIN. Let me ask a question, please. Is there a compact at the present time between Nevada, Arizona, and California, and the lower basin States?

MR. HOWARD. No, sir; there is none.

SENATOR MILLIKIN. You have not decided on your allocation of water among yourselves?

MR. HOWARD. No. We have a rather complicated situation there, sir. In a way, the California Limitation Act constitutes a substitute for such an apportionment. That is, they held our side down, but there was no agreement between California and Arizona in the matter.

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[96] *Id.*, at 876.
[97] *Id.*, at 880.

> MR. HOWARD. The Secretary of the Interior and the State of Arizona have entered into a contract which in a way is a substitute already, a three-State compact.[98]

The purpose in 1945 was, of course, to convince Congress that it would be a breach of the California contracts to allocate any Lake Mead water to Mexico; hence, the reliance on the contract as a grant. In the posture of this litigation, however, California rejects the contracts as a source of right, since the contracts clearly relate to mainstream water and not to tributary water.

A further example of inconsistency is found in the testimony of Attorney General Kenny of California. His opposition to the Mexican Treaty was based on the proposition that California would be deprived of some of its 4.4 million acre-feet. General Kenny stated:

> SENATOR WILEY. Then is the nub of this argument that you are presenting (1) that you are getting the water, 4,400,000 acre-feet; (2) that you feel, if this treaty should become the law of the land, your rights will be prejudiced and that you will not get that water?
>
> MR. KENNY. Definitely.[99]

In oral argument in this case, on the other hand, California advanced the contention that the apportionment formula adopted in this Report errs in that it permits, in times of shortage, some of California's 4.4 million acre-feet to go to Mexico, whereas, according to California, Congress intended in the Project Act that water to be forever free from the Mexican Treaty burden. Since Congress ratified the Mexican Treaty despite General Kenny's admonition that it subjected California's 4.4 to diminution in order to

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[98] *Id.*, at 886.
[99] *Id.*, at 379

fulfill the treaty obligation, it is somewhat inconsistent for California to argue in this litigation that Congress intended her 4.4 to be free from this obligation.

My conclusion is that both Arizona and California have, with respect to the meaning of Section 4(a), taken various positions from time to time as their immediate interests dictated and that the Offer of Proof fails to show a consistent interpretation of the Act by either.

So far as United States government officials are concerned, the dominant note sounded in the proffered papers is the avowed refusal of these officials to take sides in the Arizona-California controversy. The papers show a firm refusal of federal officials to state the effect of the Compact and the Project Act on the rights of Arizona and California. One need not burrow through all the papers to discover that this has been the position of the Interior Department. It is explicitly set forth in Article 10 of the Arizona contract.

From this hands-off attitude of the Secretary, California argues her second proposition that the Secretary could not have intended his contracts to apportion the water in Lake Mead. This proposition is in error. The circumstances of the time and the terms of the contracts show that the Secretary did intend to make an apportionment. The situation facing the Secretary was clear. He had to apportion the water because it was physically in Lake Mead and nobody could use it unless he did so. He had a dam capable of storing nearly 30 million acre-feet. He had clear authority under Section 5 to contract for the use of that water; indeed he was directed by the statute to make contracts, both for power and irrigation, to pay for the dam. Moreover, if contracts were not made, the water would be wasted, for no person was, according to the Act, entitled to the use of water without a contract. It would have been impractical for the Secretary to await judicial resolution of the Arizona-California controversy, since the Supreme Court had held

the United States to be an indispensable party in such litigation[99a] and the United States had refused to join as a party. Nor could the Secretary apportion water on a temporary basis, pending such an adjudication, since Section 5 of the Project Act required his contracts to be for permanent service. Accordingly, the Secretary made contracts for delivery of the water, necessarily intending thereby to allocate it.

California's Offer of Proof does not contradict this conclusion. It shows only that the contracts were intended not to be the basis for any contention respecting the meaning of the Compact or the Project Act in future litigation. Although the Secretary was forced to interpret the Project Act in order to make the contracts, he did not want his interpretation to influence future judicial construction of the Compact and the Act. The Secretary's contractual allocation scheme was to govern water deliveries to the several states unless and until it was held invalid by this Court, but the fact that he made the allocation was not to be evidence of its validity. If the scheme was valid, it was to prevail forever, unless changed as authorized by Section 8(b) of the Project Act.

Thus California's Offer of Proof shows no more than what is made explicit by Article 10 of the Arizona contract; it fails to show that the Secretary did not intend his contracts to apportion water. Since California's Offer of Proof, assuming the competence of the proffered papers, fails to establish any proposition that would affect the disposition of the issues in this litigation, it would not be provident to reopen the hearings for the purpose of receiving them as well as any evidence which might then be tendered by the other parties in contradiction.

[99a] Arizona v. California, 298 U. S. 558 (1936).

IV. The Claims of the United States to Water in the Mainstream of the Colorado River

The United States claims, in addition to control of the mainstream by reason of the Boulder Canyon Project Act and its ownership and management of the various dams and works which regulate mainstream water, the use of water in the Lower Basin for a variety of its projects and needs. The United States urges that it has reserved water for the use of the various Indian Reservations, National Forests, Parks, Recreational Areas, Monuments, Memorials and lands under the control of the Bureau of Land Management located in the Lower Basin. The United States also claims the right to fulfill its treaty obligations by delivering 1,500,000 acre-feet of water per annum in the Colorado River at the Mexican border, and by consuming water on wildlife refuges and management areas located in the Lower Basin. Finally, the United States claims the right to deliver water from Lake Mead to Boulder City, Nevada, pursuant to a federal statute.

A. Indian Reservations

The United States argues that it has reserved water flowing in the Colorado River and its tributaries in the Lower Basin for the needs of all of the Indian Reservations located within the Lower Basin. Thus the United States claims that each Indian Reservation has the right to divert and consume the amount of water necessary to irrigate all irrigable acreage on the Reservation and to satisfy related needs, subject only to the priority of appropriative rights established before a particular Reservation was created and water reserved for its benefit.

Arizona argues that the rights of the various Indian Reservations on the tributaries ought not to be adjudi-

cated in this case.[1] I agree with Arizona that there is no need in this litigation to adjudicate the rights or priorities of Indian Reservations diverting water from the Lower Basin tributaries, except for the Gila River. For the reasons detailed at pages 318-321, 323-324, *infra,* it would be inappropriate at this time to apportion water in any of these tributaries, except the Gila River. Moreover, it would certainly be inappropriate to attempt a determination of the rights and priorities between each Indian Reservation and the myriad individual users who divert water from these tributaries.[2] As to Indian Reservations on the Gila River System, I have made recommendations concerning the United States claims in a subsequent section of this Report at pages 332-334.

As to the mainstream Indian Reservations, I have concluded that it is necessary to determine their water rights, and I have done so in the Findings of Fact and Conclusions of Law which conclude this section of the Report. The United States claims it has reserved mainstream water for Indian Reservations under federal law, independently of the state law of appropriation, in quantities sufficient to irrigate all the irrigable acreage in each of the Reservations and to satisfy related uses. Arizona and California resist this claim. Arizona asserts that the quantity of water reserved for an Indian Reservation is no more than that amount necessary to satisfy the requirements of Indians living on the Reservation at any particular time. California also denies that the United States intended to reserve water for all irrigable lands on an Indian Reservation.[3]

This disagreement presents a justiciable controversy between the United States and the States of Arizona and California which ought to be adjudicated in this case in order

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[1]Ariz. Answering Brief, pp. 92-108.
[2]See Tr. 13796-13810.
[3]Calif. Brief, pp. 177-195; Calif. Response to U. S., pp. 112-127.

that the Secretary may know how much water he may release for consumption on each Indian Reservation. Thus in periods when there is insufficient water for the Secretary to fulfill all of his delivery obligations to users in a particular state, he will have to satisfy them according to priority. In such a case it will be necessary for him to know the rights and priorities of Indian Reservations as against other users within the state.[4] What these rights and priorities are can be determined only by resolving the controversy between the United States and the States of Arizona and California over the validity and scope of the reservations of mainstream water which the United States claims to have made. Indeed, if the Indian Reservations can acquire water rights only pursuant to state law, the Secretary may be prohibited from delivering any mainstream water to some of them since, so far as the evidence shows, some of the Reservations have never complied with the formalities required by the applicable state law in order to obtain a water right. Furthermore, the claims of the United States to water from the Colorado River for the benefit of Indian Reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects.

Since the Secretary cannot know how to operate Hoover Dam and the mainstream works below unless the controversy between the United States and the States of Arizona and California is resolved, since failure to adjudicate it will leave non-Indian users in doubt as to the water available for their use, and since this controversy has been prop-

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[4]It should be noted that, under similar circumstances, the Secretary may need to know the water rights intrastate of other users. In the case of the California agencies who are parties to this suit these rights are set out in the Seven-party Agreement. Such rights of other users not parties to this suit obviously cannot be determined herein.

erly presented in this case, it is appropriate to adjudicate it here.

The United States claims are sustained.

It has been established that the United States has the power to reserve water for the benefit of an Indian Reservation, created out of public lands, and that such a reservation of water creates a water right good against subsequent appropriators even if they beneficially use the water before the Reservation uses it. In short, the United States has the power to create a water right appurtenant to such lands without complying with state law. *Winters* v. *United States,* 207 U. S. 564 (1908), involved a suit by the United States on behalf of the Fort Belknap Indian Reservation, which was created by treaty between the United States and various Indian tribes on May 1, 1888. The land set apart for the Indians under the treaty was arid, but susceptible of sustaining agriculture if irrigated from the Milk River, a non-navigable stream which formed the northern border of the Reservation. The Court found that it was the intention of the United States and the Indians that the Indians should settle on the Reservation and change from a nomadic to a "pastoral and civilized people." 207 U. S., at 576. Subsequent to the establishment of the Indian Reservation, the defendants in the case acquired lands along the Milk River upstream from the Reservation under the Desert Land Act, 19 Stat. 377 (1877), by settling on the land and putting it to productive use by irrigation with water diverted from the Milk River. Some of the defendant farmers diverted water from the Milk River and obtained appropriative rights thereto under the Desert Land Act and the local law of Montana as early as 1895. 143 Fed. 740, 742 (1906). According to the opinion of the Circuit Court of Appeals, the Indians were diverting, at the time of trial, 5,000 miners' inches of water, most of which they began to use after appropriative rights of some of the defendants

had vested. The United States successfully sued to enjoin the upstream farmers from interfering with the flow of water to the Fort Belknap Reservation.

The Supreme Court affirmed the trial court's holdings that "there was reserved to said Indians the right to use the water of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty . . .," and that the defendants would be enjoined from interfering with the flow of 5,000 miners' inches of Milk River water to the Reservation. 143 Fed., at 743. The Supreme Court thus held that the reservation of water was effective as of the date that the Fort Belknap Reservation was created, 207 U. S., at 577, and that the appropriative rights obtained by the defendants subsequent to the time that the water was reserved but prior to the time that it was put to use on the Reservation were subordinate to the Reservation's rights.

The Supreme Court supported this result with the following reasoning, at p. 577:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years."

The *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water for its expanding needs. *United States* v. *Powers,* 305 U. S. 527 (1939); *United States* v. *Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U. S. 988 (1957); *United States*

v. *Walker River Irrigation District,* 104 F.2d 334 (9th Cir. 1939); *Conrad Investing Co.* v. *United States,* 161 Fed. 829 (9th Cir. 1908). In the *Winters* case the United States exercised its power to reserve water by a treaty; but the power itself stems from the United States' property rights in the water, not from the treaty power. Since the United States has the power to reserve water, by treaty, against appropriation under state law, there is no reason why it lacks the power to do so by statute or executive order. In the *Walker River* case, the Court of Appeals squarely held that the United States had reserved water for an Indian Reservation which had been created by executive order.

It is unnecessary, for the purposes of this case, to explore the origin or limits of such power to reserve water against subsequent appropriators. The authorities cited above sufficiently sustain the validity of such a reservation to preserve the Indians' rights here under consideration.

The question to be decided, therefore, as to each Indian Reservation which can divert water from the mainstream of the Colorado River is whether the United States exercised the power to reserve such water for the Reservation's future needs. As stated in the *Walker River* case, 104 F. 2d, at 336:

> "The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate. . . . The question is merely whether in this instance the power was exercised."

The United States need not expressly reserve waters for the benefit of an Indian Reservation; an implied reservation is effective. Indeed, in all of the cases cited above, including *Winters* v. *United States* itself, the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation. In the present case I have found that the

United States intended to reserve mainstream water for the reasonable future needs of the following Indian Reservations: Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave. As to each it is apparent that it was intended that the Indians would settle on the Reservation land and develop an agricultural economy. The land, however, is too arid to support such an economy without irrigation from the Colorado River. It would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable. I refuse to accept this possibility as to any of the mainstream Indian Reservations since there is no evidence as to any of them that such was the case. As the Court of Appeals stated in the *Walker River* case, at page 339: "It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."

Also, wherever I have found an intent to reserve water, I have inferred, absent evidence to the contrary, that the reservation was not limited to the needs of the population then resident upon the land, nor to the acreage being irrigated when the Reservation was created. I have concluded that enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian Reservation. Invariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations, and the possibility that other Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation. Since the Indians could remain

on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.

This conclusion comports with the holdings in the three cases decided by the Court of Appeals for the Ninth Circuit which are cited above. As that Court stated in *United States* v. *Ahtanum Irrigation District,* 236 F.2d 321, 327 (9th Cir. 1956):

> "It is plain from our decision in the *Conrad Investing Co.* case, *supra,* that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."

The conclusion reached here is also consistent with the holding in the *Winters* case that the upstream farmers could not interfere with uses on the Indian Reservation which were initiated subsequent to the farmers' diversions.

The suggestion is unacceptable that the United States intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law. The Indians were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservations. It must have been apparent that if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun. Rather than assuming that the United States intended to put the Indians in the position of having to leave their Reservations as their water needs increased if they were unable to satisfy these needs by acquiring appro-

priative rights under state law, I have concluded that reservations of water by the United States included enough to supply expanding needs regardless of state water law.

This brings us to the question of quantity. This is sharply debated, and many conflicting views have been advanced. I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses. The magnitude of the water rights created by the United States is measured by the amount of irrigable land set aside within a Reservation, not by the number of Indians inhabiting it. At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations, was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. It follows from this that the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all of the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy. This conclusion is also supported by the fact that the irrigable land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment. The only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future.

It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at the time that the land was needed for the purposes for which it was withdrawn.

Arizona argues that the United States reserved water for the Indians themselves and not for the lands withdrawn for a Reservation. Arizona seems to envisage that the United States intended to create water rights in gross which would fluctuate in magnitude as the Indian population and needs fluctuated, the water right being measured by the amount of water needed at any particular time by the Indians actually inhabiting a particular Reservation. As pointed out above, the more sensible conclusion is that the United States intended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights.

But even if Arizona were correct in her contention, the most feasible way to give full effect to the water rights created by the United States, as Arizona defines them, would be to decree to each Reservation enough water to irrigate all of the practicably irrigable acreage. It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements. Even if, as Arizona argues, the reservation of water was in gross for Indians and not Reservation lands, the Indians' needs may well increase in the future and these increased needs would have to be provided for. Thus, under the Arizona theory, there are two possible methods of framing the decree in this action, other than in terms of irrigable acreage.

One possibility would be to adopt an open-end decree, simply stating that each Reservation may divert at any

particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment. However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them. Since, under the Arizona theory, United States water rights vary with changes in Indian population, the planning of works to serve future needs would be difficult because the United States could never know whether sufficient water to operate the works economically would be legally available.

The other possibility, which would avoid the serious disadvantage of creating uncertainty as to the extent of the reserved rights, would be to predict the ultimate needs of each Reservation and to decree that much water for its future uses. The shortcoming of this solution, however, lies in the difficulty of predicting the future needs of Indian Reservations. Failure to foresee expanding requirements would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations. Whether it is ever possible accurately to predict the future needs of an Indian Reservation, it is clearly not possible in this case where the attention of the parties has been directed to a great many complex and important issues quite apart from those relating to the Indians. Whatever might be possible in a case involving solely the issue of the reserved rights of a

single Indian Reservation,[5] it would not be possible to predict future Reservation needs in this litigation.

Therefore, the most feasible decree that could be adopted in this case, even accepting Arizona's contention, would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation and to satisfy related stock and domestic uses. This will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users.

The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. The question of change in the character of use is not before me. I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation.

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[5]Even in such cases, courts have not attempted to bind the Indians on the basis of a prediction as to future needs. See Conrad Investment Co. v. United States, 161 Fed. 829 (9th Cir. 1908).

The water rights established for the benefit of the five Indian Reservations and enforced in the recommended decree are similar in many respects to the ordinary water right recognized under the law of many western states: They are of fixed magnitude and priority and are appurtenant to defined lands. They may be utilized regardless of the character of the particular user. Thus Congress has provided for the leasing of certain Reservation lands to non-Indians,[6] and these lessees may exercise the water rights appurtenant to the leased lands. *Skeem* v. *United States,* 273 Fed. 93, 96 (9th Cir. 1921). The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow. See *United States* v. *Powers,* 305 U. S. 527 (1939).

[6]See 26 Stat. 794 (1891), 31 Stat. 229 (1900), 39 Stat. 128 (1916), 41 Stat. 1232 (1921) and, the general leasing statute presently in force, 69 Stat. 539 (1955), 25 U. S. C. § 415 (Supp. 1959), 25 U. S. C. §§ 415a-d (1958).

1. *Chemehuevi Indian Reservation*

FINDINGS OF FACT

1. The Chemehuevi Indian Reservation was established by an order of withdrawal from entry made by the Secretary of the Interior dated February 2, 1907.[7]

2. In withdrawing lands for the Chemehuevi Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses.[8]

3. There are 1,900 acres of irrigable Reservation land all located within the State of California which, together with related uses, have a maximum annual diversion requirement of 11,340 acre-feet.[9]

CONCLUSION OF LAW

For the benefit of the Chemehuevi Indian Reservation, the United States has the right to the annual diversion of a maximum of 11,340 acre-feet of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever is less, with a priority of February 2, 1907.

2. *Cocopah Indian Reservation*

FINDINGS OF FACT

1. The Cocopah Indian Reservation was established by an Executive Order of September 27, 1917.[10]

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[7]U. S. Ex. 1201. This withdrawal was made pending congressional approval. Although the United States has not furnished evidence of such congressional action, I have assumed, absent evidence to the contrary, that approval was given.

[8]U. S. Exs. 1201, 1204, 1205, 1207.

[9]U. S. Ex. 1210.

[10]U. S. Ex. 1001.

2. In withdrawing lands for the Cocopah Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses.[11]

3. Colorado River water is delivered to the Reservation lands through the facilities of the Yuma Reclamation Project.[12]

4. There are 431 acres of irrigable Reservation land all located within the State of Arizona which, together with related uses, have a maximum annual diversion requirement of 2,744 acre-feet.[13]

CONCLUSION OF LAW

For the benefit of the Cocopah Indian Reservation, the United States has the right to the annual diversion of a maximum of 2,744 acre-feet of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever is less, with a priority of September 27, 1917.

3. *Yuma Indian Reservation*

FINDINGS OF FACT

1. The Yuma Indian Reservation was established by an Executive Order of January 9, 1884.[14]

2. In withdrawing lands for the Yuma Indian Reservation the United States intended to reserve rights to the use

[11] *Ibid.*, U. S. Exs. 258, pp. 386-387; 510, p. 301; 513, p. 152.
[12] Tr. 14020 (Rupkey); U. S. Ex. 1006.
[13] U. S. Ex. 1009.
[14] U. S. Ex. 1101.

of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses.[15]

3. There are 7,743 acres of irrigable Reservation land all located within the State of California which, together with related uses, have a maximum annual diversion requirement of 51,616 acre-feet.[16]

CONCLUSION OF LAW

For the benefit of the Yuma Indian Reservation, the United States has the right to the annual diversion of a maximum of 51,616 acre-feet of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever is less, with a priority of January 9, 1884.

4. *Colorado River Indian Reservation*

FINDINGS OF FACT

1. The Colorado River Indian Reservation was established by an Act of March 3, 1865 (13 Stat. 541, 559) which set apart 75,000 acres in the Territory of Arizona for an Indian Reservation.[17]

2. By an Executive Order of November 22, 1873, adjoining bottom lands in the Territory of Arizona were added to the Reservation.[18]

3. By an Executive Order of November 16, 1874, the Reservation was enlarged to include lands on the westerly side

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[15] *Ibid.*, U. S. Exs. 258, p. 387; 512, p. 20.
[16] U. S. Ex. 1121.
[17] U. S. Ex. 501.
[18] U. S. Ex. 503.

of the Colorado River in the State of California. The boundaries were defined as follows:

> "Beginning at a point where the La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said crest of mountain in a northerly direction to the top of Black Mountain; thence in a northwesterly direction across the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning. . . ."[19]

4. On January 31, 1876, the United States Indian Agent reported to the Commissioner of Indian Affairs that the boundaries as defined by the Executive Order of 1874 crossed the Colorado River twice and cut off a large tract of land on the east side of the River which was being settled by non-Indians for unlawful and improper purposes. The Agent requested that an Executive Order be obtained making the Colorado River the boundary line. The Commissioner of Indian Affairs and the Secretary of the Interior approved the recommendation that the boundary be redefined.[20]

5. Thereafter, on May 15, 1876, an Executive Order issued which redefined the boundaries of the Reservation and which contained the following description of the western boundary:

> ". . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning *to the*

[19]U. S. Ex. 504.
[20]U. S. Exs. 505A, 505B, 505C.

west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning. . . ." (italics added)[21]

6. The southern boundary of the Reservation was subsequently adjusted by an Executive Order of November 22, 1915.[22]

7. In withdrawing lands for the Colorado River Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses.[23]

8. Except at one point, the Colorado River now flows east of its 1876 course.[24]

9. The "Olive Lake Cut-off" was constructed across the neck of a large loop in the existing channel of the Colorado River in 1920. By 1921, the entire river flow passed through the new channel.[25]

10. As a result of this cut-off the River now flows east of its 1920 course.[26]

11. There are 2,058 acres of irrigable Reservation land lying west of the present west bank of the Colorado River and east of the west bank of the River as it existed in 1920 prior to the "Olive Lake Cut-off."[27]

12. The "Ninth Avenue Cut-off" was constructed across the neck of a loop in the existing channel of the Colorado

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[21]U. S. Ex. 505.
[22]U. S. Ex. 506.
[23]See U. S. Exs. 501, 503-507, 513.
[24]See U. S. Ex. 560.
[25]Tr. 20121-20128 (Engle).
[26]U. S. Ex. 592.
[27]Tr. 20211-20212 (Rupkey); U. S. Ex. 592.

River in 1943. By February, 1944, 80-90% of the River flowed through the cut and, after August 1944, substantially all of the river flow passed through the new channel. As a result of this cut-off the River now flows east of its 1943 course.[28]

13. There are 222 acres of irrigable Reservation land lying west of the present west bank of the Colorado River and east of the west bank of the River as it existed in 1943 prior to the "Ninth Avenue Cut-off."[29]

14. There are 5,933 acres of irrigable Reservation land in the Northern West Side Area to the north of the intersection of the Reservation's westerly boundary and the west bank of the Colorado River.[30]

15. Thus there is an aggregate of 8,213 acres of irrigable Reservation land west of the present west bank of the Colorado River which, together with related uses, have a maximum annual diversion requirement of 54,746 acre-feet.[31]

16. There are 99,375 acres of irrigable Reservation land east of the present west bank of the Colorado River which, together with related uses, have a maximum annual diversion requirement of 662,402 acre-feet.[32]

17. Thus there is an aggregate of 107,588 acres of irrigable Reservation land which, together with related uses, have a maximum annual diversion requirement of 717,148 acre-feet.

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[28]Tr. 20171-20181 (Wilson); U. S. Exs. 590-592.
[29]Tr. 20215 (Rupkey); U. S. Ex. 592.
[30]Calif. Ex. 3546; U. S. Ex. 570.
[31]*Ibid.*
[32]*Ibid.* This includes 461 acres of land formed by accretion. Tr. 20216 (Rupkey); U. S. Ex. 592.

CONCLUSIONS OF LAW

1. The Executive Order of 1876 established the west bank of the Colorado River as the western boundary of the Colorado River Indian Reservation.

2. The Executive Order of 1876 established a boundary which changes as the course of the Colorado River changes, except when such changes are due to avulsion.

3. In the case of avulsion, the boundary remains at the west bank of the River as it existed immediately prior to the avulsive change.

4. The west bank, along which the boundary line is drawn, is the fast land along the west side of the Colorado River which serves to confine the waters within the bed and tends to preserve the course of the River. In the case of avulsion, the west bank, along which the boundary line is drawn, is the fast land along the west side of the former course of the River which served to confine the waters within the bed and tended to preserve the course of the River immediately prior to the avulsive change.

5. The 1920 "Olive Lake Cut-off" was an avulsion and worked no change in the western boundary of the Colorado River Indian Reservation.

6. The 1943 "Ninth Avenue Cut-off" was an avulsion and worked no change in the western boundary of the Colorado River Indian Reservation.

7. For the benefit of the Colorado River Indian Reservation, the United States has the right to the annual diversion of a maximum of 717,148 acre-feet of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for irriga-

tion of 107,588 acres and for the satisfaction of related uses, whichever is less, with priority dates of March 3, 1865 for lands reserved by the Act of March 3, 1865 (13 Stat 541, 559); November 22, 1873, for lands reserved by the executive order of said date; November 16, 1874, for lands reserved by the executive order of said date, except as later modified; May 15, 1876 for lands reserved by the executive order of said date; November 22, 1915 for lands reserved by the executive order of said date.[33]

BOUNDARY DISPUTE—OPINION

A dispute concerning a portion of the west boundary of the Colorado River Indian Reservation arose between the United States and California when the United States sought to establish irrigable acreage within that Reservation. An Executive Order of May 15, 1876,[34] established the "west bank of the Colorado River" as the boundary of the Reservation. The United States contends that this language established a permanent, unchanging boundary defined by the west bank of the River as it existed in 1876.[35] California contends that the language established a changing boundary, defined by the west bank of the River as it may exist at any point of time.[36] Since the Colorado River has in this area moved eastward since 1876, California's contention, if sustained, would reduce the amount of irrigable acreage within the Reservation below the amount claimed by the United States.

In the alternative, the United States contends that if the west bank of the River as it presently exists is held to be the correct boundary, then certain land west of the present

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[33]The evidence does not permit greater specificity regarding priority.

[34]U. S. Ex. 505.

[35]U. S. Brief, pp. 31-35.

[36]Calif. Proposed Findings and Conclusions 18D: 112-18D: 209.

west bank should nevertheless be held to be within the Reservation, since two changes in the course of the river were caused by avulsion. The United States points to two artificial changes made in the channel of the River, both of which eliminated large loops or horseshoes in the river and caused its channel to move to the east. If the United States contention is accepted, the irrigable acreage in the Reservation will be somewhat greater than California concedes.

I hold that California is correct in its assertion that the present boundary of the Reservation is the west bank of the River as it now exists, but that the United States is correct in claiming that the two artificial channel changes were avulsive and that such changes did not affect the Reservation's western boundary.

The call in the Executive Order of 1876 "to the west bank of the Colorado River; thence down said west bank" clearly established the west bank of the River as the boundary line. *Alabama* v. *Georgia,* 64 U. S. (23 How.) 505 (1859); *Howard* v. *Ingersoll,* 54 U. S. (13 How.) 380 (1851). That bank is defined as the fast land along the west side of the Colorado River which serves to confine the waters within the bed and tends to preserve the course of the River.[87] See *Oklahoma* v. *Texas,* 260 U. S. 606, 631-32 (1923); *Howard* v. *Ingersoll, supra,* at 416.

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[87]The United States claims 1800 acres lying on the west side of the present channel of the River but east of the 1876 west bank (*i.e.* the lands in question lie roughly between the old channel and the present channel of the River). This contention seems to be based on the proposition that the 1876 west bank and the present west bank are the same, because in an unregulated state, the River would extend to the 1876 line. See U. S. Finding 4.4.102; Tr. 20068-20069. However, it is clear that the flow of the River does not now in fact extend to the 1876 line. *Id.* See also U. S. Exs. 560, 562. Since "bank" is defined as the fast land that serves to confine the waters of the stream to its bed, the 1876 line does not represent the present west bank of the River. Hence the 1800 acres, which lie west of the present west bank of the River, are outside the boundaries of the Reservation, and the claim of water therefor is disallowed.

It is equally clear that the boundary established along the west bank changes as the course of the River changes, except in cases of avulsion. In *Oklahoma* v. *Texas, supra,* the Court defined the south bank of the South Fork of the Red River, which was the boundary between Oklahoma and Texas. After setting forth its definition of the south bank the Court said:

> "The boundary as it was in 1821, when the treaty became effective, is the boundary of today, subject to the right application of the doctrine of erosion and accretion and of avulsion to any intervening changes."[38]

There is substantial evidence that the Executive Order of 1876 did not intend to establish a fixed boundary and, certainly, a flexible boundary is not inconsistent with the purpose of the Order, which was to prevent the acquisition by non-Indians of land proximate to Indian land on the east side of the River.[39] The evidence establishes that various officers and departments of the United States have considered the Colorado River itself and not the 1876 meander line to be the western boundary of the Reservation.[40]

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[38]260 U. S., at 636. *Cf.* Railroad Co. v. Schurmeir, 74 U. S. (7 Wall.) 272 (1868); United States v. Boynton, 53 F.2d 297 (9th Cir. 1931); United States v. 11,993.32 Acres of Land More or Less, 116 F. Supp. 671 (D. N. D. 1953).

[39]See U. S. Exs. 505A, 505B, 505C.

[40]Various maps prepared by agencies of the United States (General Land Office; Office of Indian Affairs; Indian Irrigation Service) show no Indian land west of the River in the disputed area. Calif. Exs. 3532-3534.

In acquiring land for the construction of Palo Verde Dam, the Palo Verde Irrigation District was required by Congress to furnish easements over land other than that owned by the United States or within the Reservation. The United States was required to pay for Indian land conveyed by the Secretary of the Interior. 68 Stat. 1045 (1954). A portion of the land over which an easement was granted by Palo Verde lay east of the 1876 meander line and west of the course of the River. A portion of the land paid for by the United

Evidence of such an understanding by officers and departments of the United States may properly be considered in determining the intent of the Executive Order of 1876. See *Stewart* v. *United States,* 316 U. S. 354 (1942); *cf. United States* v. *Hill,* 120 U. S. 169 (1887). In *Stewart* v. *United States,* Mr. Justice Roberts, in interpreting the extent of a Mexican grant under which the United States claimed title, considered various maps and charts prepared by United States officers and departments subsequent to the grant as probative of the amount of land to which the United States obtained title.

Finally, the understanding of the various officers and departments of the United States that the 1876 Executive Order did not establish a fixed boundary at the 1876 meander line was apparently shared by the defendant Palo Verde Irrigation District which has, for various periods of time beginning in 1927, assessed lands within the disputed area for purposes of taxation.[41] It is also worthy of note that no evidence was introduced to demonstrate that the United States has ever asserted title to the area in controversy prior to this litigation.

It having been concluded that the west bank of the River, as presently located, is the boundary of the Reservation, the question arises of avulsive changes in the course of the River since 1876. An avulsive change is a sudden,

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States and conveyed by the Secretary lay west of the 1876 meander line and east of the course of the River. Tr. 20269-20274; Calif. Exs. 3535-3537. It is at this point that the River flows west of the 1876 meander line. Calif. Ex. 3537.

In 1934 the California Department of Public Works obtained a right of way for construction of what later became United States Highway 95. Although the State was required to pay for Indian land traversed by the project, California was not required to pay for land lying in the disputed area. The United States officials involved in the various stages of the transaction were the Secretary of Agriculture, the Secretary of the Interior, the Commissioner of the General Land Office and the Superintendent of the Colorado River Indian Agency. Tr. 20305-20309; Calif. Exs. 3543-3543G.

[41] Tr. 20435-20439 (Shipley); Calif, Ex. 3547.

perceptible change in the course of a river; it does not affect existing boundaries. See, e.g., *Missouri* v. *Nebraska,* 196 U. S. 23 (1904); *Nebraska* v. *Iowa,* 143 U. S. 359 (1892). The doctrine of avulsion includes both natural changes in course and changes caused by artificial means. *Arkansas* v. *Tennessee,* 246 U. S. 158, 173 (1918); *cf. County of St. Clair* v. *Lovingston,* 90 U. S. (23 Wall.) 46, 68 (1874).

The United States seeks to invoke the doctrine of avulsion with respect to two artificial changes in the course of the Colorado River in the area in question. I find that in the period 1920-1921, a man-made change in the Olive Lake reach of the River caused the River to change course to the east, and I further find that a similar artificial change in the course of the River was made in the period 1943-1944 by the so-called "Ninth Avenue Cut-Off" in the Palo Verde Valley. Both of these changes being avulsive, the land that now lies west of the present west bank of the River but east of the west bank as it existed before these changes occurred is Reservation land and should be counted in determining the amount of irrigable acreage within the Reservation.

With reference to these avulsive changes, California requests that the findings, conclusions and decree specifically disclaim any intention to pass on land titles of occupants of these areas. Of necessity, a determination of the amount of irrigable acreage within the Reservation and the consequent award of a quantity of water based on this determination requires adjudication of the boundaries of the Reservation. The findings herein made are therefore binding on the parties. Nevertheless, in the hearings and in this Report, I did not inquire into or determine the right of any occupant, whoever he might be, to the possession of lands within the questioned areas.

5. *Fort Mohave Indian Reservation*

FINDINGS OF FACT

1. The Hay & Wood Military Reserve at Camp Mohave was created by an Executive Order of March 30, 1870, as follows:

> "The reservations at Camps *Mojave, Verde, Date Creek, McDowell, Grant, Bowie* and *Crittenden,* Arizona, as described in the accompanying plats and notes of survey—approved by the *Secretary of War,* are made for military purposes, and the *Secretary of the Interior* will cause the same to be noted in the General Land Office to be reserved as military posts."[42]

2. The western boundary of the Reserve was defined by the notes of survey as follows:

> "Thence S. 76° 17′ 28″ W.228.50 chains to a post marked U. S. in mound of earth near the left bank of the Colorado River. Thence N.23° 01′ 32″ W.362.70 chains to a post marked U. S. in a mound of earth near the left bank of the Colorado River. Thence S.88° 45′ 32″ E.369.00 chains to the post at the point of commencement. The said boundaries containing 9114.81 acres, more or less."[43]

3. When laid out, the call to the artificial monuments and the calls for specified courses and distances conflict. Adherence to the latter would require a boundary line in the foothills to the west of the Colorado River. The call to monuments would fix a line at or near the left or east bank of the River.[44]

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[42]U. S. Ex. 1323.

[43]*Ibid.*

[44]Tr. 20240; Calif. Ex. 2616, pp. 8-9.

4. An Executive Order of September 18, 1890, transferred the Fort Mohave Military Reservation, which included the Hay & Wood Military Reserve, to the Department of the Interior for Indian school purposes.[45] This Reservation is presently known as the Fort Mohave Indian Reservation.

5. An Executive Order of February 2, 1911, which superseded an Order of December 1, 1910, reserved additional lands for the Reservation.[46]

6. In 1896, pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850); 43 U. S. C. §§ 982-984 (1958)], the United States conveyed lands to California, some of which lay in the area in dispute in this case. These lands were subsequently conveyed to private owners prior to 1928.[47]

7. In 1923, pursuant to the Act of July 27, 1866 (14 Stat. 292), the United States conveyed certain lands in the disputed area to the Southern Pacific Railroad.[48]

8. In 1928, the United States Field Surveying Service, under the direction of the General Land Office, surveyed the boundaries of the Fort Mohave Indian Reservation. The survey was approved by the General Land Office in 1931.[49]

9. The 1928 General Land Office survey resolved the conflict between the call to the monuments and the calls for specified courses and distances in favor of the former.[50]

10. The locations of the monuments defining the western boundary of the Hay & Wood Reserve, which now con-

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[45]U. S. Ex. 1303.
[46]U. S. Exs. 1304-1305.
[47]Calif. Ex. 3511.
[48]Tr. 20367-20369 (Pratt); Calif. Ex. 3512.
[49]Calif. Exs. 2611, 2616.
[50]Calif. Ex. 2616, pp. 4, 7-9.

stitutes part of the western boundary of the Fort Mohave Indian Reservation, were established by the 1928 General Land Office survey by reference to a survey map of the Reserve, dated 1870, and set forth in California Exhibit 3501.[51]

11. The 1870 map of the Hay & Wood Reserve, to which reference was made in surveying the western boundary of the Reserve in 1928, is one of the plats which accompanied the Executive Order of March 30, 1870.[52]

12. In withdrawing lands for the Fort Mohave Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses.[53]

13. There are 14,916 acres of irrigable Reservation land in the State of Arizona which, together with related uses, have a maximum annual diversion requirement of 96,416 acre-feet.[54]

14. There are 2,119 acres of irrigable land in the State of California and within the exterior boundaries of the Reservation as determined by the 1928 General Land Office survey, exclusive of the tract covered by the patents referred to in Finding 6. A portion of the 2,119 acres may be land which has accreted to patented land which was riparian to the Colorado River at the time of patent and such land shall not be included within the Reservation. The 2,119 acres, together with related uses, have a maximum annual diversion requirement of 13,698 acre-feet, said maximum diversion requirement to be reduced by the

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[51]Calif. Exs. 2616, pp. 3, 8-9; 3501.
[52]See T. 20343-20346 (Pratt); U. S. Ex. 1323.
[53]See U. S. Exs. 520, 1205, 1303-1305, 1308-1310.
[54]Calif. Ex. 3517; U. S. Ex. 1322.

quantity of 6.4 acre-feet per acre of irrigable accreted lands owned by owners of such patented lands.[55]

15. There are 1,939 acres of irrigable Reservation land in the State of Nevada which, together with related uses, have a maximum annual diversion requirement of 12,534 acre-feet.[56]

16. There is, in the aggregate, a maximum of 18,974 acres of irrigable Reservation land which, together with related uses, have a maximum annual diversion requirement of 122,648 acre-feet. There should be subtracted from this 18,974 acres of irrigable land the number of irrigable acres within the exterior boundaries of the Reservation as determined by the 1928 General Land Office survey that have accreted to patented lands and that are owned by the owners of such patented lands, and the diversion requirement of 122,648 acre-feet is to be reduced by the amount of 6.4 acre-feet per acre of such land that is irrigable.[56a]

CONCLUSIONS OF LAW

1. The General Land Office had jurisdiction to survey the boundaries of the Fort Mohave Indian Reservation.

2. The General Land Office survey of 1928 is conclusive as to the western boundary line of the Hay & Wood Reserve of the Fort Mohave Indian Reservation.

3. The call to artificial monuments prevails over conflicting calls for courses and distances or acreage specified in the notes of survey accompanying the Executive Order of March 30, 1870.

4. The General Land Office survey of 1928 adequately located the western boundary of the Hay & Wood Reserve

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[55]Calif. Ex. 3517; Tr. 20375-20376. See also Calif. Ex. 3515; U. S. Exs. 1320, 1322.

[56]Calif. Ex. 3517; U. S. Ex. 1322.

[56a]The evidence does not permit greater specificity regarding irrigable acreage.

by reference to the artificial monuments called for and, therefore, established the correct western boundary of that portion of the Fort Mohave Indian Reservation.

5. Lands lying between the correct western boundary of the Reserve and the Colorado River which have been patented pursuant to congressional authorization, as well as any accretions thereto to which the owners of such land may be entitled, shall not be included in the irrigable acreage of the Fort Mohave Indian Reservation.

6. For the benefit of the Fort Mohave Indian Reservation, the United States has the right to the annual diversion of a maximum of 122,648 acre-feet of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever is less, with priority dates of September 18, 1890, for lands transferred by the executive order of said date; February 2, 1911 for land reserved by the executive order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850)], as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292) shall not be included within the above described rights.[57]

BOUNDARY DISPUTE—OPINION

A dispute concerning the western boundary of the Hay & Wood Reserve of the Fort Mohave Indian Reservation arose when the United States attempted to establish irrigable acreage within the Reservation. The Hay & Wood

[57]The evidence does not permit greater specificity regarding priority.

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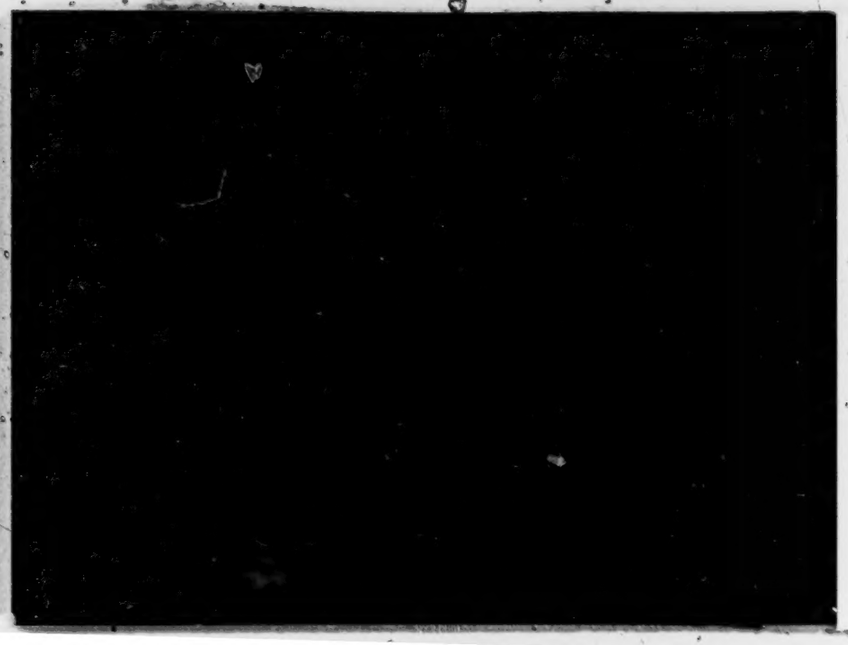

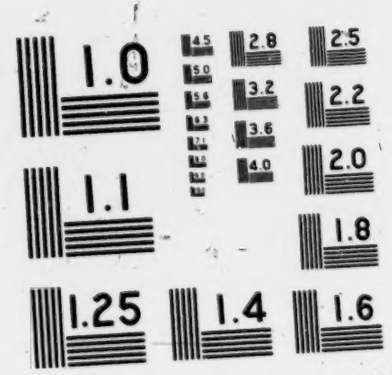

Reserve was initially established as a military post by an Executive Order of 1870,[58] and the western boundary thereof was described in notes of survey accompanying the order. When laid out on the ground the calls in the notes of survey conflict. The call to artificial monuments in the notes of survey would place the western boundary on a line near the east bank of the Colorado River, but the call for courses and distances in the notes of survey would place the boundary farther west, in foothills west of the River. In 1928, a General Land Office survey resolved this conflict in favor of the call to the artificial monuments, thus establishing the boundary on the east side of the Colorado River. California contends that the 1928 survey correctly establishes the western boundary of the Hay & Wood Reserve portion of the Reservation.[59] The United States contends that the proper boundary is farther west, as prescribed by the calls for courses, distances and acreage given in the 1870 notes of survey.[60] The California contention is sustained. In my view the 1928 General Land Office survey is conclusive of the boundary location, and, in any event, the 1928 survey is the best evidence of the proper location of the boundary and, therefore, the correct boundary is as determined therein.

It has been established beyond question that a General Land Office survey, when made within the jurisdiction of that department, is conclusive and cannot be collaterally assailed. *United States* v. *Coronado Beach Co.*, 255 U. S. 472 (1921); *Stoneroad* v. *Stoneroad*, 158 U. S. 240 (1895); *Knight* v. *United States Land Assoc.*, 142 U. S. 161 (1891); *Cragin* v. *Powell*, 128 U. S. 691 (1888); *Smelting Co.* v. *Kemp*, 104 U. S. (14 Otto) 636 (1881);

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[58]U. S. Ex. 1323.

[59]Calif. Proposed Conclusion 18E:204.

[60]Memorandum of United States Re Fort Mohave Indian Reservation Boundary (December 1958) (*passim*); see U. S. Finding 4.58.

Beard v. *Federy,* 70 U. S. (3 Wall.) 478 (1865). In *Cragin* v. *Powell, supra,* the Court said:

> " . . . the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases . . . are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."[61]

It is equally clear that the 1928 survey was made within the jurisdiction of the General Land Office. At the time of the survey that department was vested with authority to supervise the surveying and sale of the public lands of the United States. Rev. Stat. § 453 (1875). Moreover, by Section 6 of the Act of April 8, 1864, the Congress provided that:

> " . . . hereafter, when it shall become necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the general land-office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed."[62]

A General Land Office survey of an Indian Reservation made pursuant to this statute has been held not subject to collateral attack. *French* v. *United States,* 49 Ct. Cls. 337 (1914).

Even if the 1928 survey is not conclusive as to the correct western boundary of the Hay & Wood Reserve, it nevertheless constitutes the best and most substantial

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[61] 128 U. S., at 698-99.

[62] 13 Stat. 41 (1864); 25 U.S.C. § 176 (1958).

evidence of the western boundary as established by the Executive Order of March 30, 1870, and the accompanying notes of survey.

Because the description of the western boundary is internally inconsistent justification exists for resort to applicable rules of construction. These rules are clear. Generally, monuments, whether artificial or natural, prevail over courses and distances or acreage for the purpose of determining the location of a boundary,[63] and quantity is less reliable than any other element of description, particularly where the words "more or less" are added.[64] The 1928 Survey applied these principles, giving control to the call for monuments in the 1870 notes of survey. Thus, if the 1928 survey properly located these monuments, it correctly established the boundary of the Reservation.

The field notes of the 1928 survey[65] demonstrate that the surveyor, in attempting to establish the width of the Colorado River as of 1869 for purposes of locating the monuments, referred to "the official map" of the Hay & Wood Reserve. He then restored the monuments for the purposes of the survey with the aid of that "official map."[66] The "official map" could only have been the 1870 map of the Reserve which is California Exhibit 3501. The surveyor was aware of the 1869 survey upon which the 1870 map was based.[67] Indeed, he indicated knowledge of only one other survey[68] and that survey purports only to represent

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[63]United States v. Investment Co., 264 U. S. 206 (1924); Ayers v. Watson, 113 U. S. 594 (1885); Land Co. v. Saunders, 103 U. S. (13 Otto) 316 (1880); Higueras v. United States, 72 U. S. (5 Wall.) 827 (1864); Kruger & Birch Inc. v. DuBoyce, 241 F.2d 849 (3d Cir. 1957); County of St. Clair v. Lovingston, 90 U. S. (23 Wall.) 46, 62 (1874) (dictum); Patton on Titles §§ 149-50 (1957); 6 Thompson on Real Property § 3327 (1940).

[64]6 Thompson on Real Property § 3344 (1940).

[65]Calif. Ex. 2616.

[66]Calif. Ex. 2616, pp. 8-9.

[67]Calif. Ex. 2616, p. 3.

[68]*Ibid.*

certain lands in the State of Arizona.[69] Other evidence compels the conclusion that the "official map" (California Exhibit 3501) referred to in making the 1928 survey was the Fort Mohave plat accompanying the Executive Order of March 30, 1870.[70]

Because the 1928 General Land Office survey located the western boundary of the Reserve by reference to the map set forth as California Exhibit 3501, which map accompanied the Executive Order of March 30, 1870, it can safely be said that the 1928 survey adequately identified the location of the monuments and that the boundary line set forth therein is the correct western boundary of the Hay & Wood Reserve of the Fort Mohave Indian Reservation.

Manifestly, lands within the disputed area which have been patented pursuant to Congressional authorization cannot be considered as part of the irrigable acreage of the Reservation, title having passed from the United States. See *United States* v. *State Investment Co.*, 264 U. S. 206, 212 (1924).

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[69]Tr. 20326-20328 (Pratt); Calif. Ex. 3518.

[70]U. S. Ex. 1323.

The map is dated February 1870; the survey upon which it was based was made in 1869; and the letter requesting withdrawal, dated March 12, 1870, transmitted a plat of the Hay & Wood Reserve. *Ibid.* Moreover, California Exhibit 3501 was drawn by military engineers at the Head Quarters Department, California, and the letter requesting withdrawal was written by the United States Military Commander at San Francisco. In addition, the courses and distances and acreage specified in a table on the map correspond exactly to those set forth in the notes of survey accompanying the Executive Order of 1870. Tr. 20343-20344 (Pratt). *Compare* Calif. Ex. 3501 *with* U. S. Ex. 1323. Finally, the southwest and northwest corners of the tract shown on the map correspond to courses and distances specified in the notes of survey and the plat could be prepared from the description given in the notes of survey. Tr. 20344-20346 (Pratt).

6. *Coachella Indian Reservations*

FINDINGS OF FACT

1. An agreement between the Coachella Valley County Water District and the Secretary of the Interior provides:

> "After any major part of such irrigation distribution system and drainage works has been turned over to the District for care, operation and maintenance, the District shall deliver water to the lands within Improvement District No. 1 that are listed on Schedule A [the Indian lands] and that can be irrigated through such part of the system under the same conditions, rules, regulations, to the same extent, without discrimination, and for the same charges, including standby charges, as water is delivered by the District to other lands similarly located within the District. . . ."[71]

2. The agreement became effective upon the enactment of the Act of August 28, 1958. (72 Stat. 968)

3. There is no evidence that any major part of the extension of the irrigation system has been turned over to the District as provided in the agreement above cited.

4. There is no evidence that the District has repudiated the agreement or has in any way threatened to violate it.

CONCLUSION OF LAW

There is no controversy between the United States and the Coachella Valley County Water District with respect to an obligation to deliver water to the Indian Reservations within said District which requires adjudication at this time.

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[71]U. S. Ex. 2510C.

OPINION

The United States claims the right to the use of a certain quantity of Colorado River water, through the facilities of the Coachella Valley County Water District, for the irrigation of a specified number of irrigable acres of the Cabazon, Augustine and Torres-Martinez Indian Reservations located within the District.[72] This claim is based upon the Boulder Canyon Project Act, various federal statutes and several contracts to which the Coachella Valley County Water District is a party.

It is clear that the geographic relationship of these Reservations to the Colorado River—they are outside the River's drainage basin—leaves no room for a presumption, absent a specific showing, that the United States intended to reserve water from the Colorado River for use on these Reservations. Indeed, the United States does not rely on the "reservation" theory in claiming water for these Reservations.

The Boulder Canyon Project Act does not specifically invest the Coachella Reservations, or indeed any Indian Reservation, with rights to water from the Colorado River. Nor can any such rights be reasonably inferred from the Act's authorization of the Secretary of the Interior to deliver water to the Coachella Valley.

The same conclusion follows upon examination of two contracts between the Coachella Valley County Water District and the United States dated 1934 and 1947. The 1934 contract[73] provides for the construction of Imperial Dam and the All-American Canal for the benefit, *inter alia,* of lands within the Coachella Valley. The 1947 contract[74] provides for the construction of distribution and drainage

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[72]See U. S. Proposed Conclusion 4.9.
[73]Ariz. Ex. 36
[74]Calif. Ex. 309.

works for the benefit of lands within the Coachella Service Area. Neither of these contracts purports in any manner to deal with water rights of the Coachella Indian Reservations and they cannot form the basis for assertion of such rights.

The Act of August 25, 1950, 64 Stat. 470[75] is of no aid either. That statute directs the Secretary of the Interior to designate the lands of the Coachella Reservations which could be irrigated by the facilities of the Coachella Valley County Water District and authorizes him to enter into a contract with the District for the benefit of the Indian lands. The Act does not create rights to water in favor of the Indians; it merely serves as a preliminary step towards possible acquisition of rights. It is apparent, therefore, that up to and including 1950 the Coachella Reservations had no enforceable right to water from the Colorado River.

In 1957 the Coachella Valley County Water District entered into an agreement[76] with the Secretary of the Interior whereby the Secretary undertook to construct irrigation distribution works connected to the District's system to serve Indian lands designated by the Secretary. Paragraph 5 of the contract provides as follows:

> "After any major part of such irrigation distribution system and drainage works has been turned over to the District for care, operation, and maintenance, the District shall deliver water to the lands within Improvement District No. 1 that are listed on Schedule A and that can be irrigated through such part of the system under the same conditions, rules, and regulations, to the same extent, without discrimination, and for the same charges, . . . as water is delivered by the District to other lands similarly located within the District. . . ."

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[75]Calif. Ex. 254.
[76]U. S. Ex. 2510C.

The agreement was to become effective when the Congress authorized the Secretary to fulfill the obligations undertaken by him. Authorization was given by the Act of August 28, 1958.[77]

From the foregoing it is clear that rights of the Coachella Reservations to water from the Colorado River can be derived only from the 1957 contract between the Secretary and the District. But there has been no showing that the Indian distribution system has been constructed. Nor has it been established that "any major part of such irrigation distribution system . . . has been turned over to the District. . . ." The obligation of the District to deliver water to the Coachella Reservations under the contract with the Secretary, therefore, cannot be said to have matured. Thus, there is no occasion on the facts and circumstances presented for a determination of what rights may accrue to the Coachella Reservations should the District become obligated to deliver water to them in the future.

B. National Forests, Recreation Areas, Parks, Memorials, Monuments and Lands Administered By the Bureau of Land Management

The United States claims water rights for its "forests, parks, monuments, memorial, recreation area and lands under the jurisdiction of the United States Bureau of Land Management in the lower Colorado River Basin," both under state law and by reservation of water for each project when that project was established.[78] I have concluded that it is not necessary or appropriate to determine various water rights under state law in this litigation, see pages 216-218, *supra,* nor to determine water rights on

[77]72 Stat. 968.
[78]U. S. Brief, pp. 56-61.

tributaries other than the Gila River, see pages 318-321, 323-324, *infra*. The United States' interests on the Gila are disposed of in a subsequent section of this Report.

Therefore, it is necessary to treat here only the single national recreation area which presently diverts water from the Colorado River. Except for the Lake Mead National Recreation Area, no National Forests, Parks, Monuments, Memorials or lands administered by the Bureau of Land Management divert water from the mainstream of the Colorado River.[79] The United States does not claim water specifically from the Colorado River for any of its Forests, Parks, Monuments, Memorials, or lands administered by the Bureau of Land Management; rather it proposes conclusions of law to the effect that the United States establishments have rights to the water generally available in the Lower Basin.[80] I think it would be inappropriate to predict which of such federal establishments might attempt to utilize water from the mainstream in the future. It may well be that none of the others will ever need to use mainstream water and there would be no point in determining their rights to this water until it appears that it may be necessary to exercise those rights.

It is necessary to adjudicate the water rights of the Lake Mead National Recreation Area for the same reason that the rights of the mainstream Indian Reservations must be adjudicated. I conclude that the United States had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area for the same reasons that it could reserve such water for Indian Reservations. Although the authorities discussed above which establish the reservation theory all involved Indian Reserva-

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[79]See U. S. Exs. 2700-2722, 2800-2821, 2900-2911; U. S. Proposed Conclusion 11.4.

[80]U. S. Proposed Conclusions 8.1, 9.1, 10.1.

tions, the principles seem equally applicable to lands used by the United States for its other purposes. If the United States can set aside public land for an Indian Reservation and, at the same time, reserve water for the future requirements of that land, I can see no reason why the United States cannot equally reserve water for public land which it sets aside as a National Recreation Area. *Cf. F.P.C.* v. *Oregon,* 349 U. S. 435 (1955). Certainly none of the parties has suggested a tenable distinction between the two situations.

In determining whether the United States intended to reserve water for the future reasonable needs of the Lake Mead National Recreation Area, I have followed the course outlined in regard to Indian Reservations. Since the purposes of the Recreation Area could not be fully carried out without the use of water from the mainstream of the Colorado River, I have found that the United States intended to reserve such water for use within the Recreation Area. Furthermore, having found that the United States intended to reserve water for the Area, I have assumed, since there is no evidence to the contrary, that the reservation was for reasonable future requirements. As in the case of Indian Reservations, it is not likely that the United States intended that any future development of the Area would have to depend on appropriative rights to water obtained under state law.

I have not set maximum limits on the amount of mainstream water that the Lake Mead National Recreation Area can consume as I did in the case of the Indian Reservations. First, it would be very difficult to predict accurately the future requirements of the Area. Indeed, even to attempt such a prediction would require more evidence than the parties have introduced in this litigation. Second, there is no need whatsoever to predict future needs or to put an outside limit on the amount of water that can be diverted from the mainstream. The pres-

ent consumption of water diverted from the mainstream on the Lake Mead National Recreation Area is less than 300 acre-feet per annum.[81] Furthermore, from all that appears, its future requirements, whatever they may precisely be, will be of the same general order of magnitude as present uses. Unlike the mainstream Indian Reservations, the potential future uses of the Recreation Area do not cast a cloud on the continuing availability of any appreciable amount of water. This being the case, I have concluded that it would be unwise to attempt to limit the Area to a specific quantity of mainstream water for its future needs.

FINDINGS OF FACT

1. The Lake Mead National Recreation Area in Arizona and Nevada is the only one of the National Forests, Parks, Recreation Areas, Monuments, Memorials and lands administered by the Bureau of Land Management currently diverting water from the mainstream of the Colorado River in the Lower Basin.[82]

2. Executive Orders dated May 3, 1929 (No. 5105) and April 25, 1930 (No. 5339) withdrew lands in Arizona and Nevada pending determination as to the advisability of including such lands in a national monument. In 1936, the Congress appropriated funds for the operation of the Boulder Canyon Project Area which included these lands. 49 Stat. 1794. Lake Mead National Recreation Area was established on the basis of agreements between the Bureau of Reclamation and the National Park Service, dated October 13, 1936 and July 18, 1947, governing administration of the Boulder Canyon Project Area.[83]

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[81]U. S. Ex. 2802.
[82]See U. S. Exs. 2700-2722, 2800-2821, 2900-2911.
[83]U. S. Ex. 2802.

3. In withdrawing lands now constituting the Lake Mead National Recreation Area the United States intended to reserve rights to the use of so much water from the Colorado River as might thereafter be reasonably needed by the National Park Service for appropriate purposes.[84]

4. There is not sufficient evidence to make a finding of the ultimate water requirements of the Lake Mead National Recreation Area in Arizona and Nevada.

CONCLUSION OF LAW

The United States has the right to divert water from the mainstream of the Colorado River in quantities reasonably necessary to fulfill the purposes of the Lake Mead National Recreation Area in Arizona and Nevada with priority dates of May 3, 1929, for lands reserved by the executive order of said date (No. 5105), and April 25, 1930, for lands reserved by the executive order of said date (No. 5339).

C. United States Obligations Under the Mexican Water Treaty and Treaties for the Protection of Wildlife

Pursuant to a treaty between the United States and Mexico, dated February 3, 1944,[85] the United States is obligated to deliver to Mexico 1,500,000 acre-feet of water per annum in the limitrophe section of the Colorado River.[86] All of the parties to this litigation concede, as they must, that the Secretary may deliver this amount of water from the mainstream.

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[84]Executive Order 5105 (May 3, 1929); Executive Order 5339 (April 25, 1930); 49 Stat. 1794 (1936).

[85]59 Stat. 1219 (1945), Ariz. Ex. 4.

[86]This obligation may vary in certain circumstances; it is more precisely defined in Articles 10, 11 and 15 of the treaty.

The treaty obligation has priority over other water rights in the Basin. If the United States, in fulfilling this treaty obligation, divests water rights, compensation may be due. In this connection, however, Article III(c) of the Compact may be significant.[87] The question of compensation is not before me because there has been no claim of a taking under the treaty.

The United States also claims the right to divert certain quantities of water from the Colorado River for use on the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the proposed Cibola Valley Waterfowl Management Area. The United States urges that these refuges and management areas were or will be established in fulfillment of its treaty obligations under a Convention dated August 16, 1916, between the United States and Great Britain for the protection of migratory birds[88] and a Convention dated February 7, 1936 between the United States and Mexico for the protection of migratory birds and game mammals.[89] Congress has enacted legislation to give effect to both of these Conventions.[90] The Executive Orders establishing the several

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[87]Article III(c) provides:

> "If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)."

[88]39 Stat. 1702 (1916), U. S. Ex. 2601.

[89]50 Stat. 1311 (1937), U. S. Ex. 2605.

[90]40 Stat. 755 (1918), U. S. Ex. 2602; 45 Stat. 1222 (1929), U. S. Ex. 2603; 49 Stat. 1555 (1936), U. S. Ex. 2606.

refuges are detailed in the Findings of Fact which conclude this section of the Report.

Although the United States undoubtedly has the power to take property, including water rights, in order to fulfill its treaty obligations, there is no indication that it has chosen to do so in order to operate the two wildlife refuges currently diverting water from the Colorado River. The Executive Orders creating these refuges simply reserve public lands owned by the United States for use as a wildlife refuge. Nothing in these orders purports to authorize the Secretary of the Interior to utilize water from the Colorado River previously appropriated by others.

Rather, the intention of the United States, as expressed in the Executive Orders, was to reserve enough of the unappropriated water available in the River to satisfy the reasonable requirements of the Refuges. I have previously concluded that the United States had the power to reserve unappropriated water in the Colorado River for the future requirements of Indian Reservations and a National Recreation Area and I can perceive no material distinction between them and wildlife refuges. Furthermore, it is abundantly clear that the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge could not successfully be operated without diverting water from the Colorado River. Thus I find that the United States intended to reserve water from the mainstream for the reasonable future needs of these Refuges.

The United States suggests that it will need to divert no more than 41,839 acre-feet of water per annum and consumptively use no more than 37,339 acre-feet per annum for the Havasu Refuge. The United States also suggests it will need to divert no more than 28,000 acre-feet per annum and consumptively use no more than 23,000 acre-feet per annum for the Imperial Refuge. I find that diver-

sions and consumptive use in these amounts are reasonably necessary for the operation of the Refuges and that the necessary water was reserved by the United States for the Refuges when they were created. Thus I hold that the United States may divert and consume the stated quantities of water from the Colorado River as against all appropriations made subsequent to the dates that the water was reserved. If the United States requires water appropriated by others before these Refuges were created, it will have to take the necessary steps to acquire it.

Since lands within the proposed Cibola Valley Waterfowl Management Area have not as yet been withdrawn for this purpose, the United States has not reserved water for use on this management area.

1. *Havasu Lake National Wildlife Refuge.*

FINDINGS OF FACT

1. An Executive Order of January 22, 1941 (No. 8647) established the Havasu Lake National Wildlife Refuge and set apart approximately 37,370 acres of land owned by the United States in Mohave and Yuma Counties, Arizona and San Bernardino County, California, as a refuge and breeding ground for migratory birds and other wildlife.[91]

2. On February 11, 1949, the Assistant Secretary of the Interior, by Public Land Order 559, added approximately 1,677 acres in Arizona and approximately 1,080 acres in California to the Havasu Lake National Wildlife Refuge.[92]

3. In withdrawing lands for the Havasu Lake National Wildlife Refuge the United States intended to reserve rights

[91]U. S. Ex. 2607.
[92]U. S. Ex. 2610.

to the use of so much water from the Colorado River as might be reasonably needed to fulfill the purposes of the Refuge.[93]

4. The Fish and Wildlife Service of the United States Department of Interior has formulated a development plan for the Havasu Lake National Wildlife Refuge.[94]

5. Annual diversions of 41,839 acre-feet and annual consumptive use of 37,339 acre-feet of water from the Colorado River will satisfy the estimated water requirement of the development plan for the Havasu Lake National Wildlife Refuge.[95]

CONCLUSION OF LAW

The United States has the right to the annual diversion of a maximum of 41,839 acre-feet or to the annual consumptive use of 37,339 acre-feet (whichever is less) of water from the Colorado River for use in the Havasu Lake National Wildlife Refuge, with a priority of January 22, 1941 as to land reserved by Executive Order No. 8647, and a priority of February 11, 1949 as to land reserved by Public Land Order 559.

2. *Imperial National Wildlife Refuge.*

FINDINGS OF FACT

1. An Executive Order of February 14, 1941 (No. 8685) established the Imperial National Wildlife Refuge and set apart approximately 51,090 acres of land owned by the United States in Yuma County, Arizona and Imperial

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[93]U. S. Exs. 2607, 2610; see U. S. Exs. 2601-2603; 2605-2606.
[94]U S. Ex. 2618.
[95]U. S. Ex. 2619.

County, California, as a refuge and breeding ground for migratory birds and other wildlife.[96]

2. In withdrawing lands for the Imperial National Wildlife Refuge the United States intended to reserve rights to the use of so much water from the Colorado River as might be reasonably needed to fulfill the purposes of the Refuge.[97]

3. The Fish and Wildlife Service of the United States Department of Interior has formulated a development plan for the Imperial National Wildlife Refuge.[98]

4. Annual diversions of 28,000 acre-feet and annual consumptive use of 23,000 acre-feet of water from the Colorado River will satisfy the estimated water requirement of the development plan for the Imperial National Wildlife Refuge.[99]

CONCLUSION OF LAW

The United States has the right to the annual diversion of a maximum of 28,000 acre-feet or to the annual consumptive use of 23,000 acre-feet (whichever is less) of water from the Colorado River for use in the Imperial National Wildlife Refuge with a priority of February 14, 1941.

D. United States Water Rights Limited by Each State's Apportionment

It has previously been concluded that consumptive uses of mainstream water by the United States on federal establishments are chargeable to the state within which the use occurs. See pages 247-248, *supra*. As a corollary to this proposition, I have also concluded that United States' uses

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[96]U. S. Ex. 2608.
[97]*Ibid;* see U. S. Exs. 2601-2603.
[98]Tr. 15693 (Taylor); U. S. Ex. 2621.
[99]U. S. Ex. 2621; Tr. 15,737 (Taylor).

in each state are limited by the apportionment to the state in which the uses occur.[1] Thus the United States receives water in accordance with its priorities, and if the state apportionment is insufficient to satisfy all uses within the state, including federal uses, junior rights, whether acquired under state or federal law, must yield to senior rights within the state. In other words, United States projects must be fitted into a schedule of priorities along with other uses within a state, and the state's mainstream apportionment will be used to satisfy uses within the state, beginning with the senior priority. If the apportionment is not sufficient to satisfy all uses, junior priorities will not receive water.

This conclusion is required by the Project Act and the Secretary's water delivery contracts. The Project Act's limitation on California's consumption is written in terms of "the *aggregate* annual consumptive use . . . in the state of California," which language clearly includes all uses, both federal and state. Furthermore, the second paragraph of Section 4(a) contemplates a compact which apportions total consumptive use of mainstream water in the Lower Basin: Arizona is to receive 2.8 million acre-feet plus half of surplus and Nevada is to receive .3 million acre-feet. With California permitted (and expected) to take the other 4.4 million acre-feet of consumptive use plus half of surplus, total annual consumptive use is accounted for. See pages 174-177, 222-224, *supra*. Nothing is left out of the accounting; nothing remains, therefore, for the United States, except as its uses come within a state's apportionment. The Project Act, in short, contemplates a division of total uses among three parties, Arizona, California and Nevada. No separate provision is made for the United States. If Congress had intended the apportionment to be made among

[1]Such federal uses as constitute "present perfected rights" within the meaning of Section 6 are, like other perfected rights within the state, an exception to this rule.

four parties rather than the three it named, surely it would have said so.

As noted before, the Secretary's contracts substantially effectuate the apportionment authorized by Congress, and therefore should be construed in conformity with the congressional intent. Moreover, the Arizona contract, by its express terms, requires this result. Article 7(1) of the contract provides as follows: "All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the mainstream of the Colorado River below Boulder [Hoover] Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract." This provision requires federal uses in Arizona to be limited by the contractual apportionment. The Secretary, having apportioned total consumptive use of mainstream water among the three states, has safeguarded himself by this contract provision, which says in substance: the contract apportionment is the maximum that can be consumed in Arizona, whoever the user may be, whether or not a contractee.

Although the Nevada contract is not as explicit in limiting United States' uses to the state's apportionment as is the language of the California limitation and the Arizona contract, the Nevada contract was intended to carry out the apportionment contemplated by Congress and to correlate Nevada's apportionment to those of the other two states. Hence, the same result must follow as to United States' uses in Nevada.

In the light of my earlier conclusion that consumptive uses by the United States are to be charged to the states, and of the provisions and purposes of the Project Act and water delivery contracts, I hold that the uses of the United States within each state are limited by that state's apportionment, except to the extent that such uses are protected by Section 6 of the Project Act.

E. Boulder City, Nevada

By an Act of September 2, 1958, 72 Stat. 1726, Congress provided that the Secretary of the Interior shall:

> "supply water to . . . [Boulder City, Nevada] for domestic, industrial, and municipal purposes. . . . Such delivery shall be subject to the availability of water for use in the State of Nevada under the provisions of the Colorado River compact and the Project Act and . . . shall be in accordance with the terms of . . . [Nevada's water delivery contract]."

The United States claims the right to deliver water from Lake Mead to Boulder City for the purposes recited in the statute. Since the offices of the Boulder Canyon Project, Region Three of the Bureau of Reclamation and a number of other United States agencies are located in Boulder City, the United States has a substantial interest in the deliveries of such water. Nevada has acquiesced in water deliveries under this statute and I hold that the United States may deliver water to Boulder City pursuant to its terms.

The statute in effect instructs the Secretary to deliver water to Boulder City as if he had contracted for such deliveries. Thus these deliveries are clearly limited under the statute by the total amount of water available to Nevada under the Secretary's contractual apportionment. Boulder City's priorities are to be determined in the same manner as those of all other Nevada users, under Nevada law, and the city may receive only as much of Nevada's 300,000 acre-feet as is available after senior priorities have been satisfied. Conversely, consumption of mainstream water by Boulder City is chargeable to Nevada for purposes of applying the interstate apportionment. The Act of September 2, 1958 states that deliveries to Boulder City "shall be in accordance with the terms of . . . [the Nevada delivery con-

tract]." That contract specifically limits the "use in Nevada" of all water delivered from Lake Mead to 300,000 acre-feet per annum and thus deliveries to Boulder City, being for use in Nevada, are chargeable to the state under the contract. Nevada has not objected to this charge.

V. Mainstream Allocation: Conclusion

It may be useful at this point to summarize the apportionment which controls the consumption of water diverted from Lake Mead and from the mainstream of the Colorado River below Lake Mead for use in Arizona, California and Nevada under the decree recommended in this Report.

The Secretary of the Interior determines the total amount of water to be released from Lake Mead and from the several reservoirs on the mainstream of the Colorado River below Hoover Dam for consumptive use in Arizona, California and Nevada. That determination is solely within the Secretary's reasoned discretion and presumably is based on the amount of water in Lake Mead and the reservoirs below, the amount necessary to satisfy the United States treaty obligations to Mexico, necessities of "river regulation, improvement of navigation, and flood control," predictions as to future supply, and other relevant conditions in the River Basin. The only specific limitation on his discretion is that he must follow the priorities set forth in Section 6 of the Project Act. The supply of water available for consumptive use in the three states, then, is neither more nor less than the quantity of water that the Secretary annually releases for this purpose.

Of the mainstream water released for consumptive use in the United States, the first 7,500,000 acre-feet of annual consumptive use is apportioned as follows: 2,800,000 acre-feet for use in Arizona; 4,400,000 acre-feet in California; 300,000 acre-feet in Nevada.

If sufficient mainstream water is released in one year to satisfy more than 7,500,000 acre-feet of consumptive use in the three states, such additional consumptive use is surplus and is apportioned as follows: 50% to California[1a]

[1a] Subject, at the present time, to a total maximum consumption in California of 5,362,000 acre-feet under existing contracts. See pp. 208, 223-224, *supra*.

and 50% to Arizona, unless and until the Secretary makes a contract with Nevada for 4% of surplus, in which event, to Nevada shall be apportioned 4% of surplus and to Arizona 46% of surplus.

In the event that insufficient water is released from the mainstream reservoirs to satisfy 7,500,000 acre-feet of consumptive use in the United States in one year, the supply must be prorated among the three mainstream states. Each state's allocation is that proportion of the consumptive uses which can be satisfied by the available water which its apportionment of the first 7,500,000 acre-feet of mainstream consumption bears to the aggregate apportionment to all three states. Thus, if in one year water is available to satisfy an aggregate of only 6,000,000 acre-feet of consumptive use in the three states, each state's apportionment will be determined by the ratios described above, *viz:*

$\frac{2.8}{7.5}$ x 6 million acre-feet to Arizona;

$\frac{4.4}{7.5}$ x 6 million acre-feet to California;

$\frac{.3}{7.5}$ x 6 million acre-feet to Nevada.

The Secretary of the Interior is required to make deliveries of water in accordance with the apportionments outlined above; the one exception to this requirement is prescribed by Section 6 of the Project Act, which directs that the dam and reservoir be operated in "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact. . . ." I have heretofore construed "present perfected rights" to mean rights perfected as of June 25, 1929, the effective date of the Project Act. See note 20, page 152, *supra.*

Before turning to the meaning of the term "perfected rights" as used in the Act, it should be noted that if California receives in one year 4,400,000 acre-feet of consump-

tive use or more, her perfected rights are deemed by Section 4(a) to be satisfied. That section limits California to 4,400,000 acre-feet of consumptive use plus half of surplus, which shall include "all water necessary for the supply of any rights which may now exist." I construe this language to mean that California's consumptive use may not exceed the specified amount, whatever her "present perfected rights" might have been in 1929. In short, Section 4(a) limits the operation of Section 6 in the case of California.

No such statutory provision limits the protection extended by Section 6 to Arizona and Nevada. It is clear from the evidence, however, that if water is made available to satisfy an aggregate of 7,500,000 acre-feet of consumptive use in one year, the Arizona and Nevada apportionments will substantially exceed the amount of "present perfected rights" in the respective states.

In the event that sufficient water is not made available to satisfy an aggregate consumptive use of 7,500,000 acre-feet in the United States in one year, Section 6 may come into play. California will not be allotted as much as 4.4 million acre-feet of consumptive use and can, therefore, rely on the protection afforded by Section 6 until she receives sufficient water to satisfy present perfected rights, up to the maximum of 4.4 million acre-feet fixed by Section 4(a). Since it is possible for these circumstances to occur, it becomes necessary to interpret the phrase "perfected rights" in Section 6.

Neither the Compact nor the Project Act defines "perfected rights." It seems clear, however, that the term was not used in either of these enactments to refer to notices of appropriation which had not yet become the foundation of a going economy—mere paper filings on the River. The use of the term "perfected rights" rather than the more familiar "appropriative rights" suggests that Congress intended to limit the protection of Section 6 to rights of a more sub-

stantial character than paper filings sometimes recognized as an appropriative right under state law. Congress was concerned that those who were actually using water from the Colorado River and who relied on such water for their existing needs should not be deprived of it because of the proposed dam. But Congress was aware that many paper appropriations had been filed and claims of various sorts made to Colorado River water which, whatever their legal status under state law, were worthless as a practical matter unless and until the dam was built. Congress was not concerned to protect such claims. Projects and water uses developed by virtue of the construction of the dam did not need to be protected against its consequences.[2] Of course, a water right is not a "present perfected" right within the meaning of Section 6 unless it is recognized under the applicable state law, for if it cannot be vindicated under state law there would be no reason to protect it in the Project Act.

Hence I conclude that a water right is a "present perfected right" and is within the protection of Section 6 only if it was, as of the effective date of the Project Act (June 25, 1929), acquired in compliance with the formalities of state law and only to the extent that it represented, at that time, an actual diversion and beneficial use of a specific quantity of water applied to a defined area of land or to a particular domestic or industrial use.

It has been suggested by the Imperial Irrigation District that state law would treat as "perfected" the right to take water in an amount measured by the capacity of existing works, even though such amount of water had never yet been actually diverted and applied to beneficial use. It is highly unlikely that Congress intended to adopt this broader

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[2]See 70 Cong. Rec. 167-169 (1928), Ariz. Legis. Hist., pp. 22-31.

definition. Congress must have realized that following construction of Hoover Dam new diversion works would be built for most downstream uses. The Project Act authorized not only the erection of the dam but also the construction of the All-American Canal to serve Imperial and Coachella Valleys, thus relieving them of dependence on diversions through Mexico. Since the Project Act authorized structures designed to replace existing diversion works, it is unlikely that Congress intended to define perfected rights in terms of the carrying capacity of these obsolete works. More natural is a congressional intention to protect, as present perfected rights, those uses which were actually in existence and which were the basis of a going economy. As stated before, the congressional intention was to insure that persons actually applying water to beneficial use would not have their uses disturbed by the erection of the dam and the storage of water in the reservoir.

Under the proposed definition of perfected rights a question arises with respect to water reserved from the mainstream for use on federal establishments in the Lower Basin. I have held that the United States has the power to reserve water for the reasonable future needs of federal establishments and that certain statutes, executive orders and other orders of withdrawal were intended to exercise this power. The water rights created by such a federal reservation do not depend upon state law or upon the actual diversion and beneficial use of a specific quantity of water. On the contrary, they are superior to subsequent appropriations under state law, although the subsequent appropriator may be first to divert and use the water. See pages 257 *et seq., supra.*

The question that arises is whether a reservation of water by the United States before June 25, 1929, is accorded the protection given by Section 6 to present perfected rights,

even though, as of that date, the rights were not acquired under state law and all the water reserved had not been put to beneficial use. I have concluded that they are so protected.

Although not acquired in conformity with state law, these rights are protected by Section 6, since their creation and existence are valid independent of state law.

Moreover, they receive this protection although none or only part of the reserved water had been put to use as of June 25, 1929. The fundamental nature of a reserved water right is that it is fully vested at the time of its creation; nothing further need be done to perfect it. It differs radically from appropriative rights under state law, which may be initiated by a filing but which must be perfected by actual diversion and beneficial use of water within a reasonable time after the filing. Thus a reserved water right created before June 25, 1929, is, by its very nature, "perfected" as of that date. Furthermore, failure to include reserved water rights within the protection of Section 6 could have the effect of divesting them. For example, I have concluded that the United States reserved the right to divert annually a maximum of 11,340 acre-feet of mainstream water for the Chemehuevi Indian Reservation, with a priority of February 2, 1907. The Reservation was not consuming all of this water in 1929. If the right is not considered a present perfected right under Section 6, then present perfected rights acquired under California law would have seniority, even though initiated after 1907. Thus, in certain times of shortage, water would be supplied in satisfaction of the California rights and the Reservation would not receive the full amount of its reserved water, despite its needs.

To hold that Congress did not include reserved water within the protection of Section 6 would require a holding

that Congress, without saying so expressly, and without ever considering the matter,[3] intended to nullify, in times of shortage, the very purpose of the reservation. The cases cited at pp. 258-259, *supra,* demonstrate that reservation of water was made by the United States to assure an adequate supply of water for the future needs of the federal establishments, in order that they could fulfill their purposes. It would frustrate this intent to deny the United States the use of this reserved water in times of shortage.

I do not believe that Congress, when directing that the dam be operated in "satisfaction of present perfected rights", intended these consequences, and accordingly, I conclude that water rights reserved before June 25, 1929, for federal establishments are "perfected rights" within the meaning of Section 6.

In the unlikely event that water is so short that a state's apportionment is insufficient to satisfy present perfected rights therein, the Secretary must deliver water to satisfy such rights from the other states' apportionments. Each of the other two states contributes water from its apportionment for this purpose in the proportion that its apportionment of the first 7.5 million acre-feet of mainstream consumption bears to the aggregate apportionment to the two states. In the example stated, in which annual consumptive use was limited to 6 million acre-feet, California's apportionment would be $\frac{4.4}{7.5}$ x 6 million acre-feet or 3,520,000 acre-feet of consumptive use. If, hypothetically, California has present perfected rights of 3,600,000 acre-feet, she would be entitled under Section 6 of the Project Act to consumption of 3,600,000 acre-feet, and thus, ex-

[3]The legislative history reveals nothing concerning the status of federal water rights as perfected rights.

ceed her apportionment by 80,000 acre-feet of consumptive use. Arizona and Nevada would have to contribute water to supply this 80,000 acre-feet in proportion to their interstate ratios; that is, Arizona would contribute $\frac{2.8}{3.1}$ of the water necessary to supply the 80,000 acre-feet of consumption in California, and Nevada would contribute $\frac{.3}{3.1}$ of this water.

Of course, if two states' apportionments were not sufficient to satisfy present perfected rights in those states in one year, the third state would have to contribute all of the necessary water. In the extremely improbable event that releases do not satisfy the rights perfected in any of the states as of the effective date of the Act, deliveries must be made in accordance with the priority of "present perfected rights" regardless of state lines.

The water apportioned to each state is delivered to users within the state according to the provisions of the several delivery contracts. No user may consume mainstream water unless there is a contract with the Secretary providing for the delivery of such water.[8a] Under the Project Act, state law governs rights and priorities among users within a single state, except for federal establishments for which water has been reserved independent of state law. As to such establishments, the priorities recommended herein control.

Water consumed on Indian Reservations, National Forests, Parks, Monuments, Memorials, Recreation Areas, lands under the control of the Bureau of Land Management, Federal Reclamation Projects, Wildlife Refuges and Management Areas, and in Boulder City, Nevada, is

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[8a] Of course the Secretary need not contract with himself, and hence no contracts are required for Indian Reservations and similar federal establishments.

chargeable to the state within which the water is consumed, and this consumption is included within each state's apportionment. Conversely, each state's apportionment is an overriding limitation on all consumptive use within the state, including uses claimed by the United States for federal establishments.

Consumptive use is measured at the several points of diversion in each state by a determination of the amount of water diverted from the mainstream less return flow thereto available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation. The Secretary must keep an account of diversions for each state. He must compute, as accurately as possible, the amount of usable return flow from water diverted and credit this amount to each state. Reservoir evaporation, channel and other losses sustained prior to the diversion of water from the mainstream are not chargeable to the states but are to be treated as diminution of supply. Only after water is diverted from the mainstream are losses on it chargeable to a state as consumption.

The interstate allocation outlined above is based on the conclusion that the Secretary has used his water delivery contracts in conjunction with the Section 4(a) limitation on California to effectuate an apportionment among Arizona, California and Nevada of all of the water he determines to release in any year from Lake Mead and from downstream reservoirs for consumption in the United States. Of the first 7.5 million acre-feet of annual consumptive use of water from Lake Mead and the mainstream below, the Secretary has forever allocated $\frac{2.8}{7.5}$ to Arizona. Of the excess consumption, he has allocated to Arizona 50%, subject to reduction to 46% if he contracts to allocate 4% to Nevada. Similarly, out of the first 7.5 million acre-

feet of such use, he has forever allocated $\frac{4.4}{7.5}$ to California plus 50% of any excess each year up to a total annual consumption in California of 5,362,000 acre-feet. Finally, of such 7.5 million acre-feet, he has forever allocated $\frac{.3}{7.5}$ to Nevada.

However, until a state is prepared to apply to beneficial use all of its apportioned water, it has no cause for complaint if the water within its allocation is consumed elsewhere. Thus if, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that there are no delivery contracts outstanding for the full amount of the state's apportionment, or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing herein shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof.[4]

California and Nevada have suggested that it would be useful for the Court to provide for a permanent commission or commissioner to administer the decree. I do not regard this as necessary. In view of the control of the mainstream vested in the Secretary of the Interior, he will in effect administer the decree.

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[4]For comparable provisions see Colorado River Compact, Article III(e); Boulder Canyon Project Act, Section 4(a), second paragraph, subdivision 5.

VI. Claims to Water in the Tributaries

There are five principal tributaries of the Colorado River in the Lower Basin. They are: the Virgin River System, the Kanab and Johnson Creek System, the Little Colorado River System, the Bill Williams River, and the Gila River System. All but the Gila River make regularly recurring contributions to mainstream supply.[5] Inflow from the Virgin and Little Colorado Rivers and from Kanab Creek is stored in Lake Mead. Inflow from the Bill Williams River is impounded by Parker Dam and stored in Lake Havasu. The Gila River empties into the mainstream near the Mexican border, and there is no dam capable of impounding its inflow.

The controversies arising over tributary water may be divided into two general categories. First, there is the controversy between mainstream states and tributary states regarding rights in tributary supply.[6] California expressed concern in this litigation that increased uses on the tributaries will decrease mainstream supply. The mainstream state-tributary state controversy is treated in subdivision A of this section of the Report. Second, there are controversies among the tributary states *inter sese*. These controversies, which concern the Virgin, Little Colorado and Gila River systems, and Johnson and Kanab Creeks, present the usual questions that arise in the traditional equitable apportionment suit. They are dealt with in subdivision B herein. Present tributary uses do not exhaust the available water supply in any of the tributaries, except the Gila River System; therefore the considerations that apply to the Gila differ from those applicable to the other tributaries. For

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[5] See Part One, pp. 119-123.

[6] It should be noted that two states, Arizona and Nevada, are both mainstream states (*i.e.*, they share in mainstream supply) and tributary states (*i.e.*, their tributaries contribute to mainstream supply and users therein divert water from the tributaries).

this reason, the discussion in subdivision B is divided into two parts.

A. Controversies Between Mainstream States and Tributary States

Absent the Colorado River Compact and the Boulder Canyon Project Act, it is clear that principles of equitable apportionment would control the disposition of a controversy between downstream states using mainstream water and upstream tributary states. See *Nebraska* v. *Wyoming,* 325 U. S. 589, 617-619 (1945); *Colorado* v. *Kansas,* 320 U. S. 383, 393-394 (1943); *New Jersey* v. *New York,* 283 U. S. 336, 342-343 (1931). Thus, junior uses on the tributaries might well be enjoined for the benefit of senior uses on the mainstream. *Nebraska* v. *Wyoming, supra,* at 665. Therefore, unless the Compact, the Project Act or the Secretary's delivery contracts made pursuant to Section 5 of the Project Act have somehow displaced the law that would otherwise be applicable, the principles of equitable apportionment still control rights of mainstream states in water of the tributaries of the Colorado River in the Lower Basin.

The Compact does not govern the relations, *inter sese,* of the states having Lower Basin interests.[7] Therefore, it could not have displaced the principles of equitable apportionment as decisive of the question of rights in Lower Basin tributary supply.

It is equally clear that the Project Act and the California Limitation Act have not rendered the principles of equitable apportionment inapplicable to the tributaries or the mainstream above Lake Mead. The limitation in Section 4(a) of the Project Act applies only to California. It does not affect possible claims by Arizona and Nevada to tributary water. With respect to California, Section

[7] See pp. 139-141, *supra.*

4(a) is concerned with consumption and not with supply and therefore does not affect any rights of that state to demand that tributary water be permitted to flow into the mainstream. Furthermore, it has been demonstrated that Section 4(a) regulates the mainstream only. Nothing in that section may reasonably be said to affect the question of tributary supply. It is difficult to believe that Congress, including the California senators who voted for the Project Act, and the California Legislature which passed the Limitation Act, intended that California should waive all claims to the substantial tributary contributions to the mainstream supply. It is unlikely that they intended that the states in the Lower Basin through which the tributaries flowed could consume all of the water in those tributaries without regard for California's claims, needs or existing uses.

Similarly, the contracts for delivery of mainstream water which the Secretary of the Interior has made with Arizona, Nevada and the California defendants have no bearing on the question of tributary supply. The contracts are solely for delivery of water after it has found its way into the mainstream; they do not affect inflow into the mainstream. Nor can they reasonably be construed to include the waiver of any rights mainstream states may have to tributary inflow.

In the light of the foregoing, the conclusion is inescapable that principles of equitable apportionment still control rights of mainstream states in waters of the tributaries of the Colorado River in the Lower Basin. At the present time the tributaries which empty into the Colorado River in the Lower Basin, other than the Gila River, make a substantial contribution to the supply of water in the mainstream. Once this tributary water commingles with the mainstream water it is governed by the Project Act and the Secretary's water delivery contracts and may be consumed only according to the interstate apportionment created by them. The mainstream users most certainly

have a substantial interest in tributary inflow, for the greater the quantity of water entering the mainstream, the greater the quantity of water likely to be available for use by them.

There is, however, no occasion at this time to apportion water of the tributaries of the Colorado River in the Lower Basin between mainstream and tributary states. An equitable apportionment of the tributaries at the instance of mainstream states could only accomplish either or both of two objects: (1) the enjoining of existing junior tributary uses for the benefit of senior mainstream uses; (2) the enjoining of increased uses on the tributaries for the benefit of existing mainstream uses.

There is no basis in the record for closing down existing tributary uses. The mainstream states have neither asked that present tributary uses be limited nor presented evidence that would justify such a limitation.

Nor, indeed, have they asked that increased future uses on the tributaries be enjoined. Arizona expressly declares that adjudication of rights in tributary water would be premature and unwarranted.[8] California proposes to treat present tributary inflow as part of the dependable supply in the mainstream, but does not seek a determination of rights in this water.[9] Similarly, Nevada does not ask that increased uses on the tributaries be enjoined; on the contrary she seeks a decree in favor of tributary users as against the mainstream interests.[10]

Even if the mainstream states had asked for an injunction against increased tributary uses, it would be inappropriate to adjudicate the request at this time. Mainstream users are presently enjoying the use of tributary inflow, and there is no indication that such enjoyment is in imme-

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[8]Ariz. Proposed Conclusions 20-22.
[9]See Calif. Proposed Decree, pp. 7-9.
[10]Nev. Proposed Conclusion 33.

diate danger of being interfered with. There is no evidence that there will be, in the immediately forseeable future, any substantial increase in uses on the tributaries. Indeed, except for the proposed Dixie Project on the Virgin River in Utah, there is no evidence of any pending proposals or plans for the construction of specific works involving the increased use of water on any of the tributaries. At best, the evidence shows only vague general hopes for growth and development on the tributaries.

The Dixie Project itself cannot be considered an immediate threat to the continuation of present tributary inflow into the mainstream. There is no evidence that the Dixie Project will be developed except as a federal reclamation project, yet its authorization by the United States is far from certain. The Regional Director of the Bureau of Reclamation for Region Three has twice issued favorable reports on the proposed project to the Commissioner of Reclamation, but the latter has not yet approved it.[11] So far as the evidence shows, the proposed project has not even been brought to the attention of the Secretary of the Interior or of Congress,[12] and congressional approval is required before the project can be developed. Moreover, the Regional Director's approval of the Dixie Project was conditioned on Utah fulfilling certain conditions which have not yet been met.[13]

In this state of the record, principles established by the Supreme Court dictate that mainstream rights to tributary inflow ought not now be adjudicated. As the Court has stated:

> " 'Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious

[11]Calif. Exs. 2901, 2902; Utah Exs. 31, 31A.
[12]Tr. 17925-17937, 17949-17954 (Bingham); Calif. Ex. 2904.
[13]*Ibid.*

> magnitude and it must be established by clear and convincing evidence.' New York v. New Jersey, 256 U. S. 296, 309; North Dakota v. Minnesota, 263 U. S. 365, 374; Connecticut v. Massachusetts, 282 U. S. 660, 669; Missouri v. Illinois, 200 U. S. 496, 521."[14]

There has been no showing that, at the present time, tributary users are threatening mainstream rights to continued tributary inflow within the meaning of this principle.

Furthermore, it is clear that up to the present time, no existing mainstream project has been refused water, the delivery of which it has demanded. That this condition will continue at least until another large project using mainstream water is constructed cannot, on this record, be doubted. Should this condition change in the future then will be the time to consider the problem.

Since, then, there is no occasion to determine mainstream rights to tributary inflow at the present time, since such an occasion may never arise, and since, even if it should arise, a more intelligent determination can be made in the future, it would violate precedent to adjudicate these rights in this case. See *Nebraska* v. *Wyoming,* 325 U. S. 589, 608 (1945); *Colorado* v. *Kansas,* 320 U. S. 383, 398 (1943); *New York* v. *Illinois,* 274 U. S. 488, 489-490 (1927); *Missouri* v. *Illinois,* 200 U. S. 496, 521 (1906); *cf. Arizona* v. *California,* 283 U. S. 423, 463-464 (1931).

One other aspect of the mainstream-tributary controversy requires comment. Three tributary states, New Mexico, Nevada and Utah, seek a decree confirming existing uses and reserving to them rights to water for use in the future. Tributary users are not now being challenged by mainstream states in the enjoyment of their existing uses and therefore there is no controversy over their continued enjoyment. Moreover, since no new tributary uses appear

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[14]Washington v. Oregon, 297 U. S. 517, 522 (1936).

imminent, it is unnecessary to determine whether there is water available for such uses. The Supreme Court has clearly stated that it will not exercise its original jurisdiction to apportion water in an interstate stream in order to reserve it for consumption at an unspecified time in the future by one state against the possibility that another state might utilize the water first. See cases cited at page 320, *supra*.

Even assuming that an equitable apportionment of tributary water between mainstream and tributary uses would be appropriate, it is extremely doubtful that the evidence is sufficient to form the basis for decision. Arizona is an important tributary state and yet there is little evidence of the extent or seniority of her uses on tributaries other than the Gila. Moreover, the full effect of the decree in this case upon the Lower Colorado River Basin may not be immediately apparent. Undoubtedly, a more "equitable" apportionment might be achieved if apportionment is postponed at least until all practical consequences of the decree are ascertained.

B. Controversies Among the Tributary States Inter Sese

1. *Tributaries Other Than the Gila River.*

Controversies among the tributary states have arisen over four tributary systems which flow into the Colorado River in the Lower Basin, namely, the Little Colorado River System, the Virgin River System, Johnson and Kanab Creeks, and the Gila River System. The latter is dealt with in the next following section of this Report. Controversies over the other three can be disposed of on a single ground and are dealt with together in this section.

The Little Colorado River rises in Arizona at the New Mexico border and flows through the State of Arizona, joining the Colorado River upstream from Grand Canyon. Rio Puerco, the Zuni River, Black Creek and Carrizo Creek, the principal tributaries of the Little

Colorado River which originate in the State of New Mexico, join the Little Colorado River in Arizona. The Little Colorado River System drains a total of 26,930 square miles.[15]

The Virgin River rises in Utah, and flows through that state and the states of Arizona and Nevada, entering the Colorado River at Lake Mead. Important tributaries of the Virgin in Utah are the North Fork of the Virgin River, North Creek and the Santa Clara River. The principal tributary of the Virgin in Nevada was the Muddy River, which now flows directly into Lake Mead. Meadow Valley Wash is a Nevada tributary of the Muddy River. The Virgin River System drains 11,000 square miles.[16]

Kanab and Johnson Creeks rise in the eastern portion of the Lower Colorado River Basin in Utah, each having an individual drainage basin within Utah. Johnson Creek has its confluence with Kanab Creek in the State of Arizona. Kanab Creek flows into the Colorado River at Grand Canyon, midway between Lake Mead and the confluence of the Colorado and Little Colorado Rivers.[17]

The States of Nevada, New Mexico and Utah have asked for a decree confirming present uses and reserving water for future requirements on various interstate tributaries of the Colorado River flowing within their borders. Nevada asserts rights in the Virgin River System; New Mexico asserts rights in the Little Colorado and Gila Systems; and Utah asserts rights in the Virgin River System as well as in Kanab and Johnson Creeks. Arizona, the only other tributary state in the Lower Basin, does not ask that any of her rights in the tributaries be adjudicated in this case, other than the Gila. The United States claims

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[15]Ariz. Exs. 106, 1000, p. 11; N. M. Ex. 400.
[16]Ariz. Ex. 1000, p. 11; Nev. Ex. 1; Utah Ex. 1.
[17]Tr. 17814 (Bingham); Ariz. Ex. 77, p. 60; Utah Ex. 1.

rights to the use of water from these tributaries for Indian Reservations and other federal establishments.[18]

As stated above, the Supreme Court will not apportion the waters of an interstate stream unless the state seeking the adjudication establishes "by clear and convincing evidence" that there exists a substantial conflict over the present use of the water. The burden is on the state seeking the adjudication to prove the necessity for it. See cases cited at page 320, *supra*.

Neither Nevada, New Mexico nor Utah has met this burden as to any of the tributaries except the Gila River. None of the downstream tributary states contests existing upstream uses on any of the tributaries. Arizona, a downstream state on each of the tributaries, maintains that existing upstream uses on the tributaries do not interfere with her uses,[19] and she does not challenge existing uses on any of the tributaries. Nor does Nevada, the only other downstream state, contest existing upstream uses on the Virgin River System in Utah.

Thus Nevada, New Mexico (except as to the Gila) and Utah are, in effect, asking for a declaratory decree confirming their respective existing tributary uses despite the fact that such uses are unchallenged. Such a decree would be wholly without precedent. Indeed, an unbroken line of decisions requires that jurisdiction not be exercised. See *e.g., Colorado* v. *Kansas,* 320 U. S. 383 (1943); *New York* v. *Illinois,* 274 U. S. 488 (1927); *Missouri* v. *Illinois,* 200 U. S. 496 (1906).

It is equally clear that rights of tributary users *inter sese* to make increased uses of tributary water in the future ought not to be adjudicated. There is presently unused tributary water regularly flowing into the mainstream from all of the tributaries except the Gila. The record

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[18]See U. S. Proposed Conclusions 4.1, 4.2, 4.3, 4.12, 4.13, 4.21, 4.22.2, 8.1, 9.1.

[19]Ariz. Proposed Findings 159, 161, 163-164.

indicates that none of the tributary states will be able to utilize this water in the immediate future, and Supreme Court precedent requires that it not be reserved for one user against the possibility that another may appropriate it first. See cases cited at page 320, *supra*.

The considerations set forth above also control disposition of the claims of the United States. Present United States uses on the tributaries, other than the Gila, are not contested by any of the parties to this suit, and the record indicates that there is no danger of insufficient water to supply them in the future. No substantial increased United States uses appear imminent. If such uses are developed in the future, and other tributary users contest them, it will then be time to determine the extent of United States rights in the tributaries. Unlike the mainstream, the tributaries are not subject to the legal and physical control of the Secretary of the Interior, and hence with them there is no necessity of determining priorities so that the Secretary may know how to discharge his duties. There is, therefore, no occasion for declaring the extent of rights to water in the tributaries asserted for the benefit of Indian Reservations and National Forests, Parks, Recreation Areas, Memorials, and Monuments as well as lands administered by the Bureau of Land Management.

2. *The Gila River System.*

The interstate reaches of the Gila River System consist of parts of three streams, the Gila River proper and its tributaries, the San Francisco River and San Simon Creek. All of these streams have their headwaters in or near New Mexico, flow for a distance through that state and then enter Arizona.

The State of New Mexico seeks in this action a decree apportioning a quantity of water from the Gila River System sufficient to satisfy present and future requirements

for water in that part of the Gila River drainage basin located in New Mexico.[20]

Both Arizona and the United States oppose New Mexico's claims. First, they assert that New Mexico present uses are junior to those of the other parties and should not be confirmed out of priority.[21] Second, they maintain that actual present uses in New Mexico are substantially less than those claimed by New Mexico.[22] Third, they argue that confirmation of estimated New Mexico future requirements is completely unjustified.[23]

The Gila River System is overappropriated; the supply of water presently available and which seems likely to be available in the future is not sufficient to satisfy the needs and demands of existing projects. Under such circumstances, it is appropriate to adjudicate the controversy among New Mexico, Arizona and the United States over the right to water in the Gila System. *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945). None of the parties opposes such an adjudication.

As noted in this Report, neither the Colorado River Compact nor the Boulder Canyon Project Act bears upon the question of the apportionment of water in the Lower Basin tributaries, see pages 316-317, *supra,* and hence they are of no help in deciding this controversy over the Gila River System. The doctrine of equitable apportionment is decisive of this controversy, as all the parties agree, although they differ as to its proper application.[24]

a. Present Uses

New Mexico seeks a confirmation of existing uses in that state from the Gila River System. Despite the fact

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[20]N. M. Brief, Point III.

[21]Ariz. Answering Brief, pp. 82-86; U. S. Reply Brief, pp. 54-60.

[22]Ariz. Special Appendix, pp. 1-8; U. S. Reply Brief, pp. 54-59.

[23]Ariz. Special Appendix, pp. 9-13; U. S. Reply Brief, pp. 60-61.

[24]Ariz. Opening Brief, pp. 62-63; N. M. Brief, pp. 4-5, 10-33; U. S. Brief, pp. 42-43.

that many of these uses are junior in time to uses downstream in Arizona, I conclude that they should not be disturbed.

Although priority of appropriation has been characterized as the guiding principle of equitable apportionment in the arid regions of the United States, *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945); *Wyoming* v. *Colorado,* 259 U. S. 419 (1922), it is by no means necessarily conclusive of the rights in dispute. In *Nebraska* v. *Wyoming, supra,* at 618, the Court said:

> "Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to the downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

It is worthy of note that the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation. Indeed, the tendency has been to protect existing uses wherever possible. See *Washington* v. *Oregon,* 297 U. S. 517 (1936); *Kansas* v. *Colorado,* 206 U. S. 46 (1907).

In *Nebraska* v. *Wyoming, supra,* at 621-622, junior upstream existing uses were confirmed despite the fact that the North Platte, as the Gila is here, was overappropriated. The Court stated:

> "We are satisfied that a reduction in present Colorado uses is not warranted. The fact that the same amount of water might produce more in

> lower sections of the river is immaterial. [citations omitted] The established economy in Colorado's section of the river basin based on existing use of the water should be protected. [citations omitted] Appropriators in Colorado junior to Pathfinder have made out-of-priority diversions of substantial amounts. Strict application of the priority rule might well result in placing a limitation on Colorado's present use for the benefit of Pathfinder. But as we have said, priority of appropriation, while the guiding principle for an apportionment is not a hard and fast rule. Colorado's countervailing equities indicate it should not be strictly adhered to in this situation."

It is clear that the agricultural economy of the Gila River Basin in New Mexico is dependent upon water from the system and that reduction of present uses will result in commensurate contraction of that economy. Furthermore, some of the water which is used beneficially in New Mexico would be lost enroute to users in Arizona.[25] In addition, it seems that New Mexico uses only a relatively small portion of the water she contributes to the Gila River System.[26] I am satisfied, therefore, that a reduction of present New Mexico uses is not warranted. The presently irrigated acreage figures for lands in New Mexico outside the Virden Valley, set forth in the Findings of Fact and recommended decree, represent a compromise between Arizona and New Mexico to which the United States has interposed no objection. This compromise has been adopted in the decree.

This does not mean, however, that priorities as to present uses are entirely without force. On the contrary, the Gila Decree, *United States* v. *Gila Valley Irrigation District, et al* (Globe Equity No. 59),[26a] which adjudicated priorities

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[25]Tr. 1403 (Gookin).
[26]See Ariz. Ex. 77, table 23.
[26a]Ariz. Ex. 103.

on an interstate reach of the Gila River, including the Virden Valley in New Mexico, is not abrogated. Certainly confirmation of present uses requires adherence to the priorities presently being administered under that Decree. The major justification for refusing to reduce existing junior uses is to avoid disrupting going economies. Since the economy of the Virden Valley is largely based on the Gila Decree, enforcement of that decree will not disrupt the existing economy. Furthermore, the State of New Mexico is bound by that Decree to the extent that her citizens, whom she represents *parens patriae* in this suit, are bound. See *Brooks* v. *United States,* 119 F.2d 636, 643 (9th Cir.), cert. *denied,* 313 U. S. 594 (1941); *cf. Hinderlider* v. *La Plata,* 304 U. S. 92 (1938); *Wyoming* v. *Colorado,* 286 U. S. 494 (1932). If this were not the case then the rights of individual citizens, when asserted by them, would be limited by the Gila Decree, whereas their rights would not be so limited if asserted by the State as their representative.

The so-called Greenlee County and Cave Creek Decrees[27] are not binding upon New Mexico as they purport only to adjudicate water rights appurtenant to land located within Greenlee County and Cochise County, Arizona.

The decree in this cause will, of necessity, limit uses of both underground and surface water, as New Mexico's proof of irrigated acreage included acreage irrigated from surface and underground sources without distinction. This would be the proper course in any event since it appears that there is such a close relationship between surface and underground waters in this part of the System that f[illegible]ure to limit uses of underground water might well provide New Mexico an opportunity for further reduction of the surface flow of the Gila River System by allowing unrestricted depletion of underground sources.[28]

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[27]Ariz. Exs. 301-302A.

[28]See Tr. 2659-2660, 2674-2675 (Turner); 17745-17746 (Reynolds).

Two questions have been raised with respect to the use of underground, pumped water on lands in the Virden Valley in New Mexico. One question is whether lands specified in the Gila Decree may be irrigated by pumped water in addition to the surface diversions from the Gila River permitted by the Decree. The resolution of this question, which requires an interpretation of the Gila Decree, is best left to the court which rendered and administers that Decree. It is sufficient in this case to hold that the Gila Decree governs all uses of water on lands in the Virden Valley specified in the Decree, and that the interpretation of the Decree is left to the United States District Court for the District of Arizona. The recommended decree is to be so construed.

The other question is whether the use of underground, pumped water on lands in the Virden Valley which are not specified in the Gila Decree should be prohibited. Arizona and New Mexico have stipulated that there are 380.81 acres of land within the Virden Valley which are not specified in the Gila Decree and which are presently being irrigated with water from the underground water sources of the Gila River. The United States does not dispute this figure.

Arizona and New Mexico have compromised this question by agreeing that these non-decree lands, or other lands or uses in the Virden Valley to which their water rights may be transferred, may consumptively use not more than 838.2 acre-feet of underground water per annum "unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree." The United States objects to this compromise, asserting that the use of this water may reduce the surface supply in the Gila River available for storage in the San Carlos Reservoir, which in turn would reduce the water available for the Gila River Indian Reservation.

Despite this opposition from the United States, I have decided to adopt the Arizona-New Mexico settlement. The total quantity of ground water involved is only 838.2 acre feet. While I have found that pumping of ground water in the Gila River System basin affects the surface supply, there is no evidence regarding the extent that out-of-decree pumping in the Virden Valley affects United States interests in Arizona. The maximum effect would be in the amount of the 838.2 acre-feet, and in all probabilty the diminution of surface supply available to the Gila River Indian Reservation would be much less. Moreover, the United States is not foreclosed. It is protected from injury if it can show that pumping from lands outside the Gila Decree impairs rights confirmed to it under the Decree. For similar reasons I have also adopted in the recommended decree a compromise between Arizona and New Mexico which permits the domestic use of a maximum of 265 acre-feet per annum of water diverted from the Gila River or its underground sources in the Virden Valley in addition to the uses confirmed by the Gila Decree, "unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree."

Both San Simon Creek and the San Francisco River have their confluence with the Gila River in Arizona. In order to ensure that Arizona users on the Gila and on those tributaries of the Gila will not be adversely affected by increased use, diversions from one of these streams may not be transferred to any of the other streams, nor may uses for irrigation purposes within any area on one of the streams be transferred for use for irrigation purposes to any other area on that stream.[20] The recommended decree so provides.

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[20]The areas on the San Francisco River System are: Luna, Apache Creek-Aragon, Reserve, and Glenwood (including Mule Creek). The Luna, Apache Creek-Aragon, and Reserve areas are

b. Future Uses

New Mexico also claims the right to water for future requirements. It is here, however, that priority of appropriation has its greatest effect. It would be unreasonable in the extreme to reserve water for future use in New Mexico when senior downstream appropriators in Arizona remain unsatisfied. It was so held as to Colorado's claim in *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945).

New Mexico seeks to mitigate the effect of her claim by attempting to establish that, should additional water storage facilities be constructed sometime in the uncertain future, increased uses in New Mexico would not diminish the supply for downstream Arizona users.[80] To formulate a decree on the basis of such hypothetical facts would not be prudent. In *Nebraska* v. *Wyoming, supra,* at 620, the Court said:

> "There is no reliable basis for prediction. But a controversy exists; and the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new condition."

Of course, the decree will provide for modification should a change of condition warrant it.

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as shown on Arizona Exhibit 334. Glenwood (including Mule Creek) embraces the area delineated on Arizona Exhibit 334 as the Glenwood area and in addition thereto all of the San Francisco River System in New Mexico to the south of the Glenwood area as shown on said Exhibit 334.

The areas on the Gila River System are: Upper Gila, Cliff-Gila and Buckhorn-Duck Creek, Red Rock, and Virden Valley. The Red Rock area is as shown on Arizona Exhibit 328. The Cliff-Gila and Buckhorn Duck-Creek area is as shown on Arizona Exhibit 328 and in addition thereto embraces all areas on Mangas Creek and tributaries thereto. The Upper Gila area embraces the entire Gila River System upstream from the Cliff-Gila and Buckhorn-Duck Creek area as herein defined. The Virden Valley is that portion of the Gila River System in New Mexico (excluding the San Francisco River and San Simon Creek and their tributaries) downstream from the area delineated as Red Rock on Arizona Exhibit 328.

[80] N. M. Proposed Findings 18-21.

c. United States Claims

The United States asserts rights to water from sources within the drainage of the Gila River System for use on various Indian Reservations as well as on National Forests, Parks, Monuments and lands administered by the Bureau of Land Management.

A number of Indian Reservations and several other federal establishments are situated on tributaries of the Gila which flow exclusively within the State of Arizona. The United States claims on these Arizona tributaries assume the posture of claims against other individual users within the State of Arizona. It would be inexpedient in this case to adjudicate such purely local claims. Moreover, there is no such collision between competing uses on these tributaries as to warrant judicial interference in this litigation. And even if there were such a dispute, it would not be necessary or helpful to resolve it in order to make the apportionment between Arizona and New Mexico.

Different considerations govern the claims of the United States to water from the Gila River and its interstate tributaries. These streams are overappropriated. The controversy with respect to them is real and immediate; and the disposition of these claims materially affects the interstate allocation as between Arizona and New Mexico. Thus New Mexico's claim for confirmation of existing uses out-of-priority conflicts with the United States claim that it has reserved water of the Gila River and its interstate tributaries for the use of its establishments downstream in Arizona.

There are three Indian Reservations on behalf of which the United States claims the right to water from the Gila River proper; they are the Gila River, the San Carlos and the Gila Bend Indian Reservations.[81] The United States

[81] See U. S. Proposed Conclusions 4.21, 4.22.2, 4.23.4.

does not claim any rights to divert water for Indian Reservations from the San Francisco River and San Simon Creek, the other two interstate streams of the Gila System. The interests of both the Gila River Indian Reservation and San Carlos Indian Reservation were represented by the United States in *United States* v. *Gila Valley Irrigation District, et al.* (Globe Equity No. 59)[32] and the United States concedes that rights to divert water from the mainstream of the Gila River asserted on behalf of these Reservations are governed by the Gila Decree.[33] However, rights of the Gila Bend Indian Reservation, which is located below the confluence of the Salt and Gila Rivers approximately 40 miles southwest of Phoenix, are not subject to the Gila Decree.

Assuming *arguendo* that this Reservation has the senior priority on the Gila River, proper application of the principles of equitable apportionment would still compel a finding that reduction of present New Mexico uses for its benefit would be unwarranted. The Gila is a wasting stream below Ashurst-Hayden Dam, see note 45, page 338, *infra*. Water required to be released at potential points of use in New Mexico would have to travel through part of that state and through half of Arizona, across hot deserts, before reaching the Reservation, and a substantial amount of it would be lost en route. Moreover, the United States admits that "an adequate water supply, primarily from underground sources . . . . is presently available for the irrigation of lands of the Gila Bend Indian Reservation."[34] It is apparent, therefore, that no reasonable purpose can be served in an equitable apportionment by allocating water to the Reservation at the expense of present New Mexico uses.

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[32]Ariz. Ex. 103.
[33]See U. S. Proposed Conclusions 4.22.1, 4.23.2.
[34]U. S. Proposed Finding 4.21.5.

Any claims that the Reservation might have as against Arizona users on the Salt and Gila Rivers are, as discussed above, matters of intrastate rights and priorities which should not be adjudicated in this case.

The United States also claims rights to water from sources within the drainage area of the Gila River System for use in National Forests, Parks, Memorials and Monuments as well as for lands administered by the Bureau of Land Management. For reasons already stated, only claims to water of the Gila River and its interstate tributaries will be here considered. Ten federal establishments fall within this category.

With the exception of the Gila National Forest, it is unnecessary to pass on the claims of the United States for water for any of the other nine federal establisments, because the United States has not demonstrated, except as to the Gila National Forest, that it presently utilizes or requires water from the mainstream of the Gila or its interstate tributaries in order to carry out the purposes of these establishments. Nor has the United States demonstrated, again excepting the Gila National Forest, that it will in the future require water from these sources. There is, therefore, no controversy over uses by these federal establishments to be adjudicated. Certainly it would be inappropriate to adjudicate the claims of the United States (with the exception noted) at this time since those claims may never be exercised much less questioned. Moreover, it would be impossible on the basis of this record to determine the water rights of the United States (except for the Gila National Forest) either on the basis of state law or on the basis of federal reservation of water. Of course, the rights of Arizona and New Mexico adjudicated herein are subject to possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments and lands administered by the Bureau of

Land Management, as such rights may be determined hereafter.

The Gila National Forest presently diverts water from the mainstream of the Gila and San Francisco Rivers. The finding is warranted that the United States intended, when it withdrew this Forest from entry, to reserve the water necessary to fulfill the purposes for which the Forest was created. Support for this finding lies in the following facts: The Gila and San Francisco Rivers are the only substantial streams which flow within the boundaries of the Forest; the purposes of the Forest cannot be fulfilled without an adequate water supply; and the United States presently utilizes water from these sources in order to maintain the Forest. The power of the United States to make such a reservation with respect to the Forest cannot be logically differentiated from the power of the United States with respect to Indian Reservations and Recreation Areas.

Having found that the United States intended to reserve water from these sources in quantities reasonably necessary to fulfill the purpose of withdrawal, and having concluded that the United States has the power to make such a reservation, it follows that water rights in the Gila River System recognized by the recommended decree herein are subordinate to the right of the United States to divert water for the Gila National Forest to the extent that the former rights are junior in time. As in the case of the Lake Mead National Recreation Area, the future water requirements of the Gila National Forest appear to be so modest that it is unnecessary to put maximum limits on the reserved water rights created for its benefit.

FINDINGS OF FACT

1. The Gila River rises in the mountainous areas of southwestern New Mexico near the towns of Cliff and Gila. It flows southwesterly—entering Arizona between Virden,

New Mexico and Duncan, Arizona. Thence it flows westerly across Arizona to its confluence with the Colorado River below Imperial and Laguna Dams near Yuma, Arizona. Its major tributaries are San Simon Creek and the San Francisco, San Carlos, San Pedro, Santa Cruz, Salt, Verde (a tributary of the Salt), Agua Fria and Hassayampa Rivers. The Gila River System drains a total of 57,800 square miles.[35]

2. The San Francisco River, which rises in Arizona near the town of Alpine, enters New Mexico near Luna and thence flows easterly, southerly and then westerly to re-cross the state line and enter Arizona near Clifton. Its confluence with the Gila River lies below Clifton and west of Guthrie, Arizona. The San Francisco River drains a total of 2,800 square miles.[36]

3. San Simon Creek is formed in New Mexico by tributaries which rise in southeastern Arizona and southwestern New Mexico. It enters Arizona in the San Simon-Cienaga area north of Rodeo, New Mexico and thence flows northwesterly for over 100 miles to its confluence with the Gila River below Solomonsville, Arizona. San Simon Creek drains a total of 2,280 square miles.[37]

4. There are ten Indian Reservations on the Gila River System, all within the State of Arizona. They are the Ak Chin, Camp Verde, Fort Apache, Fort McDowell, Papago, Salt River, San Xavier, Gila Bend, Gila River and San Carlos Reservations.[38]

5. The Gila Bend, Gila River and San Carlos Reservations are situated on the Gila River. The other seven Reserva-

[35]Ariz. Exs. 106, 328, 1000, p. 12; N. M. Exs. 400, 402B, 402D.
[36]Ariz. Exs. 106, 334, 1000, p. 12; N. M. Exs. 400, 402C.
[37]Ariz. Exs. 106, 1000, p. 12; N. M. Exs. 400, 402A.
[38]See Part One, pp. 88-94.

tions are situated on tributaries of the Gila which flow entirely within the State of Arizona.[39]

6. The Gila Bend Indian Reservation is situated below the confluence of the Salt and Gila Rivers in Arizona, approximately 40 miles southwest of Phoenix.[40]

7. Coolidge Dam is the sole water storage facility on the Gila River between its headwaters and its confluence with the Salt River. Situated 26 miles southeast of Globe, Arizona, it creates the San Carlos Reservoir which serves the San Carlos Project in Arizona.[41]

8. The flow of the Gila River and its tributaries has been erratic.[42]

9. On June 29, 1935, the United States District Court for the District of Arizona entered a final decree which determined rights to divert and use water from the Gila River from a point in New Mexico (above the Virden Valley) ten miles east of the eastern boundary of Arizona to the Gila River Crossing, located a short distance upstream from the joinder of the Gila and Salt Rivers southwest of Phoenix, Arizona. *United States* v. *Gila Valley Irrigation District, et al.* (Globe Equity No. 59).[43]

10. The Gila River, San Francisco River, and San Simon Creek are overappropriated, supply being insufficient to satisfy existing needs.[44]

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[39]See U. S. Ex. 100.
[40]See U. S. Exs. 1408-1409.
[41]See Part One, p. 39.
[42]See *e.g.*, Ariz. Ex. 98, pp. 604-605, 609-610, 626-627.
[43]Ariz. Exs. 103, 300.
[44]Ariz. Answering Brief p. 83; N. M. Rebuttal Brief, p. 5. For example, under the Gila Decree (Globe Equity No. 59) the United States has the right to divert up to 603,276 acre-feet per annum at Ashurst-Hayden Dam for the use of the San Carlos Project and

11. The Gila River is a losing or wasting stream below Ashurst-Hayden Dam.[45]

12. Lands within the Gila River System drainage basin in New Mexico are irrigated with surface and underground water.[46]

13. There are 2,900 acres presently being irrigated with water from San Simon Creek, its tributaries and underground water sources in New Mexico.[47]

14. Present annual consumptive uses of water from San Simon Creek, its tributaries and underground water sources in New Mexico are 7,200 acre-feet.[48]

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certain federal and Arizona agencies. Ariz. Ex. 103 p. 98. However, diversions at Ashurst-Hayden Dam from 1934 to 1955 averaged 187,000 acre-feet per year. Ariz. Ex. 139, p. 1. The 1951-1955 diversion figures were as follows:

1951	47,000 acre-feet
1952	226,000 acre-feet
1953	53,000 acre-feet
1954	121,000 acre-feet
1955	113,000 acre-feet

Similarly, the Gila Decree authorized the storage in San Carlos Reservoir of 1,285,000 acre-feet. Ariz. Ex. 103, p. 105. Storage in the Reservoir, however, has never exceeded 800,000 acre-feet and storage, from 1934 to 1955, averaged 168,000 acre-feet. Ariz. Ex. 139, p. 5. Storage figures as of May 1 for the years 1951 through 1955 were:

1951	—0— acre-feet
1952	160,000 acre-feet
1953	9,000 acre-feet
1954	26,000 acre-feet
1955	—0— acre-feet

An average of 63,000 acres of the 100,546 acre San Carlos Project were irrigated from 1934 to 1955. Most of the unirrigated acreage would have been irrigated had the water supply been adequate. Tr. 1560-1562 (Gookin); see Ariz. Ex. 139. See also Part One, pp. 48-50.

[45]Tr. 1399-1402 (Gookin); 5584-5590 (Dugan); Ariz. Ex. 77B, p. 33, Table G.

[46]See Tr. 17389-17407 (Sorenson); N. M. Ex. 517.

[47]Tr. 17389-17407 (Sorenson).

[48]N. M. Ex. 517.

15. There are 225 acres presently being irrigated in the Luna area of the San Francisco River System in New Mexico.

16. There are 316 acres presently being irrigated in the Apache Creek-Aragon area of the San Francisco River System in New Mexico.

17. There are 725 acres presently being irrigated in the Reserve area of the San Francisco River System in New Mexico.

18. There are 1,003 acres presently being irrigated in the Glenwood area (including Mule Creek) of the San Francisco River System in New Mexico.

19. Thus there is an aggregate of 2,269 acres presently being irrigated with water from the San Francisco River, its tributaries and underground water sources in New Mexico.

20. Present annual consumptive uses of water from the San Francisco River, its tributaries and underground water sources in New Mexico, for all uses, are 3,187 acre-feet.

21. There are 287 acres presently being irrigated in the Upper Gila area of the Gila River in New Mexico.

22. There are 1,456 acres presently being irrigated in the Red Rock area (including the Fuller Ranch) of the Gila River in New Mexico.

23. There are 5,314 acres presently being irrigated in the Cliff-Gila and Buckhorn-Duck Creek area of the Gila River in New Mexico.

24. Thus there is an aggregate of 7,057 acres (exclusive of the Virden Valley) presently being irrigated with water

from the Gila River and its underground water sources in New Mexico.

25. Present annual consumptive uses of water from the Gila River and its underground water sources in New Mexico (exclusive of the Virden Valley), for all uses, are 13,662 acre-feet.

26. There are 380.81 acres of land within the Virden Valley, New Mexico, with no rights confirmed by the Gila Decree (Globe Equity No. 59) which are presently being irrigated with water from the underground water sources of the Gila River, to-wit, the following designated and described parcels owned by the following persons:

Owner	Subdivision	Legal Description	Sec.	Twp.	Rng.	Acreage
Marvin Arnett and J. C. O'Dell	Part Lot 3		6	19S	21W	33.84
	Part Lot 4		6	19S	21W	52.33
	NW¼ SW¼		5	19S	21W	38.36
	SW¼ SW¼		5	19S	21W	39.80
	Part Lot 1		7	19S	21W	50.68
	NW¼ NW¼		8	19S	21W	38.03
Hyrum M. Pace, Ray Richardson, Harry Day, and N. O. Pace, Est.	SW¼ NE¼		12	19S	21W	8.00
	SW¼ NE¼		12	19S	21W	15.00
	SE¼ NE¼		12	19S	21W	7.00
C. C. Martin	S. part SE¼SW¼SE¼		1	19S	21W	0.93
	W½W½W½NE¼NE¼		12	19S	21W	0.51
	NW¼NE¼		12	19S	21W	18.01
A. E. Jacobson	SW part Lot 1		6	19S	21W	11.58
W. LeRoss Jones	E. Central part	E½E½E½NW¼NW¼	12	19S	21W	0.70
	SW part	NE¼NW¼	12	19S	21W	8.93
	N. Central part	N½N½NW¼SE¼NW¼	12	19S	21W	0.51
Conrad and James R. Donaldson	N½N½N½SE¼		18	19S	20W	8.00
James D. Freestone	Part W½NW¼		33	18S	21W	7.79

Owner	Subdivision	Legal Description	Sec.	Twp.	Rng.	Acreage
Virgil W. Jones	N½SE¼NW¼; SE¼NE¼NW¼		12	19S	21W	7.40
Darrell Brooks	SE¼SW¼		32	18S	21W	6.15
Floyd Johns	Part N½SE¼NE¼		13	19S	21W	4.00
	Part NW¼SW¼NW¼		18	19S	20W	1.70
L. M. Hatch	SW¼SW¼		32	18S	21W	4.40
—	Virden Townsite					3.90
Carl M. Donaldson	SW¼SE¼		12	19S	21W	3.40
Mack Johnson	Part NW¼NW¼NE¼		10	19S	21W	2.80
	Part NE¼NW¼NE¼		10	19S	21W	0.30
	Part N½N½S½NW¼NE¼		10	19S	21W	0.10
Chris Dotz	SE¼SE¼; SW¼SE¼		3	19S	21W)	
	NW¼NE¼; NE¼NE¼		10	19S	21W)	2.66
Roy A. Johnson	NE¼SE¼SE¼		4	19S	21W	1.00
Ivan and Antone Thygerson	NE¼SE¼SE¼		32	18S	21W	1.00
John W. Bonine	SW¼SE¼SW¼		34	18S	21W	1.00
Marion K. Mortenson	SW¼SW¼SE¼		33	18S	21W	1.00
	TOTAL					380.81

27. New Mexico has not established that her claimed rights are senior in time to rights of Arizona and the United States.[49]

28. The Gila National Forest is the only one of the National Forests, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management which presently diverts water from the mainstream of the Gila or its interstate tributaries.[50]

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[49]See N. M. Opening Brief, pp. 6-10; N. M. Rebuttal Brief, p 4; N. M. Proposed Finding 12.

[50]See U. S. Exs. 2706, 2708, 2710, 2712, 2716, 2718, 2720A, 2720B, 2803, 2815, 2821. 2908-2911.

29. The Gila National Forest was created as a public reservation by a Presidential Proclamation dated March 2, 1899. Its area was subsequently enlarged and modified.[51]

30. In withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the Forest.[52]

31. There is not sufficient evidence to make a finding of the ultimate water requirements of the Gila National Forest.

CONCLUSIONS OF LAW

1. The Colorado River Compact does not give New Mexico any rights to the use of water from the Gila River System as against any of the other states of the Lower Basin.

2. The Boulder Canyon Project Act, 45 Stat. 1057 (1929), does not give New Mexico any rights to the use of water from the Gila River System as against any of the other states of the Lower Basin.

3. This controversy is governed by the principles of equitable apportionment.

4. An equitable apportionment of the waters of the Gila River System does not justify reduction of present New Mexico uses. Such uses as are specified in the foregoing Findings of Fact should be confirmed.

5. An equitable apportionment of the waters of the Gila River System requires that uses in excess of those specified in the foregoing Findings of Fact should be enjoined.

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[51]See U. S. Exs. 2720A-2720B.

[52]Presidential Proclamation of March 2, 1899, U. S. Exs. 2719A-2720B.

6. For purposes of this equitable apportionment, the State of New Mexico, as well as her citizens, is bound by the Gila Decree (Globe Equity No. 59) and priorities therein specified shall continue to be administered thereunder.

7. The decree herein recommended applies both to surface and underground water.

8. Uses recognized on particular streams may not be transferred so as to justify additional uses on other streams.

9. Rights to water from the Gila River for the benefit of the San Carlos and Gila River Indian Reservations are governed by the Gila Decree (Globe Equity No. 59).

10. Claims of the United States on behalf of the Gila Bend Indian Reservation against New Mexico users are rejected. Similar claims against Arizona users are not determined herein.

11. The United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used.

PART THREE

PART THREE

Recommended Decree

It is ORDERED, ADJUDGED AND DECREED that

I. For purposes of this decree:

(A) "Consumptive use" means diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation;

(B) "Mainstream" means Lake Mead and the mainstream of the Colorado River downstream from Lake Mead within the United States;

(C) Consumptive use from the mainstream within a state shall include all uses of water of the mainstream within that state, including but not limited to, uses made by persons, by agencies of the state, and by the United States for the benefit of Indian Reservations and other federal establishments within the state;

(D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Weir, Imperial Dam, Laguna Dam and all other dams and works controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;

(E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Hoover Dam and within the United States of America;

(F) "Tributaries" means all stream systems in the Lower Basin of the Colorado River the waters of which

naturally drain into the main Colorado River and also means that portion of the main Colorado River in the Lower Basin above Lake Mead;

(G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

(H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;

(I) "Domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power;

(J) "Annual" and "Year," except where the context may otherwise require, refer to calendar years;

(K) Consumptive use of water diverted in one state for consumptive use in another state shall be treated as if diverted in the state for whose benefit it is consumed.

II. The United States, its officers, attorneys, agents and employees, be, and they are hereby severally enjoined:

(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

(1) For river regulation, improvement of navigation, and flood control,

(2) For irrigation and domestic use, and

(3) For power;

Provided, however, that the United States may release water in satisfaction of its obligations to the United States of Mexico under the treaty dated February 3, 1944, without regard to the priorities specified above;

(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California and Nevada, except as follows:

(1) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid three states, then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada;

(2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid states in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

(3) If insufficient mainstream water is available for release, as determined by the Secretary of the In-

terior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three states, then the available annual consumptive use shall be apportioned as follows:

(a) For use in Arizona $\frac{2.8}{7.5}$,

(b) For use in California $\frac{4.4}{7.5}$,

(c) For use in Nevada $\frac{.3}{7.5}$;

(4) Any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released;

(5) If the water apportioned for consumptive use in any of said states in any year is insufficient to satisfy present perfected rights in that state, the deficiency shall first be supplied out of water apportioned for use in the other two states but not consumed in those states, and any remaining deficiency shall be supplied by each of the remaining states, out of water apportioned for consumptive use in such states which is in excess of the quantity necessary to satisfy present perfected rights in such states, in proportion to the ratios heretofore established between them, to wit: if water must be supplied to satisfy present perfected rights in two of the three states, then the third state shall, out of such excess, supply all the necessary water, and if water must be supplied to satisfy present perfected rights in one state, then each of the other two states shall out of such excess supply that proportion of the necessary water that its apportionment of the first

7,500,000 acre-feet of consumptive use bears to the aggregate apportionment of the two states;[1] provided, however, that present perfected rights in California shall not exceed 4,400,000 acre-feet of consumptive use per annum;

(6) If the mainstream water apportioned for consumptive use in any year is insufficient to satisfy present perfected rights in each and all of the three states, then such water shall be allocated for consumptive use in accordance with the priority of present perfected rights without regard to state lines; provided, however, that present perfected rights in California shall not exceed 4,400,000 acre-feet of consumptive use per annum;

(7) Notwithstanding the provisions of Paragraphs (1) through (6) of this subdivision (B), mainstream water shall be delivered to users in Arizona, California and Nevada only if contracts have been made by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act, for delivery of such water;

(8) If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other

[1]Thus if water is to be supplied to California from the other states' apportionment, Arizona shall contribute $\frac{2.8}{3.1}$ and Nevada $\frac{.3}{3.1}$ of the total amount supplied.

states. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

(C) From releasing water controlled by the United States for use in the States of Arizona, California and Nevada for:

(1) Any use or user in violation of state law, except as specified in Article II (B) (5) and (6) of this decree and except as federal statutes may otherwise specifically direct;

(2) The benefit of any federal establishment, except as specified hereinafter; provided, however, that such release may be made notwithstanding the provisions of Paragraph (7) of subdivision (B) of this Article and of Paragraph (1) of this subdivision (C) and provided further that nothing herein shall prohibit the United States from making future additional reservations of unappropriated mainstream water as may be authorized by law:

(a) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(b) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

(c) The Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(d) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(e) The Fort Mohave Indian Reservation in annual quantities not to exceed (i) 122,648 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and, subject to the next succeeding proviso, with priority dates of September 18, 1890, for lands transferred by the Executive Order of said date;

February 2, 1911, for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850)] as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292) shall not be included as irrigable acreage within the Reservation and that the above specified diversion requirement shall be reduced by 6.4 acre-feet per acre of such land that is irrigable;

(f) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the purposes of the Recreation Area, with priority dates of March 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339);

(g) The Havasu Lake National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge, not to exceed (i) 41,839 acre-feet of water diverted from the mainstream or (ii) 37,339 acre-feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of January 22, 1941, for lands reserved by the Executive Order of said date (No. 8647), and a priority date of February 11, 1949, for land reserved by the Public Land Order of said date (No. 559);

(h) The Imperial National Wildlife Refuge in annual quantities reasonbly necessary to fulfill

the purposes of the Refuge not to exceed (i) 28,000 acre-feet of water diverted from the mainstream or (ii) 23,000 acre-feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of February 14, 1941.

Provided further, that consumptive uses for the benefit of the above named federal establishments shall be satisfied only out of water allocated, as provided in subdivision (B) of this Article, to each state wherein such uses occur, and only to the extent that their priorities specified herein are senior to other priorities within the state.

III. The States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, their officers, attorneys, agents and employees, be and they are hereby severally enjoined:

(A) From interfering with the management and operation, in conformity with Article II of this decree, of regulatory structures controlled by the United States;

(B) From interfering with or permitting the interference with releases and deliveries, in conformity with Article II of this decree, of water controlled by the United States;

(C) From diverting or permitting the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective states; and provided further that none of the above named political subdivisions of the State of California shall divert or permit the diversion of water

from the mainstream the diversion of which has not been authorized by the United States for its particular use;

(D) From consuming or permitting the consumptive use of water from the mainstream in excess of the quantities specified in Article II of this decree.

IV. The State of New Mexico, its officers, attorneys, agents and employees, be and they are after four years from the date of this decree hereby severally enjoined:

(A) From diverting or permitting the diversion of water from San Simon Creek, its tributaries and underground water sources for the irrigation of more than a total of 2,900 acres during any one year, and from exceeding a total consumptive use of such water, for whatever purpose, of 72,000 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 8,220 acre-feet during any one year;

(B) From diverting or permitting the diversion of water from the San Francisco River, its tributaries and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

Luna Area	225
Apache Creek-Aragon Area	316
Reserve Area	725
Glenwood Area	1,003;

and from exceeding a total consumptive use of such water, for whatever purpose, of 31,870 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 4,112 acre-feet during any one year;

(C) From diverting or permitting the diversion of water from the Gila River, its tributaries (exclusive of the San Francisco River and San Simon Creek and their tributaries) and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

Upper Gila Area	287
Cliff-Gila and Buckhorn-Duck Creek Area	5,314
Red Rock Area	1,456;

and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 136,620 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 15,895 acre-feet during any one year;

(D) From diverting or permitting the diversion of water from the Gila River and its underground water sources in the Virden Valley, New Mexico, except for use on lands determined to have the right to the use of such water by the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in *United States* v. *Gila Valley Irrigation District, et al.* (Globe Equity No. 59) (herein referred to as the Gila Decree), and except pursuant to and in accordance with the terms and provisions of the Gila Decree; provided, however, that:

(1) This decree shall not enjoin the use of underground water on any of the following lands:

Owner	Subdivision	Legal Description	Sec.	Twp.	Rng.	Acreage
Marvin Arnett and J. C. O'Dell	Part Lot 3		6	19S	21W	33.84
	Part Lot 4		6	19S	21W	52.33
	NW¼ SW¼		5	19S	21W	38.36
	SW¼ SW¼		5	19S	21W	39.80
	Part Lot 1		7	19S	21W	50.68
	NW¼ NW¼		8	19S	21W	38.03
Hyrum M. Pace, Ray Richardson, Harry Day and N. O. Pace, Est.	SW¼ NE¼		12	19S	21W	8.00
	SW¼ NE¼		12	19S	21W	15.00
	SE¼ NE¼		12	19S	21W	7.00
C. C. Martin	S. part SE¼SW¼SE¼		1	19S	21W	0.93
	W½W½W½NE¼NE¼		12	19S	21W	0.51
	NW¼NE¼		12	19S	21W	18.01
A. E. Jacobson	SW part Lot 1		6	19S	21W	11.58
W. LeRoss Jones	E. Central part E½E½E½NW¼NW¼		12	19S	21W	0.70
	SW part NE¼NW¼		12	19S	21W	8.93
	N. Central part N½N½NW¼SE¼NW¼		12	19S	21W	0.51
Conrad and James R. Donaldson	N½N½N½SE¼		18	19S	20W	8.00
James D. Freestone	Part W½NW¼		33	18S	21W	7.79
Virgil W. Jones	N½SE¼NW¼; SE¼NE¼NW¼		12	19S	21W	7.40
Darrell Brooks	SE¼SW¼		32	18S	21W	6.15
Floyd Jones	Part N½SE¼NE¼		13	19S	21W	4.00
	Part NW¼SW¼NW¼		18	19S	20W	1.70
L. M. Hatch	SW¼SW¼		32	18S	21W	4.40
——	Virden Townsite					3.90
Carl M. Donaldson	SW¼SE¼		12	19S	21W	3.40
Mack Johnson	Part NW¼NW¼NE¼		10	19S	21W	2.80
	Part NE¼NW¼NE¼		10	19S	21W	0.30
	Part N½N½S½NW¼NE¼		10	19S	21W	0.10
Chris Dotz	SE¼SE¼; SW¼SE¼		3	19S	21W	2.66
			10	19S	21W	

Owner	Subdivision	Legal Description	Sec.	Twp.	Rng.	Acreage
Roy A. Johnson	NE¼SE¼SE¼		4	19S	21W	1.00
Ivan and Antone Thygerson	NE¼SE¼SE¼		32	18S	21W	1.00
John W. Bonine	SW¼SE¼SW¼		34	18S	21W	1.00
Marion K. Mortenson	SW¼SW¼SE¼		33	18S	21W	1.00
	TOTAL					380.81

or on lands or for other uses in the Virden Valley to which such use may be transferred or substituted on retirement from irrigation of any of said specifically described lands, up to a maximum total consumptive use of such water of 838.2 acre-feet per annum, unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree; and

(2) This decree shall not prohibit domestic use of water from the Gila River and its underground water sources on lands with rights confirmed by the Gila Decree, or on farmsteads located adjacent to said lands, or in the Virden Townsite, up to a total consumptive use of 265 acre-feet per annum in addition to the uses confirmed by the Gila Decree, unless and until such use is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree;

(E) Provided, however, that nothing in this Article IV shall be construed to affect rights as between individual water users in the State of New Mexico; nor shall anything in this Article be construed to affect possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments and

lands administered by the Bureau of Land Management; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used.

V. The United States shall prepare and maintain, or provide for the preparation and maintenance of, and shall make available, annually and at such shorter intervals as the Secretary of the Interior shall deem necessary or advisable, for inspection at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) Releases of water through regulatory structures controlled by the United States;

(B) Diversions of water from the mainstream, return flow of such water to the stream as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation, and consumptive use of such water. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(C) Releases of mainstream water pursuant to orders therefor but not diverted by the party ordering the same, and the quantity of such water delivered to Mexico in satisfaction of the Mexican Treaty or diverted by others in satisfaction of rights decreed herein. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(D) Deliveries to Mexico of water in satisfaction of the obligations of Part III of the Treaty of February 3, 1944, and, separately stated, water passing to Mexico in excess of treaty requirements;

(E) Diversions of water from the mainstream of the Gila and San Francisco Rivers and the consumptive use of such water, for the benefit of the Gila National Forest.

VI. Within two years from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their priority dates, in waters of the mainstream within each state, respectively, in terms of consumptive use, except those relating to federal establishments. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to federal establishments within each state. If the three states and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each state, any state or the United States may apply to the Court for the determination of such rights by the Court.

VII. The State of New Mexico shall, within four years from the date of this decree, prepare and maintain, or provide for the preparation and maintenance of, and shall annually thereafter make available for inspection at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) The acreages of all lands in New Mexico irrigated each year from the Gila River, the San Francisco River, San Simon Creek and their tributaries and all of their underground water sources, stated by legal description and component acreages and sepa-

rately as to each of the areas designated in Article IV of this decree and as to each of the three streams;

(B) Annual diversions and consumptive uses of water, in New Mexico, from the Gila River, the San Francisco River and San Simon Creek and their tributaries, and all their underground water sources, stated separately as to each of the three streams.

VIII. This decree shall not affect:

(A) The relative rights *inter sese* of water users within any one of the states, except as otherwise specifically provided herein;

(B) The rights or priorities to water in any of the Lower Basin tributaries of the Colorado River in the States of Arizona, California, Nevada, New Mexico and Utah except the Gila River System;

(C) The rights or priorities, whether under state law or federal law, except as specific provision is made herein, of any Indian Reservation; National Forest, Park, Recreation Area, Monument or Memorial; or lands administered by the Bureau of Land Management.

IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

This Report, together with the Findings of Fact and Conclusions of Law therein contained, and the recommended decree thereto annexed are

Respectfully submitted,

SIMON H. RIFKIND
Special Master

New York, N. Y.
December 5, 1960

APPENDIX 1

Appendix 1

PLEADINGS, BRIEFS, AND ORDERS OF THE COURT

Filing Date	
1952	
August 13	Motion for Leave to File Bill of Complaint and Bill of Complaint.
October 13	Rule Ordered to Issue, Returnable Within 60 days, Requiring Defendants to Show Cause Why Leave to File Bill of Complaint Should Not Be Granted. 344 U. S. 806.
December 8	Return of Defendants to Rule to Show Cause and Brief in Support of Return.
December 31	Motion on Behalf of the United States for Leave to Intervene and Brief in Support of Motion.
1953	
January 19	Motion for Leave to File Bill of Complaint Granted and Process Ordered to Issue, Returnable Within 60 Days. Motion of United States for Leave to Intervene Granted. 344 U. S. 919.
February 10	Motion on Behalf of Sidney Kartus et al. for Leave to File Petition to Intervene.
March 4	Complainant's Objections to Motion on Behalf of Sidney Kartus et al. for Leave to File Petition to Intervene.
March 16	Motion of Sidney Kartus et al. for Leave to Intervene Denied. 345 U. S. 914.
May 19	Answer of Defendants to Bill of Complaint.
May 20	Motion of Colter Water Project Assn., Inc., for Leave to File Brief Amicus Curiae.

Appendix 1

Filing Date	
May 22	Arizona's Motion for Leave to File Objections to Motion of Colter Water Project Assn., Inc., for Leave to File Brief Amicus Curiae.
June 1	Answer to Bill of Complaint Filed and Leave Granted the Complainant to Reply Thereto on or Before September 1, 1953. Motion for Leave to File Brief of Colter Water Project Assn., Inc., as Amicus Curiae, Denied. 345 U. S. 968.
August 28	Reply to Defendants' Answer.
October 7	Rejoinder of Defendants to Complainant's Reply to Defendants' Answer.
December 8	Petition of Intervention on Behalf of the United States.
December 14	Motion on Behalf of the State of Nevada for Leave to Intervene and Petition Intervention on Behalf of the State of Nevada.
1954	
February 5	Response of Complainant the State of Arizona to Motion of State of Nevada for Leave to Intervene.
February 11	Answer of Complainant State of Arizona to Petition of Intervention on Behalf of the United States.
April 5	Answer of California Defendants to Petition of Intervention on Behalf of the United States and Summary of the Controversy.
April 5	Response of California Defendants to Motion on Behalf of the State of Nevada for Leave to Intervene and Answer of California Defendants to Petition of Intervention on Behalf of the State of Nevada.

Appendix 1

Filing Date	
May 13	Memorandum of United States Requesting Pre-Trial Conference.
May 26	Response of Arizona to Memorandum of United States Requesting Pre-Trial Conference.
May 28	Memorandum of California Defendants in Reply to Memorandum of United States Requesting a Pre-Trial Conference.
June 1	Motion of the State of Nevada for Leave to Intervene Granted. 347 U. S. 985. George I. Haight Appointed Special Master. 347 U. S. 986.
June 1	Reply of the State of Nevada to Answer of California Defendants to Petition of Intervention on Behalf of the State of Nevada.
June 17	Memorandum of Nevada in Reply to Memorandum Requesting Pre-Trial Conference by the United States.
July 14	Answer of Complainant State of Arizona to Petition of Intervention on Behalf of the State of Nevada.
July 15	Motion on Behalf of the California Defendants for Leave to File an Amended Answer to the Bill of Complaint of Arizona and Amendatory Answer.
July 15	California Defendants' Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming.
July 29	Answer of the State of Nevada to Petition of Intervention on Behalf of the United States.

Appendix 1

Filing Date	
August 13	Response of Complainant State of Arizona to Defendants' Motion to Join as Parties the States of Colorado, New Mexico, Utah, and Wyoming.
August 27	Reply of the State of Nevada to Answer of the State of Arizona to Petition of Intervention of the State of Nevada.
October 7	California Defendants' Appendices to the Answer, Volume II.
October 7	Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming.
December 27	Brief of New Mexico Opposing Motion of California to Join as Parties the States of Colorado, New Mexico, Utah, and Wyoming.
December 27	Brief of the State of Utah Opposing the Motion of the California Defendants to Join the State of Utah as a Party to This Action.
December 27	Brief of the State of Colorado and of the State of Wyoming Opposing the Motion of the State of California to Join the States of Colorado and Wyoming as Parties to This Action.
1955	
January 10	Order of the Court Granting California Defendants 30 Days From January 10, 1955, to File Brief in Response to Briefs of Colorado, Wyoming, Utah, and New Mexico.

Appendix 1

Filing Date	
February 7	Brief of the State of Nevada, Intervener, in re Motion of California to Join as Parties the States of Colorado, New Mexico, Utah, and Wyoming.
February 9	Reply Brief of California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming.
February 28	Order Granting California Defendants Leave to File Amended Answer. 348 U. S. 947.
February 28	Order Referring Joinder Motion to Special Master for Hearing and Recommendation. 348 U. S. 947.
July 18	Special Master's Report on the Motion of California Defendants to Join as Parties the States of New Mexico, Utah, Colorado, and Wyoming. 350 U. S. 812.
October 10	Order Appointing Simon Hirsch Rifkind Special Master in Place of George I. Haight, Deceased. 350 U. S. 812.
October 14	Exceptions of Intervening State of Nevada to Report and Recommendations of Special Master Concerning California's Motion to Join Colorado, New Mexico, Utah, and Wyoming.
October 20	Motion of the United States for Determination of Questions of Law Presented by the Pleadings in the Cause and the Report of the Special Master.
October 20	Exceptions of California Defendants to Report and Recommendations of the Special Master with Respect to Their Motion to Join the States of Colorado, New Mexico, Utah, and Wyoming and Brief in Support of Exceptions.

Filing Date	
October 21	Memorandum of the California Defendants in Reply to Motion of the United States for Determination of Questions of Law Presented by the Pleadings in This Cause and the Report of the Special Master.
November 1	Memorandum of Arizona (a) in Reply to Motion of the United States for Preliminary Determination of Questions of Law; and (b) in Reply to California's and Nevada's Exceptions to the Master's Report on the Question of Joinder of Four States.
November 4	Reply of California Defendants to Arizona's Memorandum Filed November 1, 1955, Directed to the Report of Special Master.
November 4	Response of the States of Colorado, Wyoming, Utah, and New Mexico to Motion of the United States for Determination of questions of Law Prior to Determination of Joinder Motion.
November 7	Order Setting Joinder Motion for Argument on Exceptions and Order Denying Motion of the United States for Determination of Legal Points. 350 U. S. 880.
December 12	Order Denying California Defendants' Motion to Join Colorado and Wyoming. Motion to Join Utah and New Mexico as Parties Granted Only to the Extent of Their Interest in Lower Basin Waters. 350 U. S. 114.
1956	
January 3	California Defendants' Petition for Rehearing of Decision Denying Motion to Join the States of Colorado, New Mexico, Utah, and Wyoming.

Appendix 1

Filing Date	
January 23	Order Denying California Defendants' Petition for Rehearing. 350 U. S. 955.
February 13	Complaint and Answer in Intervention by the State of Utah.
February 29	Answer of California Defendants to Complaint and Answer in Intervention by the State of Utah and Interrogatories Addressed to the State of Utah by the California Defendants.
March 2	Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters.
March 12	Answer of the State of Nevada to Complaint and Answer in Intervention by the State of Utah.
March 14	Answer of California Defendants to Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters and Interrogatories Addressed to the State of New Mexico by the California Defendants.
March 15	Response of State of Arizona to Complaint and Answer by the State of Utah.
March 15	Response of State of Arizona to Appearance and Statement of New Mexico.
March 19	Answer of the State of Nevada to the Appearance and Statement in Behalf of New Mexico of Its Claim of Interest in and to Lower Basin Waters.
June 11	Order Fixing Compensation of George I. Haight as Special Master Awarded to Kathleen Haight, Executrix of the Estate of George I. Haight, Deceased. 351 U. S. 977.

Appendix 1

Filing Date	
1957	
June 17	Order Fixing Payment on Account of the Fees to Be Awarded as Compensation for the Services of Simon H. Rifkind, Special Master, and Approving Expense Funds. 354 U. S. 918.
1958	
June 9	Order Fixing Payment on Account of the Fee to Be Awarded as Compensation for the Services of Simon H. Rifkind, Special Master. 357 U. S. 902.
August 13	Complainant's Motion for Leave to File Amended Pleadings. (Filed with Special Master.)
August 13	Complainant's Proposed Amended Bill of Complaint.
August 13	Complainant's Proposed Amended Reply to California Defendants' Answer.
August 13	Complainant's Proposed Amended Answer to Petition of Intervention on Behalf of the State of Nevada.
August 13	Complainant's Proposed Amended Response to Appearance and Statement of New Mexico.
August 13	Complainant's Proposed Amended Response to the Complaint and Answer in Intervention by the State of Utah.
1960	
May 5	Circulation of Draft Report.

APPENDIX 2

Appendix 2

COLORADO RIVER COMPACT

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel for the State of Arizona
W. F. McClure for the State of California
Delph E. Carpenter for the State of Colorado
J. G. Scrugham for the State of Nevada
Stephen B. Davis, Jr., for the State of New Mexico
R. E. Caldwell for the State of Utah
Frank C. Emerson for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Appendix 2

ARTICLE II

As used in this compact—

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, in-

dustrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not

require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and

use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the bene-

fit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

Article VIII

Present prefected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Appendix 2

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL.
(Signed) W. F. MCCLURE.
(Signed) DELPH E. CARPENTER.
(Signed) J. G. SCRUGHAM.
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL.
(Signed) FRANK C. EMERSON.

Approved:

(Signed) HERBERT HOOVER.

APPENDIX 3

Appendix 3

BOULDER CANYON PROJECT ACT

[PUBLIC—NO. 642—70TH CONGRESS]
[H. R. 5773]

AN ACT To provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside

of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

SEC. 2. (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

SEC. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

SEC. 4. (a) This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no

water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the

State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the com-

pletion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for

permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased

or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been

given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however*, That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of

electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act of penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

SEC. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, w interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in propor-

tion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

SEC. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such

compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

SEC. 9. All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided,* That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of sub-

section (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U. S. C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this chapter: *Provided further,* That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further,* That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.[1]

SEC. 10. That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

SEC. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the

[1]As amended by act of March 6, 1946 (60 Stat. 36).

same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

SEC. 12. "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

SEC. 13. (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico,

Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights-of-way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right-of-way, or other privilege from the United States or under its authority, or not, and

shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

SEC. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

SEC. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

SEC. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

SEC. 17. Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

SEC. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

SEC. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

SEC. 20. Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

SEC. 21. That the short title of this Act shall be "Boulder Canyon Project Act."

Approved, December 21, 1928.

APPENDIX 4

Appendix 4

CALIFORNIA LIMITATION ACT

(Act of March 4, 1929; Ch. 16, 48th Sess.; Statutes and Amendments to the Codes, 1929, pp. 38-39)

CHAPTER 16

An act to limit the use by California of the waters of the Colorado river in compliance with the act of congress known as the "Boulder canyon project act," approved December 21, 1928, in the event the Colorado river compact is not approved by all of the states signatory thereto

(Approved by the Governor March 4, 1929; in effect August 14, 1929)

The people of the State of California do enact as follows:

SECTION 1. In the event the Colorado river compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain act entitled "An act to ratify and approve the Colorado river compact, signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice be given by the governor of such ratifications and approval," approved January 10, 1929 (statutes 1929, chapter 1), is not approved within six months from the date of the passage of that certain act of the congress of the United States known as the "Boulder canyon project act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado river compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the provisions of the first paragraph of article eleven of said compact which makes the same binding and obligatory when approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of

such six states approval and the President by public proclamation shall have so declared, as provided by the said "Boulder canyon project act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said "Boulder canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said "Boulder canyon project act," and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

SEC. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4 (a) of the said "Boulder canyon project act" and this act shall be so construed.

APPENDIX 5

Appendix 5

ARIZONA CONTRACT OF FEBRUARY 9, 1944 (EFFECTIVE FEBRUARY 24, 1944)

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

BOULDER CANYON PROJECT
ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

THIS CONTRACT made this 9th day of February 1944 pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter referred to as "United States," acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter referred to as the "Secretary," and the STATE OF ARIZONA, hereinafter referred to as "Arizona," acting for this purpose by the Colorado River Commission of Arizona, pursuant to Chapter 46 of the 1939 Session Laws of Arizona,

Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary acting under and in pursuance of the provisions of the Colorado River Compact and Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the

main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead of a capacity of about thirty-two million (32,000,000) acre-feet; and

3. Whereas said Boulder Canyon Project Act provides that the Secretary, under such general rules and regulations as he may prescribe, may contract for the storage of water in the reservoir created by Boulder Dam, and for the delivery of such water at such points on the river as may be agreed upon, for irrigation and domestic uses, and provides further that no person shall have or be entitled to have the use for any purpose of the water stored, as aforesaid, except by contract made as stated in said Act; and

4. Whereas it is the desire of the parties to this contract to contract for the storage of water and the delivery thereof for irrigation of lands and domestic uses within Arizona; and

5. Whereas nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes:

6. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER

7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, or agencies or water users therein, will accept under this contract each calendar year from storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use

for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet.

(b) The United States also shall deliver from storage in Lake Mead for use in Arizona, at a point or points of diversion on the Colorado River approved by the Secretary, for the uses set forth in subdivision (a) of this Article, one-half of any excess or surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona under said compact and said act, less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article.

(c) This contract is subject to the condition that Boulder Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the United States and Arizona, and agencies and water users therein, shall observe and be subject to and controlled by said Colorado River Compact and the Boulder Canyon Project Act in the construction, management, and operation of Boulder Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other uses.

(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

(e) This contract is for permanent service, subject to the conditions stated in subdivision (c) of this Article, but

as to the one-half of the waters of the Colorado River system unapportioned by paragraphs (a), (b), and (c) of Article III of the Colorado River Compact, such water is subject to further equitable apportionment at any time after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(g) Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights.

(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

(i) Nothing in this contract shall preclude the parties hereto from contracting for storage and delivery above Lake Mead of water herein contracted for, when and if authorized by law.

(j) As far as reasonable diligence will permit, the water provided for in this contract shall be delivered as ordered and as reasonably required for domestic and irrigation uses within Arizona. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered, for the purpose of investigation and inspection, maintenance, repairs, replacements, or installation of equipment or machinery at Boulder Dam, or other dams heretofore or hereafter to be constructed, but so far as feasible will give reasonable notice in advance of such temporary discontinuance or reduction.

(k) The United States, its officers, agents, and employees shall not be liable for damages when for any reason whatsoever suspensions or reductions in the delivery of water occur.

(l) Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract.

(m) Rights-of-way across public lands necessary or convenient for canals to facilitate the full utilization in Arizona of the water herein agreed to be delivered will be granted by the Secretary subject to applicable federal statutes.

POINTS OF DIVERSION: MEASUREMENTS OF WATER

8. The water to be delivered under this contract shall be measured at the points of diversion, or elsewhere as the

Secretary may designate (with suitable adjustment for losses between said points of diversion and measurement), by measuring and controlling devices or automatic gauges approved by the Secretary, which devices, however, shall be furnished, installed, and maintained by Arizona, or the users of water therein, in manner satisfactory to the Secretary; said measuring and controlling devices or automatic gauges shall be subject to the inspection of the United States, whose authorized representatives may at all times have access to them, and any deficiencies found shall be promptly corrected by the users thereof. The United States shall be under obligation to deliver water only at diversion points where measuring and controlling devices or automatic gauges are maintained, in accordance with this contract, but in the event diversions are made at points where such devices are not maintained, the Secretary shall estimate the quantity of such diversions and his determination thereof shall be final.

CHARGES FOR STORAGE AND DELIVERY OF WATER

9. No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona. A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot.

Appendix 5 —

RESERVATIONS

10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III (a) of the Colorado River Compact; (3) what part, if any, is within Article III (b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III (a) of the Colorado River Compact between the Upper Basin and the Lower Basin.

DISPUTES AND DISAGREEMENTS

11. Whenever a controversy arises out of this contract, and if the parties hereto then agree to submit the matter to arbitration, Arizona shall name one arbitrator and the Secretary shall name one arbitrator and the two arbitrators thus chosen shall meet within ten days after their selection and shall elect one other arbitrator within fifteen days after their first meeting, but in the event of their failure to name the third arbitrator within thirty days after their first meeting, such arbitrator not so selected shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit. The decision of any two of the three arbitrators thus chosen shall be a valid and binding award.

RULES AND REGULATIONS

12. The Secretary may prescribe and enforce rules and regulations governing the delivery and diversion of waters

hereunder, but such rules and regulations shall be promulgated, modified, revised or extended from time to time only after notice to the State of Arizona and opportunity is given to it to be heard. Arizona agrees for itself, its agencies and water users that in the operation and maintenance of the works for diversion and use of the water to be delivered hereunder, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

13. This contract is made upon the express condition and with the express covenant that all rights of Arizona, its agencies and water users, to waters of the Colorado River and its tributaries, and the use of the same, shall be subject to and controlled by the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), as approved by the Boulder Canyon Project Act.

EFFECTIVE DATE OF CONTRACT

14. This contract shall be of no effect unless it is unconditionally ratified by an Act of the Legislature of Arizona, within three years from the date hereof, and further, unless within three years from the date hereof the Colorado River Compact is unconditionally ratified by Arizona. When both ratifications are effective, this contract shall be effective.

INTEREST IN CONTRACT NOT TRANSFERABLE

15. No interest in or under this contract, except as provided by Article 7(1), shall be transferable by either party without the written consent of the other.

APPROPRIATION CLAUSE

16. The performance of this contract by the United States is contingent upon Congress making the necessary appropriations for expenditures for the completion and the operation and maintenance of any dams, power plants or

other works necessary to the carrying out of this contract, or upon the necessary allotments being made therefor by any authorized federal agency. No liability shall accrue against the United States, its officers, agents, or employees by reason of the failure of Congress to make any such appropriations or of any federal agency to make such allotments.

MEMBER-OF-CONGRESS CLAUSE

17. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

DEFINITIONS

18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract.

19. In witness whereof the parties hereto have caused this contract to be executed the day and year first above written,

THE UNITED STATES OF AMERICA,

By (s) HAROLD L. ICKES,
Secretary of the Interior.

STATE OF ARIZONA, acting by and through its COLORADO RIVER COMMISSION,

By (s) HENRY S. WRIGHT, *Chairman.*
By (s) NELLIE T. BUSH, *Secretary.*

Approved this 11th day of February 1944:

(s) SIDNEY P. OSBORN,
Governor of the State of Arizona.

Appendix 6

NEVADA CONTRACT OF MARCH 30, 1942

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

1. THIS CONTRACT, made this 30th day of March, nineteen hundred forty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Abe Fortas, Acting Secretary of the Interior (hereinafter referred to as the "Secretary"), and the STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, acting under and in pursuance of the provisions of the Colorado River Compact and the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead; and

3. Whereas the State is desirous of entering into a contract for the delivery to it of water from Lake Mead:

4. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

5. (a) Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year. The right of the State to contract for the delivery to it from storage in Lake Mead of additional water is not limited by this contract. Said water may be used only within the

State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power.

(b) Water agreed to be delivered to the State hereunder shall be delivered continuously as far as reasonable diligence will permit, but the United States shall not be obligated to deliver water to the State when for any reason, as conclusively but not arbitrarily determined by the Secretary, such delivery would interfere with the use of Boulder Dam or Lake Mead for river regulation, improvement of navigation, flood control, and/or satisfaction of perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact.

(c) The United States reserves the right, for the purpose of investigation, inspection, maintenance, repairs and replacement or installation of equipment or machinery at Boulder Dam, to discontinue temporarily or reduce the amount of water to be delivered hereunder, but so far as feasible the United States will give the State reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents, and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur.

(d) This contract is for permanent service, and is made subject to the express condition that the State, upon request of the Secretary, shall submit in writing prior to January 1st of any year, an estimate of the amount of water to be required under this contract for the succeeding calendar year.

RECEIPT OF WATER BY THE STATE

6. The State shall receive the water to be diverted by or delivered to it by the United States under the terms hereof at the point or points of delivery to be hereafter designated as

stated in the next preceding article hereof, and shall perform all acts required by law or custom in order to maintain control over such water and to secure and maintain its lawful use and proper diversion from Lake Mead. The diversion and conveyance of such water to places of use shall be without expense to the United States.

MEASUREMENT OF WATER

7. The water to be delivered to the State hereunder shall be measured at the point or points of diversion from Lake Mead, or at such point or points in any works used by the State to convey water from Lake Mead to its place or places of use as shall be satisfactory to the Secretary, and by such measuring and controlling devices or such automatic gauges or otherwise as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained in manner satisfactory to the Secretary, by and at the expense of the State, but they shall be and remain at all times under the complete control of the United States. The State's authorized representative shall be allowed access at all times to said measuring and controlling devices or automatic gauges.

RECORD OF WATER DIVERTED

8. The State shall make full and complete written monthly reports as directed by the Secretary on forms to be supplied by the United States of all water delivered to or diverted by the State from Lake Mead. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted.

CHARGE FOR DELIVERY OF WATER

9. A charge of fifty cents ($.50) per acre-foot shall be made for the diversion by or delivery of water to the State

hereunder during the Boulder Dam cost-repayment period, subject to reduction by the Secretary in the amount of the charge if studies show to his satisfaction that the charge is too high. Thereafter, charges shall be on such basis as may hereafter be prescribed by the Congress. Charges shall be made against the State only for the number of acre-feet of water actually delivered to or diverted by it from Lake Mead.

BILLING AND PAYMENTS

10. The State shall pay monthly for all water delivered to it hereunder, or diverted by it from Lake Mead, in accordance with the charge in Article nine (9) hereof established. The United States will submit bills to the State by the tenth day of each month immediately following the month during which the water is delivered or diverted and payments shall be due on the first day of the month immediately succeeding. If such charges are not paid when due, an interest charge of one per centum (1%) of the amount unpaid shall be added thereto as liquidated damages and, thereafter, as further liquidated damages, an additional interest charge of one per centum (1%) of the principal sum unpaid shall be added on the first day of each succeeding calendar month until the amount due, including such interest, is paid in full.

REFUSAL OF WATER IN CASE OF DEFAULT

11. The United States reserves the right to refuse to deliver water to the State, or to permit water to be diverted by the State from Lake Mead, in the event of default for a period of more than twelve (12) months in any payment due or to become due to the United States under this contract.

INSPECTION BY THE UNITED STATES

12. The Secretary or his representatives shall at all times have the right of ingress to and egress from all works of the

State for the purpose of inspection, repairs, and maintenance of works of the United States, and for all other proper purposes. In each contract made by the State for the redelivery of any part of the water agreed to be delivered to the State hereunder, it shall be provided, for the use and benefit of the United States, that the authorized representatives of the United States shall at all times have access to measuring and controlling devices, or automatic gauges, over the lands and rights of way of the contractee. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the State relating to the diversion and distribution of water delivered to or diverted by the State from Lake Mead with the right at any time during office hours to make copies of or from the same.

RULES AND REGULATIONS

13. There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised, and/or extended from time to time after notice to the State and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments hereof, or to protect the interests of the United States. The State hereby agrees that in the operation and maintenance of its diversion works and conduits, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

14. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to

an Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which compact was approved in section 13 (a) of the Boulder Canyon Project Act.

PRIORITY OF CLAIMS OF THE UNITED STATES

15. Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

CONTRACT CONTINGENT UPON APPROPRIATIONS

16. This contract is subject to appropriations being made by Congress from time to time of money sufficient to provide for the doing and performance of all things on the part of the United States to be done and performed under the terms hereof, and to there being sufficient money available in the Colorado River Dam Fund for such purposes. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient money not being so appropriated, or on account of there not being sufficient money in the Colorado River Dam Fund for such purposes.

EFFECT OF WAIVER OF BREACH OF CONTRACT

17. All rights of action for breach of any of the provisions of this contract are reserevd to the United States as provided in Section 3737 of the Revised Statutes of the United States. The Waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any provision hereof, or of any other subsequent breach of any provision hereof.

REMEDIES UNDER CONTRACT NOT EXCLUSIVE

18. Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States or the State of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

TRANSFER OF INTEREST IN CONTRACT

19. No voluntary transfer of this contract, or of the rights of the State hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the State, whether by voluntary transfer, judicial sale, trustee's sale, or otherwise, shall be subject to all the conditions of the Boulder Canyon Project Act, and also subject to all the provisions and conditions of this contract to the same extent as though such successor or assign were the original contractor hereunder; provided, that the execution of a mortgage or trust deed, or judicial or trustee's sale made thereunder, shall not be deemed a voluntary transfer within the meaning of this Article.

NOTICES

20. (a) Any notice, demand, or request required or authorized by this contract to be given or made to or upon the United States shall be delivered, or mailed postage prepaid, to the Director of Power, United States Bureau of Reclamation, Boulder City, Nevada, except where, by the terms hereof, the same is to be given or made to or upon the Secretary, in which event it shall be delivered, or mailed postage prepaid, to the Secretary, at Washington, D. C.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the

State shall be delivered, or mailed postage prepaid, to the Secretary of the Colorado River Commission of Nevada, Carson City, Nevada.

(c) The designation of any person specified in this article or in any such request for notice, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

OFFICIALS NOT TO BENEFIT

21. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

UNCONTROLLABLE FORCES

22. Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed, for the purposes of this contract, to mean any cause beyond the control of the party affected, including but not limited to inadequacy of water, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall exercise due diligence

In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By ABE FORTAS,
Acting Secretary of the Interior.

STATE OF NEVADA, acting by and through its Colorado River Commission,

By E. P. CARVILLE, *Chairman.*

Attest:

ALFRED MERRITT SMITH, *Secretary.*

By E. P. CARVILLE, *Chairman.*
COLORADO RIVER COMMISSION OF NEVADA,

[SEAL]

Attest:

ALFRED MERRITT SMITH, *Secretary.*

Ratified and approved this 21st day of April 1943.

E. P. CARVILLE,
Governor of the State of Nevada.

[GREAT SEAL OF THE STATE OF NEVADA]

Attest:

MALCOLM MCEACHIN,
Secretary of State.

Approved as to form:

ALAN BIBLE,
Attorney General of Nevada.

[Resolution and certificate omitted.]

APPENDIX 7

Appendix 7

NEVADA CONTRACT OF JANUARY 3, 1944

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

SUPPLEMENTAL CONTRACT FOR DELIVERY OF WATER

1. THIS SUPPLEMENTAL CONTRACT made this 3rd day of January nineteen hundred forty-four, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Harold L. Ickes, Secretary of the Interior (hereinafter styled "Secretary"), and STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this supplemental contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

Witnesseth:

EXPLANATORY RECITALS

2. Whereas, under date of March 30, 1942, the parties hereto entered into a contract providing, among other things, for the delivery of water to the State each year, from storage in Lake Mead, subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year, and it is now desired to amend said contract so as to provide for the delivery each calendar year of not to exceed an additional 200,000 acre-feet of water to the State;

3. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

4. Article 5 (a) of the aforesaid contract of date March 30, 1942, is hereby amended to read as follows:

"Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling,

industrial, and other like purposes, but shall not be used for the generation of electric power."

MODIFICATION OF PRIOR CONTRACT

5. Except as expressly herein amended, the aforesaid contract of date March 30, 1942, shall be and remain in full force and effect.

EFFECTIVE DATE OF SUPPLEMENTAL CONTRACT

6. This supplemental contract shall be of full force and effect immediately upon its execution for and on behalf of the United States.

OFFICIALS NOT TO BENEFIT

7. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In witness whereof, the parties hereto have caused this supplemental contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By /s/ HAROLD L. ICKES,
Secretary of the Interior.

STATE OF NEVADA, acting by and through its Colorado River Commission,

By /s/ E. P. CARVILLE, *Chairman.*

Attest:

/s/ ALFRED MERRITT SMITH, *Secretary*

Appendix 7

COLORADO RIVER COMMISSION OF NEVADA,

By /s/ E. P. CARVILLE, *Chairman.*

Attest.

/s/ ALFRED MERRITT SMITH, *Secretary*

Ratified and approved this 3rd day of January 1944:

/s/ E. P. CARVILLE
Governor of the State of Nevada.

Attest:

/s/ MALCOLM MCEACHIN,
Secretary of State.

Approved as to form:

/s/ ALAN BIBLE,
Attorney General of Nevada.

APPENDIX 8

Appendix 8

PALO VERDE IRRIGATION DISTRICT CONTRACT OF FEBRUARY 7, 1933

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

UNITED STATES AND PALO VERDE IRRIGATION DISTRICT CONTRACT FOR DELIVERY OF WATER

(1) THIS CONTRACT, made this 7th day of February nineteen hundred thirty-three, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter styled the Secretary, and PALO VERDE IRRIGATION DISTRICT, an irrigation district created, organized, and existing under and by virtue of an act of the Legislature of the State of California approved June 21, 1923 (Chapter 452, Statutes of California, 1923), as amended, known as and designated "Palo Verde irrigation district act", with its principal office at Blythe, Riverside County, California, hereinafter referred to as the District;

Witnesseth:

EXPLANATORY RECITALS

(2) Whereas, for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of

the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and

(3) Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir, and it is to the mutual interest of the parties hereto that such contract be executed and the rights of the District in and to waters of the river be hereby defined.

(5) Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

(6) The United States shall, from storage available in the Boulder Canyon Reservoir, deliver to the District each year at a point in the Colorado River immediately above the District's point of diversion known as Blythe Intake (or as relocated within two miles of the present intake) so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to availability thereof for

use in California under the Colorado River Compact and the Boulder Canyon Project Act):

"The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

"SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

"SEC. 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

"SEC. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"SEC. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves

and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum,

"SEC. 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"SEC. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"SEC. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

"SEC. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reducing diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the In-

terior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

"Sec. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users reulting therefrom.

"SEC. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

"SEC. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

"SEC. 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties."

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation. The District reserves the right to establish, at any time, by judicial determination, its rights to divert and/or use water from the Colorado River. In the event the above stated recommendation as to the District is superseded by an agreement betwe[illegible]ll the above allottees or by a final judicial determina[illegible] the parties hereto reserve the right to further contract in accordance with such agreement or such judicial determination; *Provided*, that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the areas for which the District is allotted water as described in the above-stated recommendation. This contract is for permanent water service but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by, said Colorado River Compact in the construction, management, and operation of Hoover Dam, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements, or installation of equipment and/or machinery at Hoover Dam, but as far as feasible the United States will

give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents, and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract neither prejudices nor admits any claim of the District on account of alleged changes in elevation of the river bed, howsoever caused, or the effect of such alleged changes on the District's diversion of water delivered hereunder. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River.

RECEIPT OF WATER BY DISTRICT

(7) The District shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated, and shall at its own expense convey such water to its distribution system, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

MEASUREMENT OF WATER

(8) The water to be delivered hereunder shall be measured at Blythe Intake by such measuring and controlling devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained by and at the expense of the District, but they shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

RECORD OF WATER DIVERTED

(9) The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied

by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

NO CHARGE FOR DELIVERY OF WATER

(10) The District shall not be required to pay to the United States any tolls, rates, or charges of any kind for or on account of the storage or delivery of water hereunder.

INSPECTION BY THE UNITED STATES

(11) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

DISPUTES OR DISAGREEMENTS

(12) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three

of such arbitrators shall be a valid and binding award of the arbitrators.

RULES AND REGULATIONS

(13) There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of its diversion works at Blythe Intake, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

(14) This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which compact was approved by the Boulder Canyon Project Act.

PRIORITY OF CLAIMS OF THE UNITED STATES

(15) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

Appendix 8

CONTINGENT UPON APPROPRIATIONS

(16) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work contemplated hereby, and to there being sufficient moneys available in the Colorado River Dam fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam fund to permit of said allotments. This agreement is also subject to the condition that if for any reason construction of Hoover Dam is not prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

RIGHTS RESERVED UNDER SECTION 3737, REVISED STATUTES

(17) All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

REMEDIES UNDER CONTRACT NOT EXCLUSIVE

(18) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

INTEREST IN CONTRACT NOT TRANSFERABLE

(19) No interest in this agreement is transferable, and no sublease shall be made, by the District without the writ-

ten consent of the Secretary, and any such attempted transfer or sublease shall cause this contract to become subject to annulment, at the option of the United States.

MEMBER OF CONGRESS CLAUSE

(20) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By RAY LYMAN WILBUR,
Secretary of the Interior.

Attest:

NORTHCUTT ELY.
RICHARD J. COFFEY.

PALO VERDE IRRIGATION DISTRICT,
By L. A. HAUSER, *President.*

Attest:

O. W. MALMGREN,
Assistant Secretary.

Approved as to form, February 7, 1933:

(Sgd.) RAY LYMAN WILBUR,
Secretary of the Interior.

[Acknowledgments and resolution omitted.]

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FEB 23 1961
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In the Supreme Court

OF THE

United States

OCTOBER TERM [redacted] 1961

No. 9 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, and COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Impleaded,*

STATE OF UTAH, *Impleaded.*

THE STATE OF NEVADA'S EXCEPTIONS TO THE REPORT OF SPECIAL MASTER, SIMON H. RIFKIND, DATED DECEMBER 5, 1960; AND THE RECOMMENDED DECREE INCLUDED THEREIN.

ROGER D. FOLEY
Attorney General
Carson City, Nevada

W. T. MATHEWS
Chief Counsel
331 Gazette Building, Reno, Nevada

R. P. PARRY
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PARRY, ROBERTSON & DALY
Special Counsel
Fidelity Bank Building, Twin Falls, Idaho
Counsel for State of Nevada.

February 20, 1961.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

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vs.

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UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Impleaded,*

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THE STATE OF NEVADA'S EXCEPTIONS TO THE REPORT OF SPECIAL MASTER, SIMON H. RIFKIND, DATED DECEMBER 5, 1960; AND THE RECOMMENDED DECREE INCLUDED THEREIN.

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Counsel for State of Nevada.

February 20, 1961.

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In the Supreme Court

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STATE OF ARIZONA, *Complainant*

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STATE OF CALIFORNIA, et al., *Defendants*,
UNITED STATES OF AMERICA, *Intervener*,
STATE OF NEVADA, *Intervener*,
STATE OF NEW MEXICO, *Impleaded*,
STATE OF UTAH, *Impleaded*.

THE STATE OF NEVADA'S EXCEPTIONS TO THE REPORT OF SPECIAL MASTER, SIMON H. RIFKIND, DATED DECEMBER 5, 1960; AND THE RECOMMENDED DECREE INCLUDED THEREIN.

The State of Nevada, Intervener, excepts to the Report of Special Master, Simon H. Rifkind, dated December 5, 1960, and the Recommended Decree therein included, filed in the above-entitled action, in the particular respects and as to the specific points as follows:

I.

The Special Master erred in providing in Paragraph II(B)(7) of the proposed Decree (p. 349) that "mainstream water shall be delivered to users in * * * Nevada only if contracts have been made by the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act for delivery of such water; * * *."

This provision of the Decree, so far as relates to Nevada may be an inadvertence inasmuch as the report itself (p. 210) finds that contract between the State of Nevada and the Secretary of the Interior (App. 6 and 7 to the Report, pp. 409-422) "does not require additional sub-contracts between each water user and the Secretary of the Interior."

II.

The Special Master erred in finding in the Report, at pages 234 to 237, 311 and 312, and in Paragraphs II(B)(5) and (6) of the Recommended Decree, that a part of Nevada's allocation of water may be used to supply the so-called "present perfected rights" in other States, in years when the allocations of such other States are not sufficient to supply said rights.

And as an alternative, the Special Master erred in not providing a minimum figure below which the allocation of the State of Nevada could not be reduced, if, and when, it ever becomes necessary to take water away from Nevada's allocation for supplying so-called "present perfected rights" in other States.

III.

That the Special Master erred in failing to recommend in his Report, or provide in his Recommended Decree for the appointment of a Commissioner with the power to supervise the operation of the Colorado River in the Lower Basin and the delivery, annually, among the various parties of the waters awarded to them by the Decree herein. (Report, p. 314)

IV.

That the Special Master erred in failing to recommend in his Report or include in his Recommended Decree, provision for the promulgation of Rules and Regulations by the Officer in charge of operating the Colorado River, after the Decree is entered herein, setting forth in detail the manner, method and plan, including time schedules, to be used annually in regulating stream flows, in managing and controlling regulatory structures and in allocating and distributing water to the parties entitled thereto; and also providing for cooperation with representatives of affected States in accordance with Section 16 of the Boulder Canyon Project Act (45 Stat. 457; 43 USC 617).

V.

The Special Master made the water allocations recommended in his Report and in his Recommended Decree to be awarded the State of Nevada under a different theory of law and interpretation of the Colorado River Compact and the Boulder Canyon Project Act, than that urged by Nevada in its pleadings, proof and prior Briefs herein. The State of Nevada expressly reserves the right, if it appears necessary during the subsequent proceedings herein, to again urge these contentions

which have been discarded by the Special Master. By not excepting to the basic theory adopted by the Special Master in his Report and Recommended Decree, Nevada is not waiving the right to assert that she is entitled to the quantity of water awarded her by the Special Master, if not a larger quantity, under the theory urged by Nevada in her pleadings, proof and prior Briefs herein, or under any plan of distribution of the waters of the Colorado River.

CONCLUSION

In accordance with the Order of this Court dated January 16, 1961, the foregoing is,

Respectfully submitted,

ROGER D. FOLEY,
Attorney General

W. T. MATHEWS,
Chief Counsel

R. P. PARRY,
CLIFFORD E. FIX,
Special Counsel

Counsel for State of Nevada.

Dated February 20, 1961.

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FILED
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IN THE

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OCTOBER TERM, 1961

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Defendants,

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener,

STATE OF NEW MEXICO,

Impleaded,

STATE OF UTAH,

Impleaded.

ARIZONA'S MOTION FOR ADOPTION, WITH EXCEPTIONS, OF THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE.

CHAS. H. REED,
Chief Counsel,
Colorado River Litigation,

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Defendants,

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener,

STATE OF NEW MEXICO,

Impleaded,

STATE OF UTAH,

Impleaded.

ARIZONA'S MOTION FOR ADOPTION, WITH EXCEPTIONS, OF THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE.

MOTION.

The great majority of the findings, conclusions and recommendations of the Special Master's Report (hereafter

the "Report"), and of the provisions of the Recommended Decree (hereafter the "Decree") are favorable to Arizona, and she therefore urges their adoption by the Court.

Arizona seeks modification of the Report and Decree only insofar as:

1. the Report, while reaching conclusions with which Arizona agrees, rejects basic positions advanced by Arizona as the correct premises for these conclusions; and

2. the Report recommends and the Decree provides that certain decisive issues be determined adversely to Arizona.

Accordingly, Arizona moves the adoption of all findings, conclusions and recommendations of the Report and all provisions of the Decree other than those to which she notes specific exception herein.[1] The exceptions are filed pursuant to the Court's order of January 16, 1961.

EXCEPTIONS.[2]

I. Construction of the Compact.

Arizona agrees with the Special Master's conclusions that the Compact has utility as a decisive factor in this case

---

[1] We have not, of course, attempted to note all of the statements made by the Master in the course of his discussion with which we disagree (e.g., we certainly disagree with the Special Master's statement that "the Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water . . ." (Rep. 235)). Elsewhere in his Report the Master recognized the impropriety of deciding questions of Compact interpretation which might affect Upper Basin interests in the absence of the states of the Upper Basin (Rep. 145).

[2] The exceptions are grouped under the several phases of the case as considered in the Report. Each category of exceptions is introduced by a brief statement of Arizona's position regarding the Master's treatment of the particular phase under consideration. Exceptions to particular findings, conclusions and recommendations

only insofar as it serves to determine the supply of main stream water legally available in the Lower Basin of the Colorado River and that the Compact is not relevant to the allocation of water from Lake Mead and from the main stream of the River below Hoover Dam among the Lower Basin States of Arizona, California and Nevada (Rep. 138-41; Ariz. Op. Br. 20-21).[3]

However, against the eventuality that the Court may differ with these conclusions as to the irrelevance of the Compact, the Report sets forth the Special Master's interpretation of various Compact terms (Rep. 141-50). For the same reason, Arizona notes by exception her disagreement with the Master's construction of these Compact provisions.

Accordingly, Arizona excepts to:

1. The Master's finding and conclusion that the apportionment of the use of water between the Upper and Lower

---

are numbered consecutively, with appropriate page citation to the Report. Wherever deemed helpful, additional particularized grounds of exception are set forth. For the convenience of the Court, reference is made to the discussion of the points involved in Arizona's Opening and Answering Briefs before the Master with page citation. The bases of the exceptions will be more fully presented and argued in the briefs to be filed subsequently with the Court on behalf of Arizona pursuant to the Court's order of January 16, 1961.

[3] The Special Master's Report is cited as "Rep." followed by page number.

Arizona's Opening and Answering Briefs before the Special Master are cited as "Ariz. Op. Br." and "Ariz. Ans. Br.", respectively, followed by page number.

Throughout, the Colorado River Compact (Rep. 371-77) is referred to as the "Compact"; the Boulder Canyon Project Act (Rep. 379-96), 45 Stat. 1057 (1928), as the "Project Act"; the California Limitation Act (Rep. 397-98), Act of March 4, 1929, Ch. 16, 48th Sess., Statutes and Amendments to the Codes, 1929, pp. 38-39, as the "Limitation Act"; and the contracts with the Secretary of the Interior for delivery of water from Lake Mead (Rep. 399, *et seq.*), as the "water delivery contracts".

Basins of the Colorado River made by Article III(a) and (b) of the Compact is achieved by imposing limitations on the quantity of water which may be appropriated in each Basin as against the other (Rep. 140, 146-47, 149).

Article III(a) and (b) of the Compact, correctly construed, do not impose limitations upon the quantity of water which may be appropriated in each Basin, but rather make an apportionment of water in perpetuity to each Basin, regardless of the extent of actual use or appropriation in either Basin of the water so apportioned.

2. The Master's finding and conclusion that Article III(a), (b), (c), (f) and (g) and the first sentence and last paragraph of Article VIII of the Compact deal with both the main stream and tributaries of the Colorado River and not with the main stream exclusively (Rep. 142-47).

The terms of the Compact, when construed in relation to the pre-existing conflict between the two Basins, the purposes sought to be achieved and the geographical and physical facts, establish that Article III(a), (b), (c), (f) and (g) and Article VIII deal with the main stream of the Colorado River and not with Lower Basin tributaries (Ariz. Op. Br. 20-32; Ariz. Ans. Br. 1-5).

As the Special Master found, the history and text of the Compact show that interbasin, not interstate relations were the subject of agreement (Rep. 138-40). These interbasin relations involved problems of concern to each Basin. These problems, created by existing and contemplated uses of main stream water (Rep. 9, 11, 13, 18, 20-22, 24, 139), impelled the adoption of the Compact. It is thus clear that the Compact was intended to deal with main stream problems and not with those, present or future, on Lower Basin tributaries (Ariz. Op. Br. 21-24).

The geographical fact that Lee Ferry is a point in the Grand Canyon separating the Basins, the Com-

pact provision naming Lee Ferry as the point where the Upper Basin is required to deliver water to the Lower Basin and the hydrological fact that Lower Basin tributary water is inaccessible and unavailable to the Upper Basin, all demonstrate that the Upper Basin could obtain physical control and acquire rights against the Lower Basin in main stream and Upper Basin tributary water only; hence the water of Lower Basin tributaries was not, and in the nature of things could not have been, subject to the division of water between the two Basins made by the Compact (Ariz. Op. Br. 26-27; Ariz. Ans. Br. 2-3).

Although the Compact defines the "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America"—terminology emphasized by the Special Master (Rep. 140-43)—Article III (a) apportions water "*from*", not "*of*", the Colorado River System and Article III (b) treats of "such waters". Thus, as expressly stated in Article I, "an apportionment of the use of *part* of the water of the Colorado River System is made".[4] (See also Articles III (f) and (g) and VI). The "part" of the "System" apportioned by the Compact is main stream, not Lower Basin tributary water (Ariz. Op. Br. 25-26; Ariz. Ans. Br. 2-3).

There is a clear and necessary correlation, and not a mere "coincidence" (Rep. 188), between the requirement of Article III (d) that the "States of the Upper Division will not cause the flow of the River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years" and the "7,500,000 acre-feet of water per annum" apportioned to the Lower Basin by Article III (a). The purpose of the Article III (d) water delivery requirement was to guarantee the Lower Basin a quantity of water sufficient to assure satisfaction of the apportionment to the Lower Basin made by Article III (a),

[4] Unless otherwise indicated, italics within quotations are supplied.

even during periods when the water supply originating in the Upper Basin might be insufficient to fulfill the total apportionment made to both Basins by Article III (a) (Ariz. Op. Br. 28-30; Ariz. Ans. Br. 3-4). The Master's holding that an interpretation is inadmissible which makes the provisions of Article III (a) and (d) correlative rather than coincidental is founded on invalid premises: that Article III (a) imposes a limitation on appropriations and that Article III (a) extends to Lower Basin tributaries as well as to the main stream (Rep. 144).

Article VIII of the Compact, which provides that "present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact", was intended to reserve to Lower Basin users their legal right to demand the release of water to satisfy priorities asserted by them until such time as storage facilities were provided to assure them a stable water supply. Article VIII expressly provides for satisfaction of such rights "whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin . . ." This reference is plainly and necessarily to rights in main stream, not Lower Basin tributary water (Ariz. Op. Br. 31-32).

II. Construction of the Project Act and Limitation Act.

Arizona concurs in the Special Master's findings and conclusions that the provisions, general operative scheme and legislative history of the Project Act establish that both Section 4(a) of that Act and the Limitation Act refer only to water stored in Lake Mead and flowing in the main stream below Hoover Dam and that, as to this water, principles of equitable apportionment or priority of appropria-

tion are irrelevant (Rep. 138, 151-52, 173-74, *et seq.*; and see Ariz. Op. Br. 35-43).

Arizona further agrees with the Special Master that the words of Section 4(a) and the substantially identical language of the Limitation Act—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" and "excess or surplus waters unapportioned by said compact"—refer to main stream water only and not to water of tributaries (Rep. 167-85; Ariz. Op. Br. 43-45).

However, Arizona reads the Compact's apportionment provisions as covering main stream water only (pp. 4-6 *supra*). Consistently, Arizona asserts that the Section 4(a) and Limitation Act references to "waters apportioned . . . by paragraph (a) of Article III of the . . . compact" and to "excess or surplus waters unapportioned by said compact" are to main stream and not tributary water.

In any event, it is the interpretation put upon the Compact by Congress in enacting the Project Act, and that construction alone, which is controlling.

Arizona asserts that by referring in Section 4(a) to provisions of the Compact either Congress construed those provisions correctly as dealing exclusively with water of the main stream, or (assuming the Compact apportionment provisions may be properly regarded as including tributaries) Congress in effect modified the Compact provisions referred to by limiting their application to main stream water.

Only in the event that the Court should hold that the Section 4(a) references to the Compact must necessarily be construed in the Compact sense, and no other, will the correct interpretation of the Compact provisions become decisive.

Against this eventuality Arizona excepts to:

3. The Master's finding and conclusion that Section 4(a) of the Project Act and the Limitation Act refer only to water stored in Lake Mead and flowing in the main stream below Hoover Dam, "*despite the fact*" that Article III (a) of the Compact deals with the Colorado River "System", which, as defined in Article II (a), includes the entire main stream and tributaries of the Colorado River (Rep. 173; cf. Ariz. Op. Br. 23-34; Ariz. Ans. Br. 2-5).

Arizona agrees that Section 4(a) of the Project Act and the Limitation Act refer only to water stored in Lake Mead and flowing in the main stream below Hoover Dam. Arizona disagrees with the Master's conclusions that Article III (a) of the Compact deals with tributaries as well as the main stream (Ariz. Op. Br. 23-34; Ariz. Ans. Br. 2-5).

4. The Master's finding and conclusion that Congress in Section 4(a) of the Project Act regarded Article III (a) of the Compact as a source of supply rather than as a limitation on appropriations and accorded Article III (a) a meaning different from the Compact meaning (Rep. 149).

Arizona's position is that Congress regarded Article III (a) as an apportionment of main stream water to the Lower Basin without reference to appropriations and that this construction of Article III (a) is correct (Ariz. Op. Br. 35-43).

5. The Master's finding and conclusion that Section 6 of the Project Act was intended to give intrabasin protection to water rights "perfected" within the Lower Basin states (Rep. 234, 306, *et seq.*).

Arizona contends that the language of Section 6 of the Project Act—"satisfaction of present perfected

rights in pursuance of Article VIII of said Colorado River compact''—does not recognize or confirm the existence of any intrabasin rights. This clause was intended to comply with the provisions of Article VIII which discharged the Upper Basin from "claims of . . . rights, *if any,* by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin", after storage capacity of five million acre-feet had been provided "on the main Colorado River within or for the benefit of the Lower Basin".

Properly construed, Article VIII provides for satisfaction of perfected rights basin versus basin only and makes no provision for satisfaction of intrabasin rights. Congress intended in Section 6 of the Project Act to give effect to Article VIII of the Compact, and nothing more (Ariz. Op. Br. 31-32; Ariz. Ans. Br. 46-47).

A construction of the Project Act which would require the Secretary of the Interior to ascertain the priority of rights on the River, both as to the time of vesting and the extent of each right and to manage the dam and reservoir so as to respect these varying rights would be completely inconsistent with the plain language of the Act and the purpose of Congress to control and store all the water in the main stream of the Colorado River at the site of Hoover Dam and to distribute the stored water pursuant to contracts with the Secretary (Ariz. Ans. Br. 36-47).

6. The Master's finding and conclusion that Section 6 of the Project Act provides for the satisfaction of rights perfected as of June 25, 1929, the effective date of the Act, rather than rights perfected as of November 24, 1922, the date when the Compact was signed (Rep. 152 note 20; 308-11).

Section 6 of the Project Act provided for satisfaction "of present perfected rights *in pursuance of Article VIII of said Colorado River compact*".

The Compact, when ratified, speaks as of the date when it was signed and not as of the date when it was approved by Congress.

The language and purposes of Article VIII demonstrate that the phrase "present perfected rights", as used therein, referred to rights perfected as of the Compact date, i.e., November 24, 1922, and not to rights perfected after that date.

However, Arizona agrees with the Master insofar as he holds that a water right is a "present perfected right" only if acquired in compliance with state law and only to the extent that it represents an actual diversion and beneficial use of a specific quantity of water applied to a defined area of land or to a particular domestic or industrial use (Rep. 308).

III. Construction of the Project Act and the Water Delivery Contracts.

Arizona adheres to her position before the Special Master that the Project Act establishes a mandatory formula for the apportionment of water which the Secretary is required to follow with precision in making contracts for delivery of water from Lake Mead; and, as a corollary, that existing water delivery contracts, insofar as they do not conform to the formula established by the Act, are beyond the power and authority of the Secretary and without legal effect (Ariz. Op. Br. 46-57; Ariz. Ans. Br. 16-23).

Therefore, Arizona excepts to:

7. The Master's finding and conclusion that Section 4(a) of the Project Act does not establish a mandatory formula for allocation of water which the Secretary is required to follow precisely in his water delivery contracts (Rep. 162-63, 202).

8. The Master's finding and conclusion that Article 7(b), (f) and (g) of Arizona's water delivery contract, providing for Arizona's recognition of rights in Nevada, New Mexico and Utah, are valid (Rep. 205-07).

> Even though the water delivery contracts may have been voluntary acts of the parties thereto, those agreements are beyond the power and authority of the Secretary and without legal effect insofar as they do not conform to the mandatory formula for allocation of water established by Section 4(a) of the Project Act (Ariz. Op. Br. 53-57; Ariz. Ans. Br. 16-18).[5]
>
> Assuming the Master is correct in holding that Section 4(a) does not establish a mandatory formula for water allocation, Article 7(b), (f) and (g) are nevertheless invalid since they "are contrary to the command of Section 5 that 'contracts respecting water for irrigation and domestic uses shall be for permanent service . . .' " (see Rep. 237).
>
> Article 7(b) and (g) are invalid for the additional reason that they introduce tributary considerations into a main stream apportionment (see Rep. 242).

IV. Claims of the United States on the Main Stream.

The Special Master has sustained certain claims of the United States to main stream water of the Colorado River for use on Indian Reservations and other federal establishments created out of public lands.

The Master holds that no contracts are required for the delivery of water from Lake Mead for use on Indian

---

[5] The Nevada water delivery contracts are also invalid in part. Under those contracts there are included in the 300,000 acre-feet of water to be delivered annually to Nevada "all other waters diverted for use within . . . Nevada from the Colorado River system" (Rep. 420), i.e., water from Lower Basin tributaries in Nevada (Ariz. Op. Br. 55).

Reservations and similar federal establishments (Rep. 312 note 3a). This is directly contrary to the express prohibition of Section 5 of the Project Act that "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

In determining the claims of the United States on behalf of Indian Reservations, the Special Master relies basically on *Winters* v. *United States,* 207 U. S. 564 (1908), a case involving the reservation of the waters of a non-navigable stream for use on an Indian Reservation created in the Territory of Montana, and concludes that the federal government has the power to reserve water rights in a navigable stream for the benefit of all federal establishments, regardless of whether the power is exercised with respect to navigable waters of a territory of the United States or with respect to navigable waters of a state.

In determining claims of the United States on behalf of Indian tribes, the Special Master has conceived and applied the principle that the establishment of an Indian Reservation, in and of itself, impliedly reserves from a navigable stream in perpetuity for use on the Reservation whatever quantity of water may be potentially required in the indefinite future to irrigate every irrigable acre within the Reservation. The resulting water rights are held to be of fixed magnitude and priority and appurtenant to defined lands, so that their use is not restricted to Indians alone but may be made available to non-Indians as well (Rep. 254-66).

The questions regarding water rights of the United States for use in the Lake Mead National Recreation Area and in the Havasu Lake and Imperial National Wildlife Refuges are similarly dealt with by application of the same

principles as those invoked in the Special Master's treatment of Indian Reservations (Rep. 297-300).

The Master's Report does not examine into the source of the federal power to reserve rights in navigable streams. The failure to distinguish between the extent of federal power with respect to the water of a navigable stream and that with respect to the water of a non-navigable stream has led the Master into error.

Title to navigable water passes from the federal government to the states at the time of their admission to the Union. While it is true that the federal government has the power, prior to or at the time of admission, to reserve rights in navigable waters for the benefit of federal lands, the intent to reserve such rights must be clearly manifested and an inference that such rights were reserved may not be drawn simply from the fact that an Indian Reservation is created in a generally arid region. Had the Master examined the statutes and executive acts creating the Indian Reservations in the Lower Basin for evidence of an intent to reserve water of the Colorado River for their benefit, he would have found no such manifestation of intent and would therefore have been obliged to conclude that there had been no reservation of such water.

Moreover, where the power to reserve navigable water for federal purposes does exist, it resides in Congress and no authority exists in the Executive to dispose by executive order or otherwise of navigable waters for such purposes in the absence of definite and explicit authority conferred by act of Congress.

After statehood the federal government has no power whatever with respect to the water of a navigable stream except the power conferred by the Commerce Clause.

Even if it be held that the United States did reserve water from the Colorado River for the benefit of the Indian Reservations of the Lower Basin, the quantity of water reserved should be measured by the reasonably foreseeable needs of the Indians occupying the Reservations, rather than by the needs of the potentially irrigable acres within the Reservations. The holding of the Master permits the maximum use of water for the Reservations concerned and leads to results which are inequitable.

If there were no express, and could be no implied, reservation of main stream water of the Colorado River for use on Indian Reservations, the same general considerations which have led the Court to employ principles of equitable apportionment in the allocation of water between states, absent a statutory apportionment, should be applied here. While Indian tribes today do not have the status of a true sovereign, nevertheless the laws of the state are generally without force within the boundaries of Indian Reservations within the state. In addition, since Indians are wards of the federal government, a true sovereign, it is peculiarly appropriate that equitable principles should be applied in weighing the claims of the United States on their behalf against those of the State of Arizona as *parens patriae*.

Accordingly, Arizona excepts to the Report in the following respects regarding claims of the United States:

9. The Master's finding and conclusion that no contracts with the Secretary of the Interior are required for Indian Reservations and similar federal establishments (Rep. 312 note 3a).

A. Indian Reservations.

a. The Master's General Recommendations.

10. The Master's finding and conclusion that the United States, despite the absence of any expressed purpose to that effect, impliedly intended to reserve main stream water for the future water needs of the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian Reservations (Rep. 259-62).

11. The Master's finding and conclusion that the United States effectuated its implied intention to provide for future Indian needs by reserving sufficient water to irrigate all the irrigable acreage in each Reservation and to supply related stock and domestic uses regardless of the number of Indians inhabiting the Reservation (Rep. 262).

12. The Master's finding and conclusion that the water rights established for the benefit of the five named Indian Reservations are of fixed magnitude and priority, are appurtenant to defined lands and, as such, may be utilized regardless of the character of the particular user (e.g., by non-Indian lessees or purchasers of Reservation lands) and may be utilized or disposed of by the United States for the benefit of the Indians as the relevant law may allow (Rep. 266).

b. The Master's Specific Findings of Fact and Conclusions of Law.

(1) *Chemehuevi Indian Reservation.*

13. The Master's finding of fact numbered 2 that in withdrawing lands for the Chemehuevi Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 267).

14. The Master's conclusion of law that for the benefit of the Chemehuevi Indian Reservation the United States has the right to the annual diversion of a maximum of 11,340 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever is less, with a priority of February 2, 1907 (Rep. 267).

(2) *Cocopah Indian Reservation.*

15. The Master's finding of fact numbered 2 that in withdrawing lands for the Cocopah Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 268).

16. The Master's conclusion of law that for the benefit of the Cocopah Indian Reservation the United States has the right to the annual diversion of a maximum of 2,744 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever is less, with a priority of September 27, 1917 (Rep. 268).

(3) *Yuma Indian Reservation.*

17. The Master's finding of fact numbered 2 that in withdrawing lands for the Yuma Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 268-69).

18. The Master's conclusion of law that for the benefit of the Yuma Indian Reservation the United States has the right to the annual diversion of a maximum of 51,616 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever is less, with a priority of January 9, 1884 (Rep. 269).

(4) *Colorado River Indian Reservation.*

19. The Master's finding of fact numbered 7 that in withdrawing lands for the Colorado River Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 271).

20. The Master's conclusion of law numbered 7 that for the benefit of the Colorado River Indian Reservation the United States has the right to the annual diversion of a maximum of 717,148 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for satisfaction of related uses, whichever is less, with priority dates of March 3, 1865 for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873 for lands reserved by the Executive Order of said date; November 16, 1874 for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876 for lands reserved by the Executive Order of said date; November 22, 1915 for lands reserved by the Executive Order of said date (Rep. 273-74).

(5) *Fort Mohave Indian Reservation.*

21. The Master's finding of fact numbered 12 that in withdrawing lands for the Fort Mohave Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 281).

22. The Master's conclusion of law numbered 6 that for the benefit of the Fort Mohave Indian Reservation the United States has the right to the annual diversion of a maximum of 122,648 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever is less, with priority dates of September 18, 1890, for lands transferred by the Executive Order of said date; February 2, 1911 for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850)], as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292) shall not be included within the above-described rights (Rep. 283).

B. National Forests, Recreation Areas, Parks, Memorials, Monuments and Lands Administered by the Bureau of Land Management.

Arizona excepts to the Report in the following respects regarding the water rights of the United States for National Forests, Recreation Areas, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management:

(1) Lake Mead National Recreation Area.

23. The Master's finding of fact numbered 3 that in withdrawing lands now constituting the Lake Mead National Recreation Area the United States intended to reserve rights to the use of so much water from the Colorado River as might thereafter be reasonably needed by the National Park Service for appropriate purposes (Rep. 295).

24. The Master's conclusion of law that the United States has the right to divert water from the main stream of the Colorado River in quantities reasonably necessary to fulfill the purposes of the Lake Mead National Recreation Area in Arizona and Nevada with priority dates of May 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339) (Rep. 295).

(2) Havasu Lake National Wildlife Refuge.

25. The Master's finding of fact numbered 3 that in withdrawing lands for the Havasu Lake National Wildlife Refuge the United States intended to reserve rights to the use of so much water from the Colorado River as might be reasonably needed to fulfill the purposes of the Refuge (Rep. 298-99).

26. The Master's conclusion of law that the United States has the right to the annual diversion of a maximum of 41,839 acre-feet or to the annual consumptive use of 37,339 acre-feet, whichever is less, of water from the Colorado River for use in the Havasu Lake National Wildlife Refuge, with a priority of January 22, 1941, as to land reserved by Executive Order No. 8647 and a priority of February 11, 1949, as to land reserved by Public Land Order 559 (Rep. 299).

(3) Imperial National Wildlife Refuge.

27. The Master's finding of fact numbered 2 that in withdrawing lands for the Imperial National Wildlife Refuge the United States intended to reserve rights to the use of so much water from the Colorado River as might be reasonably needed to fulfill the purposes of the Refuge (Rep. 300).

28. The Master's conclusion of law that the United States has the right to the annual diversion of a maximum of 28,000 acre-feet or to the annual consumptive use of 23,000 acre-feet, whichever is less, of water from the Colorado River for use in the Imperial National Wildlife Refuge with a priority of February 14, 1941 (Rep. 300).

V. Claims of the United States on Tributaries.

The Special Master has held that with the exception of the Gila National Forest, it is unnecessary to pass on claims of the United States to water of the Gila River and its tributaries for use in National Forests, Parks, Memorials and Monuments and lands administered by the Bureau of Land Management (Rep. 334). However, he concludes with respect to the Gila National Forest that the United States intended, when it withdrew this Forest from entry, to reserve the water necessary to fulfill the purposes for which the Forest was created (Rep. 335).

Arizona contends that this finding of intent is unsupported by and contrary to the evidence.

Accordingly, Arizona excepts to:

29. The Master's finding of fact numbered 30 that, in withdrawing lands for the Gila National Forest, the United

States intended to reserve rights to the use of so much water from the Gila River and the San Francisco River as might be reasonably needed to fulfill the purposes of the Forest (Rep. 342).

30. The Master's conclusion of law numbered 11 that the United States has the right to divert water from the main stream of the Gila River and San Francisco River in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, with priority dates as of the date of withdrawal for forest purposes of such area of the Forest within which the water is used (Rep. 343).

VI. Recommended Decree.

Arizona excepts as follows to the provisions of the Recommended Decree:

31. Article II(B)(2) (Rep. 347) for the reasons stated in Exceptions 7 and 8 (pp. 10-11, *supra*).

32. Article II(B)(5) and (6) (Rep. 348-49) for the reasons stated in Exceptions 5 and 6 (pp. 8-10, *supra*).

33. Article II(B)(8) (Rep. 349-50):

> We hesitate to advocate a position which would apparently result in a waste of water. Nevertheless, we believe that the provisions recommended by the Special Master would contravene the clear language of both the Project Act and the Limitation Act. The proposed provisions would permit the release of water from Lake Mead without a contract for delivery thereof in violation of the Project Act and would sanction the diversion of water in excess of the quantities authorized by the Project and Limitation Acts and existing water delivery contracts with the Secretary of the Interior.
>
> Additionally, since these provisions speak in terms of water "consumed" in a state rather than water diverted for use in a state, they might be construed

as prohibiting a state from using water apportioned to it for any non-consumptive use such as off-stream or groundwater storage and would unduly restrict the states in the use of the water apportioned to them. Further, the word "consumed" is not appropriate since water may be put to use without necessarily being entirely consumed or exhausted.

Accordingly, Arizona proposes that there be substituted for Article II(B)(8) the following:

(8) If, in any one year, main stream water apportioned for consumptive use in a state will not be ~~consumed~~ diverted for use in that state, ~~whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason,~~ nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states; provided, however, that nothing herein contained shall be construed as authorizing the diversion or use of water without a contract with the Secretary of the Interior as required by the Boulder Canyon Project Act or in excess of the amounts permitted by said Act, the California Limitation Act and contracts made by the Secretary of the Interior for the delivery of water pursuant to Section 5 of the Boulder Canyon Project Act. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

(deletions from the Recommended Decree lined out; additions underlined)

34. Article II(C)(2)(a) through (h) (Rep. 350-53) for the reasons stated in Exceptions 9 through 28 (pp. 14-20, *supra*).

35. Article III(B), (C) and (D) (Rep. 353-54):

These provisions deal with water which, as the Master holds, is "stored in Lake Mead and flowing in the mainstream below Lake Mead" (Rep. 225). Insofar as they would enjoin the State of Arizona, its officers, attorneys, agents and employees from "permitting the interference with releases and deliveries . . . of water controlled by the United States", from "permitting the diversion of water" and from "permitting the consumptive use of water", they would transfer to the State of Arizona duties with respect to main stream water which the Secretary of the Interior is required to perform under the Project Act and his water delivery contracts (see, e.g., Rep. 152-54, 186, 214-16). Furthermore, the authority of the State of Arizona to prevent the interference, diversions and uses referred to is open to serious question.

36. Article IV(E) (Rep. 357-58), insofar as it provides that the United States has the right to divert water in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, for the reasons stated in Exceptions 29 and 30 (pp. 20-21, *supra*).

37. Article VI (Rep. 359) for the reasons stated in Exceptions 5 and 6 (pp. 8-10, *supra*).

38. Arizona excepts to the failure to include in the Recommended Decree a provision requiring that quantities of water released by the Secretary of the Interior pursuant to orders therefor but not diverted by the party ordering the same shall be charged to that party.

The evidence established that on many occasions water released from Hoover Dam on order was not used by the ordering party with the result that it flowed downstream to Mexico but was not or could not be credited to satisfaction of the Mexican Treaty.

Arizona submitted to the Special Master an addition to Article V, subdivision (E) of the Recommended Decree which, if adopted, would have discouraged this wasteful practice (see Arizona's Comments on the Draft Report and Recommended Decree, p. 10). However, the suggested addition was rejected in material part by the Special Master (see Rep. 358).

Accordingly, Arizona proposes that Article I of the Recommended Decree be amended by adding thereto as subdivision (L) the following:

> (L) Consumptive use of mainstream water shall include the quantities of water released by the Secretary of the Interior pursuant to orders therefor but not diverted by the party ordering the same, except to the extent that such quantities of water are delivered to Mexico in satisfaction of the Mexican Treaty or are diverted by others in satisfaction of rights decreed herein.

Respectfully submitted,

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February 27, 1961
Phoenix, Arizona

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No. 3 Original

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA ET AL.

EXCEPTIONS OF THE UNITED STATES [illegible] TO THE SPECIAL MASTER'S REPORT AND [illegible] PROPOSED DECREE

ARCHIBALD COX
Solicitor General
Department of Justice
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

NO. 9 ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

EXCEPTIONS OF THE UNITED STATES, INTERVENER, TO THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE

The United States excepts to the Special Master's Report and the Recommended Decree with respect to:

I. (a.) The determination that waters of the mainstream, and the use thereof, above Lake Mead are not included in the mainstream waters referred to in the first and second paragraphs of Section 4 of the Boulder Canyon Project Act.

(b.) The failure to include uses of waters of the mainstream above Lake Mead in the allocations adjudicated by the Recommended Decree. (Article I, Subdivision (B), Article I, Subdivision (E), and Article I, Subdivision (F), Recommended Decree, pp. 345–346; Report, pp. 173, 183, 185, 225–226, 316–

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321. See also: Report, pp. 99 fn. 19, 151 fn. 18, 152 fn. 19, 228 fn. 86.)

II. The determination that the provisions of Article 7(d) of the contract between the United States and the State of Arizona, dated February 9, 1944, and Article 5(a) of the amended contract between the United States and the State of Nevada, dated January 3, 1944, which condition the total quantities of water deliverable from Lake Mead under those contracts upon the extent by which uses of either tributary or mainstream waters upstream from Lake Mead in the respective States diminish the flow into Lake Mead, are in violation of the Project Act and unenforceable; the corollary failure to provide in Article II, Subdivision (B), of the Recommended Decree for the confirmation of such contract provisions. (Report, pp. 237–247, 226–228. See also: Report, pp. 201, 207, 210.)

III. The declarations to the effect that state law governs intrastate rights and priorities to and quantities of water diverted from the Colorado River and to the effect that users under contracts made in pursuance of Section 5 of the Project Act must be under no disability to receive such water under state law; the corollary reference to "any use or user in violation of state law," in the recommended injunction against the release of water by the United States, its officers, attorneys, agents and employees. (Article II, Subdivision (C), paragraph (1). Recommended Decree, p. 350; Report, pp. 216–219. See also: Report, pp. 203–204, 237, 240–241, 303, 312.)

IV. The declaration on page 210 of the Report that:

> It should be noted that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior. On the contrary, the State of Nevada is free to determine who shall use the water, subject only to the Secretary's approval of the points of diversion.

V. The failure to make the following Findings of Fact proposed by the United States:

> The quantity of Colorado River water presently consumed on the 7,100 acres of the Topock Marsh to be developed under the Havasu Lake National Wildlife Refuge Development Plan is approximately 55,000 acre feet per annum. (Tr. 15,691.)
>
> The net saving of approximately 18,000 acre feet per annum of Colorado River water in the Topock Marsh area which would result from the Havasu Lake National Wildlife Refuge Development Plan is due to the change in and control of vegetation provided by operation of that Plan and such salvage is in addition to salvage resulting from channelization. (Tr. 15,753; 15,793.)
>
> The quantity of Colorado River water presently consumed on the 4,000 acres in the Imperial National Wildlife Refuge on which development is proposed is greater than 28,000 acre-feet per year. (Tr. 15,694.)

The failure to provide in the Conclusions of Law and Recommended Decree that water salvaged by

the United States from the mainstream of the Colorado River may be used by it on federal mainstream Wildlife Refuges without limitation by the priority dates decreed for the respective refuge areas. (Article II, Subdivision (C), paragraph (2)(g), Article II, Subdivision (C), paragraph (2)(h), and proviso following, Recommended Decree, pp. 352–353; Report, pp. 296–300.)

ARCHIBALD COX,
Solicitor General.

FEBRUARY, 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

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IN THE

Supreme Court of the United States

October Term, 1960.
No. 9 Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, and COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

THE UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF UTAH and STATE OF NEW MEXICO,

Impleaded Defendants.

Additional Objections and Exceptions of Imperial Irrigation District and Palo Verde Irrigation District to Report and Recommended Decree of Special Master.

Come Now Imperial Irrigation District and Palo Verde Irrigation District and Make and File These Their Additional Objections and Exceptions to the Report and Recommended Decree of the Special Master Filed Herein.

Preface

In view of the magnitude of the trial record and the complexity of the issues resulting, it is believed that a general statement of the major issues plead and tried and the basic determinations of the Special Master objected and excepted to by the California defendants may be helpful to a better understanding of these objections and exceptions.

The issues plead and tried involved an accounting of all of the Lower Basin beneficial consumptive uses of Colorado River System water, including all tributary uses and especially those on the Gila River System.[1] This was upon the basis that in order to apply the provisions of Article III of the Colorado River Compact; the first paragraph of Section 4(a) of the Project Act; the provisions of the California Limitation Act and the obligation of the Mexican American Water Treaty of 1944, it is necessary that an accounting be had of all beneficial consumptive uses in the Lower Basin, wherever used.

The Master's Report and Recommended Decree is premised principally upon two concepts. The first is that there is and always will be plenty of water for all

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[1]Par. XXII, Pg. 26, Ariz. Complt.; Par. 8, Pg. 11, Cal. Answers; Par. 8, Pgs. 16-17, Ariz. Reply to Cal. Par. XIV, Pg. 18, Nev. Complt.; Pars. XXIV, Pg. 22 and XXXVI, Pg. 36, U. S. Intervention.

concerned in the Lower Basin and therefore an accounting is useless.[2] The second is that the only measure of Lower Basin uses is that of water stored in Lake Mead and only from the main stream from Lake Mead to the Mexican Boundary;[3] that this case and the rights of the states and agencies that are parties hereto do not involve any Lower Basin tributary uses and not even any uses from the main stream of the Colorado River from Lee Ferry down to the headwaters of Lake Mead; that none of the parties are chargeable with their uses from any tributary or from the main stream above Lake Mead;[4] that the Compact and any Compact accounting are irrelevant to the case;[5] and that priority of appropriation and equitable apportionment are irrelevent.[6]

It is to these basic concepts of the Master, as evidenced by the Report and Recommended Decree, and to the issues and incidents that the Master holds to flow therefrom that these California defendants object and except.

As a further statement of these California defendants' objections and exceptions, and explanation thereof, these defendants state:

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[2]Tr. Pgs. 23084 and 23092.

[3]M. Rpt. Pgs. 185, 226-227.

[4]M. Rpt. Pg. 183 *et seq.*, 226 *et seq.*, 242 *et seq.*, 317 *et seq.*

[5]M. Rpt. Pg. 177.

[6]M. Rpt. Pg. 138. (Passing for the moment the Master's holding as to priority of present perfected rights as of June 1929, M. Rpt. Pg. 152, footnote, and Pgs. 161, 234, 347 and 359.)

During the period of 1930-34 the Secretary of Interior pursuant to his General Regulation in the matter[1] contracted with California defendant agencies for delivery at designated diversion points in California from water stored behind Hoover Dam so much water as necessary to supply for beneficial consumptive use in California the aggregate annual amount of 5,362,000 acre feet.[2]

The Colorado River Compact[3] provides in Article VIII that present perfected rights to the beneficial use of waters of the Colorado River *System* are unimpaired by the Compact. Article II(a) defines the Colorado River *System* as that portion of the Colorado River and its *tributaries* in the United States. Article III(a) apportions from the Colorado River *System* in perpetuity to the Upper and Lower Basins, respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum which shall include all water necessary for the supply of "any rights which may now exist." Article III(b) provides that in addition the Lower Basin may increase its beneficial consumptive use of *such* waters by 1,000,000 acre feet per annum.

The Boulder Canyon Project Act[4] in Sections 8(a), 8(b) and 13(b) provides that notwithstanding anything to the contrary in the Act, the United States and those claiming under the United States and all contractees and users or appropriators of water shall be controlled by the Compact. Section 6 provides that

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[1]Cal. Ex. 1811; M. Rpt. Pg. 28.
[2]Ariz. Exs. 33, 34, 36, 38, 39 and 40, M. Rpt. Pg. 28.
[3]Ariz. Ex. 1; App. 2, Pg. 371 M. Rpt.
[4]Ariz. Ex. 7; App. 3, Pg. 379 M. Rpt.

Hoover Dam and the reservoir shall be used—for satisfaction of present perfected rights in pursuance of Article VIII of the Compact. Section 13(d) provides that the conditions and covenants referred to shall run with the land and be attached thereto as a matter of law.

The first paragraph of Section 4(a) provides for a six state Compact if California consents that the aggregate annual consumptive use of Colorado River water for use in California, including "rights which may now exist" shall not exceed 4,400,000 acre feet apportioned to the Lower Basin by Article III(a) of the Compact plus not more than one-half of any excess or surplus unapportioned by the Compact—such uses to be subject to the Compact. California accepted the provisions and agreed to the limitation on the conditions indicated.[5]

California has always claimed, as she does now, that the Compact is controlling. That the rights to the beneficial consumptive use of water in the Lower Basin relate to and involve all waters of the Colorado River System which includes all tributary uses in the Lower Basin. That uses of water as to rights which now exist and present perfected rights—as of 1929 wheresoever used in the Lower Basin—including tributary uses, must be charged as uses of Compact Article III(a) water uses. That all beneficial consumptive uses of water shall be charged to the state within which the use is made on the basis of actual uses at the site of use. That Arizona should be charged as against any rights to III(a) water for her rights and uses on the Gila River System and other tributaries existent as of 1929. That the law of prior appropriation of water

[5]Ariz. Ex. 14; App. 4, Pg. 397 M. Rpt.

applies interstate on the Colorado River System and is recognized by the Compact and Project Act, including the rule of equitable apportionment. That the California defendant agencies represent agricultural and domestic projects with early historic appropriations.[6] That these projects date from as early as 1877 and the latest from 1926, and their work have been constructed to fully use their contracted supplies and their agricultural and domestic economies are dependent thereon[7] and are entitled to priority and not parity with junior rights and contracts as the Master holds.

Arizona having refused until 1944 to ratify the Compact, procured that year a contract from the then Secretary of Interior[8] which, subject to availability under the Compact and Project Act, called for delivery to Arizona from Lake Mead of a maximum of 2,800,000 acre feet per annum for beneficial consumptive use, plus one-half of any excess or surplus unapportioned by the Compact less rights of Nevada, New Mexico and Utah. (Nevada has a contract for 300,000 acre feet per annum from Lake Mead.[9]) By Sections 7(d) and 7(1) uses above Lake Mead and from the main stream below Hoover Dam are to be charged *pro tanto* against Arizona's contract entitlement. By Section 7(h) Arizona agreed to recognize the right of the United States to contract with California agencies within the limits of the California Limitation Act and by

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[6]See Cal. Exs. 66A, 67, 68, 70-90, for appropriative claims to title to water rights.

[7]See Pgs. 44-47, Pgs. 46-53; Par. 2, Pg. 3, and Exs. A, B, and C, Calif. Ans. to Ariz. Bill of Complaint.

[8]Ariz. Ex. 32; App. 5, Pg. 399 M. Rpt.

[9]Ariz. Exs. 43 and 44, App. 6 and 7, Pgs. 409 and 419 M. Rpt.

Section 7(1) is agreed that present perfected rights are unimpaired by the Arizona contract. By Section 7(c) Arizona agreed that Lake Mead be used in satisfaction of perfected rights. Section 13 of the Arizona contract provides that the rights of Arizona to the waters of the Colorado River and its tributaries are subject to and controlled by the Compact. There is no specific reference in the Arizona contract as to *pro tanto* charge against Arizona for her uses on tributaries below Hoover Dam, including the Gila River.

The Nevada contracts[10] by Section 5a of the 1944 contract of Nevada charge Nevada *pro tanto* for tributary uses.

The Utah and New Mexico uses are all tributary uses.

The Report of the Special Master is premised on certain major and several companion determinations to which California objects and takes exception.

Among the major items to which California objects and excepts are the following:

1. The assumption, contrary to the evidence, that there is an adequate water supply for all parties concerned and that California's claims of shortage of safe annual yield are unsound.[11] The assumption and basis of the determination is typified by the Master's statement of his determination at the hearing in New York August 19, 1960 that he was morally certain that for the lifetime of our children and great-grandchildren that there would be an adequate supply for the Metro-

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[10]Ariz. Exs. 43 and 44.

[11]M. Rpt. Pgs. 102 *et seq.*, 113 *et seq.*

politan Project and its contemplated expansion[12] and had he not so believed he would have strained every legal document to try to prevent a shortage.[13] (NOTE: This would be despite Metropolitan's relatively low priority among the California agencies.)

2. The determination that the future water supply to the Lower Basin of main stream water is irrelevant and the refusal of the Master to determine and pass upon the safe annual yield in determining the rights of the parties.[14]

3. The holding that the Colorado River Compact, the doctrine of equitable apportionment and the law of appropriation are all irrelevant herein[15] with the consequences held to flow therefrom.

4. The holding that the uses of water on the tributaries in the Lower Basin, including the Gila River and the uses of or from the main stream of the Colorado River from Lee Ferry to the headwaters of Lake Mead are irrelevant and not subject to *pro tanto* charge against the right of the state using[16] and the holding that provisions of the Nevada and Arizona contracts for *pro tanto* charge or tributary uses are invalid.[17]

5. The holding that the Project Act, and especially the holding that this proceeding, relate only to the main stream of the Colorado River from the headwaters of Lake Mead to the International Boundary and that the

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[12]Tr. 23084.

[13]Tr. 23092.

[14]M. Rpt. Pg. 99 *et seq.*

[15]M. Rpt. Pg. 138 *et seq.*

[16]M. Rpt. Pgs. 177 *et seq.*, 183 *et seq.*, 226 *et seq.*, 240 *et seq.*, 323 *et seq.*, 345-346 Items (B) and (F).

[17]M. Rpt. Pgs. 201, 205, 207 and 210.

Compact has no application to this case or intrabasin to the Lower Basin and that the uses of main stream water above Lake Mead without accounting therefor or *pro tanto* charge against the decreed water to the using state are available to Arizona and Nevada.[18]

6. The holding that Congress by the Project Act, second paragraph of Section 4(a), intended to and did apportion the waters to which the Lower Basin is entitled to the use of and that the Secretary of Interior had the authority to and did apportion between the Lower Basin States the uses of water available and that said Section 4(a), second paragraph, did and does give to Arizona, in addition, all uses on the Gila River System.[19]

7. The Master recognizes that the Compact deals with both the tributaries and the main stream.[20] Despite this the holding is made that the Compact is irrelevant to this case[21] and is applicable purely interbasin[22]; has no application intrabasin in the Lower Basin[23]; that the Project Act is controlling[24] and that the Compact accounting of uses in the Lower Basin of Colorado River System water is not applicable in this case.[25]

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[18]M. Rpt. Pg. 225 *et seq.*, 183 *et seq.*, 173 *et seq.*, 345-346 Items (B) and (F).

[19]M. Rpt. Pgs. 179, 231 *et seq.*, 99 *et seq.*, 151 *et seq.*, 162 *et seq.*

[20]M. Rpt. Pg. 142 *et seq.*

[21]M. Rpt. Pg. 138 *et seq.*

[22]M. Rpt. Pg. 141.

[23]M. Rpt. Pg. 144.

[24]M. Rpt. Pg. 138.

[25]M. Rpt. Pg. 177 *et seq.*

8. The holding that regardless of any Compact classification of uses and regardless of when or how rights were initiated and regardless of the completion of the California projects, the rule to be applied to the rights of Lower Basin States and to use water is to be based on parity and percentage proration and not on any basis of priority.[26]

9. The holding that despite reliance on the Compact and Acts, and the then interpretations, the early rights of the California agencies or their contracts and the existence of their going projects and economies result in no priority or equity as against non-existent new projects.[27]

10. The Master recognizes that the law or priority of appropriation is the guiding doctrine in the arid western states[28] and is recognized by all the Colorado River Basin States.[29] However, the holding is that the law of prior appropriation is not to the same extent applicable in California[30] and that generally as applied here the Compact provisions as to appropriative rights are inapplicable and rejected[31] and that the Project Act renders appropriative rights inapplicable.[32]

11. The holding that as to the Gila River the inflow therefrom into the Colorado River was non-existent and, if existent, not available for use in California and

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[26]M. Rpt. Pg. 99 *et seq.*, 232 *et seq.*, 306 *et seq.* (perfected rights excepted).

[27]M. Rpt. Pgs. 100, 138, 152, 229, 233.

[28]M. Rpt. Pgs. 326, 140.

[29]M. Rpt. Pg. 22.

[30]M. Rpt. Pg. 22.

[31]M. Rpt. Pg. 196.

[32]M. Rpt. Pgs. 152, 229 *et seq.*

not appropriated by California agencies[33] and no accounting of its uses as a use of III(a) or other Compact Water is required and accountability is removed by the Project Act.[34]

12. The holding that "present perfected rights" or existing rights or appropriative rights are limited to actual diversions and uses of specific quantities of water applied to a defined area or a particular use.

That if this holding implies that where appropriation proceedings are duly had for a given intended project; the works necessary for the irrigation of the project are built with due and reasonable diligence considering the magnitude of the project; water is brought and is available to and is being used on the project—all within the limits of the original appropriation and intent—that rights to the full development of the project are not firm and perfected to the extent of need therefor—then it is submitted the implied holding is in error.[35]

13. The holding that issues were not joined and the case was not tried and evidence was not received of the tributary uses in Nevada, Utah, New Mexico and Arizona as to existing rights of 1929 and as to future tributary uses and the failure and refusal to find on the issue of the priority in time and amount of such uses[36] and the failure and refusal to find and determine the III(a) and other tributary Compact uses of water in the Lower Basin as to the several state parties herein.[37]

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[33]M. Rpt. footnotes Pgs. 179 and 184; and Pg. 229.
[34]M. Rpt. Pg. 232.
[35]M. Rpt. Pg. 307 *et seq.*; 346 Item (g).
[36]M. Rpt. Pg. 240 *et seq.*, 323.
[37]M. Rpt. Pg. 177 *et seq.*, 240 *et seq.*, 317 *et seq.*, 325.

14. The holding that evidence was not presented as to water uses in Arizona on the basis of beneficial consumptive use and that figures are not available for return flow from Arizona uses[38] and the failure and refusal to find and determine the beneficial consumptive use of Arizona on the Gila and other tributaries,[39] and the holding that beneficial consumptive use is not measurable as to tributary uses.[40]

15. The failure and refusal of the Master to find on all material issues necessary to conclusions of law and the findings of the Master contrary to the admitted issues in the pleadings and contrary to the evidence herein and the making of Conclusions of Law unsupported by the evidence and contrary to the law and in direct conflict with issues admitted in the pleadings.

16. The Master erred in disregarding the pleadings and the issues admitted therein[41] and in deciding the issues on the basis of the proffered amended pleadings of Aribona,[42] which the Master excluded as pleadings and as to which California was not permitted to meet the new issues,[43] and in denying California's application to reopen the case for additional evidence on the new issues raised by the Report and the new offered but rejected pleadings of Arizona.[44]

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[38]M. Rpt. Pg. 126 *et seq.*

[39]M. Rpt. Pg. 149.

[40]M. Rpt. Pg. 149, Footnote 17.

[41]M. Rpt. Pg. 3.

[42]M. Rpt. Pg. 136.

[43]Note: California objected to amendments by Arizona and sought, if they were to be allowed, an opportunity to meet the issues. The new pleadings were not proffered until August 13, 1958, M. Rpt. Pg. 370, Tr. 13611 *et seq.*, and Tr. 22558 and Cal. Exs. 7301-7306 and 7302A-7306A.

[44]M. Rpt. Pgs. 3-4.

17. The Master's Report is so drafted as to make it impossible to distinguish between the recitals of the opinion and matters that are intended as Findings of Fact or Conclusions of Law. As a matter of precaution reference is here made to those items designated as Findings or Conclusions or Recommended Decree. Exception is taken to the following:

(a) The Conclusions, Pg. 115, M. Rpt.

(b) The Conclusions 1 and 2, Pg. 342, M. Rpt.

(c) Items of the Recommended Decree numbered I(A) (B) (C) (F) (G) Pgs. 345-6; II(A) (2) Pgs. 346-7; II(B)(1) through II(B)(6); II(C)(1)(2) Pg. 350; III Pgs. 353-354; V(C) Pg. 358; VI Pg. 359; VIII(B) Pg. 360; and VIII(C) Pg. 360.

18. The holding of the Master relative to the western boundary of the Colorado River Indian Reservation and in the Master's definition of the West bank of the Colorado River in connection therewith.[45]

19. The Master's recommended provision placing the operation of a part of the Colorado River System in the hands of the Secretary of Interior instead of a Commission or Commissioner as suggested by California and Nevada.[46]

20. The holding and interpretation of the Master with respect to his claimed application of priority of appropriation and as applied to "perfected rights."[47]

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[45]M. Rpt. Pg. 269 *et seq.*, Pg. 274 *et seq.*

[46]See Cal. proposed Findings Vol. 1, Par. IX, Pgs. 24-26 and Cal. Opening Brief Pg. 199. Also see Nevada Conclusions 34-35, Pgs. 77-78 and Pg. 167 Nevada Opening Brief.

[47]M. Rpt. Pg. 234 *et seq.*

21. The holding that the Compact operates only interbasin.[48]

22. The holding that the Compact is a ceiling on appropriations.[49]

In view of the magnitude of the record in this case, a minute specification of all items of rulings during trial and of failures to find on material facts would exceed any useful set of objections and exceptions. It is the intent by these objections and exceptions to object and except to all rulings, opinions, findings, conclusions and the provisions of the recommended Decree that are adverse to California and objection and exception is so taken.

The footnote references are not intended to be by way of limitation and are intended only as illustrative and for convenience.

Respectfully submitted,

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[48]M. Rpt. Pg. 141 *et seq.*, Pg. 230 *et seq.*

[49]M. Rpt. Pg. 147 *et seq.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 4 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors.

STATE OF NEW MEXICO, STATE OF UTAH,

Intervenors.

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 9 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Exceptions of the California Defendants to the Report of the Special Master

February 27, 1961

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INTRODUCTION

These exceptions are filed in accordance with the notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961.[1]

Those portions of the Special Master's Report which are most adverse to the California defendants (Report, pp. 99-125, 138-248, 305-21) contain no findings of fact specially identified or conclusions of law separately stated.[2] Our exceptions are therefore directed to the adverse and erroneous determinations of ultimate issues made by the Special Master, including the underlying determinations and rulings on evidence and motions.

The exceptions are based on the grounds, to be developed in our opening brief, that these determinations are contrary to the evidence and the law.

Appended is a map of the Colorado River basin.

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[1]Pursuant to that notice, our opening brief in support of these exceptions will be filed May 22; answering brief will be filed August 14; reply brief will be filed October 2, 1961.

[2]This Court directed the Master to find the facts specially and to state separately his conclusions of law thereon, and to submit them to the Court together with a draft of a recommended decree. (See Report, p. 2.) The Report does so only with respect to certain claims of the United States (Report, pp. 267-74, 279-83, 288, 294-95, 298-300) and claims of Arizona, New Mexico, and the United States relative to the Gila River system (Report, pp. 335-43).

STATEMENT OF EXCEPTIONS

The California defendants except to the Report of the Special Master, dated December 5, 1960, and to the recommended decree contained therein, upon the following grounds:

I

EXCEPTIONS RELATING TO THE LIMITATION ON CALIFORNIA STATED IN SECTION 4(a) (FIRST PARAGRAPH) OF THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT (Report, pp. 164-200)

A. The Issue

What is the meaning of those words of the first paragraph of section 4(a) of the Boulder Canyon Project Act[3] (repeated in substantially identical words in the California Limitation Act[4]) which are identified by emphasis and bracketed numbers in the following quotation?

> "California . . . shall agree . . . that the aggregate annual consumptive use . . . of water . . . from the Colorado River for use in the State of California . . . shall not exceed four million four hundred thousand acre-feet of the [1] *waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact,* plus not more

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[3]45 Stat. 1058 (1928), 43 U.S.C. § 617c (1958) (Report, pp. 381-82).

[4]Calif. Stats. 1929, ch. 16, p. 38 (Report, pp. 397-98).

than one-half of any [2] *excess or surplus waters unapportioned by said compact,* such uses always to be subject to the terms of said compact."[5]

B. The Determinations to Which Exception Is Taken

The Special Master erroneously concludes:

1. That the emphasized words identified by the bracketed [1]—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"—and by the bracketed [2]—"excess or surplus waters unapportioned by said compact"—cannot and do not refer to the Colorado River Compact[6] or to any paragraph or provision of that Compact whatsoever (Report, pp. 170-85, 194-200).

2. That the words identified by the bracketed [1]—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"—refer to the first 7.5 million acre-feet per annum of consumptive use in the lower basin from the "mainstream" (Report, pp. 170-85). The Report erroneously defines the "mainstream" as constituting only Lake Mead and the main Colorado River below Lake Mead in the United States (Report, pp. 173, 185), including the inflow of the Bill Williams River (Report, pp. 184, 225), but excluding the waters in all tributaries both be-

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[5]Words similar to these identified by emphasis and bracketed numbers also appear in the second paragraph of § 4(a) (Report, pp. 382-83). We consider the effect of the second paragraph in group II of these exceptions, in relation to the Secretary's water delivery contracts, *infra* pp. 9-17.

[6]For full text of the Compact, see Report, pp. 371-77.

low and above Lake Mead, and excluding the Colorado River itself between Lee Ferry and Lake Mead (Report, pp. 183, 227).[7]

3. That the emphasized words identified by the bracketed [2]—"excess or surplus waters unapportioned by said compact"—refer to all consumptive use in the United States in any year from the "mainstream" in the lower basin in excess of 7.5 million acre-feet (Report, pp. 194-200).

4. That the increase in use permitted to the lower basin by Article III(b)[8] of the Colorado River Compact is in legal effect identical to the apportionment made in Article III(a)[9] so that such Article III(b) waters are not "unapportioned" within the "literal" meaning of the words identified by the bracketed [2] —"excess or surplus waters unapportioned by said compact" (Report, pp. 150-51, 169, 194-96).[10]

5. That (1) the Project Act and the California Limitation Act are not to be construed as a statutory

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[7]All references hereafter to "mainstream" mean the "mainstream" as defined above in the Report. Lake Mead, the Bill Williams River, and Lee Ferry are shown on the map of the Colorado River basin appended to these exceptions.

[8]For text of Article III(b), see Report, p. 373.

[9]Report, pp. 147-50. For text of Article III(a), see Report, p. 373.

[10]Notwithstanding the cited determination, to which we except, that if the Compact is construed literally the million acre-feet of consumptive use referred to in Article III(b) of the Compact is "apportioned," the Report concludes that § 4(a) of the Project Act, separately construed, does not exclude California from participation in that million acre-feet. We agree that California is not excluded, but assert that this result follows whether arrived at by interpretation of the words "excess or surplus waters unapportioned" in the Project Act and the Limitation Act, or the words "is hereby given the right to increase its beneficial consumptive use" in Article III(b) of the Colorado River Compact.

compact or consensual agreement established by the offer by the United States to California contained in the Project Act and the acceptance by California in the Limitation Act; and (2) the limitation on California, even if it were construed as a consensual agreement, has the meaning ascribed to it by the Report, as set forth above (Report, pp. 180-83).

C. The Correct Conclusions

The Special Master should have concluded:

1. That the identified words, in each instance, take their meaning from the Colorado River Compact.

2. That the words identified by the bracketed [1]—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"—refer to the first 7.5 million acre-feet of consumptive use per year from the Colorado River system (*i.e.*, the entire Colorado River main stream from Lee Ferry to the Mexican boundary, and all of its tributaries in the United States) within the lower basin, in conformity with the meaning which the Report properly attributes to Article III(a) of the Colorado River Compact (Report, pp. 144, 173), and not merely from the "mainstream."

3. That the words identified by the bracketed [2]—"excess or surplus waters unapportioned by said compact"—refer to all consumptive use from the Colorado River system within the lower basin in excess of the first 7.5 million acre-feet of consumptive use per year from the Colorado River *system* in the lower basin, and not merely from the "mainstream."

4. That the increase in use permitted to the lower basin by Article III(b) of the Colorado River Compact

is not in legal effect identical with the apportionment in perpetuity made in Article III(a). Article III(b) waters are "unapportioned" within the meaning of (1) the Colorado River Compact and (2) the Project Act and Limitation Act expression identified by bracketed number [2]—"excess or surplus waters unapportioned by said compact"—as well as being "excess . . . waters" within the meaning of the expression last quoted.

5. That (1) section 4(a) of the Project Act and the California Limitation Act establish by reciprocal legislation a statutory compact between the United States and California, accepted by six basin states (excepting Arizona) as a premise for six-state ratification for the Colorado River Compact, and (2) that limitation adopts the Compact method of accounting above set forth.

D. The Effect of the Resolution of This Issue

The Special Master in effect holds that the Boulder Canyon Project Act, unlike the Compact, truncated the Colorado River at the upper margin of Lake Mead[1] (Report, pp. 151, 183, 225-26).

All parties apparently agree that there probably will be sufficient water throughout the Colorado River *system*

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[1]"Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System*, which is defined in Article II(a) as including the entire mainstream and the tributaries." (Report, p. 173. Emphasis in the original).

in the lower basin to sustain permanently the consumptive use of at least 7.5 million acre-feet annually. Of this, the permanently dependable supply in the tributaries now supports about 2 million acre-feet per annum of consumptive use, and the permanently dependable supply in the Colorado River from Lee Ferry to the Mexican boundary can probably support a beneficial consumptive use of not less than 5.5 million acre-feet per annum.

Therefore, if the emphasized words identified by the bracketed number [1] relate to Colorado River *system* water throughout the lower basin, the permanently dependable supply is adequate to sustain California's use of at least 4.4 million acre-feet per annum, as well as the consumptive use of 3.1 million acre-feet by the other lower basin states: Arizona, Nevada, New Mexico, and Utah. No problem of shortage need be resolved, with respect to that 7.5 million.

Whenever *system* supply in the lower basin will support beneficial consumptive uses exceeding 7.5 million acre-feet per annum, there is "excess or surplus" in which California may participate to the limit of one half.

However, the Report's interpretation of the words identified by the bracketed number [1] limits the waters referred to therein to that segment of the Colorado River system which the Report labels "mainstream." This interpretation makes it impossible to satisfy permanently 7.5 million acre-feet of consumptive use from such waters because the permanently dependable supply

of the "mainstream," so defined, available for consumptive use in the lower basin is substantially less than 7.5 million.[2] (See group III of these exceptions, relating to water supply.) This interpretation creates the shortage which is dealt with in the "contractual allocation scheme" and proration formula to which group II of these exceptions relates.

If some 2 million acre-feet of consumptive use which is now sustained by the permanently dependable supply of the tributaries in the lower basin is eliminated from the accounting, as the Report would do, the "mainstream" supply, considered alone, contains no "excess or surplus." This makes inoperative, for all practical purposes, the provision of section 4(a) which permits California to use up to one half of "excess or surplus waters unapportioned by said compact."

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[2]"With the storage provided by Lake Mead, and barring a drought unprecedented in the recorded history of the River, the Lower Basin has, under the guarantee of the Compact, available for use at Hoover Dam a minimum of 7,500,000 acre-feet of water per year, less transit losses between Lee Ferry and the dam, evaporation loss from Lake Mead, and its share of the Mexican treaty obligation." (Report, pp. 144-45.) When minimum figures are substituted for the deductions specified by the Master and for similar losses below Hoover Dam which the Report properly characterizes as a further diminution of supply (Report, p. 187), this is a "guarantee" under the Compact of less than 6 million acre-feet per year of consumptive use from the "mainstream." Thus, there must be a supply of at least 10 million acre-feet of water annually in the "mainstream" to satisfy 7.5 million acre-feet of beneficial consumptive use from the "mainstream" in Arizona, Nevada, and California.

II

EXCEPTIONS RELATING TO THE BASIS OF WATER RIGHTS IN THE LOWER BASIN: THE "CONTRACTUAL ALLOCATION SCHEME" AND THE NULLIFICATION OF THE PRINCIPLES OF INTERSTATE PRIORITIES AND EQUITABLE APPORTIONMENT (Report, pp. 151-64, 201-48, 305-14)

A. The Issues

1. Did Congress in the Boulder Canyon Project Act nullify interstate priorities and equitable apportionment principles in the "mainstream," and substitute therefor an authorization to the Secretary of the Interior to establish, as the sole basis of interstate rights to such waters, a "contractual allocation scheme" in which the execution of water delivery contracts perpetually apportioned water *en bloc* among Arizona, California, and Nevada irrespective of time of initiation or construction of projects or quantity of use?

2. Did successive Secretaries of the Interior purport to exercise such an authority or make such an apportionment in any contract?

3. How are shortages in "mainstream" waters to be borne, interstate, among competing claimants in Arizona, California, and Nevada?

B. The Determinations to Which Exception Is Taken

The Special Master erroneously concludes:

1. That the Boulder Canyon Project Act nullified the principles of equitable apportionment and priority of appropriation in the "mainstream" (Report, pp. 138, 152), although (as the Report correctly concludes) those doctrines control (1) interstate controversies between

users of "mainstream" water and users of waters of lower basin tributaries, including the Colorado River itself above Lake Mead (Report, pp. 316-18), and (2) interstate controversies between users on the tributaries of the Colorado River (Report, p. 325).

2. That the Boulder Canyon Project Act delegated to the Secretary of the Interior the authority, in default of prior interstate agreement, (1) to divide, without regard to appropriation and use (except for "present perfected rights") among California, Arizona and Nevada, "unappropriated"[3] water in the "mainstream" by means of water storage and delivery contracts, and (2) by signature of such contracts (subject to the provisions of the first paragraph of section 4(a) of the Project Act) to impose on the states a federal apportionment of the waters of the "mainstream" (Report, pp. 151-54, 173, 221-22).

3. That the authority so given includes also the authority to deliver "mainstream" water, to which rights had theretofore validly been acquired under the laws of a state, to others than the holders of such rights, to the extent that the rights thereby invaded do not qualify under

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[3]There is unresolved confusion in the Master's Report: At page 152 he speaks of the Project Act as authority for an "allocation of all of the available water" in the "mainstream"; at pages 153 and 210 he speaks of authority to divide the "unappropriated water" as of the effective date of the Project Act; at page 307 he categorizes all appropriations as either "perfected rights" or "mere paper filings" and gives legal effect only to the former.

As the Master recognizes (Report, pp. 234-35), appropriative rights, if diligently pursued, relate back, in priority and in full quantity, to the date of the initiation thereof. *Wyoming v. Colorado*, 259 U.S. 419, 459 (1922).

section 6 as "present perfected rights" as of June 25, 1929 (Report, p. 152), leaving open only the question of right to compensation for their taking (Report, p. 161).

4. That (1) "present perfected rights" based upon water rights under state law are limited to quantities of water actually applied to use as of June 25, 1929 (Report, p. 308); (2) "present perfected rights" of federal reservations created prior to June 25, 1929, extend to the quantities of water ultimately required for those reservations, and are not limited to the quantities actually put to use at that date, or affected by the absence of any use at any time (Report, pp. 309-11).

5. That successive Secretaries of the Interior, during the period 1930-1944, in a series of water storage and delivery contracts, have "forever allocated" or "apportioned" (Report, pp. 313-14) all "mainstream" waters among the states of Arizona, California, and Nevada by the mere execution of those contracts (Report, pp. 201-27, 237-47).

6. That the Project Act and water delivery contracts place on a parity all interstate rights in "mainstream" waters (Report, pp. 233, 236) irrespective of the principles of equitable apportionment and priority of appropriation (Report, p. 152), or time of commencement of use or quantities in fact used, subject only to protection of "present perfected rights" (Report, pp. 308-12).

7. That successive Secretaries of the Interior, in executing all of their various contracts over the period 1930-1944, voluntarily bound themselves to follow substantially the allocation which the Report attributes

to the second paragraph of section 4(a) of the Boulder Canyon Project Act, specifying the terms of a tri-state compact among Arizona, California, and Nevada which was never executed or ratified by any state (Report, pp. 222-24), notwithstanding the Report's correct conclusion that section 5 of the Project Act did not require the Secretary to follow the allocation described in the second paragraph of section 4(a), absent its ratification by the three states (Report, pp. 163, 202).

8. That (1) successive Secretaries of the Interior, by voluntarily following in their various contracts the allocation described in the second paragraph of section 4(a) of the Project Act, adopted the construction now accorded that paragraph by the Report (Report, pp. 173, 183-85, 196, 200, 225, 226, 316-18); but (2) while purportedly following the allocation described in the second paragraph of section 4(a), in fact imposed 44/75 of the Mexican Treaty burden on the California defendants, whereas the nonexistent tri-state compact stated in the second paragraph of section 4(a) (clause (4)) would have imposed only one half of that burden on California.

9. That (1) the provisions of article 7(d) of the Arizona water delivery contract and of article 4 of the 1944 Nevada contract (amending article 5(a) of the 1942 Nevada contract), which diminish the Secretary's aggregate delivery obligations in respect of uses made of water in those states above Lake Mead, are invalid (Report, pp. 201, 207, 210, 237-47), but that (2) the invalidation of those provisions does not affect the validity of the remainder of said contracts (Report, pp. 207, 210).

10. That (1) the several contracts of the successive Secretaries of the Interior thus establish a proration formula under which the first 7.5 million acre-feet or less of consumptive use from the "mainstream" is apportioned in perpetuity in fixed proportions: to Arizona 28/75, to California 44/75, to Nevada 3/75; and of consumptive use of "mainstream" waters in excess of 7.5 million, one half to California, one half to Arizona, unless the Secretary makes a contract with Nevada for 4 per cent of such surplus, in which event Nevada will be apportioned 4 per cent and Arizona 46 per cent thereof (Report, pp. 221-25, 241, 305-06); (2) such apportionments in such fixed proportions of the 7.5 million acre-feet are subject to displacement only if the supply is insufficient to sustain "present perfected rights"; and (3) the numerator and the denominator of the fractions in that formula include valid rights in the natural flow antedating the effective date of the Project Act (Report, pp. 305-12).

C. The Correct Conclusions

The Special Master should have concluded:

1. That rights to the consumptive use of all Colorado River system water in the lower basin, including "mainstream" water, whether founded upon valid water rights under state law or asserted under contracts executed under the Boulder Canyon Project Act or other portions of the reclamation law, are governed by equitable apportionment principles established by this Court, including (1) the principles of priority, and (2) the principle of protection of existing uses against impairment for the benefit of new projects. Waters to supply such rights are subject to the quantitative limi-

tations expressly imposed thereon by the Compact and the California limitation.

2. That the Boulder Canyon Project Act does not impose a federal apportionment or interstate allocation upon the states, or authorize the Secretary of the Interior to do so.

3. That (1) the authority conferred by the Project Act upon the Secretary of the Interior to contract for the storage and delivery of water does not include authority to impair valid rights under state law to the natural flow waters, acquired prior to the effective date of the Project Act, whether or not such waters had been fully put to use prior to that date; and that (2) contracts for the storage and delivery of waters to holders of such rights merely confirm such preexisting rights, which retain their interstate priorities.

4. That (1) "present perfected rights," as that expression is used in section 6 of the Project Act, are not limited to the quantities of water actually applied to use prior to June 25, 1929, but extend to the quantities of water capable of use from the natural flow by works constructed or in process of construction with due diligence prior to the effective date of the Colorado River Compact, and theretofore or thereafter put to use by the exercise of due diligence, pursuant to appropriations which were initiated under state law or pursuant to reservations which were established under federal law, prior to said effective date; (2) although the effective date of the Colorado River Compact as a six-state agreement was June 25, 1929, nevertheless if Arizona is held to have effectively ratified the Compact on February 24, 1944, then 1944 is the effective

date of the Compact as a seven-state agreement and the date to which the expression "present perfected rights" in Article VIII of that Compact and in section 6 of the Project Act relates; (3) "present perfected rights," as that expression is used in article 7(*l*) of the 1944 Arizona contract (Report, p. 403), extend to the quantities of water capable of use by works in California, actually constructed or in process of construction with due diligence prior to February 24, 1944, and theretofore or thereafter put to use by the exercise of due diligence, pursuant to appropriations initiated, federal reservations established, or federal water storage and delivery contracts executed, prior to February 24, 1944.

5. That no Secretary of the Interior has effectuated or purported to effectuate an interstate apportionment of water either by water delivery contracts or otherwise.

6. That any rights based upon water storage and delivery contracts are subject to and controlled by section 8 of the Reclamation Act of 1902[4] and by sections 14[5] and 18[6] of the Project Act, which compel the application of priority and not parity to interstate water rights.

7. That the water delivery contracts made by the successive Secretaries of the Interior do not purport to and do not follow the terms of the nonexistent tri-state compact set forth in the second paragraph of section 4(a).

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[4]32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958), quoted in part in Report, p. 217.

[5]See Report, p. 394.

[6]See Report, pp. 217, 395.

8. That the successive Secretaries of the Interior, in executing their various water storage and delivery contracts from time to time during a period of 14 years and administering them during a period of 30 years, have not accorded to the second paragraph of section 4(a) of the Project Act the meaning attributed thereto by the Special Master as independent of the Colorado River Compact.

9. That (1) the Arizona and Nevada contracts are administrative devices establishing quantitative limitations or ceilings upon the aggregate quantity of water which may be stored and delivered by the Secretary of the Interior to Arizona and Nevada water users, respectively, pursuant to federal reservations or appropriations under state law, or under contracts made by the Secretary directly with such users; (2) the provisions of article 4 of the Nevada 1944 contract and article 7(d) of the Arizona contract, diminishing the stated aggregate quantities in respect of uses of water made above Lake Mead, are valid; and (3) if those provisions of article 4 of the 1944 Nevada contract and article 7(d) of the Arizona contract are invalid, the contracts are invalid in their entirety, because those provisions are not severable from the remainder of the contracts.

10. That rights in natural flow are properly added to, and not included within, any rights in stored waters, howsoever allocated.

D. The Effect of the Resolution of These Issues

As pointed out above, there is not enough water permanently available in the truncated "mainstream" to sustain 7.5 million acre-feet of consumptive use in Ari-

zona, California, and Nevada. The effect of the Report's formula is to prorate shortages among Arizona, California, and Nevada in fixed percentages, or fractions, disregarding interstate priorities. Under the Report's formula, California users are thus required to bear 44/75 of such shortage, irrespective of the relative magnitudes or priorities of rights in natural flow, interstate, which preexisted the creation of storage (excepting only "present perfected rights").

The dependable "mainstream" supply permanently available will not support more than about 6 million acre-feet per annum of consumptive use. (See group III of these exceptions.) Therefore, if the Report's construction of the limitation on California is sustained —that the 7.5 million acre-feet of Article III(a) water must be found, if at all, in the "mainstream" alone— this proration formula restricts California to 3,520,000 acre-feet of consumptive use out of that dependable supply (44/75 of 6 million). (See Report, p. 311.)

Under priority and equitable apportionment principles, California's existing uses, which were 4.6 million acre-feet per annum at the time of trial (Report, p. 128 and n.73), would be protected at least to the extent of the quantitative limitation of 4.4 million acre-feet per annum stated in the limitation. Moreover, the Report precludes the possibility of any "excess or surplus" in the "mainstream" because the Report excludes the main stream between Lee Ferry and Lake Mead and all lower basin tributaries from the accounting. (See group III of these exceptions, relating to water supply.)

III

EXCEPTIONS RELATING TO WATER SUPPLY AND JUSTICIABILITY (Report, pp. 99-135)

A. The Issues

1. Is the determination of the dependable (*i.e.*, permanently available) water supply necessary in this case?

2. Is there a justiciable controversy before the Court if the dependable water supply is based on the Report's premises that the Colorado River Compact is a "ceiling on appropriations" in each basin and is irrelevant to the issues in this case?

3. What effect does water supply have upon the resolution of the issues?

4. What is the dependable water supply of the Colorado River in the lower basin?

B. The Determinations to Which Exception Is Taken

The Special Master erroneously concludes:

1. That water supply is irrelevant to the resolution of the issues in this suit (Report, pp. 99-102, 145-46), notwithstanding the correct conclusions that existing projects cannot be economically operated unless a dependable supply of water is available (Report, p. 239), and that new projects can be financed only if a relatively constant and dependable supply seems likely to be available after their completion (Report, p. 239), both physically and legally (Report, p. 133).

2. That (1) the apportionment in perpetuity to the upper basin of 7.5 million acre-feet of consumptive use per annum made by Article III(a) of the Colorado River Compact constitutes a "ceiling on appropriations," so that water temporarily available in the lower basin but legally apportioned to the upper basin may be treated as part of the lower basin's dependable supply (Report, pp. 110-15, 140-42, 144, 149, 176) and (2) there is nothing to indicate that upper basin depletions will expand to "anywhere near" 6.5 million acre-feet per annum (Report, p. 111), or indeed beyond 4.8 million (Report, pp. 112, 113).

3. That, under the premises of the Report and of the decree recommended therein, Article III(c) of the Colorado River Compact need not, and should not, in the absence of the upper basin states, be herein construed (Report, pp. 145-46).

4. That (1) the dependable water supply of the Colorado River in the lower basin, hence the effect of the recommended decree, is not determinable within useful limits of accuracy (Report, p. 103); (2) the record in this case gives no indication that the decision and decree recommended by the Report will destroy or seriously impair existing projects in California (Report, pp. 102-25); and (3) a great deal of water has been permitted to waste in California as purportedly evidenced by large annual "unused runoff" into the Salton Sea (Report, p. 103 n.25).

5. That this case presents a justiciable controversy with compelling reasons for its adjudication (Report, pp. 129-35) despite the determinations (1) that the Colorado River Compact constitutes a ceiling on appropriations in each basin (Report, pp. 111-13, 140-41, 144, 149, 176) and is irrelevant to the suit (Report, p. 138) and (2) that California's existing uses (and *a fortiori,* Arizona's and Nevada's uses from the "mainstream") are "in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed" (Report, p. 115).[7]

C. The Correct Conclusions

The Special Master should have concluded:

1. That the determination of the dependable water supply is relevant and essential in the resolution of the issues in this suit with respect to (1) the existence of a justiciable controversy, (2) the appraisal of the effect of the apportionment proposed by the Report, and (3) the testing of the result of any decision in this case against the intent of Congress and the legislatures of the Colorado River basin states as of 1928 in light of the water supply anticipated by those bodies as of that date.

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[7]California's existing uses (1955-1957) were 4,483,885 acre-feet annually (Report, p. 128); corrected in accordance with note 73 at that page, these uses are 4,586,392 acre-feet, for all practical purposes identical with the 4,600,000 acre-feet of dependable supply sought by California in its proposed decree submitted to the Master, vol. I, Calif. Findings and Conclusions.

2. That the apportionment in perpetuity to the upper basin made by Article III(a) of the Colorado River Compact has withdrawn the apportioned quantity from the permanently dependable supply of the lower basin, irrespective of the time when the waters so apportioned may be put to use, subject only to the overriding delivery obligations imposed on the states of the upper division by the Colorado River Compact, *e.g.*, Articles III(c) and III(d) of the Compact.

3. That, under the premises of the decision and decree recommended by the Report, Article III(c) must be construed to determine or permit determination of the effect of the recommended decree on the dependable lower basin main stream supply.

4. That the dependable water supply of the lower basin is determinable within useful limits of accuracy, and the formula proposed, applied to that dependable supply, produces inequitable results (see pars. 6-8 *infra*).

5. That (1) the controversy is justiciable if, and only if, the apportionment to the upper basin by Article III(a) of the Colorado River Compact is regarded as a deduction from the lower basin supply at least to the extent that existing and authorized storage works in the upper basin make possible utilization of that apportionment without impinging on upper division obligations under the Compact, *e.g.*, Articles III(c), III(d), and III(e) of the Compact; and (2) if effect is not so given to the apportionment to the upper basin made

by Article III(a) of the Compact, the water supply presently available in the Colorado River from Lee Ferry to the Mexican boundary so greatly exceeds the claims thereto of Arizona, California, and Nevada that there is no justiciable controversy between any of those states.

6. That the dependable supply permanently available under the Colorado River Compact from the "mainstream" for use in Arizona, California, and Nevada will not sustain more than 6,000,000 acre-feet per annum of consumptive use.

7. That (1) the proration formula proposed by the Report, applied to a dependable supply of only 6 million acre-feet, would supply California with only 3,520,000 acre-feet of beneficial consumptive use annually (Report, pp. 306, 311), or 1 million acre-feet less than that required by California's uses existing at the time of trial (see Report, p. 128, noted *supra* p. 20 n.7); and (2) the decision and decree recommended by the Report will accordingly result in disaster to California by seriously curtailing California's present uses in the dependable supply and by eliminating all diversions from that supply by the defendant The Metropolitan Water District of Southern California.

8. That under existing circumstances California projects operate with high efficiency and make reasonable, nonwasteful use of Colorado River water.

D. The Effect of the Resolution of These Issues

If the water supply premises of the Report were adopted, this suit should be dismissed as not justiciable. On the premises of the Report there is an abundant water supply for all present and contemplated lower basin projects and there is no likelihood of any shortage in the foreseeable future, unless and until Congress authorizes large new projects. Therefore, the Court would be rendering an advisory opinion to Congress on a moot controversy.

If the Court rejects the water supply premises of the Report and accepts the dependable water supply which is established in the evidence, then the Report's proposed resolution of the issues must be rejected as inequitable and contrary to the intention of Congress and the state legislatures in 1928. The decision proposed in the Report would completely destroy the permanent water supply of the defendant The Metropolitan Water District of Southern California and seriously curtail the water supply for California's agricultural agencies. This result could not have been intended by Congress or the state legislatures in light of the dependable water supply anticipated as of 1928.

IV

GENERAL EXCEPTIONS

1. The California defendants except to the Report on the ground that the decision therein proposed is outside the order of reference of this Court.

2. The California defendants except to the Report on the ground that the decision therein proposed is outside the issues pleaded and tried, and contrary to facts established by admissions in the pleadings.

3. The California defendants except to the erroneous determination that the limitation upon use of water in California set out in the first paragraph of section 4(a) of the Project Act and accepted by the reciprocal California Limitation Act continues operative despite the Report's conclusion that Arizona effectively ratified the Compact on February 24, 1944, thereby effecting seven-state ratification of the Compact (Report, pp. 27, 166-67).

4. The California defendants except to the erroneous determination that California had no diversion works as of 1928 capable of diverting Gila River water for use in that state, that no such use of Gila River water in California was contemplated at that time, and that California has not used Gila River water since 1928 (Report, p. 179 n.38).[8]

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[8]As of 1928, the diversion works for Imperial Irrigation District in California were located below the mouth of the Gila, and Gila River system waters, when available, were diverted by the District until 1940 when the All-American Canal diversions at Imperial Dam above the mouth of the Gila were made for the first time. (See Report, pp. 54-55.)

5. The California defendants except to the erroneous determinations of (1) the quantities of water reserved by the United States for Indian reservations (Report, pp. 254-87) and for other federal lands and purposes (Report, pp. 291-300), (2) the priorities accorded to such federal reservations, and (3) the bases upon which the Report predicates water rights for such federal reservations.[9]

6. The California defendants except to the erroneous determination of the western boundary of the Colorado River Indian Reservation with respect to the "Olive Lake Cutoff" and the "Ninth Avenue Cutoff," as reflected in findings of fact 8, 9, 10, 11, 12, 13, 15, and 17 (Report, pp. 271-72), conclusions of law 1, 5, 6, and 7 (Report, p. 273), and the opinion (Report, pp. 274-78).[10]

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[9]Although we indicate here our disagreement in principle with the Master's determinations which sustain the United States claims for Indian and other federal reservations, we do not now plan to brief this point. First, the quantities of Indian water in dispute in California are relatively small. Second, the Special Master has correctly decided that federal uses in Arizona and Nevada are chargeable to those states out of water from which California users are excluded by the California Limitation Act, and the Master asserts that "all of the parties seem to agree to this accounting." (Report, p. 247.) However, if the decision that federal uses are so chargeable should be attacked by any party, we reserve by this exception our challenge to the determinations which sustain the federal reservation claims.

[10]We understand that the Special Master does not purport to adjudicate the rights to land of persons not parties to this suit. Report, p. 278; Tr. 20,289, 20,371.

7. The California defendants except to the erroneous denial of their motion of June 10, 1960 (California Comments on the Draft Report, pp. 61-90), in which the California defendants moved (1) that the Master submit to the Court tables which should set forth specified data as to the water supply of the Colorado River system in the lower basin and (2) that the Master either appoint or recommend that the Court appoint independent experts to testify as the Court's own witnesses on the dependable supply (letter to all counsel from Special Master, dated July 1, 1960, reported at Tr. 22,598-601).

8. The California defendants except to the erroneous denial of their motion to reopen the hearings to receive the evidence tendered in their Offer of Proof as well as any other evidence relating thereto which might be tendered by other parties (Report, pp. 248-53).

9. The California defendants except to the erroneous denial of their motion of August 31, 1960, to reopen the trial for the taking of evidence on the future depletion of the Colorado River at Lee Ferry by the upper basin (Report, p. 112 n.41).

V

EXCEPTIONS RELATING TO THE RECOMMENDED DECREE (Report, pp. 345-60)

The California defendants except to the erroneous decree recommended in the Report, especially in the following particulars:

1. The recommended decree reflects the errors specified above (Decree arts. I-III).

2. The recommended decree grants injunctive relief where no foundation for an injunction has been established (Decree arts. II, III).

3. The recommended decree specifically subjects the California defendant agencies to an injunction which does not apply to their counterparts in Arizona and Nevada (Decree art. III).

4. The recommended decree with respect to "non-contract" uses of water, which are largely on federally owned lands, does not apply to the United States (Decree art. III(C)), the only party with practical or legal means to prevent those uses.

5. The recommended decree fails to make clear that the consumptive use in the lower basin of ground water interconnected with the Colorado River, within the safe annual yield of the ground water basin, is chargeable under any interstate allocation which may be decreed (Decree art. I).

6. The recommended decree fails to make clear that jurisdiction is retained (Decree art. IX), among other

things, to hear and decide any interstate case of "main-stream" users against tributary users and the issuance of a supplementary decree thereon.

7. The recommended decree fails to encompass every portion of the Colorado River system within the lower basin from which, according to the record, major new diversion works have been proposed.[11]

WHEREFORE, the California defendants request that the Court reject the Report of the Special Master and the recommended decree contained therein, and that the Court decide this cause in the manner indicated by the modifications of the Special Master's Report and recommended decree described above.

Dated: February 27, 1961.

Respectfully submitted,

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[11]The main Colorado River above Lake Mead within the lower basin, which includes one alternative point of diversion (Report, pp. 227-28) for the Central Arizona Project (which Arizona alleged was the precipitating cause of this litigation, Ariz. Complaint, par. XX; Report, p. 131) is outside the terms of this decree (Report, pp. 152, 183-85, 227, 237-47, 345) and is left to adjudication in future litigation (Report, pp. 247, 316-21).

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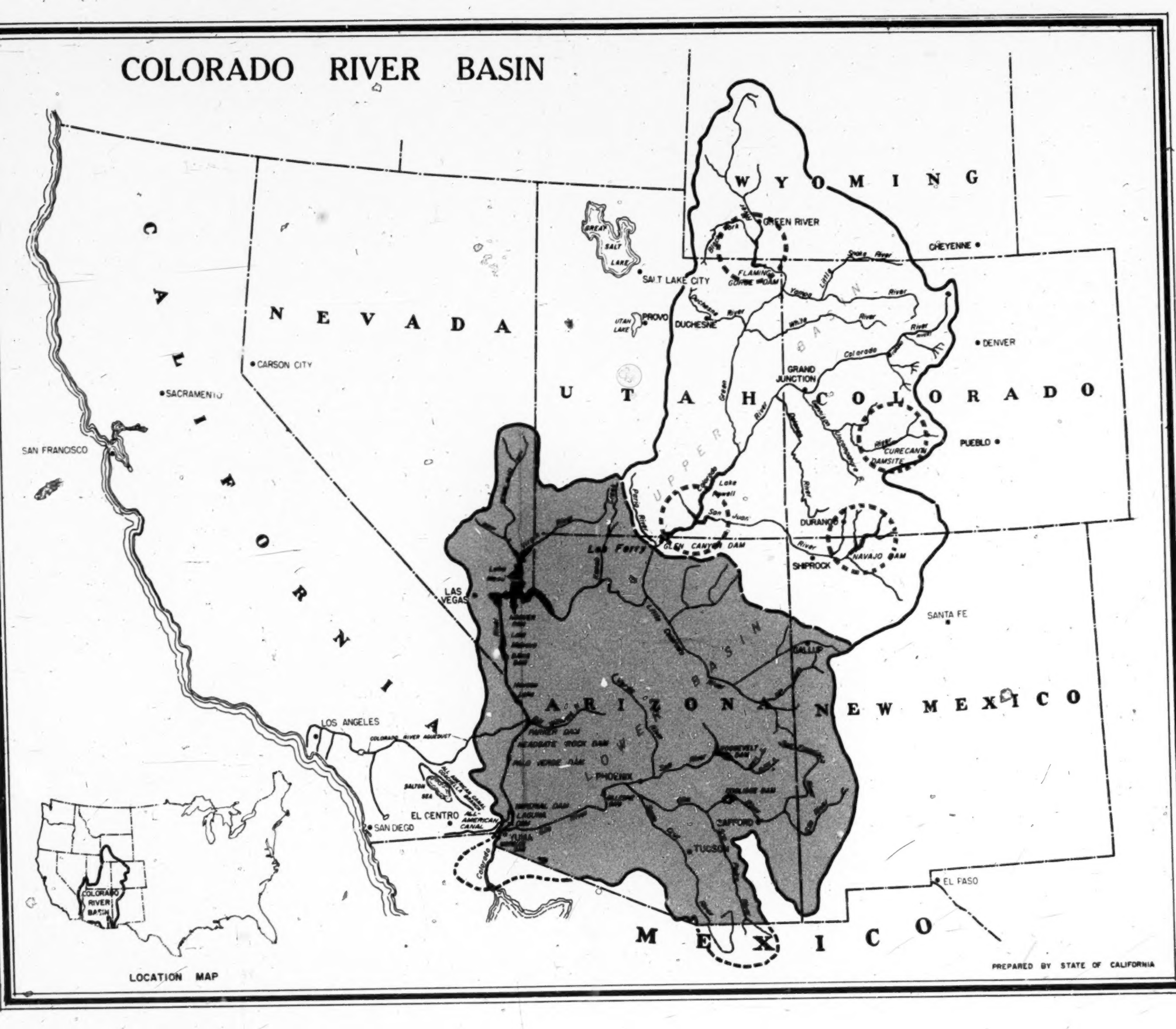
APPENDIX

MAP OF THE COLORADO RIVER BASIN

The accompanying map illustrates the Colorado River system in the upper and lower basins and the principal storage and diversion works located therein.

Reservoirs outlined in red are the four major storage reservoirs authorized or under construction in the upper basin, pursuant to the Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958).

COLORADO RIVER BASIN



LOCATION MAP

PREPARED BY STATE OF CALIFORNIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 9 Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Parties.

Exceptions to the Report of the Special Master and Recommended Decree on File Herein, Dated December 5, 1960, Filed by Defendant, The Metropolitan Water District of Southern California, on Its Behalf and on Behalf of Its Co-Defendants, The City of Los Angeles, and Its Department of Water and Power, The City of San Diego, and The County of San Diego.

February 27, 1961

INTRODUCTION.

The defendant, The Metropolitan Water District of Southern California, is a public and municipal corporation of the State of California. Its corporate area is situated on the coastal plain of Southern California extending from (and including a part of) Ventura County to the Mexican border, a distance of 180 miles.[1] A large number of municipalities, including the City of Los Angeles (population 2,500,000), the City of San Diego (population 575,000), and a substantial part of the County of San Diego are within the boundaries of, and are served with Colorado River water on a wholesale basis by, the Metropolitan Water District.[2] The population of the Metropolitan Water District in 1956 was 6,423,000.[3] (It is now about 7,000,000).

Its assessed valuation, in 1956, was $9,674,000,560.[4] (It is now $13,820,731,775), about one-half of total assessed valuation of the State of California.[5] All available local water sources have long since been fully developed and put to use. To sustain its present development and population, and to provide for its inevitable growth, the Metropolitan Water District is de-

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[1]Calif. Ex. 447 (Map showing constituent cities and municipalities—present and potential areas, and MWD distribution system as of 1941-57, Tr. 9,395), and Tr. 9,495-500 (Elder).

[2]*Ibid.*

[3]Calif. Ex. 527 (Economic Analysis—Population 1900-75, Tr. 9,395), Table 1, Tr. 9,784-92 (Dunn).

[4]Calif. Ex. 479 (Tabulation showing comparison of assessed valuation and area of constituent entities of MWD, Tr. 9,395), Tr. 9,658-61 (McKinlay); Calif. Ex. 527, note 3 *supra*, Table 9, Chart 9; Tr. 9,812-14 (Dunn).

[5]Calif. Ex. 480 (Tabulation showing comparison of assessed valuation of property taxable for local purposes within MWD and State of California from 1929/30 to 1956/57, Tr. 9,395).

pendent upon water agreed to be delivered to it under contracts with the United States (1931-1934) made under the Boulder Canyon Project Act.[6]

Municipal water requirments must be anticipated, and provisions made for continuous supply for a rapidly expanding population. Existing use, as of any given time, does not indicate requirements. Public officers in charge of water supply must look at least ten years into the future in providing municipal water supplies.[7]

The Metropolitan Water District rights to the use of Colorado River water, both appropriative[8] and those derived by contract under the Boulder Canyon Project Act,[9] are junior to established "present perfected rights"

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[6]Ariz. Ex. 38 (Water Delivery Contract: United States and MWD, April 24, 1930, Tr. 251); Ariz. Ex. 39 (Amended Water Contract: United States and MWD, September 28, 1931, Tr. 252); Ariz. Ex. 40 (Water Delivery Contract: United States and City of San Diego, Feb. 15, 1933, Tr. 252); Ariz. Ex. 41 (Merger, San Diego Water Delivery Contract with MWD, Tr. 253); Ariz. Ex. 42 (Assignment, San Diego to MWD, March 14, 1947, Tr. 253), and Tr. 9,721-22 (Mr. Howard).

[7]Tr. 9,828 (Morris).

[8]Calif. Ex. 426 (Application for appropriation by MWD, No. 6406, August 14, 1929, Tr. 9,395); Calif. Ex. 431 (Application for appropriation by MWD, No. 6840, December 1, 1930, Tr. 9,395); Calif. Ex. 430 (Application by MWD, No. 6406, 4th Amendment, of September 26, 1947; and PERMIT No. 7641, issued January 6, 1950, Tr. 9,395); Calif. Ex. 435 (Application by MWD, No. 6840, 4th Amendment of September 26, 1947; and PERMIT No. 7642 issued January 6, 1950, Tr. 9,395); Calif. Ex. 439 (Application by MWD, as successor to City of San Diego, No. 4997, 3rd Amendment of September 26, 1947; and PERMIT No. 7640 issued January 6, 1950, Tr. 9,395); and Calif. Ex. 68 MWD Chart—chain of title of appropriative rights, Tr. 6,894, 9,487), Tr. 9,482-87 (Mr. Howard).

[9]See note 6, *supra*.

as of 1929. Under an agreement made in 1931,[10] embodied in the water delivery contracts with the United States made by the Secretary of the Interior under the Boulder Canyon Project Act, such rights are junior to old agricultural rights on the river. It follows that, in the event that the conclusions in the pending Report of the Special Master be sustained, the District would suffer the major damage resulting from errors of law appearing in the Report and Recommended Decree. In fact, under water supply conditions, revealed by the evidence but as to which the Special Master erroneously declines to make findings,[11] the application of the principles asserted by the Report would result in complete elimination of the District's water supply from the Colorado River.

Counsel for the defendant, the Metropolitan Water District, have co-operated with the State's Attorney General in the preparation of exceptions and objections to the Special Master's Report and Recommended Decree, and join therein. Because it appears in this cause, and has been considered by the Special Master, as a separate defendant, and has a special interest in the outcome of the pending litigation, the Metropolitan Water District, on behalf of itself, and on behalf of its co-defendants and constituent agencies, the City of Los Angeles and its Department of Water and Power, the City of San Diego and the County of San Diego, herewith files additional exceptions to the Special Mas-

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[10]Ariz. Ex. 27 (Seven-Party Priority Water Agreement, August 18, 1931, Tr. 242).

[11]Report pp. 99-102, 146.

ter's Report on file herein, dated December 5, 1960, on grounds hereinafter set out.

The erroneous conclusions adverse to the defendant, the Metropolitan Water District, are not separately stated as findings and conclusions in the Report, but are in large part merged in the text of the Report and reflected in the Recommended Decree. Consequently, the following exceptions relate to the ultimate conclusions hereinafter specified and to all incidental determinations involved in reaching such ultimate conclusions.

Specification of Errors and Exceptions

Exception No. 1:

The Special Master errs in all holdings, determinations, and conclusions supporting the proposition that the contract[12] entered into in 1931 by the United States, acting through the Secretary of the Interior under the Boulder Canyon Project Act,[13] and the defendant, the Metropolitan Water District, providing for delivery to the District from storage in the reservoir created by Hoover Dam (Lake Mead), water up to a fixed quantity, and providing for "permanent service" (subject to the Colorado River Compact[14] and the Boulder Canyon Project Act), which contract was relied upon by the defendant, the Metropolitan Water District, in constructing the Colorado River Aqueduct, is subject to impairment

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[12]Ariz. Ex. 39 (Amended Water Contract: United States and MWD September 28, 1931, Tr. 252).

[13]45 Stat. 1058 (1928), 43 U.S.C. Sec. 617c (1958); Report, p. 379, Appx. 3.

[14]Ariz. Ex. 1 (Colorado River Compact, Tr. 214); Report, p. 371, Appx. 2.

and defeat in whole or in part by acts of a later Secretary of the Interior in 1944,[14a] which acts the Special Master erroneously holds to constitute an apportionment of the use of water to other states.[15] [15a]

Exception No. 2:

The Special Master errs in holding that the Congress "imposed" a limitation on use of water of the Colorado River in California[16]; and in failing to recognize that the Boulder Canyon Project Act[17] and the California Limitation Act[18] constitute a compact between the United States and the State of California voluntarily entered into, consensual in character, and subject to interpretation under the law of contract.[19]

Exception No. 3:

The Special Master errs in holding that the references in the Boulder Canyon project Act (first paragraph of Section 4(a)), and the corresponding language in the California Limitation Act, to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"[20] (by definition. water in the Colorado River System, including its tribu-

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[14a]Ariz. Ex. 32 (Water Delivery Contract between United States and Arizona, Feb. 9, 1944, Tr. 248); Report, p. 399, Appx. 5.

[15]Report, pp. 150-54, 221-28, 313-14.

[15a]A contract dated Feb. 15, 1933 between the City of San Diego and the United States (Ariz. Ex. 40), similar in character to the Metropolitan Water District contract (Ariz. Ex. 39), has been assigned to the Metropolitan Water District (Ariz. Ex. 42), and is subject to the same exception set forth in Exception 1. See also, note 6, *supra*.

[16]Report, p. 165.

[17]Report, p. 379, Appx. 3.

[18]Arix. Ex. 14 (California Limitation Act, 1929, Tr. 232); Report, p. 397, Appx. 4.

[19]Report, pp. 180-83.

[20]Report, p. 379, Appx. 3 at p. 382; Report, p. 397 at p. 398.

taries) do not carry their literal meanings but instead mean the first 7,500,000 acre-feet of "mainstream" water (exclusive of tributaries) available for use in the lower basin from Lake Mead and the river below Lake Mead.[21]

Exception No. 4:

The Special Master further errs in holding that the references in the Boulder Canyon Project Act (first paragraph of Section 4(a)), and in the corresponding language of the California Limitation Act, to "excess or surplus waters unapportioned by said compact"[22] do not carry their literal meanings, but instead, mean water available for use in the lower basin from the mainstream (exclusive of tributaries), in excess of the first 7,500,000 acre-feet so available.[23]

Exception No. 5:

The Special Master errs in defining the "mainstream" as "water stored in Lake Mead and flowing in the mainstream below Hoover Dam"[24] and in treating the river above Lake Mead as a "tributary".[25]

Exception No. 6:

The Special Master errs in determining that the right of increase of use permitted to the lower basin by Article III(b) of the Compact[26] constitutes an apportionment of use of water with the same legal effect as the apportionments made by Article III(a)[27] and that,

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[21]Report, pp. 167-85.
[22]Report, p. 379, Appx. 3 at p. 382; Report, p. 397 at p. 398.
[23]Report, pp. 168-70; 194-200.
[24]Report, p. 173, 185.
[25]Report, p. 202.
[26]Report, p. 371, Appx. 2, at p. 373.
[27]*Ibid.*

if the California Limitation Act derives its meaning from the Compact, California is excluded from participating in the use of water referred to in Article III(b).[28]

Exception No. 7:

The Special Master errs in holding that the Colorado River Compact, the doctrine of equitable apportionment, and the law of appropriation are all irrelevant to the allocation of such water among the three states (Arizona, Nevada, and California).[29]

Exception No. 8:

The Special Master errs in holding, (a) that in the Boulder Canyon Project Act, the Congress intended to or did delegate to the Secretary of the Interior the authority to allocate[30] (apportion) by a formula unrelated to water supply, among the three states of the lower basin having access thereto, use of the water from the mainstream of the Colorado River (defined as Lake Mead and the mainstream below Lake Mead) in perpetuity and on a parity regardless of use, time of use, or priority based on use (except as to present perfected rights as of 1929),[31] and (b) that the successive Secretaries of the Interior by a series of contracts intended to or did so apportion such use of water in perpetuity or on a parity.[32]

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[28]Report, pp. 169, 194-96.

[29]Report, p. 138.

[30]The Report uses the terms "allocate" and "apportion" and their derivatives interchangeably.

[31]Report, pp. 151-54, 173, 221-22, 233, 236.

[32]Report, pp. 201-27, 237-47, 313-14, 162.

Exception No. 9:

The Special Master erroneously concludes (a) that the beneficial consumptive use of 7,500,000 acre-feet per annum apportioned in perpetuity to the upper basin by Article III(a) of the Colorado River Compact (subject only to the covenants of paragraphs (c), (d), and (e) of Article III of the Compact) constitutes a "ceiling on appropriations", and is irrelevant to the determination of the pending controversy;[33] (b) that the dependable water supply of the lower basin, hence the effect of the Recommended Decree, is not determinable within useful limits of accuracy;[34] and (c) that the dependable water supply available for consumptive use in the lower basin is irrelevant to the resolution of the issue in this suit.[35]

Exception No. 10:

(a) The Special Master errs in holding that Arizona did effectively ratify the Colorado River Compact in 1944.[36]

(b) The Special Master further errs in holding that the California Limitation Act is operative and binding on the State of California, despite his holding that Arizona effectively ratified the Colorado River Compact in 1944.[37]

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[33]Report, pp. 140-42, 113-15, 147, 149.

[34]Report, pp. 102-25.

[35]Report, pp. 99-102.

[36]Report, pp. 166-67.

[37]Report, pp. 164-66.

Exception No. 11:

The Special Master errs in holding that the "Contract dated February 9, 1944, between the United States and the State of Arizona"[38] constitutes an apportionment in perpetuity of use of water of the Colorado River to Arizona by a formula unrelated to water supply and on a parity with contracts made in 1930-34[39] with users of water from the Colorado River in California.[40]

Exception No. 12:

The Special Master errs in holding that the provisions of the Arizona and the Nevada Contracts[41] diminishing deliveries to Arizona and Nevada, respectively, of water from Lake Mead in the quantity that upstream diversions in those states diminish the flow into Lake Mead, are invalid.[42]

Exception No. 13:

The Special Master errs in holding that the Contract provisions referred to in Exception 12 are separable and can be invalidated without invalidating the said contracts in their entirety.[43]

Wherefore, the defendant, The Metropolitan Water District of Southern California, respectfully requests that this Court reject the Report of the Special Mas-

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[38]Ariz. Ex. 32 (Water Delivery Contract between United States and Arizona, Feb. 9, 1944, Tr. 248); Report, p. 399, Appx. 5.

[39]See note 6, *supra*.

[40]Report, pp. 221-37.

[41]Report, p. 399, Appx. 5, Sec. 7(d) at p. 401; Report, p. 409, Appx. 6, Sec. 5(a), at p. 410.

[42]Report, pp. 201 and n. 62; 204-210, 237-47.

[43]Report, pp. 207, 210.

ter and Recommended Decree on file herein, and that in any decree entered herein, the right of this defendant to use of water of the Colorado River evidenced by its water delivery contracts with the United States and by appropriation under State law, and established by application of such water to beneficial use with diligence considered in relation to the magnitude of the project, be recognized and protected with a priority as against uses initiated later in time or not now in existence, subject to the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act if the latter be held to be still operative.

Respectfully submitted,

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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SUPREME COURT

Office-Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1961

No. 8 Original

STATE OF ARIZONA, Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants,

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners

STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.

NEW MEXICO'S EXCEPTIONS TO THE REPORT AND RECOMMENDED DECREE OF THE SPECIAL MASTER, DATED DECEMBER 5, 1960

STATE OF NEW MEXICO,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

STATE OF ARIZONA, Complainant, v. STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants, THE UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners, STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.	No. 9 Original

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NEW MEXICO'S EXCEPTIONS TO THE REPORT AND RECOMMENDED DECREE OF THE SPECIAL MASTER, DATED DECEMBER 5, 1960

OPENING REMARKS

The Findings and Conclusions of the Special Master in his report and recommended Decree of December 5, 1960, are generally satisfactory to the State of New Mexico. Insofar as the recommended decree is concerned, Article IV, Sections A, B, C and D (Report pp. 354, 355, 356, 357) are the result of negotiations between the states of Arizona and New Mexico, and in part, the United States. The United States attended some of these negotiations though it objected to the principle of the compromise. A review of the aforementioned sections of Article IV discloses that the Special Master has adopted the language agreed upon by Arizona and New Mexico and as submitted to him. As a part of this negotiated compromise, the representatives of Arizona and New Mexico agreed that neither party would further object to the findings of present uses described in the compromise agreement. For this reason, New Mexico does not believe it appropriate for it to further dispute the findings and conclusions incorporated in that portion of the recommended decree.

RESERVATION THEORY

Sub-paragraph E of Article IV recognizes the reservation theory as applied to federal lands. New Mexico does not agree in principle with the Winters Doctrine as applied to Indian Reservations nor to the extension thereof to include all Federal Reservations (Report p. 293) and possibly lands administered by the Bureau of Land Management (Report, pp. 96, 334). New Mexico believes that an application of these doctrines is generally contrary to the efficient development and use of the water resources of the arid West. However, New Mexico does not take ex-

ception to the specific manner in which the reservation theory is applied in the Report and Recommended Decree involving the equitable apportionment of the waters of the Gila River system.

SAN SIMON CREEK

Since the time of the aforementioned negotiations between Arizona and New Mexico, it has come to our attention that development of the underground waters on the Arizona side of the San Simon basin is progressing quite rapidly; across the state line, New Mexico has declared an underground basin pursuant to its pertinent statutory authority (Sec. 75-11-1, et seq., N.M.S.A., 1953 Comp.) to prohibit any further development of underground waters within the San Simon basin. Furthermore, at such time as the Recommended Decree in its present form should become final, New Mexico would be prohibited from developing uses over and above what has been determined to be its present uses. (Report Recommended Decree, Art. IV, Sec. A. p. 354; Findings 13, 14, p. 338). Should the development on the Arizona side of the boundary continue at its present uninhibited rate the ground water sources will be depleted and the present uses in New Mexico from this same basin will be seriously encroached upon. Therefore, it appears likely that unless prompt action is taken by Arizona in halting the uncontrolled development of the underground waters in the San Simon Creek area in Arizona, or the Recommended Decree is amended to require such action, it will become incumbent upon New Mexico at some future time, as permitted by Article IX of the Recommended Decree, to apply to this Court for amendment of the decree for relief to protect present New Mexico uses.

CORRECTIONS

New Mexico takes this opportunity to point out one omission in the Recommended Decree. In Article IV (D) (1) (Report, p. 356) at the bottom of the page under the owner designated Chris Dotz, a description of a portion of the Dotz ownership was inadvertently omitted. A comparison of the descriptions shown therein with that found in Finding 26, (Report, pp. 340, 341), discloses that in addition to the SE1/4SE1/4; SW1/4SE1/4, there should be included the NW1/4NE1/4; and NE1/4NE1/4.

CONCLUSION

In conclusion, New Mexico takes no specific exception to the Report and Recommended Decree dated December 5, 1960, as submitted.

In view of the foregoing, New Mexico will not file an opening brief but New Mexico does reserve the right to file briefs in response to exceptions, if any, wherein her interests are affected.

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MAY 20 1961
JAMES R. BROWNING, Clerk

In the Supreme Court

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United States

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UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Impleaded,*

STATE OF UTAH, *Impleaded.*

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May 15, 1961

In the Supreme Court

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May 15, 1961

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UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Impleaded,*

STATE OF UTAH, *Impleaded.*

OPENING BRIEF FOR THE STATE OF NEVADA, Intervener

JURISDICTION

This is an action between States in which leave to file the Bill of Complaint was granted January 19, 1953 (344 U.S. 919). The State of Nevada was granted leave to intervene June 1, 1954 (347 U.S. 985). Original jurisdiction exists under Article III, Sec. 2, of the Constitution of the United States.

STATEMENT OF THE CASE

This case is now before this Court on Exceptions by all parties (except the State of Utah) to the Report of Simon H. Rifkind, the Special Master who conducted extensive hearings as outlined at pages 2 and 3 of his Report. He recommended that a decree be entered allocating and controlling the waters in the manner set out in Part Three of his Report (pages 345–360). This recommended decree is based upon the findings and conclusions contained in the other portions of his Report.

This voluminous Report contains a complete and accurate statement of the complex history and factual situation involved in this action, as well as a summary of the evidence introduced at the lengthy hearing. It seems to the State of Nevada unnecessary to repeat the same material in this Brief.

Arizona instituted this action against the State of California, and certain entities in that State who were using Colorado River water (commonly called the California defendants) pursuant to the order of this Court dated January 19, 1953 (344 U.S. 919). Simultaneously, the United States was granted leave to intervene. Subsequently, on June 1, 1954, Nevada was granted leave to intervene (347 U.S. 985) and thereafter, on December 12, 1955, order was entered joining Utah and New Mexico as parties only to the extent of their interest in Lower Basin waters (350 U.S. 114).

The pleadings in the action are listed in detail in Appendix I to the Special Master's Report (pages 363–370) and are summarized briefly in pages 2 and 3 of his Report. The issues, as they appeared to the Special Master as ultimately submitted, are listed on pages 4–6 of the Report.

In its Petition in Intervention herein, Nevada asserted that it was one of the Lower Basin States, as defined in the Colorado

River Compact (hereinafter referred to as "the Compact"),[1] that it was entitled to protection of all of its existing rights in the Colorado River system, including both diversions from the mainstream and from the tributaries flowing through Nevada (the Virgin and Muddy Rivers and Meadow Valley Wash), and that it was entitled to a fair and equitable portion of the waters of the Colorado River Basin, out of all waters available to the Lower Basin. Attached hereto as Appendix IV, page 113, is a map showing the portion of Nevada which is within the Colorado River drainage area.

The fundamental problem in this matter is the allocation of the mainstream water of the Colorado River among the three Lower Basin States, Arizona, California and Nevada. Lying in an arid region, this water is literally the life blood of an area which is now undergoing a population explosion and industrial expansion, probably without parallel in history. As each year passes, the vital necessity of a known water supply becomes increasingly apparent to everyone responsibly connected with this area.

In the Special Master's Report, he has capably described the geography of the Colorado River Basin (pages 9–14); the history of the Colorado River (pages 15–31); he has listed (pages 7–8) the four prior instances in which some phases of this matter have been presented to this Court in actions between Arizona and the other States.

In brief, the Special Master determined: That if there is sufficient mainstream water in the Colorado River to satisfy 7,500,000 acre feet of annual consumptive uses in the Lower Basin States, it should be apportioned: 2,800,000 acre feet to Arizona; 4,400,000 acre feet to California and 300,000 acre feet to Nevada. That any water available in excess of 7,500,000

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[1]Appendix 2, Report, pp. 371–377.

acre feet should go 50 percent to Arizona and 50 percent to California (unless the United States contracts with Nevada, and then it would be 4 percent to Nevada and 46 percent to Arizona). That whenever the water supply is less than 7,500,000 acre feet of consumptive use, it is to be divided fractionally:

$\frac{2.8}{7.5}$ for Arizona $\frac{4.4}{7.5}$ for California $\frac{.3}{7.5}$ for Nevada

And he further determined that rights presently perfected on June 25, 1929, should be filled in order of priority, even though it requires contributions from the water apportioned to other States. All of the foregoing allocations are from mainstream water at and below Lake Mead; and he did not find it necessary to make any determinations as to tributary uses except those applying to the rights of New Mexico and Arizona on the Gila River System.

His Report provided that the Secretary of the Interior should make all determinations relative to available water supply and be in sole control of the operation and management of the reservoirs and the lower river.

The basic law involved in the determination of this action depends upon interpretation of the Colorado River Compact, the Boulder Canyon Project Act[2] (hereinafter referred to as the "Project Act"), the California Limitation Act[3] (hereinafter referred to as the "Limitation Act"), and the Mexican Treaty.[4] All of these are thoroughly described and analyzed by the Special Master in his Report.

The fundamental physical situation is one resulting from the

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[2]45 Stat. 1057; 43 U.S.C. 617.

[3]Act of March 4, 1929; ch. 16, 48 Session; Statutes and Amendments to the Codes, 1929, pp. 38–39.

[4]Treaty between the United States and Mexico, dated February 3, 1944 (59 Stat. 1219).

great complex of dams, reservoirs and diversion works, beginning with the Hoover Dam and extending downstream to the Mexican Border. This vast array of projects has been built at the cost of hundreds of millions of dollars by the United States of America (except only the Colorado River Aqueduct which was built by Metropolitan Water District of Southern California) (Report, pages 38–39). The Report describes these mainstream works at pages 32–38, and the Gila System works at pages 39–43.

At the hearing, Nevada's proof established that the gross diversion requirements for use in Southern Nevada by the year 2000 would be 786,000 acre feet from the Colorado River and its tributaries in Nevada, resulting in a total net consumptive use of 530,000 acre feet. Of this amount, there would be a net consumptive use requirement of 431,600 acre feet from Lake Mead.

Because of the voluminous record herein, Nevada has, for the convenience of the Court, compiled and is attaching hereto as Appendix I, pp. 63–105, a document entitled "Present and Future Water Requirements for Colorado River Basin in Nevada" which covers in considerable detail the present and future water requirements for irrigation, industrial, municipal, and domestic purposes in Southern Nevada, which is fully documented by the record.

Generally, the posture of this case at this time, according to the Exceptions that have been filed by the parties is this: Arizona, the United States and Nevada all accept the Special Master's recommended decree, with only minor exceptions thereto. Nevada's Exceptions might properly be described as perfecting exceptions. California, on the other hand, disagrees with the ultimate decision of the Master *in toto*. So that on this main issue, we have the parties aligned, California on the one hand, the other parties in opposition.

However, there are two specific issues between Nevada and the United States. The Special Master found in his Report at pages 237–247 that Article 5(a) of the Nevada Contract[5] with the United States of America (and a similar Article 8(d) in the Arizona-United States contract)[6] providing that water used by Nevada users above Lake Mead should be deducted from her contract allocation was invalid and void. Nevada (and Arizona) agree with the Special Master's decision on this point. However, the United States disagrees.

Likewise, Nevada contends, and the Special Master found in his Report (page 210), that the contract between the United States and the Colorado River Commission of Nevada, a statutory body of the State of Nevada, does not require additional subcontracts between water users and the Secretary of the Interior. The United States disagrees.

Again, any more detailed statement of the facts and issues in this case would be merely repetition of the Special Master's excellent presentation thereof.

PATTERN OF THE BRIEF

Because of the extent and complexity of the record, issues and exceptions of the various parties in this case, it does not seem to Nevada that it would be helpful in her opening Brief to attempt to discuss at length every one of the multiple questions involved. Accordingly, in this Brief, she will present the argument in general support of her basic position in the matter. And will point out in detail the reasons for her perfecting exceptions to the Special Master's recommended decree.

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[5]Appendices 6 and 7, Report, pp. 409–422.
[6]Appendix 5, Report, pp. 399–407.

This brief does not contain specific opposition to the exceptions filed by the other parties. It is, as noted, a general statement of Nevada's position in support of the Special Master's Report and an argument in support of Nevada's perfecting exceptions thereto.

Nevada respectfully reserves for its second, or Answering Brief, the right to specifically oppose the exceptions of other parties on matters adverse to her. No proper or full opposition to such exceptions can be made at this time, prior to being advised as to the arguments made in their behalf. To divide such opposition partly in this brief and partly in an answering brief would, Nevada believes, tend toward confusion rather than clarification.

SPECIFICATION OF EXCEPTIONS TO BE URGED

The State of Nevada will urge Exceptions I, II, III and IV. Argument in support of these exceptions is contained in Point V of this brief. These exceptions, in summary, are:

I. The Special Master erred in providing in the proposed decree that "mainstream water shall be delivered to users * * * in Nevada only if contracts have been made by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act for delivery of such water."

II. The Special Master erred in finding in his Report and in the proposed decree that a part of Nevada's allocation of water may be used to supply the so-called "present perfected rights" in other States in years when the allocations of such other States are not sufficient to supply said rights, and, as an alternative, the Special Master erred in not providing a minimum figure below which the allocation of the State of Nevada could not be reduced, if, and when, it

ever becomes necessary to take water away from Nevada's allocation for supplying so-called "present perfected rights" in other States.

III. The Special Master erred in failing to recommend in his Report, or provide in his proposed decree, for the appointment by this Court of a Commissioner with power to supervise the operation of the Colorado River in the Lower Basin and the delivery of water to the several contractors.

IV. The Special Master erred in failing to recommend in his Report or include in his proposed decree, a provision for the promulgation of Rules and Regulations by the Officer in charge of operating the Colorado River after the decree is entered herein.

Point V in Nevada's Exceptions is not strictly an exception. Nevada reserves the right, if it appears during the subsequent proceedings herein, to again urge the legal contentions made by Nevada which were not adopted by the Special Master. By not excepting to the basic theory adopted by the Special Master, Nevada is not waiving the right to assert that she is entitled to the quantity of water awarded her by the Special Master, if not a larger quantity, under the theory urged by Nevada in her pleadings, proof and prior briefs herein or under any other theory or plan of distribution. This is developed in more detail in Points I, III and IV of this Brief.

SUMMARY OF ARGUMENT

I.

Since Nevada is one of the three sovereign States in the Lower Basin of the Colorado River, she believed that it was necessary, if her rights therein were to be adequately protected, to intervene in this action. As one of these three sovereign States, Nevada

stands on a par so far as the quality of her legal rights are concerned with the other two States of the Lower Basin. The quantities of water claimed by the complainant and defendants, if fully allowed, would deprive Nevada of her equitable share.

While the total of Nevada's claim is smaller than that of the other two States, Nevada's need for this claimed water is far more urgent. For she is unique in that the portion of her area lying within the drainage area of the Colorado River, has no other source of water. On the other hand, each of the other States has alternative sources.

As is true in all lengthy hearings, we find in this case, and especially after the Special Master's Report, that the issues have greatly sharpened. The basic one now is as to the proper one theory for allocating the mainstream water among the three Lower Basin States. It is Nevada's position that, as a sovereign State, she has a basic minimum right which entitles her to at least the amount of water awarded in the Special Master's Report, under whatever legal theory may be used.

While the Report awards Nevada a smaller amount of water than her proof indicates that she would be entitled to, Nevada has not excepted to this because it seems equitable under all the circumstances. Nevada has filed exceptions to some of the more or less ancillary or subsidiary conclusions of the Special Master. In not excepting to the basic award, Nevada emphatically asserts that she is not waiving the right to urge an allocation to her in at least the amount now recommended if the Court should determine that this case should be decided on any other or different theory than that followed by the Special Master.

II.

The 300,000 acre feet of the Colorado River mainstream water allocated to Nevada by the Special Master's Report is the bare

minimum which will be required for existing and future uses. In fact, it will not be sufficient to provide for her growth and development as far in the future as the year 2000. It is conservatively estimated that by that time, Southern Nevada will require a beneficial consumptive use of 431,600 acre feet of water from Lake Mead, more than 35 percent of the amount allotted by the Special Master.

The portion of the affected region included within Clark County, which area encompasses the City of Las Vegas, the principal metropolitan center, has had a fantastic growth. With a population of only 3,031 in 1910, Clark County jumped to 16,414 in 1940, and then an explosive increase to 115,000 in 1956, and to 127,016 in 1960. The rate of population growth in Nevada in the last seven years is greater than that of any other State. Clark County has shown a greater rate of increase than Nevada, Arizona, New Mexico or California; having increased almost 35 times since 1910. Compared with areas of similar climate, such as Los Angeles, Phoenix and Albuquerque, it has shown a greater growth. It is a sound and reasonable forecast that this population will increase to at least 600,000 people by the year 2000.

There are present in the area all of the factors making for sound growth. Large industrial developments, which are the outgrowth of great plants built by the United States during World War II, are located in that area, and are continuing to expand. These industries derive adequate water supplies from Lake Mead and low-cost electric power from the Hoover Dam installation. There is available for future industrial growth these factors of adequate water supply, low cost electric power, natural gas, and an attractive climate which reduces construction costs. The area is well supplied with all types of transportation, both railroad, air and adequate highways. There is ample room for attractive

homesite tracts which fit into the currently popular trend toward desert living. With both nearby mountains and the large man-made lakes on the Colorado River, the area is supreme in its recreational and entertainment facilities, and attracts thousands of tourists annually.

As a result of all these factors, it is very evident that by the year 2000, the net consumptive use requirements from Lake Mead (diversions less return flows) for the affected Nevada area will be:

Domestic uses	305,700 acre feet
Industrial uses	97,000 acre feet
Irrigation uses	28,900 acre feet
Total	431,600 acre feet

Nevada is unique in not having any available source of water other than mainstream Colorado River water. On the other hand, both the States of Arizona and California are cooperating with the United States in the current rapidly progressing development of methods of converting salt or brackish waters into water of useable quality at a low economic cost. Arizona has large amounts of this type of water which will be capable of reconversion, as does also California, including limitless quantities of available sea water. Also, California has a great surplus of water in the northern part of the State, the transportation of which to the southern part of the State has been authorized by its Legislature, approved by the voters of the State and the initial steps of which are now in progress.

All of the foregoing, in Nevada's opinion, are factors to be taken into account in allocating the waters of the mainstream among the three affected sovereign States. To Nevada, this water is indispensable.

III.

The Special Master found the Project Act and the Limitation Act to be the sole controlling statutes in allocating mainstream Colorado River water among the three States. It is Nevada's position that the Compact, the Project Act, the Limitation Act, and the general Reclamation Law[7] must all be considered together as an integrated and interwoven body of law. Together they comprise a single "bundle" or "package" from which the rights of the parties in this action must be determined.

By Articles III(a) and III(b) of the Compact, there was an apportionment of beneficial consumptive use of water of the entire Colorado River System in the amount of 7,500,000 acre feet to the Upper Basin and 8,500,000 acre feet to the Lower Basin. By Article III(d) of the Compact, the Lower Basin must, in every 10-year period, permit 75,000,000 acre feet to pass Lee Ferry and into the Lower Basin. The Compact additionally makes provision for supplying the water granted to Mexico by the Mexican Treaty.

It does not allocate specific amounts of water to the separate Lower Basin States, either in exact quantities or percentages of flow or in any manner, and it is inevitably true that in the Lower Colorado River Basin, which is in the midst of one of the greatest population explosions in history, that there must be an allocation of mainstream water among the three Lower Basin States.

In the Project Act, Congress provided as a condition precedent for it becoming effective (in the event all seven States did not ratify the Compact—and they did not), that California should by appropriate legislation limit its demands for water from the Colorado River.

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[7]Act of Congress, approved June 17, 1902 (32 Stat. 388, 43 U.S.C. 1311), and acts amendatory thereof or supplementary thereto.

For very real and cogent reasons, California promptly passed the Limitation Act, limiting her right to use of Colorado River water to 4,400,000 acre feet of the total Compact apportionment of the 7,500,000 acre feet made by Article III(a) of that document, and one-half of any excess or surplus.

The Special Master has defined the additional 1,000,000 acre feet of water apportioned to the Lower Basin by Article III(b) of the Compact as excess or surplus water. In Nevada's opinion, there is much reason to believe that this so-called III(b) water is not excess or surplus, but water apportioned by the Compact. In any event, the allocation to California recommended in the Special Master's Report is generous to California's claim and that State is in no position to complain. By reason of her Limitation Act, she cannot claim more water than as awarded in the Special Master's Report.

The Special Master interprets Section 4(a) of the Project Act as being a precise, definite and conclusive direction by the Congress to the Secretary of the Interior to allocate the mainstream water among the three States by contracts. He holds that the contracts which have been made by the Secretary with Nevada awarding her 300,000 acre feet of water; with the State of Arizona, awarding her 2,800,000 acre feet of water; and with California, awarding her 4,400,000 acre feet of water all out of the first 7,500,000 acre feet available in the mainstream, are dictated by and are in accordance with this statutory allocation.

There is no question that the United States had the right to construct and operate Hoover Dam and to create the resulting storage behind it for irrigation purposes, either under the General Welfare Clause of the Constitution (Art. I, Sec. 8), *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725, 738 (1950) or, conceding the navigability of the Colorado River, under the Commerce Clause (Art. I, Sec. 8). *United States* v. *Twin City Power*

Co., 350 U.S. 222 (1955); *United States* v. *Chandler Dunbar Co.*, 229 U.S. 53 (1912); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940), and to control and dispose of such stored waters. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958).

It follows that with the construction of Hoover Dam in the Colorado River and the resultant complete control of all the water reaching the impoundment of Lake Mead, that the United States would be in control of the waters of that stream and that the waters thereafter used would be such stored waters.

Regardless of the specific language of Section 5 of the Project Act requiring the Secretary of the Interior to make contracts for the delivery of stored water, the Secretary had the basic right and obligation under the general Reclamation Law, to make contracts for the delivery of stored water. Obviously such contracts would be necessary to avoid utter chaos.

There was nothing in any existing law which provided that such contracts should be limited only to projects then in being. On the other hand, the underlying basic rights of the sovereign States would indicate the necessity of protecting the rights of the more slowly developing uses in Arizona and in Nevada as against the then great uses being insisted upon by California, which had progressed more rapidly in her development. There was no abuse of discretion on the part of the Secretary in making the contracts as he did.

By the time this action had been commenced, the Federal Government by a series of dams financed, constructed and operated by it, had taken physical control of the Colorado River from Lake Mead to the Mexican border, and of all waters stored in or flowing through that stretch of the river. By reason of this legal and factual situation, it is perfectly proper at this time to find that the contracts made by the Secretary are valid. In the

case of the State of Nevada, its contract for 300,000 acre feet of consumptive use of mainstream water is a valid, binding and controlling document; with the single exception that Article 5(a), which purports to diminish this total amount by Nevada's upstream tributary uses is, as the Special Master finds, invalid. This paragraph was wrongfully inserted in the contract, is contrary to the terms of the Project Act, and is *ultra vires*.

The Secretary's contracts, when interpreted in the light of the Compact, the Project Act, the Limitation Act and the general Reclamation Law, allocate the mainstream waters among the three States in the precise amounts which the legislative history of the Project Act clearly shows that the Senators from the affected States believed were being allocated to those States.

The basic allocation of mainstream water evidenced by these contracts should be upheld, whatever interpretation is made of the literal language of the Project Act.

IV.

The division of mainstream water proposed in the Special Master's decree is a fair and just allocation. It can be upheld under either the theory of statutory allocation adopted by the Special Master, or that of a judicial equitable apportionment of these waters.

During the hearing, the United States and Arizona relied on a contract allocation authorized by the Project Act, a theory substantially similar to that followed by the Special Master. California has always urged what she describes as an equitable apportionment theory, but in reality, restricts it to a mere judicial confirmation of existing rights. While Nevada asked for a true judicial equitable apportionment which would give effect to her future needs.

Nevada is willing to accept the allocation of mainstream water as made by the Special Master, even though it is less than the total amount revealed by her evidence as being needed by the year 2000. In her opinion, the award to her of the 300,000 acre feet of consumptive use, in accordance with her contract with the United States can be sustained on any one of several theories. It can be sustained under the theory of statutory allocation adopted by the Special Master. If we were to assume that there were no Project Act and that Hoover Dam had been built under the general Reclamation Law, and that the Secretary had made a similar contract, that contract could, in that situation have been upheld in an action such as this. Or, if we consider this action as one for a judicial equitable apportionment, it is proper to use the contracts made by the Secretary, such as that with Nevada, as a yardstick, and as evidence of a water right which could and should be sustained in any such decree.

The voluminous record in this case justifies the use of the judicial power in dividing this urgently needed water among the three States. While the Special Master stated that he followed the statutory allocation made by Section 4(a) of the Project Act in his basic division, he definitely recommends the use of judicial authority in providing that in years when there is less than a total of 7,500,000 acre feet of mainstream water available for consumptive use, that the allotments to the States should be reduced so that they take on a pro-rata share. And he further recommends the use of judicial authority in his provisions for protecting prior perfected rights, regardless of state lines, in years of extreme drouth. Nevada believes all of these basic features of the proposed decree are logical and proper.

V.

Nevada has filed only four exceptions to the Special Master's Report and Recommended Decree, all of which are more or less of a perfecting nature.

Exception Number I requests apt language in the final decree herein to make it clear that in Nevada, the basic contract with the State acting through the Colorado River Commission of Nevada is sufficient and that additional sub-contracts between the Secretary and the actual users are not necessary. The Special Master points out in his Report (page 210) that the Nevada contract, different from that of Arizona, does not require such sub-contracts. The Nevada Commission is an active operating body controlling the diversion and delivery of water diverted from Lake Mead and making the payments therefor. The actual uses are, and will be, domestic and industrial in the main. There will be a multitude of users and to attempt sub-contracts for all would result in chaos and confusion.

Exception Number II requests that the provisions of the recommended decree be amended to provide that no part of Nevada's allocation of water be used to supply so-called "present perfected rights" in Arizona and California in years when the allocations of such States are not sufficient to supply such rights, or in the alternative, Nevada asks that a minimum figure (she suggests 250,000 acre feet) be fixed below which Nevada's allocations should not be reduced to make contributions to others. This is necessary because the principal uses in Nevada will be domestic uses and industrial uses in the nature of the sustenance of life and the continuation of business. They are not of the nature that can be temporarily suspended in years of short supply. Nor does Nevada have any large quantity of perfected rights on the mainstream. On the other hand, the other two States, each of whom have large quantities of perfected rights, use the major

portion of their water for irrigation use, a type of use which can be reduced or even suspended in short water years. A minimum on Nevada's rights is very vital to her and because of her small share of the mainstream water would have minimal detrimental effect on the other two States.

Exception Number III requests that the Court appoint a Commissioner with power to supervise the operation of the Colorado River in the Lower Basin and to control the delivery of the waters thereof. The Special Master recommends that these duties be imposed on the Secretary of the Interior. Nevada believes that it is more just and equitable to have such an independent Commissioner, subject to the control of this Court. The Secretary of the Interior operates in many capacities and there is much chance of a conflict of interest between the proprietary water demands of many of the agencies under him and those of other water users. The Special Master's suggestion, in effect, would constitute the Secretary the owner, the attorney, the judge and the jury with respect to the Colorado River water. This would not seem to be a desirable situation.

Exception Number IV requests that the decree provide that whatever official is given the management and control of the lower Colorado River be required to promulgate Rules and Regulations setting forth in detail the manner, method and plan that will be followed in operating the river in determining annual allocations and scheduling deliveries. Absent a set of Rules and Regulations such as this, the various water users would be left in constant uncertainty and there would be an invitation to unnecessary controversy. On the other hand, with all parties knowing in advance the Rules and Regulations under which the river is to be operated, the possibility of friction would be removed and intelligent advanced planning could be had by the various water using agencies.

ARGUMENT

I.

BASIC POSITION OF THE STATE OF NEVADA

Nevada occupies a unique position in this action. In a sense, it is being compelled to prematurely press for definition and protection of its Colorado River water rights which she will ultimately desperately need.

As one of the three Lower Basin States, she is, of course, vitally concerned in the allocation of the waters of that stream. That portion of Southern Nevada lying in the Colorado River Basin has no other source for additional water.

Accordingly, after the instant suit was filed and the United States requested and was granted the right to intervene, it was apparent that there would inevitably be a determination of the rights of the Lower Basin States in the waters of the Colorado River. In that situation, Nevada believed it necessary to protect its rights by requesting permission to intervene herein, and was granted that right. Nevada was not then, and is not even now being deprived of water presently needed. But it was very apparent then, and is absolutely definite now, that in the immediate future, as the history of states and nations are measured, Nevada will require substantial amounts of water from the Colorado River if her normal growth and development are to continue.[8]

The tremendous quantities of water being requested by Arizona and California would, if allowed, consume all of the water available in the mainstream in the Lower Basin. If their claims were granted in a suit to which she was not a party without protection of Nevada's rights, she would at best have been put to the tremendous and expensive task of bringing subsequent litigation in

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[8]Appendix I, pp. 77–105.

this Court to assert her rights and perhaps be then confronted with the additional overwhelming burden of attempting to acquire rights to the use of water after it already had been used as the basis of economic growth in other States. This is the basic reason that Nevada is requesting the delineation of its rights in the mainstream Colorado water in the decree herein.

As one of the three sovereign States comprising the Lower Basin of the Colorado River System as defined in the Compact, Nevada stands on a par, so far as legal rights are concerned, with the Complainant Arizona and the Defendant California.

True, the amount of water required by Nevada is substantially smaller than that sought by the other two States. But this fact does not render the outcome of this case less important to the Intervener, Nevada. On the contrary, it is more important. For Nevada is unique in that she has no other conceivable source of additional water in that portion of the State lying within the Colorado River Basin, other than by taking it from the Colorado River. The same is not true with respect to either Arizona or California. The former has immense possibilities of additional water supply by the reconversion of presently unuseable waters. And the latter not only has available, but is in the process of transporting to the southern part of the State tremendous quantities of waters from the surplus regions in northern California. In addition, it has limitless quantities of sea water along the coastal regions available for conversion.[9] Nevada has no region with surplus waters from which it can transport waters to the South. It does not have even presently unuseable water which can be reconverted.

At the outset, we should comment that, as is generally true in nearly all lengthy hearings, much of the evidentiary matter

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[9]*Infra*, pp. 32–34.

upon which months of time was spent and which fills thousands of pages of transcript, has lost its meaning and significance now. This, because of the fact that the parties have come to substantial agreement on some points and have realized the irrelevancy of other matters. This simplification and re-defining of issues is even more apparent with the filing of the Special Master's Report.

It is Nevada's basic premise that whatever legal theory or theories that may be followed in allocating Colorado River waters among the Lower Basin States, that there is a basic minimum right on the part of Nevada, as a sovereign State, to eventually use water at least in the amount allocated to her by the Master's Report herein. Or, to put it another way, that whatever legal theory is followed, it would be necessary that Nevada be given the right to use up to the amount of the quantity of water specified in the Master's Report.

The amount of water awarded to Nevada in the Special Master's Report is less than that shown to be required in the reasonably near future by Nevada's proof. However, since the award appears to be equitable under all the circumstances, Nevada has not taken exception to the basic conclusions of law found by the Special Master and by which he disposed of this action. It has only filed exceptions as to certain more or less ancillary or subsidiary conclusions found by him.

In not thus excepting to the Special Master's Report, Nevada desires to make it precisely clear here, that she is not waiving the right to urge an allocation to her of an amount of water at least equal to the award made by the Special Master in the event it is decided that a different theory of law shall prevail from that adopted by the Special Master. For instance, that no less than this amount should be awarded her if it were determined that the case should be decided on the theory of equitable apportionment.

II.

EXISTING AND FUTURE WATER REQUIREMENTS FOR SOUTHERN NEVADA FROM LAKE MEAD

The Special Master's allocation of 300,000 acre feet to the State of Nevada from Lake Mead for consumptive use in Nevada is the bare minimum of the amount of water which will be required for existing and future uses. It is conservatively estimated that the net consumptive use requirements from Lake Mead for Clark County by the year 2000 for domestic, municipal and irrigation uses will be 431,600 acre feet, an increase of more than 35 percent of the amount allowed by the Special Master. This is fully supported by the record.[10]

The City of Las Vegas is the principal residential area and trading center in Southern Nevada. Las Vegas and Las Vegas Valley is entirely in Clark County. The growth of the Las Vegas area during the past 25 years has been phenomenal. Las Vegas has grown from virtually nothing in 1905 to its present state of development. The population census in 1910 showed a population of 800 in Las Vegas and 3,031 for Clark County. The 1930 census showed 5,365 in Las Vegas and 8,632 in Clark County. The construction of Hoover Dam which commenced in 1930 accelerated its growth. In 1940 the population of Las Vegas was 8,422, Boulder City 2,600, and Clark County 16,414.

The accelerated growth commenced with World War II and has continued since. The Basic Magnesium Project was commenced in 1941. Following the close of World War II Basic Magnesium, Inc., was acquired by Basic Management, Inc., comprised of the Stauffer Chemical Company, American Potash & Chemical Company, Combined Metals Production Corporation, Titanium Metal Corporation and United States Lime Production Corporation, which companies have contributed materially

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[10]Appendix I, pp. 80–105.

to the growth not only of the City of Henderson, but also of the Las Vegas area.[11]

Nellis Air Force Base was constructed during the War and has increased in size since that time and is now the largest jet aircraft training center in the country. Near this base the Navy has constructed the large Lake Mead Naval Ammunition Depot. Also, the proving grounds of the Atomic Energy Commission, "Frenchman Flats," is located about 60 miles northwest of Las Vegas. These factors have caused an explosion in population growth. The population of Las Vegas increased from 8,422 in 1940 to 53,000 in 1956, and in Clark County from 16,414 to 115,000 during the same period.[12] The population of Clark County in 1960 was 127,016.[13]

There are a number of factors which have contributed to the phenomenal growth of the Las Vegas area. Important factors were the construction of Hoover Dam with the resulting cheap power and water. Electric power made possible the development of the major industries at Henderson and additional power is available through the thermal generating stations. Another factor is the extensive government installations to which reference has

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[11]These industries were all in production in 1958. The Stauffer Chemical Company is producing chlorine and caustic soda. The American Potash & Chemical Company and Western Electrochemical Company produce perchlorates and electromatic manganese. They are the largest producers of ammonium perchlorates in the United States used in the missile program. The Titanium Metal Corporation is the largest producer of titanium. This product is also used in the missile industry and related fields. The United States Lime Production Corporation calcines lime for steel and agricultural industries and hydrates lime for construction industries. Appendix I, pp. 81–83.

[12]Appendix I, pp. 73–76.

[13]General Population Characteristics, Final Report PC(1) 30B of U. S. Department of Commerce.

been made. Other factors are the tourist travel and recreational facilities. Las Vegas has become the greatest live entertainment center in the country, and thousands of tourists are attracted there annually. Finally, since World War II, there has been a trend toward desert living. Air conditioning has made desert living attractive and comfortable, and there are a number of large cities with similar climatic factors which have grown rapidly, including Tucson, Phoenix, and Palm Springs, California.[14]

It is, of course, a matter of common knowledge that the industrial growth in the Las Vegas area has been phenomenal since the beginning of World War II, and is continuing at an accelerated pace. In addition to the Basic Management, Inc., industries, to which reference has been made, other major industries in the area are Manganese, Inc., which mines manganese for the steel industry, and Pabco, Inc., which mines and processes gypsum. The sole source of water for these industries is Lake Mead and all of these industries are expanding users of waters from Lake Mead.[15]

There is every indication that the Las Vegas area will experience a tremendous industrial growth in the next 40 years. There are a number of factors which lead to this conclusion. The availability of power and water which attracted the existing industries will continue to attract other industries. Southern Nevada enjoys the same climate and natural attractions which have led to large industrial growth in other cities such as Phoenix and Tucson. The climate has a direct effect on construction costs, lost time due to inclement weather, and production of products which are sensitive to humidity. Another factor is the availability of land. Large areas of land can be acquired at nominal cost and yet have all the requirements for basic industries. The accessibility of ores and

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[14]Appendix I, pp. 80–81.
[15]Appendix I, pp. 81–84.

minerals also will have an important effect on the industrial growth of southern Nevada. Transportation services both by land and air are excellent. Adequate utilities are available. Both the electric and gas utilities have completed large expansion programs, and have projected programs for service to take care of future growth. Other factors are that Southern Nevada is attractive to labor supply, and the tax and corporate laws of Nevada are attractive to industries.[16]

A conservative estimate for future water supplies for the present industries by the year 2000 is 90,000 acre feet. Each of these industries have made estimates based upon their present expanding programs. It is conservatively estimated that new industries will require 47,500 acre feet. There also will be required an estimated 37,000 acre feet for thermal power cooling purposes by the year 2000, making a gross diversion requirement of 175,800 acre feet. The estimated return flow would be 78,800 acre feet, making an estimated net consumptive use of 97,000 acre feet.[17]

There are many large areas in the general vicinity of Las Vegas which are ideally situated and suited for industrial sites and small homesites, to which it would be economically feasible to pump waters from Lake Mead. The principal areas are Las Vegas Valley, Eldorado Valley, Apex Dry Lake Valley, California Wash, Mormon Mesa and certain areas in Moapa Valley. Plans for the development of Eldorado Valley are already in an advanced stage.[18]

A sound and reasonable forecast for the population of Clark County by the year 2000 is 600,000.[19]

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[16]Appendix I, pp. 85–87.

[17]Appendix I, pp. 87–89.

[18]These areas are fully described and water requirements discussed in Appendix I, pp. 90–96.

[19]Appendix I, pp. 97–99.

This is a conservative estimate. During the past 97 years while the population of the Continental United States grew about 5½ times, the population of the eight Mountain States increased 36 times and Nevada has increased almost 39 times. Its population has grown 66.6 percent since 1950. Its population in 1950 was 160,000 and its population in 1957 was 267,000. Nevada's rate of growth is steeper than the United States, the Mountain States or the Western States. During the past 7 years it has grown faster than any State in the Union. Its population by the year 2000 is estimated to be 1,300,000. Since 1920 Clark County has shown a steeper rate of increase than Nevada, Arizona, New Mexico or California. It has increased almost 35 times since 1910.

As compared to rapid growing counties with like or similar climate, Clark County has shown a greater rate of increase than Los Angeles, Maricopa (Phoenix), Pima (Tucson), Bernalillo (Albuquerque). The average rate of growth conservatively forecast for Clark County by the year 2000 is slower than the long-term growth experienced by the above named counties. The forecast for the year 2000 represents a maximum of 5.2 times the 1957 population. This is a slower rate of growth than is shown by the other counties between these same population figures of 115,000 and 600,000. While Clark County is expected to grow from one to the other level of that population in the period of 42 years, Los Angeles accomplished it in about 20 years and Maricopa County is expected to accomplish it in about 35 years. Expressing this comparison in still another way, the projection of Clark County population from 1957 to the year 2000 is at an average annual rate of increase of nearly 3.9 percent, while Los Angeles County covered the same range of population growth at an average rate of more than 8.5 percent per year, and Maricopa is expected to achieve it at an average rate of almost 5 percent.

The average annual rate for the Clark County forecast for the

43-year period from 1957 to 2000 is 3.9 percent or approximately half the average annual rate for the 47-year period from 1910 to 1957. In comparable counties in the southwest, the average annual rate of growth in recent years has been from 4.2 percent to 6 percent.

The water requirements of municipal and domestic uses by the year 2000 would be 353,000 acre feet per year. Municipal and domestic uses include all uses other than industrial, water for thermal power cooling, and water for commercial irrigation. The per capita use per day for uses other than industrial uses, including power cooling and commercial irrigation, would be 525 gallons per day. Based on a population of 600,000 by the year 2000 this would require 353,000 acre feet per year. The estimated return flow from the use of the water diverted would be 38,000 acre feet. Therefore, the estimated net use for all domestic and municipal uses would be 315,000 acre feet per year. From this would be subtracted 9,320 acre feet of ground water in Las Vegas Valley, leaving 305,680 acre feet needed from Lake Mead for net consumptive use for domestic and municipal purposes.

Thus, there will be a net consumptive use requirement from Lake Mead for Clark County by the year 2000 for irrigation, domestic, municipal and industrial uses of 431,600 acre feet. In tabular form this can be shown as follows:

From Lake Mead (diversions less returns).	
Domestic uses	305,700 acre feet.
Industrial uses	97,000 acre feet.
Irrigation uses	28,900 acre feet.
Total	431,600 acre feet.[20]

[20]Appendix I, pp. 99–105. Irrigation uses from Lake Mead are described in Appendix I, pp. 71–72, 103–104.

Another factual situation important to and bearing upon the particular issue of equitable apportionment, is the fact that Nevada has no additional source of water available other than from the Colorado River. California and Arizona, on the other hand, have other sources of water to meet their future needs.

The State of Nevada is unique with respect to its complete dependency on the right to the increased use of the waters of the Colorado River for future growth and development of the Nevada portion of the Colorado River Basin. There is no alternative source of water for this particular area. No water is available either for direct use, or for the recharging of underground basins, or for any other purpose other than that of diverting from the Colorado River System.

The situation is different with respect to the other States who are major claimants for waters of the Colorado River System. California, with large surpluses of water in the northern part of the State now going to waste, has taken definitive steps for the development of a plan, the so-called California Water Plan,[21] to bring surplus waters to the water-deficient area in the southern part of the State. The Legislature in 1959 passed the California Water Resources Development Bond Act[22] authorizing the issuance of bonds in the amount of $1,750,000,000 to finance the

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[21]Ariz. Exs. 89 and 89A, Tr. 10,012.

[22]The California Water Development Bond Act, (Cal. Stats. 1959, ch. 1762; Water Code of California, Div. 6, Pt. 6, Ch. 8, Secs. 12930–12942), popularly known as the Burns-Porter Act, was submitted pursuant to Article XVI, Sec. 1 of the California Constitution to, and approved by, a vote of the people on November 8, 1960. This submission was required by Article XVI, Sec. 1 of the California Constitution for the reason that it involved incurring of a debt (bond issuance) in excess of the limitation of $300,000 set forth in the Constitution.

In its principal aspects, the Bond Act is a financing measure intended to make funds available for the construction of water

construction of water facilities, now authorized, including facilities to make water available to Southern California.

Likewise, there are large sources of water available as soon as the rapidly progressing art of de-salting reaches a higher degree of efficiency. The State of California obviously has adequate supplies of sea water along the coastal area, and a large supply in the Salton Sea, and in the drains leading into it from Mexico.

With respect to the State of Arizona, it has the possibility of taking advantage of large amounts of underground storage capacities available in the Phoenix area; and there are also large quantities of saline or brackish water which can be utilized when de-salting reaches the expected stage of economic efficiency.

Implications in saline and brackish water conversion stagger the imagination. Tremendous progress has already been made in the field of low cost conversion.[23] All experts agree that the ultimate goal of truly economic conversion will be reached, and will be reached relatively soon with optimum effort and support.[24]

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facilities. The Bond authorization is in the amount of $1,750,000,000, with a first priority on its use being established to construct designated facilities, among which are those required to make water available to Southern California.

Prior to the enactment of the Bond Act, many of the facilities which are to be financed by that Act were authorized by Act of the Legislature. These, in effect, were reauthorized and more specifically described by the Bond Act, including the facilities to make water available to Southern California.

[23]Report to Select Committee on National Water Resources—U. S. Senate pursuant to S. Res. 48 on Saline Water Conversion. Committee Print No. 26, 86th Cong. 1st. Sess., p. iv-vii. Hearings before Subcommittee on Government Operations. House of Representatives, on Saline Water Program—p. 5, et seq., 85th Cong. 2d Sess.

[24]House Report No. 71, 89th Cong. 1st Sess. March 10, 1961 —Staff Report of the Committee on Science and Astronautics —House of Representatives, Research Needs for Salt Water Conversion, p. 9.

The United States has undertaken a comprehensive research program for the conversion of saline water and has expended over $10,000,000 since the program was started in 1953.[25] It has entered into cooperative agreements with both the States of Arizona and California for mutual assistance and exchange of information.[26]

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[25]Congress, to meet the urgent need for further research and development to bring the cost of de-salting within economic range, enacted the Saline Water Act of July 3, 1952 (66 Stat. 328, 42 U.S.C. Secs. 1951 et seq.) which directed the Secretary of the Interior to engage in a 5-year program of research and development for low cost conversion of saline water. To carry out this program the Office of Saline Water was established in the Department of the Interior. Three years later, by the amendatory act of June 29, 1955 (69 Stat. 198), Congress broadened the 1952 legislation to a 14-year program. The amendatory act also increased the total authorization from $2,000,000 to $10,000,000. On September 2, 1958, Congress enacted Public Law 85–883 (72 Stat. 1706) providing for the construction of five demonstration plants to be test operated in a 7-year period, and an additional ten million dollars was authorized to be appropriated for this purpose. One demonstration plant to convert sea water was to be located on the West Coast, and one to treat brackish water was to be located in the arid Southwest. The demonstration plant sites selected in the West are at San Diego, California and Roswell, New Mexico. House Report No. 71, *supra*, pp. 57–107, Thirty-first Report by Committee on Government Operations—Saline Water Program, House Report No. 2551, 85th Cong. 2d. Sess., pp. 3–4. During the short span of 8 years the Office of Saline Control has been in existence, the curve of comparative costs has gone down further and faster than in all previous history. Report of Secretary of the Interior to the President on Saline Water Conversion—1959—p. 3.

[26]House Report No. 71, *supra*, p. 173.

III.

THE SPECIAL MASTER'S RECOMMENDED ALLOCATION OF MAINSTREAM WATER AMONG CALIFORNIA, ARIZONA AND NEVADA SHOULD BE SUSTAINED

It has been the position of the State of Nevada throughout this entire proceedings, and it is her position now, that, as a sovereign State, she is entitled to be protected in her right to the use of waters of the main Colorado River for the sustenance and development of Southern Nevada. While the amount suggested to be decreed by the Report of the Special Master is less than that requested by Nevada as has heretofore been pointed out, it is an amount which will permit continued substantial development of this area. But it is close to the absolute minimum that could have practical value to that section of the State.

The one basic issue now is: Should the division of mainstream water among the three Lower Basin States delineated in the recommended decree be adopted, upon any or all applicable theories of law?

Much argument has been advanced during the hearing and in subsequent briefs and exceptions as to whether the Compact or the Project Act or the Limitation Act is controlling, one against the other, or whether they, or any combination of them, are mutually exclusive in providing the rules for the decision of this case. Even the Special Master's Report follows this general pattern in ruling out some of these pertinent statutes in favor of others.

While Nevada accepts the Special Master's recommendation and agrees with its basic logic and conclusion, it does not appear to her that all of the specific steps in his reasoning are necessary.

In Nevada's opinion, immediately upon, and forever after the time that President Hoover proclaimed that the Project Act was in effect, everyone connected with the administration of the Colorado River has been presented by an intermingled, interrelated

and correlated body of statutory law. Since the Compact was ratified, not in a separate Congressional Act but as an integral part of the Project Act, it seems implicit that the two must always be construed together and are, in effect, one over-all statutory enactment.

Not only are they both so included, but so also is the Limitation Act, the passage of which was by the Congress, made a condition precedent to the effectiveness of the Act ratifying the Compact and authorizing the construction of Hoover Dam and related works. In addition, the general Reclamation Law was incorporated in the enactment to the extent that it was not inconsistent. So there resulted a single "bundle" or "package" of regulatory provisions. We mention this because we think it leads to confusion to say that any one part of this "package" shall control to the exclusion of the others; or, to say that any of the integral parts are irrelevant. For it is necessary to look to and give effect to the provisions of all of them in arriving at a final, logical answer.

A. The Colorado River Compact.

So far as the Compact itself is concerned, it is noteworthy as much for what it did not prescribe as for that which it did prescribe.

It is crystal clear, and now conceded by all the parties to this action, that the Compact did make an apportionment of the amount of water that could be applied to beneficial consumptive use in each the Upper and Lower Basins by the provisions of its Articles III(a) and III(b). By these provisions, the Lower Basin is given the right to consumptively use, out of the entire Colorado River System 8,500,000 acre feet of water, and the Upper Basin the right to use 7,500,000 acre feet of water. This latter being subject, of course, to the possible exception that by Article III(d) in the Compact, the Lower Basin must, in every 10-year period

permit 75 million acre feet of water to pass Lee Ferry for use in the Lower Basin, if that amount is required to permit the Lower Basin users to exercise the full rights granted by the Compact. And also that the Compact provides the method of supplying the amount of water required by the Mexican Treaty to be delivered to Mexico from both portions of the Basin.

The foregoing are self-evident and no one considering the problems of the river can either close his eyes to their meaning and implication or ignore their effect.

There are other things that the Compact does not do. One of the most self-evident of these is that it did not allot water to specific States, in either the Upper Basin or the Lower Basin, either in stated quantities, percentages of flow, or otherwise. Nor did it allot any water to the United States in its proprietary capacity. The controversy as to the amount of water to be allotted to and to be used in specific States, had existed for years prior to the completion of the Compact and in the Lower Basin has continued to rage ever since. Recognizing this gap in the Compact, the Upper Basin States, with the consent and subsequent approval of Congress, agreed on a division of the water alloted to the Upper Basin among the several Upper Basin States. The Lower Basin States have never been able to agree on any phase of this problem. Hence, this litigation.

But it is inescapably true that the orderly development of the area served by the Lower Colorado River System, which is in the midst of one of the greatest population explosions in history, requires that there be an allocation of the mainstream water among the three States. We emphasize mainstream particularly because at the time of the enactment of this legislation, substantially all of the waters of the tributaries in Arizona and Nevada had been already appropriated, and California is devoid of tributaries. So that the *res* of the problem is necessarily the water flowing in the

mainstream, and that the tributary uses, although contained in the Compact definition of the division between the Basins are, as the Special Master logically finds in his Report, of no concern in the decision of this case.

B. The California Limitation Act.

As a condition of the Project Act, including the therein contained approval of the Compact becoming effective, the Congress included the provision that in the absence of ratification by all seven States, California must pass a specifically described Act limiting forever its claim on the water from the Colorado River. We concur in the Special Master's description of this as a condition precedent.

California, for many reasons, had for years prior to the signing of the Compact and the enactment of the Project Act, been the driving force in attempting to secure its enactment. This is very evident from the evidence herein and from the legislative history of the continuing effort through many sessions of Congress to assure the passage of an act similar to the final Project Act.

This was due to many reasons. The great irrigated Imperial Valley was suffering many woes due to the erratic flow of Colorado River. It could never be sure at any time whether it was going to suffer from disastrous floods such as those of the early 1900's that nearly resulted in turning almost the whole thereof into a great inland sea with incalculable destruction, or frequently appearing periods of drouth during which, at times, there was not adequate water for irrigation. In addition to these troubles arising from the uncontrollable forces of nature, the same area was beset with international woes. The only method of transporting Colorado water to this area was through a canal which looped southward into Mexico before re-crossing the International Boundary

in its northward flow to the Imperial Valley. Extreme demands were being made by Mexican land owners as to the amount of water they could divert for their uses from this canal while flowing through their country and obviously no American authorities had any control over this section of the canal or effective means of preventing diversion of water therefor.

Also, it was very evident that the coastal region around Los Angeles was in immediate need of the vast quantities of hydro-electric power which would be provided by Hoover Dam and that the same region would soon require the diversion of Colorado River water for domestic and municipal uses.

All of these reasons were very real and very cogent. California promptly passed the Limitation Act and in the years since, the State of California has reaped rewards of incalculable value as a result of the developments on the Colorado River which she thus made possible.

The subsequent attempts of California to evade the provisions of this Limitation Act or to reduce its effectiveness by proposed technical construction that would render it rather meaningless, come with poor grace from a sovereign State.

As we have noted heretofore, the alignment of the parties in this case has resulted in a situation in which California is taking one position and all of the other parties, while not agreeing among themselves as to all details, are united in supporting the basic decision contained in the decree recommended by the Special Master. California has no standing to in any way attempt to destroy, evade or diminish the limitation placed upon her use of Colorado River water (from the mainstream, which is the only place which she ever has diverted, or could divert) by the Limitation Act.

In Nevada's opinion, the Special Master has been generous to California in his application of the provisions of that Act. In brief,

that Act provided that California was limited to a total of 4,400,-000 acre feet of the water apportioned to the Lower Basin by Article III(a) of the Compact, and one-half of any excess or surplus water. Article III(b) of the Compact apportioned an additional 1,000,000 acre feet of water to the Lower Basin. There is much reason to contend that this additional 1,000,000 acre feet apportioned to the Lower Basin by Article III(b) water is not excess or surplus water, and Nevada so argued in her briefs herein. However, the Special Master has concluded that the portion of the water allotted to the Lower Basin by Article III(b) is excess or surplus water and has awarded one-half thereof to California.

This interpretation of the Limitation Act gives to California the maximum amount of water which it could take from the Colorado River. Certainly that State is in no position to complain as to that part of the Special Master's recommended decree and the limitation on California's diversions prescribed by him should be given effect in any decree that may be entered herein.

C. The Boulder Canyon Project Act.

The basic Act which became effective after the passage of the Limitation Act and which permitted the six-state Compact to become effective was the Project Act. Its basic purpose was to authorize and provide for the construction of Boulder Canyon Dam and the All-American Canal, together with provision for all of the attendant facilities, methods for repayment and management and control of all of the various structures. The portion of the Act dealing with the hydroelectric generation facilities and the sale of the power and energy produced are not in issue here.

The Special Master has determined that because of the provisions of Sections 1 and 6 of the Project Act which list, among the purposes of the legislation that of improving navigation, that

Congress accepted the invitation contained in the last sentence of Article IV(a) of the Compact and disagreed with the statement in that Article that the Colorado River had ceased to be navigable and that the use of waters for navigation should be subservient to other uses.

The Project Act provided for the construction of a dam which would, both because of the terms of the Act and of the inevitable results of its physical capacity impound and control all waters of the main Colorado River reaching that point. By the terms of Section 5, the Secretary of the Interior was particularly instructed to contract for the storage of water in the reservoir and for delivery thereof at various points on the river. And it particularly provided, "And no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid, except by contract made as herein stated."

It was additionally provided in Section 14 that the Act should be supplementary to the general Reclamation Law and that that law should govern the construction, operation and management of the works herein authorized, except as otherwise therein provided. The historical pattern followed under the general Reclamation Law has, of course, been one in which the Secretary has contracted for the delivery of specific quantities of water to the various entities who would be entitled to divert and use them. Without exception, this has been the plan followed on all of the irrigation projects constructed by the Bureau of Reclamation, the greatest builder of dams and irrigation systems throughout the arid Western States.

As to these portions of the Project Act, there has not been and cannot be any particular controversy. The record herein is replete with references to quotations from the legislative history relating to the passage of the Project Act. The Special Master, in turn, quotes at length therefrom in his Report. Arizona and California

attempted to derive contrary conclusions from the legislative history, but it is certainly true that the history unequivocally shows that the Senators from the affected States believed that the Act would result in the ultimate division of the water which would reach Hoover Dam and be stored in the reservoir behind it, among the three Lower Basin States of Arizona, California and Nevada. And in voting upon the complexity of amendments to the portion of the Act which is now Section 4, they unquestionably believed that they were taking effective action on the amount of water which California would have as a prior right and thus guarantee the allocation of the balance available to the other two States. Specific votes were held on these questions.

We do not at this point discuss in detail the thoughtful reasoning of the Special Master wherein he finds that the provisions of this Section constitute a statutory allocation of the mainstream water. There is much reason and logic to sustain the Special Master's position. But in view of the provisions of the Act itself, with reference to the contracting of the water resulting from the construction of Hoover Dam and of the subsequent actions of the Secretary of the Interior, it is Nevada's position that the rights of Arizona and Nevada to receive as sovereign States amounts of mainstream water in the quantities specified in their respective contracts can be sustained on other grounds as well.

Aside from its power under the Commerce Clause of the Constitution, there can be no question now of the right of the United States to construct Hoover Dam and to create the resulting storage behind it for irrigation uses under the General Welfare Clause of the Constitution. *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725, 738 (1950); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294 (1958). Conceding the navigability of the Colorado River,[27] clearly the United States, under the Commerce Clause, had the right to construct and

operate dams, and control and dispose of the waters of the Colorado River regardless of prior rights. *Arizona* v. *California*, 283 U.S. 423 (1931); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1912); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 890; *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940). It follows the United States having expended money to impound the waters and having obtained physical control of it had the right through its properly authorized officers—in this case, the Secretary of the Interior—to specify the quantities of water to be delivered and the conditions for its use. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725. In the *Ivanhoe* case, at page 295, the Court said:

> "Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property and federal privileges * * *. The Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof."

In view of this basic situation, regardless of the specificness of directives to the Secretary of the Interior, contained in Sections 4 and 5 of the Project Act, the Secretary had the basic right and obligation under the general Reclamation Law[28] to make contracts for the disposition of the stored water. In no other

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[27]It was Nevada's position in her briefs before the Special Master that the Colorado River was no longer navigable and the navigation servitude for all practical purposes was mooted. Nevada contended that Congress, in approving the Compact in the Project Act, had consented to Article IV(a) of the Compact which declares that the Colorado River is no longer navigable. The Special Master rejected that contention (Report, p. 151).

way could the highest and best use of the water be attained or the public interests be best served. The only question could be, then, as to whether or not the specific contracts entered into by him are invalid because of any abuse of discretion on his part. No one questions the validity of the contracts made with the various California agencies; although it must at all times be kept in mind that the total to be delivered thereunder cannot exceed the quantity to which California is entitled under its Limitation Act.

And certainly, there was no abuse of discretion on the part of the Secretary in contracting for the delivery of stored water with the respective sovereign States of Arizona and Nevada in the capacity in which he did for the use and development of those States. The legislative history of the attempts to have the Central Arizona Project authorized by the Congress clearly reveals the inescapable necessity of the Congress itself being advised as to the water rights available for a proposed project. There is nothing in the law which restricted the Secretary to make contracts only for projects then in being. In fact, the very essence of water developments in the arid West has been that of first being certain of the availability of water, then the authorizing, financing and construction of the projects. In some instances, this intervening period has been short, but in many instances, of large projects, a considerable number of years have elapsed before the completion of use.

Only after being certain that they would be entitled to specific quantities of water as expressed in their respective contracts could the States of Arizona and Nevada proceed with the planning, financing and construction of the projects which would use this

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[28]See, for example, the Reclamation Project Act of 1939, Sections 9(d) and 9(e), 53 Stat. 1187, 43 U.S.C. 85.

water. In the case of Nevada, the acceleration of its growth has been comparatively recent. As shown in the record, however, at the present time, its rate of growth is one of the highest in the nation and the development is proceeding at a fantastic rate.[29]

Because of the physical fact that the Colorado River, at the points where Nevada can divert its waters, flows through a deep canyon, Nevada is confronted with a major development problem. It will take much time, planning and money to develop and complete the projects which will be eventually required to permit the use of Nevada's allotted share of water as her growth continues. It is submitted that the Secretary would have been guilty of an abuse of discretion if, in the light of his facts, he did not contract with the State of Nevada and its Colorado River Commission, the body authorized by the legislation of that State to represent it. And the quantity of water awarded Nevada is, as elsewhere herein noted, a bare minimum of the amount required.

D. Physical Background of the Suit.

Twenty-three years, nearly a quarter of a century, elapsed between the time of the enactment of the Project Act and the institution of this suit in 1952. During this period, many events occurred which have a bearing on the present controversy and which cannot be ignored in the decision herein. We have here perhaps another example of the situation where it is plain that the Court must consider all of the background of existing facts and circumstances.

Foremost in this array of events has been the completion of Hoover Dam itself, and the resultant control of all of the mainstream Colorado River at that point by that structure. Of equal importance has been the completion of the Imperial Dam which

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[29] Appendix I, pp. 73–77, 81–87, 97–98.

diverts the water into its companion facility, the All-American Canal, both long ago completed and used for the diversion of the major share of California's portion of the Colorado River water. Imperial Dam is the lower-most American structure, and all water passing it is susceptible of use only in Mexico.

Between Hoover Dam, the uppermost reservoir in the Lower Basin and Imperial Dam, there have been completed a series of other dams which are in descending downstream order, Davis Dam, Parker Dam, Headgate Rock Dam, and Palo Verde Weir. All of these structures were constructed by the United States and are presently under the management and control of Federal officials. Collectively, these structures result in complete physical control by the United States of all the water entering into, stored in reservoirs on or diverted from the mainstream in the Lower Basin.

As a result of this complex of structures and projects, the Court now finds the mainstream water in the Lower Basin thus under physical control of Federal officials. And the accompanying situation is that these officials make the continuing determinations as to available total water supply, the amount available for various diversions and all other determinations affecting the control, management and delivery of the Colorado River water.

Also, during this period of more than two decades, the water delivery contracts were entered into with the California agencies which divert water for use in that State; with the State of Arizona and the presently operating agencies in that State who are now using water from the mainstream; and with the Colorado River Commission of the State of Nevada.

As to the State of Nevada, the situation is that that State has been for several years diverting a portion of the water provided for in its contract with the Secretary of the Interior. It has been necessary to construct expensive pumping facilities and pipelines

to bring the water from Lake Mead to the high adjoining plateau where it is required and is being used. The Nevada use under this contract is a constantly expanding one. Plans are under way for the additional facilities that will be required for the constantly expanding growth of the area.

Accordingly, we now find that dominion and control of the waters of the main Colorado River from Lake Mead to the Mexican border by officials of the United States is an accomplished fact. We find, likewise, that water delivery contracts which, as we have pointed out, were well within the power and discretion of the Secretary of the Interior, have been executed and in a very substantial degree actually operative for a considerable period of time. And with respect to Nevada, we find that she has, in reliance on her contract, spent large sums of money in beginning the process of providing facilities for and diverting water from Lake Mead for use by her citizens. True, Nevada's start has been slow, and compared with California's uses, small, but it is a fact which must necessarily be considered in rendering a decision as to the fate of the mainstream waters.

E. The Contracts May Be Properly Used as the Fundamental Basis for the Allocation of the Mainstream Water in This Suit.

Summarizing the foregoing discussion, it is very clear that the Compact, the Project Act, the Limitation Act, and the general Reclamation Law, together, form an integrated body of law which not only authorized but required that there be water delivery contracts relating to the mainstream waters available to the three Lower Basin States. In no other way could an effective plan for the delivery and use of those waters be attained. And this contractual arrangement has been actually brought into being and use in a very substantial degree.

Accordingly, Nevada submits that she, as a sovereign State should be awarded the amount of water provided in her contract, namely, 300,000 acre feet of consumptive use (diversions less return) of Lake Mead water, and furthermore, that this amount of consumptive use should not be in any way diminished or reduced by reason of other water uses in Nevada from the tributaries above Lake Mead.

The last proposition is mentioned because there would be such diminution of Nevada's rights to mainstream water if effect is given Article 5(a) of the Contract between the United States and Nevada.[30] This Article purports to reduce Nevada's 300,000 acre feet of mainstream water by the amount of Nevada's upstream diversions.

There is nothing in the Project Act that authorized or directed the United States officials to limit the Nevada use of Lake Mead water by deducting therefrom other Nevada diversions. Nor could the act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed. It is fundamental that State officials do not have any power to surrender, abrogate, release or dispose of any of the rights of a sovereign State. Accordingly, from every angle, the provision in the Nevada contract, purporting to whittle down the Nevada Lake Mead allocation of 300,000 acre feet by the amount of tributary diversions elsewhere in the State would be *ultra vires*, void and unenforceable. For that reason in any water supply computation based on contract rights, Nevada is entitled to the full 300,000 acre feet of Lake Mead storage water, as Arizona concedes.

Arizona is confronted by the same problem as a result of Article 7(d) of her contract with the United States. The Special

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[30]Appendix 7, Report, p. 420.

Master has reviewed this problem at length in his Report at pages 237–247 and arrived at the proper and sound decision that such limitation provision is not only not supported by the Project Act, but, in fact, is contrary to the provisions thereof. He points out that such a provision can have no other effect than to violate the Project Act which provided that the water delivery contract should be "for permanent service." And also makes the proper comment that future upstream users would be in effect given priority over the older users under the Contract, if this paragraph were given validity. And he further points out that it is necessary to invalidate this paragraph in each the Arizona and Nevada contracts to be consistent with the real meaning of Section 4(a) of the Project Act as he interpreted it. Nevada, of course, concurs in the Special Master's Report and recommended decree in this respect.

IV.

THE RECOMMENDED DECREE IS IN REALITY AN EQUITABLE APPORTIONMENT OF COLORADO RIVER WATER

The decree proposed by the Special Master proposes a complete and efficient plan for dividing annually all available mainstream water among the three Lower Basin States.

There has been much controversy among the parties during the progress of this litigation as to the proper basic method of arriving at a decree to effectuate this purpose. Arizona and the United States urged a theory substantially like that adopted by the Special Master. California, while giving apparent lip service to a theory of equitable apportionment, such as has been followed in other interstate water cases in this Court, in reality, has at all times insisted on an allocation based upon actual appropriations and

uses under the laws of the various States. In effect, she was simply asking for a decree confirming existing appropriations only, but ignoring State lines. Nevada has urged that, as between sovereign States, the doctrine of equitable apportionment should apply, but departed from California's theory and urged that the Court could and should use its equitable powers in determining the share of water each of the Lower Basin States should ultimately be entitled to, and not limit allocations to the precise uses existing at the present time.

In his Report, the Special Master has pointed out precisely and in detail the reasons why and the method in which he has arrived at his decision. He has found specifically that the Project Act is the authority for the allocation and delivery of water[31] and that the principles of equitable apportionment or priority of appropriation which were found applicable in other suits for the interstate division were abrogated by the Project Act; and as also stated[32] "This case involves a statutory, not an equitable apportionment * * *." He has buttressed this basic conclusion by detailed analysis and reference to the legislative history of the Act and all of the surrounding circumstances, so that he came to the final conclusion that the intent of the Project Act was to make such a statutory allocation even though the literal words did not do so.

Nevada has complete confidence and respect in the determination of the Special Master and as has been noted, has not filed any exceptions to the basic provisions of his Report and proposed decree, but has only excepted to certain parts thereof not affecting the main conclusion.

However, being firm in her belief that this long existing controversy can and should be decided upon the voluminous record now before the Court, she urges that even should there be disagreement

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[31]Report, p. 151.
[32]Report, p. 100.

with the Special Master's interpretation of the Project Act, that his proposed decree is in reality an equitable apportionment of the waters of the main Colorado River stream and can be completely justified on that ground. Assuredly, if the Special Master's determination, that this is a purely statutory allocation suit, is in error, then the only other alternative would be to treat it as an action for equitable apportionment. Viewed in that light the Master's proposed decree, is entirely correct and proper, fully supported by the evidence and a proper exercise of the judicial authority.

Suppose, for example, that the Project Act was not in existence but that the United States had constructed, under the general Reclamation Law, all of the Lower Colorado River dams, reservoirs and diversions which are now in existence. And let us further assume that under such law, the Secretary of the Interior had entered into the contracts which are before the Court in this action. Then we make the final assumption that the same parties as are now here, were before this Court asking for an equitable apportionment of the mainstream water.

In that situation, the Court would assuredly have to take into account the contracts. These contracts would be as much evidence of the rights of the parties to the mainstream water as any other water right they might present, whether State appropriations, actual use or whatever. The *res* of such a suit would be principally the waters stored in reservoirs constructed and managed by the United States. No decree could be entered effectively apportioning the water in question without taking into account these contracts.

The contracts would, indeed, be proper yardsticks to be used by the Court in determining the rights of the parties. The Report of the Special Master herein and his proposed decree can easily be justified, even aside from and different from the theory of

statutory allocation, on the ground that in reality, he did use these contracts as yardsticks to measure the rights of the parties, and so using them equitably apportioned the waters of the river.

We are not aware of any instance in any suit for interstate division of water wherein the Court has ignored, or found invalid, a water delivery contract made between the proper Federal agencies and a water using entity providing for the use and delivery of stored water.

As a matter of fact, the Special Master has recommended the use of the judicial power of the Court, in his determination that in years of shortage the water should be prorated among the States in the same proportion as their contract right bears to each other. And he has again used this judicial power in his provision that present perfected rights, protected under the provisions of the Compact, must be filled in order of their priority, even if it requires ignoring State lines.

In view of the foregoing, Nevada respectfully urges that the decision recommended by the Special Master can be completely justified and upheld as a valid equitable apportionment of the mainstream Colorado River water, consistent with the position that Nevada has taken throughout these proceedings.

V.

ARGUMENT IN SUPPORT OF EXCEPTIONS OF STATE OF NEVADA

i

*The Special Master erred in providing in Paragraph II(B)(7) of the proposed Decree (p. 349) that "mainstream water shall be delivered to users in * * * Nevada only if contracts have been made by the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act for delivery of such water; * * *."*

Nevada requests that, by apt language, Paragraph II(B)(7) (Report, p. 349) be amended so that the phrase "mainstream water shall be delivered to users in * * * Nevada only if contracts have been made by the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act for the delivery of such water; * * *" be amended so that this restriction (i.e., apparently requiring individual users to have contracts with the Secretary of the Interior) be not applicable within the State of Nevada.

This provision of the proposed decree, so far as relates to Nevada may be an inadvertence inasmuch as the Report itself (p. 210) finds that contract between the State of Nevada and the Secretary of the Interior "does not require additional subcontracts between each water user and the Secretary of the Interior."

The reason for this requested change is that the Nevada contract with the Secretary of the Interior is, on this point, distinctly different from the Arizona contract. While the Arizona contract provides in Section 7(1) (Report, p. 403) that

> "Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political sub-divisions therein of Arizona *as may contract therefor with the Secretary*, * * *."

The Nevada contract is different in that it is a contract, directly with the State, acting through its Colorado River Commission, and makes no provision for what might be called "sub-contracts" with other users. It is stated in the Contract, Section 5(a) (Report, p. 410)

> "The right of the State to contract for the delivery to it from storage in Lake Mead is not limited by this Contract. * * *"

and also in Section 5(b) (Report, p. 411)

"(b) Water agreed to be delivered to the State hereunder shall be delivered * * *."

and it is further provided in Section 6 (Report, p. 411)

"The State shall receive the water to be diverted by or delivered to it by the United States under the terms hereof at the point or points of delivery to be hereinafter designated * * *."

And in Section 1 (Report, p. 412), it is stated:

"The water to be delivered to the State hereunder * * *."

And in Sections 8, 9, 10 and 11 (Report, pp. 412–413), it is provided that the State shall make the necessary reports, that the charges shall be made to the State, that the State shall pay for water delivered, and that deliveries to the State shall be refused in the event of a default.

All of this is in conformity with the contract itself which is made with the "State of Nevada, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State used in this contract being deemed to be both the State of Nevada and its Colorado River Commission)," (Report, p. 409).

As mentioned in this contract, the Colorado River Commission of Nevada is a body politic, acting for the State. The Commission was established by the Legislature of the State of Nevada and the Act appears in Chapter 538 of the Nevada Revised Statutes, and specifically, Sections NRS 538.040–538.260, as amended. Pertinent parts of this legislation is set forth in Appendix II hereof. Specifically, Section NRS 538.160 authorizes the execution of a contract such as that involved in this action; Section NRS 538.170 authorizes the Commission to receive the water

covered by the contract for the State of Nevada and to make necessary appropriations therefor, and Section NRS 538.180 authorizes the Commission to make all necessary leases, sub-leases, or contracts of sale of the water obtained through the contract with the United States. As shown by the record herein, the State, through the Commission, has been the entity which has received the water available from Lake Mead and the Colorado River, paid the charges due the Secretary under said contract and made the necessary State appropriations therefor.

Nevada submits that to continue this program as conceived by the contract provisions is, in this instance, better both from the point of view of the United States and the State. In all probability, the uses in Nevada will be principally industrial, domestic or municipal. It is not a case of there being a comparatively few large irrigation or municipal projects, as in Arizona or California, but on the contrary, many small users. The Commission is constituted for the purpose, and can conveniently and efficiently perform the functions required by the United States in connection with the contract for Colorado River water, as well as best serve the interests of the users in the area.

It is submitted that this arrangement with Nevada in the contract is in accord with Section 5 of the Project Act (Report, pp. 384–385), and that the State of Nevada is a "person" as used in that section of the Project Act and, therefore, entitled to have the use of the water contracted for.

For the foregoing reasons, Nevada respectfully submits that there be the necessary changes in the language of Paragraph II(B)(7) (Report, p. 349), in conformance with the Special Master's finding in his Report (p. 210).

ii

The Special Master erred in finding in the Report, at pages 234 to 237, 311 and 312, and in Paragraphs II(B) (5) and (6) of the Recommended Decree, that a part of Nevada's allocation of water may be used to supply the so-called "present perfected rights" in other States, in years when the allocations of such other States are not sufficient to supply said rights.

And as an alternative, the Special Master erred in not providing a minimum figure below which the allocation of the State of Nevada could not be reduced, if, and when, it ever becomes necessary to take water away from Nevada's allocation for supplying so-called "present perfected rights" in other States.

By Paragraphs II(B)(5) and (6) (Report, pp. 348–349), a plan is outlined whereby one or two of the mainstream States shall make contributions to insure full delivery of present perfected rights to the third State, or to two States (II(B)(4)), and in the event of extreme shortage for the satisfaction of present perfected rights by priorities without regard to State lines (II(B)(6)).

Nevada submits that in the exercise of this Court's equitable powers, it should amend Paragraph II(B)(5) to provide that no part of Nevada's allocation of water may be used to supply the so-called "present perfected rights" in Arizona and California in years when the allocations of such States are not sufficient to supply such rights, or in the alternative, the decree should contain a provision providing that Nevada's deliveries shall never be reduced below a minimum figure (not less than 250,000 acre feet), provided there is present actual need therefor.

Such a requirement is necessary because, as is shown by the evidence herein, the Nevada users of mainstream water are, and

will be of the type which it is necessary to maintain, i.e., municipal, domestic or industrial. In other words, there will not be uses, such as irrigation uses, which can be temporarily suspended without disaster. Uses such as domestic and municipal cannot be arbitrarily cut off, or even heavily reduced, for a period of time, as can agricultural uses.

The factual situation presented is that out of the basic allotments, California will have present perfected rights approximating 70 percent or more of her total apportionment of 4.4 million acre feet; Arizona will have perfected rights constituting 21 percent or more of her apportionment of 2.8 million acre feet. While on the other hand, Nevada's mainstream present perfected rights are not in excess of 3 percent of her State allotments; and even this amount comprises solely the rights for the Fort Mohave Indian Reservation and the Lake Mead National Recreational Area.[33] In the event of a severe reduction in the amount of water released by the United States in any given year, a situation could arise, under the decree as now proposed, wherein all the water would go to the present perfected rights of California and Arizona and practically none would be available for Nevada.

It appears to Nevada that the present Report goes further than necessary in protecting present perfected rights as among the downstream States.

The only thing provided by Article VIII of the Compact (Report, p. 376) with respect to the priority of these rights is first, that they are unimpaired by the Compact (the Report has construed the Compact as being nothing more than an apportionment of water between the Basins and as being entirely irrelevant in the

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[33]See Appendix III, p. 110, being a tabulation of "present existing rights" as of June 25, 1929.

apportionment of water among states); and secondly, that whenever a storage capacity of 5 million acre feet is available in the Lower Basin, present perfected rights must be supplied out of that storage as against appropriators or users in the Upper Basin.

The Project Act merely provides in Section 6 (Report, p. 387) that the dam and reservoir shall be used for the "satisfaction of present perfected rights in pursuance of Article VIII of said Compact * * *." In other words, it does not create any priorities as between downstream States, above and beyond that created by the Compact which, as noted above, have been determined to be non-existent. Neither does it pretend to assure such rights a better water supply than they had before the Compact.

Accordingly, it would seem that the decree as drawn is an exercise of the equitable power of the Court in providing for the priority of these present perfected rights as among the three downstream States and is not based on any specific statutory language, or authority. Accordingly, inasmuch as this portion of the decree is an exercise of this Court's equitable powers in that regard, it is fully within the power of this Court to provide that no part of Nevada's allocation of water shall be used to supply so-called "present perfected rights" in other states, or in the alternative, to place a floor, as suggested above, below which the deliveries to Nevada shall not be cut.

There will come a time in the future that some assured amount of water will be necessary for the very preservation of life and existence in the Southern Nevada area. On the other hand, assurance of this limited amount will not and cannot materially impair the much larger allotments (which are principally for agricultural use) in the other two Lower Basin mainstream States.

iii

The Special Master erred in failing to recommend in his Report, or provide in his recommended decree, for the appointment of a Commissioner with the power to supervise the operation of the Colorado River in the Lower Basin and the delivery, annually, among the various parties of the waters awarded to them by the decree herein (Report, p. 314).

Nevada, in its briefs before the Special Master, strongly urged that whatever course the decree of this Court might follow, there should be appointed a Commissioner by this Court to administer the decree. After careful analysis of the proposed decree recommended by the Special Master, we believe that the appointment of a Commissioner, an officer of this Court, is essential. Such a Commissioner would necessarily have to make annual determinations as to the amount of water that may be expected to be available, and the portion thereof which will be available to the three mainstream States in accordance with the basic decision recommended by the Special Master.

Nevada also recommended the appointment of an Advisory Board composed of representatives of each of the States of Arizona, California and Nevada to assist and advise the Commissioner, and we reaffirm that recommendation and recommend also that a representative of the Secretary of the Interior be made a member of that Board.

We believe it to be a logical solution of this case that there be made a basic allocation of water among the mainstream States such as the Special Master has recommended and that then this Court retain jurisdiction through its own Commissioner to make annual allocations in accordance therewith. Nevada submits that the allocations recommended by the Special Master, together with the continuing jurisdiction by a Commissioner, will result

in the highest degree of justice and in the most efficient division of the water among the parties to this action.

The proper utilization of mainstream waters available at Lake Mead and from Lake Mead to the International Boundary requires an annual determination of the amount thereof available on a basis of diversions less returns to the river with due consideration to Lower Basin inflows at Lee Ferry, inflows from tributaries between Lee Ferry and Lake Mead, mainstream reservoir and channel losses, deliveries to Mexico, regulation losses, storage on hand at Lake Mead and other factors including also the avoidance of greatly fluctuating supplies of water within the amount corresponding to the Compact apportionments to the Lower Basin.

The determination of annual water supplies available for use by the States of Arizona, California and Nevada, in accordance with the decree recommended by the Special Master should be made by a Commissioner appointed by the Court and should be annually announced by him at a designated time. Such Commissioner should have the authority and responsibility for the record of mainstream inflows at Lee Ferry and inflows from tributaries, the periodic determination of depletions by each State on the tributaries, the mainstream uses of water, and the submission of annual reports in appropriate number covering the activities described. The costs of such activities should annually be advanced by the States of Arizona, California and Nevada in proportion to the amounts of mainstream water allocated to them.

iv

The Special Master erred in failing to recommend in his Report or include in his recommended decree, provision for the promulgation of Rules and Regulations by the Officer in charge of operating the Colorado River, after the Decree is entered herein, setting forth in detail the manner, method and plan, including time schedules, to be used annually in

regulating stream flows, in managing and controlling regulatory structures and in allocating and distributing water to the parties entitled thereto; and also providing for cooperation with representatives of affected States in accordance with Section 16 of the Boulder Canyon Project Act (45 Stat. 457; 43 USC 617).

Nevada respectfully suggests that the decree specifically provide that the Officer in charge of operating the Colorado River, after the decree is entered herein, shall promulgate Rules and Regulations relating thereto. If this is done, all of the interested parties will be more aware of the planned procedure and activities, and it should tend to remove misunderstandings and possible friction. Generally, in the Western States, such Rules and Regulations are of material assistance in operating streams with complex and complicated rights thereon.

Some of the subjects which, among others, could very properly be covered by such Rules and Regulations, rather than in a more inflexible decree, are:

(a) The approximate time when the Secretary will annually announce to the interested parties the amount of controlled water that will be available for release in that water year.

(b) The definition of, and the manner of measuring those diversions which consist of wells in the mainstream valley so that they result in the diversion of water that is hydraulically connected with the mainstream flow.

(c) Provisional regulations concerning the manner and method of determining when contributions shall be made by each of the Upper and Lower Basins for the Mexican delivery in accordance with Article III(c) of the Compact; the point at which the Upper Basin contributions to Mexico shall be measured; and the manner and method of computing transportation; and evaporation losses thereon.

CONCLUSION

Nevada submits that the division of mainstream water proposed by the Special Master is a fair and just allocation and should be sustained. It is logical and proper.

Nevada is willing to accept the allocation of mainstream water proposed by the Special Master, even though Nevada's share is a bare minimum of the amount of water which will be required for existing and future uses.

The Special Master's proposed division of mainstream water can be sustained on any one of several legal theories. It can be sustained under the theory of statutory allocation adopted by the Special Master. In the absence of the Project Act, contracts, such as the one with the State of Nevada, would have been valid and could be judicially sustained, under the general Reclamation Law. Or if this action be considered one for equitable apportionment, it would be judicially proper to use the contracts made by the Secretary of the Interior, such as that with Nevada, as a yardstick, and evidence of the right to the use of mainstream water, which could and should be sustained in any decree entered herein.

Respectfully submitted,

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Dated May 15, 1961.

APPENDIX I

PRESENT AND FUTURE WATER REQUIREMENTS FOR COLORADO RIVER BASIN IN NEVADA

I.

GENERAL

Description of Colorado River System.

The Colorado River is one of the major stream systems of the United States, with its most northerly tributaries rising in the high mountains of southwestern Wyoming, eastern Utah and western Colorado. From there it flows southerly until it passes into Mexico and empties into the Gulf of California. Through many tributaries it drains southwestern Wyoming, the western slope of the Rocky Mountains in Colorado, eastern Utah and southeastern Nevada. Other tributaries arising in western New Mexico, flow westerly through the State of Arizona into the main stream. It forms part of the border between Arizona and Nevada and all of the border between Arizona and California.

Substantially the whole of the State of Arizona is within the Basin. While California borders the river, no tributaries arise in that State.

The Salton Sea, a below sea level depression or "dead sea," lies approximately 60 miles westerly of the main river, and approximately 50 miles north of the California Mexican boundary. During disastrous floods in the early 1900's, the whole river broke through canal headings, and for a time poured into this Sea instead of following its normal course to the ocean. At the present time, this Sea receives the waters of some streams flowing northerly from Mexico, and all of the drainage waters and return flow from the Imperial Valley Irrigation Project and the Coachella Project in California.

The areas adjacent to the river and its major tributaries are semiarid or arid in nature. The lands in these areas require the artificial application of water for the production of agricultural crops. In the southern part of the Basin, true desert conditions prevail.

The so-called Lower Basin area is in this southern desert portion. The climatic conditions in this area are such that the amount of Colorado River System water available in any given section will inevitably be the limiting factor on the future growth of that area, whether agricultural, industrial or municipal.

After leaving the southern boundary of California, the river for approximately 20 miles forms the boundary line between Mexico and Arizona (the limitrophe section). It then flows for approximately 75 miles through Mexico to its mouth at the Gulf of California. A great irrigated area in Mexico is dependent upon the waters of the Colorado River.

In this action there is involved that portion of the Basin of the Colorado River which is defined in the Colorado River Compact (Article II(g)) as the Lower Basin. There is, therefore, involved herein all of the waters entering the Lower Basin at Lee Ferry, the waters arising in all of the tributaries of the Colorado River whose mouths are below Lee Ferry, and all water entering or re-entering the main stream from any source between Lee Ferry and the International Boundary. Area-wise, the action affects all of the portions of the States which are party to the action from which waters naturally drain into the river below Lee Ferry, and also (as described in the Compact, Article II(g)), "* * * all parts of said States located without the drainage area of the Colorado River System which are now or shall hereinafter be beneficially served by waters diverted from the System below Lee Ferry."

Description of Colorado River Basin in Nevada.

The drainage basin may be described as follows: Starting in the southern-most tip and extending along the California-Nevada line about 45 miles to the summit of the McCullough range; then north along the summit of that range, and then northwesterly, crossing U. S. Highway 91 and along the summit of the Spring Mountain range through the Nevada National Forest just beyond Lee Canyon; thence in a northeasterly course, crossing U. S. Highway 95 a few miles south of Indian Springs and following a series of mountain ranges in the northeasterly direction to about 8 miles westerly of Caliente; then the drainage line takes a more northern course passing about 9 miles west of Pioche to a couple of miles south of the first standard parallel south; then a general easterly course to the State Line, and then down the Utah State Line about 9 miles to where the drainage divide comes back into the State of Nevada in a southwesterly direction and then turns back and hits the State Line just opposite Caliente; then down the State Line to the Colorado River and along the Colorado River 145 miles to the point of commencement. The length of the drainage basin is approximately 240 miles in a north-south direction line and about 90 miles at its widest point. It has an area of about 12,000 square miles and represents 5 percent of the area of the entire Colorado River Drainage Basin. It also represents about 11 percent of the total area of the State of Nevada.[1]

Principal Cities.

The principal cities in Clark County are Las Vegas with a population in 1956 of 48,500; North Las Vegas with a population of 12,900; Henderson with a population of 14,000; and

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[1]Nev. Exs. 1 and 2, Tr. 16,204; Tr. 16,205–16,206; Appendix IV, p. 113.

Boulder City with a population of approximately 4,000. The principal towns in Lincoln County are Caliente and Pioche. The total population of the Colorado River Basin in Nevada was approximately 118,000 in 1957.[2]

Principal Railroads and Highways.

The main line of the Union Pacific Railroad serves most of the Colorado River Drainage Basin in Nevada. It extends from Los Angeles to Las Vegas, then northeasterly to Moapa, follows the Meadow Valley Wash to Caliente where it turns easterly and goes up the Clover Creek area into Utah. A few miles south of Las Vegas a branch line extends to Boulder City and Hoover Dam. A few miles further south another branch line runs from Arden to the Blue Diamond Gypsum Mine and plant. From Moapa a branch line runs down the Muddy River to Overton. At Caliente another branch line follows up the Meadow Valley Wash to Patterson Wash and over to Pioche and the Caselton Mines.

There is one transcontinental east-west highway—U. S. 91, which comes in from the direction of Los Angeles, passing through Las Vegas, Glendale and Mesquite, thence into Arizona, Utah and eastward. There are two north-south transcontinental highways—U. S. 95 and U. S. 93. U. S. 95 comes down from Oregon through Reno, Goldfield, Tonopah and comes through the Basin at about Indian Springs and to Las Vegas. It then joins with U. S. 93 at Railroad Pass, a point just westerly of Boulder City where it takes a southerly course through Eldorado Valley to Needles, California. U. S. 93 comes in from the eastern part, down from Idaho through Ely and comes in by Pioche, Caliente into Glendale, and then joins U. S. 91 to Las Vegas and 93 to

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[2]Nev. Exs. 1 and 2, Tr. 16,206–16,207.

Railroad Pass. It then continues on to Boulder City and across Hoover Dam to Kingman and Phoenix.[3]

Description of River Systems in the Colorado River Basin in Nevada.

Virgin River: The principal tributary to the Colorado River in Nevada is the Virgin River. The Virgin River heads in southwestern Utah, takes a southwesterly course, and cuts across the northwest corner of Arizona in Mohave County, enters Nevada at about the location of the town of Mesquite and thence to Lake Mead. In Utah below the town of St. George the river enters a narrow canyon passing through the Beaver Mountains. This canyon, called the "Narrows," extends 17 miles in length. During the low flow of the Virgin River, which occurs from about May through October, very little of the natural flow gets all the way through the canyon. The irrigated land in Arizona and Nevada depends mostly on some saline springs, containing about 2,500 per million of salts, that rise just above the town of Littlefield. The Virgin River drains approximately 6,000 square miles, of which 2,900 are in Utah, 1,100 in Nevada, and 2,000 in Arizona.[4]

Muddy River: The Muddy River commences about where the second standard parallel south intersects the western boundary and about 15 miles above the confluence of Kane Springs Wash. The channel extends about 35 miles in a southerly direction and then turns easterly, then through the Moapa Indian Reservation and to Glendale where the Meadow Valley Wash joins the Muddy River. It then continues southeasterly to Logandale and Overton to Lake Mead. The drainage area of the Muddy River,

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[3]Nev. Ex. 1, Tr. 16,204, 16,207.

[4]Nev. Exs. 1 and 2, Tr. 16,209–16,210.

excluding the Meadow Valley Wash, is about 1,650 square miles and prior to the construction of Lake Mead was tributary to Virgin River several miles below the town of Overton. At the present time it flows directly into Lake Mead rather than into the Virgin River. The flow of Muddy River originates in a series of thermal springs about 12 miles above Glendale. The springs are uniform month by month and year by year in flow with an average yearly flow of 34,000 acre feet. Two or three times each year minor storms above the Warm Springs contribute to the flow but such flows are of short duration and inconsequential. About once in every 10 years a large flood comes down, but for the most part the stream bed above Warm Springs is dry. The water from the Warm Springs contains about 700 parts per million of dissolved solids.[5]

Meadow Valley Wash: The Meadow Valley Wash stream system originates in Lincoln County near the first standard parallel north, runs south through Spring Valley and through a series of little valleys, through Condor Canyon to Panaca and along to Caliente. At Caliente it is joined by Clover Creek which drains the area toward the Utah boundary, and thence proceeds southerly some 70 miles to where it joins with the Muddy River at Glendale. The drainage area of the Meadow Valley Wash is 2,500 square miles. The flow of Meadow Valley Wash originates in Spring Valley through a series of springs which rise in an alpine meadow area. During the irrigation season this water is all used for irrigation in Spring Valley and in the three small valleys between Spring Valley and Panaca. Just above the town of Panaca in Panaca Valley there is a large spring flowing 8 second feet which furnishes most of the irrigation water for the Panaca area. Meadow Valley Wash is divided into Upper Meadow Valley Wash and Lower Meadow Valley Wash at

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[5]Nev. Exs. 1 and 2, Tr. 16,230, 16,232.

a point on the Lincoln County and Clark County line. Meadow Valley Wash from Caliente to Glendale is usually dry from the latter part of April through December except when a cloudburst occurs.

Meadow Valley Wash below Caliente, and for a distance of about 70 miles, is a typical dry desert stream and under both conditions, i.e., those existing prior to the advent of man in the area, no material contribution of water was or is made from this stream to the Colorado River System; the only time water ever flows from the Meadow Valley Wash into the Muddy River and Colorado River is on rare occasions of unique desert storms and only then for brief periods of time. While the Meadow Valley Wash is a tributary of the Muddy and the Colorado and contributes occasional flood waters thereto, the irrigation uses on that stream do not affect the contribution to the main stream.[6]

Existing and Future Irrigation Uses in Colorado River Basin in Nevada.

The total area of land being irrigated in Nevada from the Virgin River in 1956 was 2,800 acres. Broken down into areas, the Mesquite Irrigation Company furnishes water for 1,360 acres, the Bunkerville Irrigation Company furnishes water for 960 acres, and the area below Bunkerville in the vicinity of the Riverside Bridge, and below, an additional 480 acres were being irrigated. Irrigation in this area started in 1865 and has been continuous since about 1880.

There are approximately 5,000 acres of irrigable lands not now being irrigated which are susceptible of irrigation from the Virgin River. Of this amount 2,200 acres are alluvial slope lands consisting of about 300 acres in the Mesquite area, 310 acres

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[6]Nev. Exs. 1 and 2, Tr. 16,252–16,255; Tr. 16,274, 16,282–16,289.

in the Bunkerville area, and approximately 1,590 acres between Riverside and Lake Mead. In addition there are 2,800 acres of bottom lands along the Virgin River which can be reclaimed. Phreatophytic growth on the river bottom lands now consumes about 5 acre feet per acre. These lands, when reclaimed and placed into cultivation, would save or salvage as much as 80 percent of that present use. In other words, only about 20 percent more water would be needed for cultivated crops.[7]

The beneficial consumptive use requirement for the total of 7,800 irrigated and irrigable acres would be 36,496 acre feet.[8]

The total number of acres being irrigated from Muddy River in 1954 was 5,240 acres. Areas irrigated from the Muddy River are divided into the Upper Moapa Valley and the Lower Moapa Valley. Of this amount, 1,860 acres were located in the Upper Moapa Valley and 3,380 acres were located in the Lower Moapa Valley. Of the 1,860 acres irrigated in the Upper Moapa Valley, 355 were on the Moapa Indian Reservation. With the exception of 350 acres of land being irrigated in the Overton Wildlife Management Area, all lands irrigated in the Lower Moapa Valley are served by the Muddy River Valley Irrigation Company. Irrigation was first started on the Muddy River in 1865 by Mormon colonists from Utah. They settled at St. Thomas, a community that is now covered by Lake Mead. In 1870 the colonists were recalled and did not return until about 1881 and there has been irrigation continuously since that time.[9]

In the Moapa Valley, consisting of three units—Upper and Lower Moapa Valley and Lower Meadow Valley Wash—there are 7,180 acres of irrigable land not now being irrigated. Of this

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[7]Tr. 16,404–16,405, Nev. Ex. 201, Tr. 16,401; Nev. Ex. 209, Tr. 16,467.

[8]Nev. Exs. 208, 209, 210, Tr. 16,451–16,457.

[9]Nev. Ex. 34, Tr. 16,328; 16,237–16,241.

amount 1,830 acres of irrigable land in the Upper Moapa Valley are susceptible of irrigation from the Muddy River and by pumping from underground sources. The Lower Meadow Valley Wash has no irrigation at the present time. There are approximately 5,000 irrigable acres but, because of the elevation of the upper end, only 3,030 acres in the lower end are considered feasible for irrigation. Water for these lands would be furnished on an exchange basis. Water now used in the Lower Moapa Valley could be diverted by gravity to the irrigable lands in Lower Meadow Valley Wash and water would be pumped from Lake Mead to lands in Lower Moapa Valley now being irrigated from the Muddy River. There are 2,325 acres of irrigable land in the Lower Moapa Valley susceptible of irrigation. The source of water would be Muddy River and water saved by better utilization of the present supply, better management and better systems of irrigation. It would also be feasible to pump water for irrigation from Lake Mead.[10]

The total beneficial consumptive use requirement for the 12,425 irrigated and irrigable acres would be 52,273 acre feet.[11]

There are 5,050 acres now irrigated in Upper Meadow Valley Wash. As heretofore pointed out (*supra*, p. 68), however, the water used for irrigation is not Colorado River System water. In addition there are 1,840 acres of irrigable lands which may be feasibly irrigated from the existing water supply. There is a much larger area of irrigable land but no available water for irrigation other than the 1,840 acres. The total beneficial consumptive use requirement for the 6,890 acres of irrigable acres would be 21,480 acre feet.[12]

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[10]Tr. 16,423, 16,424, 16,426, Nev. Ex. 201, Tr. 16,401.

[11]Nev. Exs. 208, 209, 210, Tr. 16,451–16,447.

[12]Tr. 16,436, Nev. Ex. 201, Tr. 16,401; Nev. Exs. 208, 209, 210, Tr. 16,451, 16,457.

There are two units in the Fort Mohave-Big Bend area. The upper, or Big Bend unit, consists of 500 irrigable acres. The lower, or Fort Mohave unit, consists of 1,600 irrigable acres of public domain lands and approximately 2,150 irrigable acres in the Fort Mohave Indian Reservation section. Water will be available by pumping from the Colorado River. There is no irrigation at the present time. The lands are now covered by a phreatophytic growth consisting of willows, cottonwood, mesquite, and various types of native vegetation. Approximately 15,000 acre feet is now being consumed by this phreatophytic growth. These lands, when reclaimed, would save or salvage about 80 percent of the present nonbeneficial use. In other words, only about 20 percent more water would be needed for cultivated crops.[13]

The total beneficial consumptive use requirement for the 4,039 irrigable acres would be 16,217 acre feet.[14]

There were 2,150 acres being irrigated in Las Vegas Valley in 1954 from underground water sources with a diversion requirement of 15,179 acre feet. There is no return flow and there is no irrigation from surface sources. The ground water used for irrigation is not part of the Colorado River System. No portion of the Las Vegas ground water supply flows into or contributes to the water supply of the Colorado River System and none of the ground water used would have reached or contributed to the water supply of the Colorado River. It is not anticipated that there will be any increase in commercial irrigation in excess of the 2,150 acres now being irrigated in Las Vegas Valley.[15]

Future land and water usage in Las Vegas Valley, as well as Eldorado Valley, Apex Dry Valley, California Wash, Mormon

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[13]Nev. Ex. 201, Tr. 16,401; Tr. 16,444–16,445, Tr. 16,447.

[14]Nev. Ex. 207, Tr. 16,451; Nev. Exs. 209 and 210, Tr. 16,461–16,467; Nev. Ex. 101, Tr. 16,383.

[15]Nev. Exs. 208 and 210, Tr. 16,467; Tr. 16,326; Nev. Ex. 601, Tr. 16,682; Tr. 16,709–16,711.

Mesa, and certain portions of Moapa Valley, hereinafter described, will be for industrial use and for small home site tracts and not for commercial irrigation.[16]

The total number of irrigated and irrigable acres susceptible of irrigation by existing water supplies from the Colorado River Basin in Nevada is 33,304 acres with a diversion requirement of 257,539 acre feet. The return flow would be 115,894 acre feet and the beneficial consumptive use would be 141,645 acre feet.[17] There is deducted from the beneficial consumptive use of 21,480 acre feet for irrigated and irrigable lands in Meadow Valley Wash and 15,179 acre feet being beneficially consumptively used in Las Vegas Valley since the sources of this water for irrigation make no contribution to the Colorado River System. There is also deducted 11,200 acre feet "salvaged" by reclaiming 2,800 acres of Virgin River bottom lands. The net amount of water needed by the year 2000 for the irrigated and irrigable acres in Nevada in the Colorado River Basin for beneficial consumptive use from the Colorado River System would be 93,786 acre feet.

II.

PAST AND PRESENT GROWTH IN LAS VEGAS VALLEY—CLARK COUNTY

The Las Vegas Valley which lies entirely within the boundaries of Clark County, is a northwest-southeast trending valley bounded on the West by the Spring Mountains, on the Northeast by the south parts of Desert Range, Sheep Mountain Range, and Las Vegas Range. The east part of the valley is bounded by Frenchman Mountain and a lower range of unnamed hills extending to Las Vegas Wash. The eastern boundary of the

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[16]Nev. Ex. 211, Tr. 16,467.

[17]Nev. Ex. 210, Tr. 16,467; Tr. 16,284–16,288; Tr. 16,406.

valley floor is about 10 miles from the Colorado River. The south end of the valley is bounded by the River Mountains and the north extremities of the McCullough Range. The valley covers approximately 400 square miles.[1]

The large springs just westerly of Las Vegas are known as the Las Vegas Springs ("The Meadows" in Spanish), and were used as watering places by Indians long prior to the coming of white man. The springs were known to the Spaniards as early as 1770. The Mormons started settlement about 1855 but this was abandoned about 1857. After 1857, some use was made of the springs by others for agricultural purposes but the valley was sparsely settled until the early part of the 20th century. In 1905 the San Pedro-Los Angeles and Salt Lake Railroad, now the Union Pacific, was completed and Las Vegas was made a division point due to the excellent water supply from the springs. Shortly after that a subsidiary of the railroad company known as the Las Vegas Land & Water Company laid out the original townsite and built a water works system to attract workers and settlers to that area.[2]

The growth of the Las Vegas area during the past 25 years has been phenomenal. Las Vegas has grown from virtually nothing in 1905 to its present state of development. The townsite was laid out in 1905 after Las Vegas was selected as a division point for the San Pedro-Los Angeles and Salt Lake Railroad Company but it was not incorporated until 1911. The population census in 1910 showed a population of 800 in Las Vegas, and 3,331 for all of Clark County. The community grew slowly. The 1930 census showed 5,165 in Las Vegas and 8,632 in Clark County. The construction of Boulder Dam which commenced in 1930 accelerated its growth. In 1940 the population

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[1]Nev. Exs. 1 and 2, Tr. 16,204; 16,295–16,296.
[2]Tr. 16,296–16,299.

of Las Vegas was 8,422, Boulder City 2,600 and Clark County 16,414.[3]

The accelerated growth commenced with World War II and has continued ever since. The Basic Magnesium Project was commenced in 1941. Following the close of World War II, Basic Magnesium, Inc. was acquired by Basic Management, Inc. which has contributed materially to the growth, not only to the City of Henderson, but the Las Vegas area. Nellis Air Force Base was constructed during the War and has increased in size since that time. During the 1940's the "Strip" resort hotels were commenced and there is now a 4-mile row of resort hotels. The population of Las Vegas increased from 8,422 in 1940 to 53,000 in 1956, and in Clark County from 16,414 to 115,000 during the same period.[4] The 1960 census showed a population in Clark County of 127,016.[5]

The City of Las Vegas is the principal residential area and trading center in Southern Nevada. It is located about 290 miles northeast from Los Angeles, about 450 miles south of Salt Lake City, Utah, and 330 miles northwesterly of Phoenix, Arizona. Los Angeles is the nearest center of large population. The city was incorporated in 1911 and now covers an area of 24 square miles. North Las Vegas, which joins the City of Las Vegas on the north, was incorporated in 1946 and it covers an area of 6¼ square miles. It had a population in 1956 of 12,900. The City of Henderson is located 12 miles southeast of Las Vegas adjacent to the Basic Management, Inc. plants. It was incorporated in 1953 and has an area of 13 square miles. It had a population of 14,000 people in 1956. Boulder City is located about 24 miles southeast of Las Vegas and is at the northern end of Eldorado

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[3]Tr. 16,558–16,560.

[4]Nev. Ex. 401, Tr. 16,565; Tr. 16,560–16,561.

[5]General Population Characteristics, Final Report RC(1) 30B of the Department of Commerce.

Valley. It is the headquarters of Region 3 of the Bureau of Reclamation and the United States Department of Mines operates a research plant there. The population of Boulder City in 1956 was about 4,000.[6]

At least 30,000 people reside in the Las Vegas Valley outside of the incorporated towns. The centers of population outside of the incorporated towns are Paradise Valley, which is southwest of Las Vegas; the "Strip" area adjacent to U. S. 91 on the way to Los Angeles, and there are a large number of homesite tracts scattered around the valley in which several thousand people now live. The Nellis Air Force Base, which is the largest jet aircraft training center in the country, is located about 8 miles northeast of Las Vegas. Near this Base, the Navy has constructed the large Lake Mead Naval Ammunition Depot. Also, the proving ground of the Atomic Energy Commission, Frenchman's Flat, is located about 60 miles northwest of Las Vegas. The population of Clark County in 1956, was 115,000. The population in 1950 was 48,300. The percentage of growth has been 139 percent in six years.[7]

The phenomenal growth of the Las Vegas area is disclosed by the following growth statistics. The population of Clark County increased from 8,532 in 1930 to 16,414 in 1940, to 48,289 in 1950 and to 115,000 in 1956. Plane traffic has increased from 35,000 passengers in 1948 to 585,000 in 1957. Bank deposits have increased from $5,966,000 in 1941 to $105,380,000 in 1957; motor vehicles have increased from 8,000 in 1941 to 61,400 in 1958; property tax valuations have increased from $18,213,000 in 1941 to $224,200,000 in 1957; postal receipts have increased from $77,000 in 1940 to $1,069,000 in 1957; telephone service has increased from 1,808 in 1941

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[6]Tr. 16,299–16,302.

[7]Tr. 16,299–16,302.

to 34,500 in 1957; school enrollment has increased from 2,500 in 1941 to 17,000 in 1957.[8]

III.

EXISTING WATER SUPPLY AND WATER USES IN LAS VEGAS VALLEY—CLARK COUNTY

Until construction of the Las Vegas Water District pipeline in 1956, the sole source of water supply for Las Vegas Valley other than the City of Henderson and the Basic Management, Inc. plants was from ground water sources. Until 1945, ground water use in the area was such that ground water sources were adequate. Since that time the population has increased so rapidly that the ground water basin is being depleted and is now greatly overdrawn.

The total discharge in 1956 from the ground water basin was 52,400 acre feet. The average annual replacement is 27,000 acre feet so that there is a present annual overdraft of 25,400 acre feet which must be replaced from water from Lake Mead.[1]

Of this amount 47,000 acre feet were beneficially used. There were 5,400 acre feet lost by "upward leakage" which could not be beneficially used. Of the 47,000 acre feet beneficially used, 30,704 acre feet were for municipal and domestic purposes, 1,126 acre feet for industrial purposes and 15,179 acre feet for irrigation.[2]

In recent years ground water use in the Las Vegas area has been supplemented by water pumped from Lake Mead through the BMI (Basic Management, Inc.) pipeline. In 1956, 24,370 acre feet were pumped from Lake Mead, and of this amount

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[8]Nev. Ex. 401, Tr. 16,563.
[1]Nev. Ex. 33, Tr. 16,307, 16,322.
[2]Nev. Ex. 29, Tr. 16,314; 16,311.

1,770 acre feet were measured into the Las Vegas Water District pipeline to the Las Vegas area and used for municipal purpose. The sole source for industrial uses at the Basic Management, Inc. plants at Henderson is water from Lake Mead pumped through the BMI pipeline. In 1956 with the 21,700 acre feet pumped through the pipeline, 15,560 acre feet were actually used by the BMI industries. There were 4,370 acre feet used by the City of Henderson in 1956. Also, 2,670 acre feet were used by Boulder City through its own pipeline from Lake Mead.[3]

The total amount of water beneficially used in 1956 in the Las Vegas Valley, including Boulder City, from water pumped from Lake Mead and from the ground water basin for domestic and municipal purposes and for industrial uses was, exclusive of irrigation uses, 56,200 acre feet. Of this amount, 24,370 acre feet were pumped from Lake Mead—8,810 for domestic and municipal use and 15,560 for industrial use. The balance, 31,830 acre feet, was from ground water sources—30,700 acre feet for domestic and municipal uses and 1,130 acre feet for industrial use.[4]

IV.

APPROPRIATIONS FOR EXISTING AND FUTURE USE OF WATER IN CLARK COUNTY FROM LAKE MEAD

Prior to 1958, seven appropriations have been made for water from Lake Mead for use in Las Vegas Valley and two appropriations have been made for water from the Colorado River below Lake Mead. These appropriations were initiated by applications to appropriate to the State Engineer of Nevada. Permits

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[3]Tr. 16,329; Nev. Ex. 504, Tr. 16,652, 16,849; Nev. Ex. 808, Tr. 16,834.

[4]Nev. Ex. 808, Tr. 16,834.

to appropriate have been granted, and in four cases, certificates of appropriation have been issued. The amounts of water total 163.5 c. f. s. or 118,365 acre feet. The names of the appropriators and the amounts appropriated are:

Name of Appropriator	Permit No.	Cert. of Approp.	Amount of Appropriation — Second feet	Amount of Appropriation — Acre ft. per year
Basic Management, Inc.	10779	3118	37.264	26,973
Western Electro-chemical Co.	10779	3118	7.736	5,598
Basic Management, Inc.	10779	3119	12.000	8,685
Reconstruction Finance Corp.	10861	4101	5.000	3,619
Las Vegas Valley Water Dist.	13424	.....	59.000	43,000
Maganese, Inc.	15571	.....	2.000	1,448
E. L. Cleveland	16489	.....	3.000	1,384
City of Henderson	16577	.....	34.500	24,971
River Valley Resort, Inc.	16822	.....	3.000	687
Totals			163.500	116,365

These appropriations are in good standing.[1]

In 1958, to-wit, on February 21, 1958, the Stauffer Chemical Company, National Lead Company and American Potash and Chemical Company, filed applications to appropriate 66,843 acre feet of water from Lake Mead for future industrial uses at Henderson. The names of the appropriators and the amounts appropriated are:

Applicant	Application No.	C.F.S.	Acre feet
Stauffer Chemical Co.	17494	13.270	9,589
National Lead Company	17495	65.760	47,523
American Potash & Chemical Co.	17496	13.464	9,731
Totals		92.494	66,843

[1]Tr. 16,330–16,334; Nev. Exs. 35 to 43, incl.; Tr. 16,331; Nev. Ex. 57, Tr. 16,354.

These applications for appropriation are in good standing.[2]

On March 5, 1958, the Colorado River Commission of Nevada, acting for the State of Nevada, filed on behalf of the people of the State of Nevada in trust seven applications to appropriate a total of 475,100 acre feet of water from Lake Mead for industrial, domestic and municipal, and irrigation uses for future use in Las Vegas Valley, Eldorado Valley, California Wash, Apex Dry Lake, Mormon Mesa, Moapa Valley and Fort Mohave. The application numbers and the amount applied for under each application are:

Application No.	Amount applied for (acre feet)
17500	225,000
17501	75,000
17502	100,000
17503	25,000
17504	25,000
17505	3,100
17506	22,000
Total	475,100

These applications for appropriation are in good standing.[3]

V.

PRESENT AND FUTURE INDUSTRIAL GROWTH IN CLARK COUNTY AND WATER REQUIREMENTS

There are a number of factors which have contributed to the phenomenal growth of the Las Vegas area. Its growth initially started with the construction of the San Pedro-Los Angles and Salt Lake Railroad which is the main line of the Union Pacific

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[2]Tr. 16,334–16,336; Nev. Exs. 44, 45, 46, and 47; Tr. 16,336; Nev. Ex. 57, Tr. 16,354.

[3]Nev. Ex. 49 to 56, incl. for iden., Tr. 16,352.

between Los Angeles and the East. Important factors were the construction of Hoover Dam with resulting cheap power and ample water. Electric power made possible the development of the major industries at Henderson and additional ample power is available through the thermal generating stations. Natural gas is also available. The third factor was the government installations including Nellis Air Force Base, the Lake Mead Base, Atomic Energy installations, and the Basic Magnesium Project which was subsequently superseded by the Basic Management, Inc. industries at Henderson. Other factors are the tourist travel and recreational facilities. Las Vegas has become one of the great live-entertainment centers in the country and thousands of visitors are attracted there annually. Finally since World War II there has been a trend toward desert living. Air conditioning has made desert living attractive and comfortable and there are a number of large cities which have grown rapidly with adverse summer climates including Tucson, Phoenix, and Palm Springs, California.[1]

Industrial Growth Since World War II.

It is a matter of common knowledge that the industrial growth in the Las Vegas area since the beginning of World War II has been phenomenal.

While there has been some mining in the area, the major industrial growth commenced at the beginning of World War II. Basic Refractories, Inc. negotiated with the Defense Plant Corporation for the production of magnesium to be used principally in fire bombs. Basic Refractories, Inc. controlled large magnesite deposits in central Nevada. The Basic Magnesium plant was commenced in September, 1941, and the first magnesium was produced in September of 1942. In the fall of 1942

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[1]Tr. 16,562–16,563.

Anaconda Copper Company replaced Basic Refractories as the managing and operating agents for the Basic Magnesium plant. The peak of production was in the summer of 1943. In the spring of 1944 cut-backs were ordered and on November 15, 1944, production of magnesium was concluded. During this period, 165,000,000 pounds were produced at Henderson making it the largest magnesium-producing plant during World War II.

The approximate cost of the plant was $135,000,000. The following year the War Production Board felt that the facilities should be kept in operation and the Stauffer Chemical Company leased part of the plant and continued the production of chlorine and caustic soda. Also the Navy Department entered into an agreement with Western Electrochemical Company to convert one of the 10 electrolytic metal buildings for the production of chlorates and perchlorates. In 1947 the plant was declared surplus. In April, 1948, the State of Nevada purchased the plant from the Federal Government and took possession. From April, 1948, until 1951 the Colorado River Commission of Nevada leased the remainder of the plant. The National Lead Company leased a large part of the buildings to join with the Allegheny Ludman Steel Corporation to form Titanium Metal Corporations of America. Also Combined Metals Production Company secured facilities and constructed two large electro furnaces for the production of ferro manganese and the U. S. Lime Products Corporation converted existing kilns to calcine lime and installed a hydrating plant. In 1952 the five companies negotiated with the State of Nevada for the purchase of facilities and formed Basic Management, Incorporated, to take over the residual assets and to own and operate the facilities. The townsite was sold to the residents in 1951 and 1952 and incorporated into a second-class city on June 8, 1953.[2]

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[2]Tr. 16,632–16,636.

These industries were all in production in 1958. The Stauffer Chemical Company is producing chlorine and caustic soda. The Western Electrochemical Company which has been purchased by American Potash & Chemical Company produces perchlorates and electromatic manganese principally. It is the only major producer of ammonium perchlorates in the United States today. In view of the missile program it has a great potential future. The Titanium Metals Corporation owns approximately one-third of the plant area and their product is being used in the missile program and related fields. The price of titanium has gone from $250 pound when the plant first started producing titanium to $2.25 per pound, all in about 7 or 8 years. The United States Lime Production Corporation produce their own products locally and calcine lime for steel and agricultural industries in Southern California and also hydrate lime for the construction industry, a large portion of which goes to the Southern California market. Over the years they have averaged about 290 cars per month leaving the Henderson plant.

All of these industries are expanding users of Colorado River water.[3]

Another major industry in the Henderson area is the Manganese, Inc. mines located 7 miles northeast from Henderson from which up-graded manganese is shipped for the steel industries and for the strategic stockpile for the Government. Another major operation is Pabco, Incorporated, which has some gypsum deposits which are mined and the raw gypsum is ground and screened and shipped to California where it is made into wall board for the construction industry. The average annual employment for the Basic Management, Inc. industries has been 2,500 people during the past 5 years and the average payroll in

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[3]Tr. 16,642.

excess of $12,000,000. The combined value of products produced exceeds $100,000,000 a year.[4]

Water from Lake Mead is supplied to these industries, and to Henderson, by a 40-inch pipeline 15 miles long with a present capacity of 67.7 second feet or 43.7 million gallons per day. This would be equivalent to about 50,000 acre feet per year. Not all of this water is available for use for industry and municipal use in the Henderson area. Under contractual arrangement between the Las Vegas Water District and Basic Management, Inc., the District has capacity rights up to the year 1990 for 15,400 acre feet annually. Basic Management, Inc. is also obligated to deliver up to 5,000,000 gallons per day to the City of Henderson but in the summer months has furnished as much as 8,000,000 gallons per day. In 1956 and 1957 water meters were installed in Henderson. The average per capita use in 1956 was 325 gallons per day. The City of Henderson used 4,370 acre feet in 1956. Manganese, Inc. also has a tap on the 40-inch pipeline at the Manganese plant and during 1956 was delivered 2,317 acre feet.[5]

The amount pumped from Lake Mead through BMI facilities has fluctuated extremely from 1942 to 1956. In 1943, 16,977 acre feet were pumped during the time the Manganese plant was in full operation. This dropped off sharply in 1945 after the curtailment of the production of magnesium during the period before new industries came into the area and reached a low of 4,512 acre feet in 1949. As the new industries came into operation it has now steadily expanded. In 1956, 21,700 acre feet were pumped. Of this amount 15,600 acre feet were actually used by the BMI industries.[6]

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[4]Tr. 16,637–16,646.
[5]Tr. 16,646–16,649.
[6]Nev. Ex. 502, Tr. 16,648.

Future Industrial Growth.

The Las Vegas area will experience a tremendous industrial growth within the next 40 years. There are a number of factors which lead to this conclusion. The availability of power and water which attracted the existing industries will continue to attract other industries. More specifically, Southern Nevada enjoys the same climate and natural attractions which have led to large industrial growth in cities such as Phoenix and Tucson. In addition to the natural attractions of the desert as an ideal living area, there is sunshine 83 percent of the time and this is an important factor. This has a direct effect on construction costs, lost time due to inclement weather, and production of products which are sensitive to humidity. It is also ideal for outside storage which is a big economic factor.

Another factor is the availability of land. Large areas of land situated in remote areas yet having all the requirements for basic industries is an important factor. There are few areas available which offer all of the prerequisites for industry at a nominal cost and without being in a congested area as does this area. The already crowded condition in Southern California, coupled with the smog and water pollution problem, indicates an inevitable dispersal out of that area.

The accessible ores and minerals also will have an important effect on the industrial growth of Southern Nevada. As the population of Southern California and the Southwest continues to grow the 290 miles to Los Angeles becomes less important. There is now being shipped from Southern Nevada such relatively low cost items as ore, silica sand, stone and rock to the Los Angeles area. As manufacturing concerns produce products of relatively higher value to their weight, distance becomes less important. Adequate transportation facilities are already available in the area and can be readily expanded to meet future needs. Rail

service is provided by the main line of the Union Pacific Railroad Company. There are at least 15 trucking concerns operating in the area including several intercontinental lines.

Las Vegas is the focal point of air transportation in the Southwest. Three major air lines and two feeder lines serve Southern Nevada and make it easily accessible to the financing and manufacturing centers of the United States.

Adequate utilities are available. The area is served by progressive public utilities which insure adequate supplies of natural gas and electric energy at moderate rates. Both the electric and gas utilities have recently completed large expansion programs and have projected programs which will provide adequate service to take care of future growth.

Southern Nevada is attractive to labor supply. The general attractiveness of the area, and particularly Nevada's climate, has proved a strong attraction for bringing workers into the area. This is borne out by the fact that 80 percent of Nevada's increase in the past few years has resulted from immigration rather than from natural increase.

The tax and corporate laws of Nevada are attractive to industry. There is no state income tax and the property tax is considered the basic source of revenue for government functions. Nevada is the only state that has no inheritance or estate tax. Nevada has also recently enacted a free-port law which makes it an ideal location for the warehousing, the assembling and the serving of the West Coast market.

With respect to the type of industries which may be reasonably expected to locate in Southern Nevada, the most promising are made up of those concerns planning to serve the Southern California market. The most logical are those which may not want to locate in Southern California because of limitations on the availability of land, congestion, and air pollution. In Southern

Nevada industries with smog-producing operations can be so located as to take advantage of prevailing winds and keep living areas free of the nuisance. Also defense industries who must take into consideration dispersal because of possible air attack will find Southern Nevada an ideal location. The Department of Defense has designated Southern Nevada as an acceptable area for the dispersal of defense industries. Specifically, the most promising industries would be the chemical industries. There are now a large number of chemical products being produced and these chemicals and the mineral resources deposits provide the basis of a substantial expanding chemical industry.[7]

There are also good prospects of industrial development of the mineral resources of the area. There is a potential both in ferrous and nonferrous metals in the area. The suitability of Southern Nevada for steel mills seems particularly well adapted. The principal ores used in the manufacture of steel are available in the immediate area within economical shipping distance. There are large quantities of limestone that are used in the steel industry and substantially large coal reserves in Southern Utah. There are also locally basic materials for cement and cement products, gypsum products and glass products.[8]

Future Water Requirements for Industrial Purposes.

A conservative estimate of future water requirements for the present industries at Henderson by the year 2000 would be 90,000 acre feet. The major increases will be by American Potash & Chemical Company from a present requirement of 1,535 acre feet to 15,350 acre feet; Stauffer Chemical Company with a present requirement of 3,690 acre feet to 15,800 acre

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[7]Tr. 16,653–16,662, 16,571–16,572, 16,898–16,912, 17,072–17,087.

[8]Tr. 16,714–16,736.

feet; and Titanium Metals Corporation with present requirement of 7,700 acre feet to 56,000 acre feet. These are realistic estimates. Each of the companies have made estimates based upon their present expanding programs.[9]

It is conservatively estimated that new industries will use 47,500 acre feet by the year 2000. This will be in addition to the 90,000 acre feet needed for existing industries, making a total of 137,500 acre feet needed for industrial use by the year 2000.[10]

In addition, at least 37,000 acre feet of water from Lake Mead will be needed for thermal power cooling purposes by the year 2000. The use of power in Clark and Lincoln Counties has increased tremendously during the past 20 years. In 1937, 26,000,000 kilowatt hours were used. In 1957 there were 1,419,000,000 kilowatt hours used, broken down into the following categories:

Residential: 318,600,000 kilowatt hours.
Commercial: 287,900,000 kilowatt hours.
Industrial: 735,200,000 kilowatt hours.
Miscellaneous: 77,400,000 kilowatt hours.

The increase has been steady except for the accelerated use during 1943–1944 when the Basic Magnesium Project was in full operation.[11]

It is estimated the power requirements for Clark and Lincoln Counties for the year 2000 will be 13,000,000,000 kilowatt hours. This was arrived at in two ways. The first one, a factor in percentage increase annually, starting in 1957, was applied to each category of use, to-wit: 6 percent annual increase to residential, 6 percent annual increase to commercial, 8 percent annual

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[9]Nev. Ex. 504, Tr. 16,652, Tr. 16,651–16,652, 17,082–17,083.
[10]Tr. 17,082–17,083.
[11]Nev. Ex. 301, Tr. 16,513 and Nev. Ex. 304, Tr. 16,520.

increase to heavy industry, 8 percent to light industry, and 4 percent to miscellaneous classifications. In the second method, growth factors by classifications, using the same classifications that were used in the first were applied to the 1,415,000,000 kilowatt hours used in 1957. With respect to residential, assuming a six-fold increase in population by the year 2000, the factor of 12 is applied to the 319,000,000 kilowatt hours used in 1957, making a total use of 3,744,000,000 kilowatt hours. The growth factor of 12 was used for commercial use, 3.6 for heavy industry, 27 for light industry, and 3 for miscellaneous, making a total use by the year 2000 of 12,932,000,000 kilowatt hours.[12]

Power for future requirements for Clark and Lincoln Counties must come from thermal sources. There is no evidence that any further hydro sources will be available to the State of Nevada from the Colorado River. Approximately 12,000,000,000 kilowatt hours of the 13,000,000,000 kilowatt hours which will be required by the year 2000 must come from thermal sources.[13]

Approximately 37,000 acre feet of water from Lake Mead will be required for cooling purposes based upon an anticipated thermal development of 12,000,000,000 kilowatt hours by the year 2000. This is based upon the present rate of 1 gallon per kilowatt hour generated which is now being used by the Southern Nevada Power Company in their existing plants.[14] This 37,000 acre feet, together with the 137,500 which will be needed for existing and new industries, makes a total of 175,000 acre feet which will be needed for industrial uses. The estimated return flow will be 78,500 acre feet so that the net consumptive use for industrial uses by the year 2000 will be 97,000 acre feet.

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[12]Nev. Ex. 307, Tr. 16,536, Tr. 16,529–16,538.
[13]Tr. 16,525–16,526, 16,536–16,537.
[14]Tr. 17,083–17,084, 16,537–16,538.

VI.

AVAILABILITY OF LAND IN CLARK COUNTY, NEVADA, FOR INDUSTRIAL AND SMALL HOMESITE TRACT DEVELOPMENTS, AND WATER REQUIREMENTS

There are many large areas in the general vicinity of Las Vegas which are ideally situated and suited for industrial sites and small homesite tracts. The principal areas are Las Vegas Valley, Apex Dry Lake Valley, California Wash, Mormon Mesa, certain areas in Moapa Valley, and Eldorado Valley.

Soil surveys and land classifications based upon those surveys have been made in these areas. The land was classified into Capability Classes I, II, III, IV, VII and VIII. The first four are generally considered to indicate lands suitable for farming. Classes I, II and III, when properly managed, are capable of producing all climatically or adapted crops indefinitely in continuous rotation. Class IV is poorer land usually utilized in the production of hay or pasture when the land can be irrigated easily and water is plentiful. It ordinarily is not recommended for commercial irrigation. Capability VII is a range land classification and would be suitable for industrial sites or small homesite tracts. Class VIII is rougher, has little usable forage, and has substantially no range value, but to a more limited extent, would be suitable for industrial sites or small home sites.[1]

Referring first to Las Vegas Valley, for the purpose of the soil survey, it is the area surrounding the City of Las Vegas comprising 213,000 acres below the 2,500-foot contour and being appurtenant to the cities of Las Vegas, Henderson, Nellis Air Base, McCarran Air Field and the BMI plants.

The soil survey showed that there were 149,000 acres below

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[1]Tr. 16,408–16,410, 16,437; Nev. Exs. 202, 203 and 204, Tr. 16,420, 16,440 and 16,443.

the 2,300-foot contour which is considered a reasonable pumping lift, being approximately 1,200 feet above Lake Mead. There are 27,000 acres in Capabilities I, II and III and 30,000 acres in Capability IV. The balance, 90,900 acres, are all in Class VIII. Between the 2,300- and 2,500-foot contour the land is similar to the land below the 2,300-foot, the only difference being the pumping lift. A considerable amount of land is being used for small homesites in this area and some of that is Class VIII land.[2]

With respect to the existing expanding small homesite tracts development, there are approximately 30,000 people now living in Las Vegas Valley outside of incorporated towns. Approximately 130,000 acres were in private ownership in 1956 and 86,000 acres of public land have been classified as open for small homesite tracts. The total acreage classified and proposed to be classified to be open for small tract filings is 93,500 acres; there were some 4,650 patents issued up to January 1, 1958, covering 14,000 acres; there is a total estimated number of leases outstanding of 18,000 and an estimated acreage under these leases of 54,000; and there are 8,217 pending leases and sales applications. Approximately 2,000 wells have been drilled on these small tracts alone.[3]

Apex Dry Lake lies several miles northwest of Las Vegas. It is a valley with interior drainage. In general, the soils are rather shallow, and somewhat sandy. In the center of the valley, surrounding a little dry lake, there is some very good soil, that has been classified as I and III which would be very good farm lands. There are 2,900 acres in Class I and 5,000 acres in Class III.

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[2]Tr. 16,437–16,440; Nev. Ex. 203, Tr. 16,440.

[3]Tr. 16,300, Tr. 16,305–16,306, Nev. Exs. 27 and 28, Tr. 16,304, 16,306.

The balance, approximately 17,000 acres, is in Class VII and all below the 2,300-foot contour. This land is too shallow for commercial agriculture but it slopes well and would be desirable for homesite tracts.[4]

California Wash is a broad gentle sloping valley about 25 miles long just to the south and east of Apex Dry Lake. An intermittent stream drains to Muddy River, about two miles west of Glendale. There are 1,500 acres of Class I land, 6,500 acres of Class III, 2,000 acres of Class IV and 55,000 acres of Class VII, all below the 2,300-foot contour. All of the Class VII would be suitable for homesite tracts or industrial purposes.[5]

Mormon Mesa lies east of Glendale and west of Mesquite and about 65 miles from Las Vegas. It lies on both sides of U. S. Highway 91. It is table land, flat and generally sloping. It starts at an elevation of 1,800 feet at the rim on the south end and rises to 2,300 feet north of the highway. Some 4,000 acres have been classified as Class II land suitable for farming. The balance, comprising 82,000 acres, falls in Class VII. The soil is shallow but would be suitable for small homesite tracts or industrial sites.[6]

In Moapa Valley, in addition to the 7,185 acres classified as irrigable, some 20,000 acres have been classified as suitable for small homesite tracts and industrial uses.[7]

The most important area from the standpoint of immediate development is Eldorado Valley. Specific plans have been made

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[4]Tr. 16,427–16,429; Nev. Ex. 202, Tr. 16,420; Nev. Ex. 211, Tr. 16,467.

[5]Tr. 16,430–16,431; Nev. Ex. 202, Tr. 16,420; Nev. Ex. 211, Tr. 16,467.

[6]Tr. 16,432; Nev. Ex. 202, Tr. 16,420; Nev. Ex. 211, Tr. 16,467.

[7]Tr. 16,424–16,427; Nev. Ex. 202, Tr. 16,420; Nev. Ex. 211, Tr. 16,467.

for the development of this area. Eldorado Valley, comprising some 125,000 acres, lies immediately southwest of Boulder City. In fact, Boulder City is in the upper north end of the Valley. Other than Boulder City there is no development in the area at the present time. A number of gold and silver mines in the adjacent Eldorado Canyon district have produced many millions of dollars.

The area is ideally suited for small homesite tracts and industrial site development. Soil surveys disclose that some 19,000 acres in classifications I to IV are suitable for farming, and some 47,000 acres in Class VIII suitable for small homesite tracts and industrial sites. There are many characteristics which make the valley attractive for this type of development. One is the proximity of Lake Mead, a few miles north of the valley, from where water may be obtained at a comparatively low pump lift. Utilities are readily available, including two gas lines and power lines which traverse the valley; weather conditions are ideal for small homesite tracts and for industry; recreation facilities are available at Lake Mead and Lake Mohave. Transportation is also readily available. A railroad traverses the northern end of the valley and there is a major highway traversing the north end of the valley to Boulder City, Southern California and Arizona.[8]

Recognizing the attractiveness of this area for development, the State of Nevada, through its Colorado River Commission, has taken definite steps for its development. On March 9, 1956, Governor Russell made an application to the Bureau of Land Management, pursuant to 43 C. F. R., Section 295.9, for the withdrawal and segregation of approximately 150,000 acres in Eldorado Valley. In his letter of application, the Governor pointed out this area was ideally suited for industrial and homesite tract development, stating:

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[8]Tr. 16,356–16,357.

"One of the factors involved here is that if the State could obtain the land in the area, and with such land not being encumbered with land entries, the State could then plan an actual industrial development together with homesite and small tract areas."[9]

Following the granting of this application, the Congress of the United States, on March 6, 1958, passed an act (Public Law 85–339) directing the Secretary of the Interior to convey to the Colorado River Commission of Nevada the withdrawn lands in Eldorado Valley upon payment of their appraised value to the Federal Government. The Bureau of Land Management is now proceeding with the making of the appraisal.[10]

Also the Legislature of Nevada in 1957 passed the "Eldorado Valley Development Law" (NRS 321.390 to 321.470) which authorized the Colorado River Commission of Nevada, on behalf of the State of Nevada, to purchase or otherwise acquire from the Federal Government these lands, and authorized the appointment of an advisory group to the Commission to advise and assist the Commission in all phases of planning and development of Eldorado Valley. The Commission is also authorized, with the advice of the advisory group, to undertake such engineering and planning studies and surveys and to take such other action as may be necessary for the development of Eldorado Valley.[11]

The Colorado River Commission in Nevada has had an engineering study made of the proposed development of Eldorado Valley and the feasible location of pipelines and booster pumping stations for the transportation of water from Lake Mead to Eldorado Valley.[12]

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[9]Nev. Exs. 59 and 60, Tr. 16,363; Tr. 16,358–16,363.
[10]Nev. Ex. 61, Tr. 16,363; Tr. 16,360–16,363.
[11]Nev. Ex. 62, Tr. 16,363.
[12]Nev. Ex. 407, Tr. 16,587.

The water system to serve this valley would consist of an intake pumping station located on the south shore of Lake Mead. It would lift water into a reservoir and a booster pumping station would pick up the water at that point and lift it to another booster station. From that point it would be delivered over a pass at an elevation of approximately 2,400 feet to a terminal reservoir located south of Boulder City. From there the water would flow by gravity to the valley area. The water system which has been studied would have a capacity of 25,000,000 gallons per day or 28,000 acre feet per year but it is not contemplated that the initial installation would serve the entire valley at its maximum development. The cost of the initial project is estimated to be $5,100,000. The cost of pumping the water is estimated to be $11.85 per acre foot for power and cost of water, and $16.15 per operation and amortization costs. This would amount to 8.4 cents for 1,000 gallons. This is a reasonable and feasible cost for water for domestic and industrial uses. In the center of Eldorado Valley there is a dry lake. The dry lake area would be reserved as a disposal area by leaching or evaporation of the waste water.

The valley has also been zoned for industrial and small homesite developments.[13]

Cost of delivering water to the Apex Dry Lake Valley area and California Wash and to the North Las Vegas area was also the subject of the study. An estimate was made of the cost of a pipeline which would deliver 25,000,000 gallons per day (or 28,000 acre feet per year) from Lake Mead to a junction point near Highway No. 91, just north of Lake Mead Base. The pipeline would deliver 15,000,000 gallons per day at that point into Apex Dry Lake Valley and 10,000,000 gallons per day along Highway No. 91, past Nellis Air Force Base, to North Las

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[13]Tr. 16,582–16,587; Nev. Ex. 407, Tr. 16,587.

Vegas where it would connect with the Las Vegas Water District System. The elevation of the junction would be 2,175 feet and the summit over which the water would have to be delivered into Apex Dry Lake Valley would be 2,500 feet. It would flow by gravity from the junction to North Las Vegas. The cost of pumping water to the junction would be approximately $9.77 per acre foot for power and cost of water, and approximately $22.53 for operation and amortization of the project for a total cost of $32.30 per acre foot. The cost of pumping from the reservoir at the junction to the Apex Dry Lake Valley would be $4.88 for power and cost of water, and approximately $8.20 per acre foot for operation and amortization for a total of $13.08 per acre foot. The total cost, therefore, would be $45.38 per acre foot which is equivalent to 13.6 cents per thousand gallons. This is a reasonable and feasible cost for industrial and municipal use. After reaching Apex Dry Lake Valley, the water would flow by gravity to the California Wash area.[14]

The consumptive use requirement for small homesite tracts would be 5 acre feet per acre. Diversion requirement would be the same. There would be no return flow. In summary, 98,900 acres have been classified in Classes I to IV with a net usable acreage of 79,100 acres. A total of 324,000 acres have been classified as Classes VII and VIII with a net usable amount of 129,720 acres or a total of 208,820 acres of usable land. The consumptive use requirement for this acreage would be approximately 1,000,000 acre feet. This is exclusive of the land classified as irrigable for commercial farming in the Colorado River Basin in Nevada.[15]

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[14]Tr. 16,588–16,592.

[15]Tr. 16,458–16,459; 16,461–16,463; 16,466; Nev. Ex. 211, Tr. 16,467.

VII.

POPULATION FORECAST FOR CLARK COUNTY BY THE YEAR 2000 AND FUTURE MUNICIPAL AND DOMESTIC WATER REQUIREMENTS

The Colorado River Commission of Nevada retained the internationally famous engineering firm of Tippetts-Abbett-McCarthy-Stratton of New York City to make a study with respect to the future economic growth of Clark County with resulting water requirements, including a population forecast to the year 2000. This firm was eminently qualified to make this study.[1]

Population Forecast to the Year 2000.

The year 2000 is a reasonable date upon which to base a population forecast. The population forecast can be made with reasonable accuracy for a period of at least 40 years.[2] A sound and reasonable forecast for the population of Clark County by the year 2000 is 600,000.[3]

This is a conservative estimate. During the past 97 years while the population of the Continental United States grew about 5½ times, the population of the eight Mountain States increased 36 times and Nevada has increased almost 39 times. Its population has grown 66.6 percent since 1950. Its population in 1950 was 160,000 and its population in 1957 was 267,000. Nevada's rate of growth is steeper than the United States, the Mountain States or the Western States. During the past 7 years it has grown faster than any state in the Union. Its population by the year 2000 is estimated to be 1,300,000. Since 1920 Clark County

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[1]Tr. 16,744–16,748.
[2]Tr. 16,760.
[3]Nev. Ex. 801, Tr. 16,790; Tr. 16,765–16,790; Tr. 17,074.

has shown a steeper rate of increase than Nevada, Arizona, New Mexico or California. It has increased almost 35 times since 1910.[4]

As compared to rapid growing counties with like or similar climate, Clark County has shown a greater rate of increase than Los Angeles, Maricopa (Phoenix), Pima (Tucson), Bernalillo (Albuquerque). The average rate of growth conservatively forecast for Clark County by the year 2000 is slower than the long-term growth experienced by the above-named counties. The forecast for the year 2000 represents a maximum of 5.2 times the 1957 population. This is a slower rate of growth than is shown by the other counties between these same population figures of 115,000 and 600,000. While Clark County is expected to grow from one to the other level of that population in the period of 42 years, Los Angeles accomplished it in about 20 years and Maricopa County is expected to accomplish it in about 35 years. Expressing this comparison in still another way, the projection of Clark County population from 1957 to the year 2000 is at an average annual rate of increase of nearly 3.9 percent, while Los Angeles County covered the same range of population growth at an average rate of more than 8.5 percent per year, and Maricopa is expected to achieve it at an average rate of almost 5 percent.[5]

The average annual rate for the Clark County forecast for the 43-year period from 1957 to 2000 is 3.9 percent or approximately half the average annual rate for the 47-year period from 1910 to 1957. In comparable counties in the Southwest the average annual rate of growth in recent years has been from 4.2 percent to 6 percent.

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[4]Nev. Ex. 801, Tr. 16,790; Tr. 16,779–16,780.
[5]Nev. Ex. 801, Tr. 16,790; Tr. 16,785.

Projection to the year 2000 assumes a continuation of present-day trends; continued technological advances in science and industry, steadily rising production and gradually increased leisure time and expendable income. Moreover, the projection for Clark County was based upon the assumption that its growth would not be hampered for lack of water. In the year 2000 the growth would be rising at a rate of 1.7 percent as compared with the present rate of 10 percent.[6]

It is estimated that the proportion of the 600,000 population forecast for the year 2000 that will be employed in manufacturing industries is 83 persons per 1,000 which would result in a figure of 50,000 employed in manufacturing by the year 2000. This compares with a national average of 100 up to 150 in highly industrialized areas and down to 50 to 60 in lightly industrialized areas. Of this 50,000 which is estimated will be engaged in employment in manufacturing, it is estimated that 7,000 will be employed in the existing Basic Management, Inc. industries; chemical industries 10,000; cement products 1,000; gypsum products 2,500; glass products 1,000; electrical machinery 3,000; fabricated metal products 4,000; instruments and related products 2,000; apparel 2,400; and accessory and miscellaneous industries, 24,000.[7]

Water Requirements for Municipal and Domestic Uses.

Municipal and domestic uses include all uses other than industrial, water for power cooling and water for commercial irrigation. The per capita use per day, for uses other than industrial uses, including power cooling and commercial irrigation, would be 525

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[6]Tr. 16,785.

[7]Tr. 17,077–17,081.

gallons per capita per day, based on a population of 600,000 people by the year 2000 and which would require 353,000 acre feet per year. The present per capita use per day of water for municipal and domestic purposes, or for uses for everything other than industrial and water for power cooling is 370 gallons per capita per day. At the rate of increase of ¼ percent to the year 2000, this would amount to 450 gallons per capita per day. The current average increase of the Southwest at the present time is 1 percent per year. Included in this domestic and municipal use is use on 10,000 acres on small homesite land for suburban areas which will be in tracts from ½ to 1 acre in size. With the 5 acre foot duty per acre on the 10,000 acres, it would mean 50,000 acre feet per year, or 75 gallons per capita per day. This, added to the 450 gallons per day equals the 525 gallons. Some 2½ to 5 percent of the population represented by 200,000 families would live on such small homesite tracts. The estimated return flow from the use of water would be 38,000 acre feet. Therefore, the estimated net use for all domestic and municipal uses, other than industrial and water for power cooling purposes, would be 315,000 acre feet per year for a population of 600,000 by the year 2000.[8]

VIII.

SUMMARY OF PRESENT AND FUTURE WATER REQUIREMENTS FOR THE COLORADO RIVER BASIN IN NEVADA

The existing present diversions of water from all sources within the Colorado River Basin of Nevada is 167,060 acre feet. This is made up of 39,510 acre feet for domestic and municipal

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[8]Tr. 17,082–17,087; Tr. 17,123–17,130.

purposes, which includes 8,810 acre feet from Lake Mead, and the balance of 30,700 from underground water in the Las Vegas Basin. There are diversions for industrial uses at the present time of 16,690 acre feet, which includes 15,560 acre feet diverted from Lake Mead, the balance from ground water. There are 110,868 acre feet presently being diverted for irrigation purposes. Of this amount, 15,180 acre feet are diverted from the underground water basin in Las Vegas; the balance of 95,680 acre feet from the Virgin River, Muddy River, and Meadow Valley Wash.[1]

In determining the estimated net consumptive use requirement for all purposes, the total diversion requirements are first determined and from this amount the estimated return flows are computed and deducted from the total diversion. The result is the net consumptive use from all sources.

The estimated gross diversion requirements for year 2000 for all uses within Clark County is 786,040 acre feet. This is made up of 353,000 for domestic and municipal which includes use on small homesite tracts; in fact, everything other than commercial irrigation and industry; 175,000 acre feet for industrial uses, and 357,540 acre feet for irrigation. With the return flows, the estimated net use for domestic and municipal, including all uses other than industrial and commercial irrigation, would be 315,000 acre feet; for industry 97,000 acre feet and for irrigation 141,650 acre feet, or a total net consumptive use of 553,650 acre feet by year 2000.

This is shown in tabular form as follows:[2]

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[1]Nev. Ex. 808, Tr. 18,834, Tr. 16,832–16,834; Nev. Ex. 504, Tr. 16,652–16,653; Nev. Ex. 29, Tr. 16,314; Nev. Ex. 208, Tr. 16,467.

[2]Nev. Ex. 815, Tr. 17,166, Tr. 17,162–17,166.

Type of use	Estimated present diversion (acre feet)	Estimated gross diversion requirements by year 2000 (acre feet)	Estimated return flow (acre feet)	Estimated net use year 2000 (acre feet)
Domestic and municipal	39,510	353,000	38,000	315,000
Industrial	10,690	175,500	78,500	97,000
Irrigation	110,860	257,540	115,890	141,650
Totals	167,060	786,040	232,390	553,650

Of the 553,650 acre feet of net consumptive use of water in Nevada by year 2000, there should be deducted the average annual replenishment to the Las Vegas ground water basin of 24,500 acre feet which is not Colorado River System water.[3] Of this amount, 9,320 acre feet of ground water will be used for domestic purposes and 15,179 acre feet used for irrigation purposes.[4] This then leaves a net consumptive use of 529,150 acre feet.

In order to obtain the future estimated net consumptive use of water from Lake Mead, the figure of 529,150 acre feet must be further reduced by the net consumptive use on the tributaries. The Upper Meadow Valley Wash has a consumptive use of 21,480 acre feet for irrigation purposes which is not considered as Colorado River System water.[5] Also in the same category is 11,200 acre feet of salvaged water on the Virgin River bottom lands.[6] This reduces the future net consumptive use of water from the Colorado River System to 496,500 acre feet. This figure includes 65,000 acre feet of system water used for irrigation purposes from the tributaries. Therefore, the chargeable future consumptive use in Southern Nevada from Lake Mead

[3]Nev. Ex. 33, Tr. 16,322; Tr. 16,699.
[4]Nev. Ex. 210, Tr. 16,467.
[5]Nev. Ex. 210, Tr. 16,467; Tr. 16,272–16,288.
[6]Tr. 16,406–16,407.

will be about 431,600 acre feet. The 65,000 acre feet figure representing the future estimated consumptive use of system water from the tributaries for irrigation purposes is derived as follows:

	Estimated future consumptive use (acre feet)	Salvaged water (acre feet)	Lake Mead replacement water (acre feet)	Net consumptive system use (acre feet)
Virgin River	36,496	11,200	----------	25,296
Meadow Valley W.	21,480	21,480	----------	0
Muddy River	52,273	----------	12,696	39,577
Total				64,873
				(65,000)

In tabular form, the net consumptive use requirement from Lake Mead for Clark County by year 2000 is as follows:

From Lake Mead (diversion less returns)

Domestic uses	305,700 acre feet[7]
Industrial uses	97,000 acre feet[8]
Irrigation uses	28,900 acre feet[9]
Total	431,600 acre feet

[7]While the net consumptive uses for domestic purposes is 315,000 acre feet (Nev. Ex. 815, Tr. 17,166), this includes 9,320 acre feet of ground water in Las Vegas Valley which should be subtracted, leaving 305,680 acre feet needed from Lake Mead for consumptive use for domestic purposes.

[8]While the estimated gross diversions for industrial purposes by the year 2000 is 175,500 acre feet, the estimated return flow would be 78,500 acre feet, leaving a net consumptive use of 97,000 acre feet from Lake Mead (Nev. Ex. 815, Tr. 17,166).

[9]The future net consumptive use for irrigation purposes from Lake Mead for the Fort Mohave and Big Bend units ---------- 16,217 acre feet.

(There are two units of the Fort Mohave and Big Bend areas located in the southern tip of Nevada, comprising

A tabulation showing method of determining net consumptive use of water from Lake Mead follows:

4,039 irrigable acres none of which is irrigated now. Water will be available by pumping from the Colorado River. The diversion requirement would be 29,485 acre feet. The percentage of return flow is 45 percent or a total of 13,268 acre feet. The net beneficial consumptive use in acre feet would be 16,217 acre feet. Nev. Ex. 201, Tr. 16,401; Tr. 16,444–16,445, 16,447; Nev. Ex. 207, Tr. 16,451; Nev. Exs. 209–210, Tr. 16,461–16,467.)

Replacement water from Lake Mead to Lower Moapa Valley ..... 12,696 acre feet.

(It is proposed to pump 12,696 acre feet of Lake Mead water to the Lower Moapa Valley to replace water to be diverted to 3,030 acres of irrigable lands in the Lower Meadow Valley Wash area with a consumptive use of 4.19 acre feet per acre. Nev. Ex. 207, Tr. 16,451. The water need for consumptive use would be 12,696 acre feet. Tr. 16,424.)

Total future net consumptive use for irrigation purposes from Lake Mead ..... 28,913 acre feet.

While the estimated gross diversion for irrigation in Clark County by the year 2000 is 257,540 acre feet, with a net consumptive use of 141,650 acre feet (Nev. Ex. 815, Tr. 17,166), water for most of the increased irrigation use would not be from Lake Mead. The difference between 28,900 acre feet and 141,650 acre feet or 112,750 acre feet would be irrigation uses from the tributaries Virgin River, Muddy River, and Meadow Valley Wash and pumping in Las Vegas Valley.

TABULATION SHOWING METHOD OF DETERMINING NET CONSUMPTIVE USE OF WATER FROM LAKE MEAD BY YEAR 2000

Type of use (acre feet)	Estimated present diversion (acre feet)	Estimated gross diversion requirements by year 2000 (acre feet)	Estimated return flow (acre feet)	Estimated net use year 2000 (acre feet)	Estimated net use from Las Vegas ground water basin (acre feet)	Salvaged water on tributaries (acre feet)	Stream system water on tributaries (acre feet)	Estimated net cons. use of water for Lake Mead year 2000 (acre feet)
Domestic and municipal	39,510	353,000	38,000	315,000	9,320	----------	----------	305,680 (305,700)
Industrial	16,690	175,500	78,500	97,000	----------	----------	----------	97,000 (97,000)
Irrigation	110,860	257,540	115,890	141,650	15,179	32,680	64,873	28,918 (28,900)
Totals	167,060	786,040	232,390	553,650	24,499	32,680	64,873	431,598 (431,600)

APPENDIX II

COLORADO RIVER COMMISSION OF NEVADA

538.040 "COMMISSION" DEFINED. As used in NRS 538.040 to 538.260, inclusive, "commission" means the Colorado River Commission of Nevada.

538.050 CREATION OF COMMISSION; NUMBER OF COMMISSIONERS. A commission is hereby created, to be known as the Colorado River Commission of Nevada, consisting of five commissioners: The governor, and four commissioners to be appointed by the governor.

[Part 1:71:1935; 1931 NCL § 1443.01]

538.160 DUTIES OF COMMISSION. The duties of the commission shall be:

1. To collect and arrange all data and information connected with the Colorado River and its tributaries which may affect or be of interest to the State of Nevada.

2. To represent and act for the State of Nevada in the negotiation and execution of contracts, leases or agreements for the use or exchange of power and for the use of electrical generating machinery and power transmission lines both within and outside of the State of Nevada, but solely for use within the State of Nevada, and to present the same to the governor for his information and approval.

3. To represent the State of Nevada in such interstate or other conferences or conventions as may be called for the consideration of the development of reclamation and power projects connected with the Colorado River or its tributaries, or in connection with Boulder Dam or other federally operated dams.

4. To render the friendly cooperation of the State of Nevada to such constructive enterprises as look to the conservation of the waters of the Colorado River and its tributaries and the development of power thereon.

5. To render friendly cooperation to and to negotiate with, cooperate with, and invite industries for the purpose of establishing the same within the State of Nevada.

6. To negotiate with the representatives of other states and the United States in an endeavor to settle equitably and define the rights of the states and of the United States *in the water of the Colorado River and its tributaries.*

7. To make and enter into agreements, compacts or treaties between the State of Nevada and the States of Arizona, California, Colorado, New Mexico, Utah, Washington, Oregon, Idaho and Wyoming, either jointly or severally, which agreements, compacts or treaties, however, will not become binding upon the State of Nevada until ratified and approved by the legislature and governor of the State of Nevada.

8. To report to the governor such measures and legislative action as may be deemed necessary to secure to the people of Nevada all possible benefits from the water of the Colorado River allocated to or contracted by the State of Nevada and the power allocated to or contracted by the State of Nevada to be generated at Boulder Dam or elsewhere within the Colorado River stream system or from any private or federal power development upon other rivers in the western United States for use in the State of Nevada.

9. To cooperate with and to establish, conduct and maintain, in conjunction with other states or federal agencies, power, *water and irrigation projects.*

[Part 7:71:1935; A 1943, 209; 1947, 738; 1943 NCL § 1443.07]

538.170 COMMISSION TO RECEIVE, SAFEGUARD WATER, WATER RIGHTS AND POWER OF COLORADO RIVER.

1. The commission is empowered to receive, protect and safeguard and hold in trust for the State of Nevada *all water and water rights*, and all other rights, interests or benefits *in and to the waters of the Colorado River* and to the power generated thereon, now held by or which may hereafter accrue to the State of Nevada under and by virtue of any Act of the Congress of the United States or any compacts or treaties between states to which the State of Nevada may become a party, or otherwise.

2. Applications to appropriate such waters shall be made in accordance with chapter 533 of NRS and shall be subject to approval by the commission as set forth in NRS 533.370.

[Part 7:71:1935; A 1943, 209; 1947, 738; 1943 NCL § 1443.07]—(NRS A 1959, 555)

538.180 LEASES, SALES AND CONTRACTS OF POWER BY COMMISSION: PROCEDURE; NOTICE AND HEARING; APPLICANT'S BOND.

1. The commission shall hold and administer all rights and benefits pertaining to the distribution of the power mentioned in NRS 538.040 to 538.260, inclusive, for the State of Nevada, and is empowered to lease, sublease, let, sublet, contract or sell the same on such terms as the commission shall determine.

2. Every applicant for power to be used within the State of Nevada shall, before the application is approved, provide an indemnifying bond by a corporation qualified under the laws of this state, or other collateral, approved by the state board of examiners, payable to the State of Nevada in such sum and in such manner as the commission may require, conditioned for the full and faithful performance of such lease, sublease, contract or other agreement.

3. The power shall not be sold for less than the actual cost to the State of Nevada as determined by the Secretary of the Interior of the United States.

4. Before any such sale or lease is made, the same shall be advertised in two papers of general circulation published in the State of Nevada for a period of once a week for 2 weeks; and the commission shall require any person desiring to make objection thereto to file the objection with the secretary of the commission within 10 days after the date of the last publication of the notice. If any objection shall be filed pursuant to such notice then the commission shall set a time and place for a hearing of the objection not more than 30 days after the date of the last publication of the notice.

5. Any such lease, sublease, contract or sale, *either of the water* or power mentioned in NRS 538.040 to 538.260, inclusive, shall not become binding upon the State of Nevada until ratified and approved by the governor.

[Part 7:71:1935; A 1943, 209; 1947, 738; 1943 NCL § 1443.07]

538.190 COLORADO RIVER COMMISSION FUND: DEPOSIT OF REVENUES FROM SALE, LEASE OR USE OF WATER, POWER. All revenues derived from the *sale, lease or use of the water* or power derived from the Colorado River or its tributaries mentioned in NRS 538.040 to 538.260, inclusive, and all revenues which shall become due and owing to the State of Nevada under any such lease, contract or sale, or otherwise, within the Colorado River power and water system shall be received, collected and paid directly to the state treasurer and deposited by him in a fund, hereby created, to be known as and called the Colorado River commission fund.

[Part 7:71:1935; A 1943, 209; 1947, 738; 1943 NCL § 1443.07]

APPENDIX III

PRESENT PERFECTED RIGHTS AS OF JUNE 25, 1929

ARIZONA

North and South Gila Valleys	(1) [1]	23,900 AF (Ariz. Exs. 77A, 77B & 186)
City of Yuma	(2)	200 AF (Ariz. Ex. 190, Tr. 8867)
Yuma Project	(3)	164,700 AF (Ariz. Exs. 77B & 98)
Federal establishments		
Ft. Mohave Ind. R.		48,208 AF (Calif. Ex. 3517; U. S. Ex. 1322)
Colorado R. Ind. R.		331,201 AF (U. S. Ex. 592)
Cocopah Ind. R.		1,372 AF (U. S. Ex. 1009)
Total		569,581 AF, say 570,000 AF

CALIFORNIA

Palo Verde Valley	(4)	120,560 AF (Calif. Exs. 352 & 356)
Yuma Project, Bard Dist.	(5)	17,000 AF (Calif. Exs. 375 & 376)
Imperial Irr. Dist.	(6)	2,807,000 AF (Calif. Exs. 270 & 273)
Federal establishments		
Ft. Mohave Ind. R		6,849 AF (Calif. Ex. 3515, 3517, U. S. Exs. 1320, 1322)
Chemehuevi Ind. R.		6,237 AF (U. S. Ex. 1210)
Colorado R. Ind. R.		27,373 AF (Report pp. 271, 272; Tr. 14469–14470)
Yuma Ind. R.		25,808 AF (U. S. Ex. 1121)
Total		3,010,827 AF, say 3,011,000 AF

NEVADA

Lake Mead Nat'l. Recreation Area	(7)	2,000 AF (Report, p. 295)
Ft. Mohave Ind. Res.		6,267 AF (Calif. Ex. 3517, U. S. Ex. 1322)
Total		8,267 AF, say 8,000 AF
TOTAL ALL STATES		3,589,000 AF

(1) Arizona Ex. 186 shows for North Gila Valley an irrigated area of 1,800 acres in 1924 and 6,332 acres in 1952, with no intervening data. Arizona Ex. 77B, on page 43, shows for North and South Gila Valleys an irrigated area of 6,520 acres in 1929. Arizona Ex. 77A, page 95, shows a consumptive use of 19,685 AF for 5,552 acres irrigated in these valleys. The corresponding consumptive use for 6,520 acres would be 23,100 AF and with the addition of irrigation water used on the non-cropped areas from Arizona Ex. 77A, p. 109, the total would be 23,900. As Gila River is a mainstream tributary in this proceeding, such waters are a part of the mainstream supply.

(2) Yuma in 1929 was pumping from Colorado River (Arizona Ex. 190). The reported use of 260 million gallons for 1930, equal to 800 AF, is also considered applicable to 1929. A consumptive use of 25 percent is here applied.

(3) The Yuma Project in Arizona in 1929 comprised the Yuma Valley with an irrigated area of 43,440 acres and the Yuma Auxiliary Unit on the Mesa with 1,162 acres irrigated (Arizona Ex. 186). The valley area includes the small area of Cocopah Indian lands then irrigated. In 1929 and prior years, irrigation supplies for Yuma Valley and Yuma Mesa were measured at the siphon crossing Colorado River from the California side, with Mesa supplies pumped out of the Valley East Main Canal. Waters not consumed were either returned to the river through wasteways or delivered to Mexico users at the boundary. Such outflows are now fully used by Mexico as part of the Treaty delivery. Considering that Yuma Project reports on irrigated areas, in 1926 and prior years, duplicated double-cropped areas, the irrigated areas for the Mesa and the Valley from Arizona Ex. 77B, p. 43, and the inflows less outflows from Arizona Ex. 98 (U.S. G.S. Water Supply Paper 1313) were:

	1927	1928	1929
Irrigated Area	42,906 Ac.	44,053 Ac.	44,810 Ac.
Inflow less outflow	164,700 AF	152,300 AF	125,200 AF

(4) Cal. Ex. 356 shows a consumptive use of 120,560 AF for 1929 with 32,393 acres cropped. Cal. Ex. 352 shows 1926 with cropped area of 36,100 acres but using relatively less water.

(5) Cal. Ex. 375 shows the irrigated area on the Reservation Division increasing to 1926 and then declining; and with the Bard (non-Indian) District irrigated area 5,404 acres in 1924, and 5,055 acres in 1931. From these data the Bard area in 1929 is estimated at 5,600 acres. Cal. Ex. 376 indicates a consumptive use of 3.10 AF per acre for the Reservation Division, resulting in a consumptive use of 17,000 AF for the Bard District in 1926.

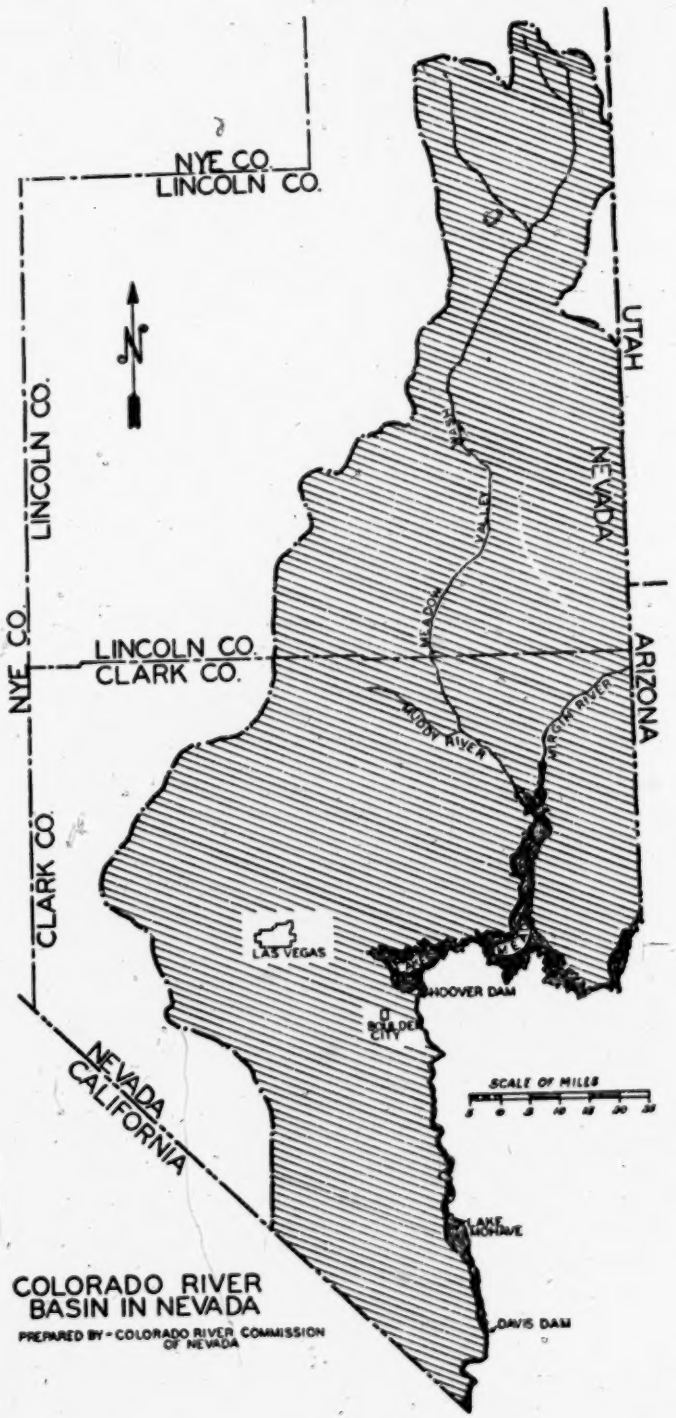
(6) Cal. Ex. 270 shows Alamo Canal diversions for 1929 to be the highest made to that time. Cal. Ex. 273 shows disposition thereof as:

	Units 1000 AF or Acres
Diversion to Alamo Canal at Hanlon Heading	3,423
Loss in main canals	261
Loss—Deliveries to Mexico	616
Total Main Canal Loss	877
Other System Losses Unaccounted For	325
Total System Losses and Unaccounted For	1,202
Waste for System Regulation	423
Deliveries to Users	1,798
Net Average Irrigated	424.1

The designation of Delivery to Mexico *as a loss* is improper for the purpose of arriving at Present Perfected Use as stream flow was sufficient to enable the District to divert more water if desired for its use. The "Main Canal Loss" applies to the Alamo Canal and the two main canals around the border of the District with very little of such loss occurring in the Alamo Canal which is an ancient natural channel of the Colorado River. The District use then becomes the Alamo diversion less deliveries to Mexico, being 2,807,000 AF. Included therein is 423,000 AF of regulatory waste, roughly 12 percent of the total diversion.

(7) The amount indicated is an estimate of foreseeable maximum uses.

APPENDIX IV


NYE CO.
LINCOLN CO.
LINCOLN CO.
NYE CO.
LINCOLN CO.
CLARK CO.
CLARK CO.
UTAH
NEVADA
ARIZONA
MEADOW
VIRGIN RIVER
MUDDY RIVER
LAS VEGAS
HOOVER DAM
BOULDER CITY
NEVADA
CALIFORNIA
SCALE OF MILES
LAKE MOHAVE
DAVIS DAM
COLORADO RIVER
BASIN IN NEVADA
PREPARED BY - COLORADO RIVER COMMISSION OF NEVADA

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 8 Original

STATE OF ARIZONA, *Complainant*

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants*

UNITED STATES OF AMERICA, *Intervener*

STATE OF NEVADA, *Intervener*

STATE OF NEW MEXICO, *Impleaded Defendant*

STATE OF UTAH, *Impleaded Defendant*

OPENING BRIEF FOR ARIZONA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 9 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

OPENING BRIEF FOR ARIZONA

This case of original jurisdiction comes before the Court in its final stage upon the Report and Recommended Decree

filed by Honorable Simon H. Rifkind, Special Master, and exceptions thereto filed by the parties pursuant to order of the Court dated January 16, 1961.[1]

Since the Report and Recommended Decree are for the most part favorable to Arizona, she moves their adoption by the Court, with such modifications as are requested in her exceptions.

JURISDICTION

Jurisdiction is based on Article III, §2, cl. 2 of the Constitution of the United States and is supported by decisions of this Court, including *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945); *Colorado* v. *Kansas,* 320 U. S. 383 (1943); *Kansas* v. *Colorado,* 206 U. S. 46 (1907); *Kansas* v. *Colorado,* 185 U. S. 125 (1902), and *Missouri* v. *Illinois,* 180 U. S. 208 (1901).[2]

---

[1] The Special Master's Report is cited as "Rep."

The transcript of hearings before the Special Master is referred to as "Tr." The hearing exhibits are cited by number preceded by "SM" for the Special Master's; "A" for Arizona's; "C" for California's; "N" for Nevada's; "NM" for New Mexico's; "U" for Utah's; and "US" for those of the United States.

The exceptions to the Master's Report and Recommended Decree are referred to as "Exc." followed by the number of the exception and preceded by the appropriate letter to identify the excepting party (*e.g.*, "A Exc. 13" to cite Arizona Exception 13).

Submitted together with this brief in a separate volume is "Arizona's Legislative History of Sections 4(a), 5(1st paragraph) and 8 of the Boulder Canyon Project Act." This document will be cited "Ariz. Legis. Hist." followed by a page reference. It is substantially identical with "Arizona's Legislative History" submitted to the Special Master except for changes in pagination due to printing. In order that the Court, in reading the Master's Report may be able to refer to the Master's references to "Arizona's Legislative History", Arizona has preserved by bold face bracketed page numbers the pagination of the "Legislative History" as it was submitted to the Master.

[2] As the Special Master noted, the Court's jurisdiction was conceded by all parties (Rep. 129).

STATUTES AND BASIC DOCUMENTS

The case involves:

The Colorado River Compact, executed November 24, 1922, printed as Appendix A.[3]

The Boulder Canyon Project Act, enacted December 21, 1928, effective June 25, 1929, 45 Stat. 1057, as amended, 43 U. S. C. §§617-617u, printed as Appendix B.

The California Limitation Act (Act of March 4, 1929, Ch. 16, 48th Sess.; California Statutes and Amendments to the Codes, 1929, pp. 38-39), printed as Appendix C.[4]

Regulations of the Secretary of the Interior governing water contracts under the Boulder Canyon Project Act, printed as Appendix D.

The Arizona contract with the United States for delivery of water from Lake Mead dated February 9, 1944, effective February 24, 1944, printed as Appendix E.

The Nevada contract with the United States for delivery of such water dated March 30, 1942 and their supplemental contract dated January 3, 1944, printed as Appendices F and G, respectively.

Water delivery contracts between the United States and the defendant California agencies, all of which are essentially similar in form. The Palo Verde Irrigation District contract is a typical example of these and is printed as Appendix H.[5]

---

[3] Pages of the Appendices have been numbered page 1a through page 70a. References in the brief to the statutes and other documents printed in the Appendices will be to these page numbers.

[4] The Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act will be referred to as the "Compact", "Project Act", and "Limitation Act", respectively.

[5] The relevant statutes and executive orders creating federal establishments are too numerous for listing here and printing as appendices to this brief, but they are specifically referred to and, where appropriate, quoted hereafter.

NATURE OF THE ACTION AND PARTIES

Arizona commenced this action by leave of the Court (344 U. S. 919 (1953)) against California and certain political subdivisions of that state[6] to have determined the extent of Arizona's rights to the use of water within the Lower Basin of the Colorado River and its tributaries and for appropriate injunctive relief (Rep. 1-2).

The United States was permitted to intervene (344 U. S. 919 (1953)). Nevada likewise was permitted to intervene (347 U. S. 985 (1954)) and New Mexico and Utah were impleaded on motion of California to the extent of their interests as states of the lower Colorado River Basin (350 U. S. 114 (1955)).

Each party asserts claims to varying amounts of water of the Colorado River System in the Lower Basin.

SCOPE AND DIVISION OF THE BRIEF

As the Special Master noted, the case presents controversies regarding rights to the use of water of the Colorado River and its tributaries within the Lower Basin (Rep. 4-6).

The main stream controversy involves the conflicting claims of Arizona, California, Nevada and the United States to the use of water of the main stream of the Colorado River (Rep. 4-6).

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[6] The defendants Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District and Metropolitan Water District of Southern California are political subdivisions and agencies of the State of California duly organized and existing under the laws of that state. The defendants City of Los Angeles and City of San Diego are municipal corporations organized under the laws of the State of California. The defendant County of San Diego is a county duly created under the laws of the State of California. These defendants and the State of California will be referred to as the California defendants.

The tributary controversy is in two parts: (1) disputes between tributary states and main stream states benefiting from tributary inflow and (2) disputes between tributary states *vis-à-vis* each other and between the United States and tributary states (Rep. 4-6).

The Special Master has reported, quite properly, that there is presently no occasion to apportion water of the tributaries in the Lower Basin between main stream and tributary states (Rep. 316-18).[7]

The controversies regarding tributary uses involve New Mexico, Arizona and the United States as to the Gila and Little Colorado River Systems; Arizona, Utah and Nevada as to the Virgin River System and Arizona and Utah as to Kanab and Johnson Creeks (Rep. 5).

The Special Master has found that there is no justiciable controversy as to any of these tributaries except the Gila River System (Rep. 321-24). Arizona agrees with this conclusion and none of the parties has excepted to it.

Arizona and New Mexico compromised their dispute regarding the Gila River System and the Master adopted their proposed settlement, embodying its terms in his findings and conclusions and Recommended Decree, over the opposition of the United States (Rep. 324-30, 335-43, 354-58).

The United States has filed no exceptions to the findings and conclusions and Recommended Decree of the Special Master with respect to his disposition of the

[7] Since the Special Master concludes that it is neither necessary nor appropriate to determine at this time the rights of main stream states to tributary inflow, we regard as irrelevant and unnecessary his discussion of the principles which may govern the determination of these rights in the future, should the occasion to do so ever arise, and the remedies which may or may not be available to parties to future litigation, if any, involving the attempted enforcement of these asserted rights (Rep. 317-21). Although we disagree with many of the statements made by the Master in the course of his discussion, we do not set forth the grounds of our disagreement, since we regard the discussion itself as irrelevant.

dispute with regard to rights to use water of the Gila River System. New Mexico has taken no "specific" exception to the Report and Recommended Decree of the Special Master. It has, however, reserved its right to file an answering brief in the event its interests are affected (NM Exc. p. 4).

Arizona has filed exceptions to the Master's finding that in withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the forest and to his conclusion that the United States has the right to divert sufficient water to satisfy such purposes (Rep. 335, 343, 357-58; A Exc. 29, 30).

Therefore, except for questions regarding the Gila National Forest, this brief is limited to the main stream controversy.

The controversy among Arizona, California and Nevada with respect to their rights in main stream water involves factual and legal considerations different in character from and independent of the controversy between Arizona and the United States with respect to the rights of the federal government in main stream water and water from the Gila River System for the Gila National Forest. Therefore, this brief is divided into two parts.

The questions presented immediately hereafter, the statement of facts, the summary of argument and the first three points of Arizona's argument concern the controversy among the states with respect to main stream water and are dealt with in Part I. In Part II of the brief additional questions and further facts relevant to the controversy concerning the rights of the United States are set forth, together with a summary of argument and argument regarding these questions.

PART I

The Controversy Among Arizona, California and Nevada With Respect to Main Stream Water

PART I

The Controversy Among Arizona, California and Nevada With Respect to Main Stream Water

QUESTIONS PRESENTED

1. Whether Congress in enacting the Project Act allocated among Arizona, California and Nevada all available water in Lake Mead and in the main stream of the Colorado River downstream from Lake Mead; and as subsidiary questions:

A. Whether the Project Act renders principles of equitable apportionment inapplicable to the division of main stream water among Arizona, California and Nevada.

B. Whether the Project Act renders inapplicable the doctrine of prior appropriation as to rights to the use of water of the Colorado River, a navigable stream.

C. Whether §6 of the Project Act, in providing that Hoover Dam and Lake Mead should be used for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact", recognized or confirmed the existence of intrabasin rights in the Lower Basin to the use of water of the Colorado River, or was intended only to satisfy claims of prior rights in the Lower Basin as against the Upper Basin.

D. Whether, assuming §6 of the Project Act protects or confirms any intrabasin water rights in the Lower Basin, a "present perfected right" within the protection of §6 exists only if it was acquired in compliance with the requirements of state law and only to the extent that it represented, at that time, an actual diversion and beneficial use of a specific quantity of water applied to a definite area of land or to a particular domestic or industrial use.

E. Whether, assuming §6 of the Project Act protects or confirms any intrabasin rights in the Lower Basin, it preserves rights perfected as of November 24, 1922, the date that the Compact was signed, or rights perfected as of June 25, 1929, the effective date of the Project Act.

2. Whether the Project Act and the Limitation Act established an irrevocable and unconditional limitation in perpetuity on California's consumptive use of main stream water in an amount not to exceed 4,400,000 acre-feet of the first 7,500,000 acre-feet of such water available for release from Lake Mead in any one calendar year plus one-half of any such water in excess of that amount; and as a subsidiary question:

A. Whether the reference in §4(a) of the Project Act and in the Limitation Act to "the waters apportioned to the lower basin States" by Article III(a) of the Compact means main stream water only or main stream and tributary water.

3. Whether §§4(a) and 5 of the Project Act established a formula which, in the absence of an interstate compact, governs the apportionment of main stream water among Arizona, California and Nevada and to which the water delivery contracts made by the Secretary of the Interior are required to conform; and as a subsidiary question:

A. Whether the provisions of Article 7(b), (d), (f) and (g) of Arizona's water delivery contract, in so far as they do not conform to the formula established by the Project Act, are invalid.

4. Whether the provisions of Article 7(b), (d), (f) and (g) of Arizona's water delivery contract are invalid as contrary to the provisions of §5 of the Project Act,

which requires that "contracts respecting water for irrigation and domestic uses shall be for permanent service", and as introducing tributary considerations into a main stream apportionment.

5. Whether "consumptive use" means diversion from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation; and as subsidiary questions:

A. Whether each state's apportionment of water is to be measured at the points of diversion.

B. Whether deliveries in satisfaction of the Mexican treaty obligation and reservoir evaporation, channel and other losses sustained prior to diversion are to be treated as diminution of supply.

C. Whether quantities of water released by the Secretary of the Interior from Lake Mead pursuant to orders therefor but not diverted by the party ordering the same are to be considered as diverted by that party, except to the extent that such quantities of water are delivered to Mexico in satisfaction of the Mexican Treaty or are diverted by others in satisfaction of rights decreed herein.

6. Whether water apportioned to a state which will not be used in that state in any year may be released by the Secretary of the Interior for use in another state if such release would result in deliveries of water for use in a state in excess of the quantities permitted by the Project Act, the Limitation Act or the water delivery contracts.

STATEMENT OF THE CASE

The Colorado River System

The main stream of the Colorado River rises in the mountainous regions of north central Colorado where the highest peaks are over 14,000 feet above sea level. Flowing approximately 1,300 miles, the river is the third longest in the United States, exceeded only by the Mississippi River System and the Rio Grande. The Colorado flows 245 miles through western Colorado and then traverses Utah for 285 miles. After crossing the Utah-Arizona boundary, it proceeds southwesterly through the Grand Canyon for 295 miles and forms the Arizona-Nevada boundary for an additional 145 miles. Flowing almost due south, the river forms the California-Arizona boundary for 235 miles and then becomes the international boundary between Arizona and Mexico for a distance of 16 to 20 miles. It then flows 75 miles within Mexico, emptying into the Gulf of California (Rep. 9).

The Colorado River System drains an area of approximately 242,000 square miles in the United States and its basin is comprised of portions of Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada and California, or one-twelfth of the continental United States exclusive of Alaska. The drainage basin from its northernmost point in Wyoming to the Mexican border is approximately 900 miles long and varies in width from about 300 miles in the northerly section to about 500 miles in the southerly section. It is bounded on the north and east by the Continental Divide in the Rocky Mountains, on the west by the Wasatch Range and other divides and by minor divides on the south and southwest (Rep. 9).

Significantly, 107,242 square miles, or more than 94% of the total area of Arizona, are within the drainage basin

of the river and conversely over 44% of the drainage basin lies within Arizona. Also, 100,306 square miles, or 88.5% of the state's total area, are within the drainage area of the Lower Basin of the river and 75.8% of the Lower Basin drainage area of the river is within Arizona (Rep. 10).

In contrast, only 3,599 square miles, or 2.3% of California's total area, are within the drainage basin of the Colorado River and only 1.5% of the drainage basin lies within California. This comparatively small area of the state is in the Lower Basin drainage area of the river and merely 2.7% of the Lower Basin drainage area is within the State of California (Rep. 10).

A canyon approximately 1,000 miles long in southern Utah and northern Arizona divides the basin of the Colorado River System into two natural parts, which are known and will be referred to as the Upper Basin and Lower Basin, respectively (Rep. 11). In both basins most kinds of agriculture can be practiced successfully only by irrigation because of prevailing arid and semi-arid conditions (Rep. 13). The important geographic and climatic differences between the two basins and their particular significance to this case will appear in the course of this brief.

Above the canyon section the basin is at high elevations and the growing season for crops is short, while below the canyon section the irrigable portions of the basin lie at low elevations and the growing season for crops is long, continuing in many places throughout the year. As a result, the extreme aridity and the long growing season of the Lower Basin make its water consumption per irrigated acre relatively high. Losses by evaporation and transpiration are much greater in the lower part of the river system than in the upper (Rep. 12-14).

Systems tributary to the Colorado exist in every basin state except California. The most important of these in the Lower Basin are the Little Colorado in Arizona and New Mexico, the Bill Williams in Arizona, the Gila in Arizona and New Mexico and the Virgin in Nevada, Utah and Arizona (Rep. 11).

The confluence of the Gila with the Colorado occurs between Laguna Dam and Yuma, Arizona, south of all existing diversion structures in the United States. No water emptying from the Gila into the Colorado is diverted or used in California (Rep. 179 note 38; A 114).

The Compact

For many years before 1922, when the Compact was negotiated, the flow of the Colorado River was unpredictable and erratic. Floods menaced and seriously damaged the Lower Basin, particularly in the Yuma area and Imperial Valley. Flood control by storage was essential to protect the Lower Basin (Rep. 20).

Since the water supply from the main stream in the Lower Basin was variant and undependable for irrigation, there was immediate need for storage in the Lower Basin to control the flow of the river in order to assure a regulated water supply. Moreover, the Colorado River carried large amounts of silt which damaged irrigation works and agricultural lands, thus making silt control essential to the protection and development of the Lower Basin (Rep. 20-21).

Water for the Imperial Valley was supplied by a Mexican corporation through the Alamo Canal, which, for the greater part of its length, was located in Mexico. The canal was maintained by the Mexican corporation under a concession granted to it in 1904 by the Republic of Mexico, and the concession required that there be made available for irrigation in Mexico an amount not "exceeding

one-half of the volume of water passing through said canals" (C 137). The Mexican corporation was formed by the developers of Imperial Valley to comply with Mexican law. After the organization of Imperial Irrigation District, its directors became directors of the Mexican corporation. A canal wholly within the United States to provide water for Imperial Valley was recognized as essential to eliminate complications arising from the location of the Alamo Canal in Mexico and from the Mexican concession and to remove the Imperial Valley water supply from Mexican control (Rep. 20).

The demand by the Lower Basin for the construction of storage facilities on the main stream of the Colorado River for its benefit caused apprehension in the Upper Basin states of Colorado, New Mexico, Utah and Wyoming. They recognized that agricultural expansion and other developments in the Upper Basin would be much slower than in the Lower. Because of this, they feared that construction of storage facilities on the main stream of the Colorado River for the benefit of the Lower Basin would permit uses of water there to expand rapidly and form the basis for possible claims of prior appropriative rights, which would prevent long-range development in the Upper Basin (Rep. 22).

Necessity for adjustment of this conflict of interest had been recognized long before 1922. On May 18, 1920, Congress passed the Kincaid Act authorizing and directing the Secretary of the Interior to investigate and report as to the feasibility and advisability of a plan of irrigation development in the Imperial Valley in the State of California. On November 27, 1920, the Director of the Reclamation Service, pursuant to this direction of Congress, transmitted a report on the problems of the Lower Basin to the Secretary of the Interior.

In early 1921, the seven Colorado River Basin states by legislation authorized the appointment of commissioners to negotiate a compact for apportionment of the water supply of the river and its tributaries. Later that year Congress consented that the states might negotiate and conclude a compact which would equitably apportion the water of the Colorado River and its tributaries among the states, on condition that a representative of the United States be appointed by the President to participate in the negotiations and report to Congress on the proceedings and any compact which might result (Rep. 22-24).

The Colorado River Commission, consisting of members appointed by the seven Colorado River Basin states and Mr. Herbert Hoover, representative of the United States, convened on January 26, 1922 (Rep. 24).

On November 24, 1922, an interstate agreement, known as the Colorado River Compact, was executed (Rep. 24).

The Compact represents an accommodation of the conflicting interests of the Upper and Lower Basins for the mutual benefit of both (Rep. 139).

State Action on the Compact

In 1923, the legislatures of the Colorado River Basin states, except Arizona, approved the Compact (Rep. 24).

In 1925, these six states waived the requirement that seven states ratify the Compact and agreed that it should become effective whenever six of the signatory states and Congress should ratify it (Rep. 24-25).

Unsuccessful Federal Legislation, 1922-1927

Between 1922 and 1927, three bills popularly known as the Swing-Johnson bills were successively introduced by Representative Swing and Senator Johnson, both of

California, which would have authorized construction of an All-American canal and a dam at or near Boulder Canyon, but all failed of enactment (Rep. 27).

Unsuccessful Attempts to Make a Lower Basin Compact

From 1925 to 1927, negotiations between Arizona, California and Nevada for a Lower Basin compact dividing among them the water apportioned to the Lower Basin by the Compact were unsuccessful.[8]

The Governors' Conference of 1927

In 1927, the Governors of the seven Colorado River Basin states met to attempt to bring about seven-state ratification of the Compact. The Governors of the Upper Division states suggested by resolution adopted by them at this conference that, out of the average annual delivery of water to be provided by those states at Lee Ferry under the Compact, there be apportioned to Nevada 300,000 acre-feet, to Arizona 3,000,000 acre-feet and to California 4,200,000 acre-feet. They further recommended that each Lower Basin state should have exclusive use of all water of Colorado River tributaries within its boundaries above the place where that water emptied into the main stream. These proposals failed of acceptance primarily because of California's demand that it should be allotted 4,600,000 acre-feet and Arizona's insistence that California be limited to 4,200,000 acre-feet.[9]

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[8] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 21-23; 70 Cong. Rec. 171 (1928), Ariz. Legis. Hist. 50-57; 70 Cong. Rec. 333 (1928), Ariz. Legis. Hist. 71-72.

[9] 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 50-52; 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 22-23.

The Project Act

The fourth Swing-Johnson bill,[10] authorizing construction of the All-American Canal and of a dam at or near Boulder Canyon, was introduced in December 1927, passed by the House with amendments and sent to the Senate in May 1928. Senate action in the first session of the Seventieth Congress was prevented by an Arizona-led filibuster. In December 1928, the Senate resumed consideration of the bill, which it passed after extended debate and amendment. Thereafter the bill was adopted by the House without further amendment. It was approved by the President on December 21, 1928, and by its terms was to be known as the "Boulder Canyon Project Act".

Congress in enacting the Project Act authorized construction of a dam in the main stream of the Colorado River at Black Canyon or Boulder Canyon (Hoover Dam) adequate to create a storage reservoir (Lake Mead) with a capacity of at least 20,000,000 acre-feet and construction of the All-American Canal from the Colorado River to Imperial and Coachella Valleys in California (§1, Appendix B, pp. 9a-10a).

The Project Act also approved the Compact (§13(a), Appendix B, pp. 23a-24a).

The Project Act was not to take effect until certain specified conditions precedent had been met: (1) ratification of the Compact by the seven Colorado River Basin states within six months from the date of the passage of the Act or, if seven states failed to ratify within the six-month period, (2) ratification by six of those states, including California, a waiver by each ratifying state of the Compact requirement of seven-state ratification and enactment by the California legislature of the Limitation Act (§4(a), Appendix B, pp. 12a-13a).

[10] H.R. 5773 and S. 728, 70th Cong., 1st Sess. (1927).

The Limitation Act

The Compact was not ratified by the seven Colorado River Basin states within six months after passage of the Project Act, although six states, including California, ratified within that time and waived seven-state ratification (Rep. 25-26, 166).

On March 4, 1929, the California legislature enacted the Limitation Act which, in compliance with the conditions prescribed by the Project Act for its effectiveness, accepted the limitations imposed therein upon the use in California of water "of and from the Colorado River" (Rep. 26, 180-82; Appendix C, pp. 27a-28a).

Presidential Proclamation

On June 25, 1929, the President proclaimed the Project Act to be effective. His proclamation declared that (a) there had not been seven-state ratification of the Compact within six months of passage and approval of the Project Act; (b) there had been six-state ratification of the Compact and waiver by the ratifying states of the requirement of seven-state ratification; (c) the requirements of §4(a) of the Project Act necessary to render the Act effective had been met by California and (d) all prescribed conditions for effectiveness of the Project Act had been fulfilled (Rep. 26-27).

Construction of Hoover and Imperial Dams and the All-American Canal

Pursuant to authorization of the Project Act, Hoover Dam was constructed in Black Canyon in the main channel of the Colorado River 330 miles above the Mexico-California border. The middle of the channel at the site is the boundary between Nevada and Arizona. Construction was initiated September 17, 1930, water first impounded February

1, 1935 and power first generated September 11, 1936. The dam is the principal structure of the Lower Basin development, impounding the water of the Colorado River to create a huge reservoir called Lake Mead, which has a maximum length of 115 miles and a maximum width of 8 miles. The original unsilted storage capacity of Lake Mead was 32,359,000 acre-feet and its maximum surface area is 162,700 acres. Its present usable capacity is approximately 27,200,000 acre-feet. Title to Hoover Dam is in the United States and it is operated and maintained by the Department of the Interior (Rep. 32-33).

Also pursuant to authority of the Project Act, Imperial Dam was built in the main channel of the Colorado River 303 miles below Hoover Dam and 18 miles above Yuma, Arizona. The thread of the stream at the dam site constitutes the boundary between Arizona and California. Imperial Dam is the diversion point for the All-American Canal and for the Gila Project and the Yuma Auxiliary Project in Arizona. Title to the dam is in the United States and it is operated and maintained by the Department of the Interior (Rep. 35-36).

The All-American Canal was built under authority of the Project Act primarily to carry Colorado River water from Imperial Dam to the Imperial and Coachella Valleys in California (Rep. 36-37).

Regulations of the Secretary of the Interior Governing Water Contracts

After the Project Act became effective, the Secretary of the Interior in 1930 promulgated general regulations under which the United States would contract for storage and delivery of main stream Colorado River water. These regulations required contracts for domestic and irrigation uses to be for permanent service and to conform to §4(a)

of the Project Act and that all contracts for delivery of water be subject to the terms and conditions of the Compact and Project Act (Appendix D, pp. 29a-33a).

The California Contracts and Seven-Party Agreement

From time to time the Secretary of the Interior entered into contracts on behalf of the United States with the California defendants for delivery of an aggregate of 5,362,000 acre-feet of water annually from Lake Mead, subject to the availability of such water under the Compact and the Project Act (Rep. 207-08; see, *e. g.*, Appendix H, pp. 59a-70a).

By agreement of August 18, 1931 (the Seven-Party Agreement, which is incorporated in all the California contracts, see, *e. g.*, Appendix H, pp. 59a-70a), the various California agencies established intrastate priorities to the use of Colorado River water as follows:

1. A first priority to Palo Verde Irrigation District for water for 104,500 acres.

2. A second priority to the Yuma Project in California for water for 25,000 acres.

3. A third priority to Imperial Irrigation District, Coachella Valley and Palo Verde Irrigation District for 3,850,000 acre-feet less the quantities under the first and second priorities.

4. A fourth priority to Metropolitan Water District for 550,000 acre-feet.

5. A fifth priority to Metropolitan Water District for 550,000 acre-feet and to San Diego for 112,000 acre-feet.

6. A sixth priority to Imperial and Coachella Valleys and to the Palo Verde Irrigation District for 300,000 acre-feet.

7. A seventh priority for agricultural use for all water remaining for use in California.

The Special Master has held that "the 5,362,000 acre-feet for which California users have contracted must be satisfied as follows: 4,400,000 acre-feet out of the first 7,500,000 acre-feet; and 962,000 acre-feet out of surplus" (Rep. 224 note 85).

The Nevada Contracts

By contracts dated March 30, 1942, and January 3, 1944, respectively, the United States agreed to deliver annually to Nevada from Lake Mead so much water, including all other waters diverted for use within Nevada from the Colorado River System, as might be necessary to supply the state with a total quantity of not to exceed 300,000 acre-feet per annum, subject to the availability of such water under the Compact and the Project Act (Rep. 28, 209-10; Appendices, F, G, pp. 45a-58a).

Arizona's Ratification of the Compact

On February 24, 1944, Arizona unconditionally ratified the Compact by Act of its legislature, effective as of that date (Rep. 27).

The Arizona Contract

By contract dated February 9, 1944, effective February 24, 1944, the United States agreed to deliver annually to Arizona and its water users from storage in Lake Mead so

much water as might be necessary for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet plus one-half of the surplus water unapportioned by the Compact, subject to the availability of such water under the Compact and the Project Act (Rep. 29, 205-06).

Article 7(b) of the Arizona contract (Appendix E, p. 37a) provides in part that deliveries to Arizona of unapportioned water shall be "less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article". In subdivision (f) (Appendix E, p. 38a) Arizona "recognizes the right" of the United States and Nevada to contract for annual beneficial consumptive use within Nevada for agricultural and domestic uses of one-twenty-fifth "of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact . . . ." By subdivision (g) (Appendix E, p. 38a) Arizona "recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact . . . ."

The Arizona contract further provides in Article 7:

> "(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead . . . ."

Circumstances Requiring Adjudication of Arizona's Rights

Since Arizona is an arid state, irrigation is essential to its successful agriculture and water is needed for domestic, municipal and industrial purposes. The state has no

substantial surface water supply except from the Colorado River System (A 1000, pp. 7-8).

In the central part of Arizona, consisting primarily of Maricopa and Pinal Counties, the water supply is inadequate to meet existing demands and maintain present economic development (A 64, p. 11; A 136). Since 1940, there has been rapid and continuous lowering of the groundwater table in central Arizona (A 145, 159, 391, 392) and as a result wells in some areas have gone completely dry, while in others further pumping has become economically impractical. In prospect these conditions will grow progressively worse (Tr. 1458, 1539-41, 1641, 1660, 2010, 2012-14).

There has been an alarming decrease in acreage under cultivation in central Arizona. In 1952, agricultural lands irrigated in Maricopa and Pinal Counties aggregated 875,500 acres. By 1955, this total had declined by more than 100,000 acres (A 136, Tables for 1952 and 1955) and, unless a supplemental water supply is provided, the maximum of irrigated lands which can be permanently maintained in these two counties is between 450,000 and 500,000 acres (Tr. 1476-83).

The main stream of the Colorado River is the only available source of water to supplement the local water supply in central Arizona (A 65, p. 3, par. 15; A 71, p. 115, par. 15).

In 1944, the United States Bureau of Reclamation in cooperation with Arizona began active investigation and planning of what is known as the Central Arizona Project, designed to bring supplemental water from the main stream of the Colorado River to a portion of the central Arizona area suffering from an inadequate water supply (Rep. 30). On September 16, 1948, the Secretary of the Interior

reported to Congress that this project was feasible and that there was urgent need in central Arizona for water from the Colorado River, which the project would make available (Rep. 30; A 70). The Secretary also reported that California challenged Arizona's claims to the water which the Central Arizona Project would divert and that if California's contentions were correct there would be no dependable water supply available from the Colorado River for diversion to central Arizona (Rep. 30, 130).

During the Seventy-Ninth and succeeding Congresses through the Eighty-Second Congress, Arizona sought congressional authorization for construction of the Central Arizona Project and met with vigorous resistance by the California defendants, who claimed Arizona had not shown there was any water of the Colorado River System available for use in Arizona in addition to that in use or required for Arizona projects already authorized (Rep. 31, 130).

The Senate approved this legislation in the Eighty-First and Eighty-Second Congresses. However, on April 18, 1951, the House of Representatives Committee on Interior and Insular Affairs adopted a resolution that consideration of bills relating to the Central Arizona Project "be postponed until such time as use of the water in the Lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the states of the Lower Colorado River Basin" (Rep. 31, 131).

In 1952, Arizona made a motion for leave to file its Bill of Complaint, which was granted on January 19, 1953 (344 U. S. 919), and the Bill of Complaint was filed that day (Rep. 1, 31, 131).

SUMMARY OF THE ARGUMENT

I. The Water Dealt With by the Project Act and the Limitation Act

Neither construction of Hoover Dam nor the vast benefits resulting from its operation, which have been and will continue to be enjoyed by the parties to this action, could have been realized without the authorization of Congress. That authorization was given in the Project Act by Congress in the exercise of its plenary power over navigable waters.

The Project Act did not become effective, however, until certain conditions precedent, explicitly set forth in §4(a) of the statute itself, had been fulfilled. These conditions were: (A) ratification of the Compact within six months after June 25, 1929, the effective date of the Act, by all seven Colorado River Basin states; (B) failing such seven-state ratification (a) approval of the Compact by six states, including California, and their waiver of the Compact requirement that seven states ratify; (b) enactment by California of the Limitation Act and (c) presidential proclamation of the effectiveness of the Project Act.

Seven-state ratification of the Compact within the prescribed six-month period did not occur. But the alternative conditions laid down by Congress for effectiveness of the Project Act were met in every respect (Rep. 26-27).

In specifying the conditions for effectiveness of the Project Act, Congress required that California should

> " . . . agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggre-

> gate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." Project Act §4(a)

California complied with this condition by enactment of the Limitation Act which, in terms practically identical with those of the Project Act, provided that

> " . . . the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said 'Boulder canyon project act' that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said 'Boulder canyon project act,' and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." Limitation Act §1

The Special Master concluded that the provisions, general operative scheme and legislative history of the Project Act establish that both §4(a) of the Project Act and the Limitation Act refer only to water in Lake Mead and flowing in the main stream below Hoover Dam (Rep. 138, 151-52, 173-83). Therefore, he found that the phrase, "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact", was intended by Congress to refer only to water in the main stream, and not to water of tributaries. Hence, when Congress thus made reference to the 7.5 million acre-feet per annum apportioned to the Lower Basin by Article III(a) of the Compact, Congress was dealing with main stream water only, *i.e.*, water in Lake Mead and in the main stream below Hoover Dam; and consequently, by virtue of §4(a) of the Project Act and the Limitation Act, California is limited to 4.4 million acre-feet of that water (Rep. 173 *et seq.*).

In addition, the Special Master concluded that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in §4(a) among three states only: of the first 7.5 million acre-feet available in each year, 4.4 to California, 2.8 to Arizona and .3 to Nevada and the balance in excess of 7.5 million acre-feet to California and Arizona equally (Rep. 174).

Arizona agrees with these conclusions of the Special Master and urges their adoption by the Court.

The Master reached these results solely on the basis of the terms, purposes and legislative history of the Project Act. He considered, and we agree, that the Compact has utility as a decisive factor in this case only insofar as it serves to determine the supply of main stream water legally available in the Lower Basin and that the Compact

is not relevant to the allocation of water from Lake Mead and from the main stream of the river below Hoover Dam among Arizona, California and Nevada (Rep. 138-41).

It makes little difference, therefore, whether the apportionment provisions of Article III(a) of the Compact refer to main stream water only, as Arizona contends (A Exc. 3), or whether those provisions cover both main stream and tributary water, as the Master construes them (Rep. 173). Whatever may be the correct interpretation of Article III(a), considered independently and apart from the Project Act, it is the construction put upon Article III(a) by Congress in enacting the Project Act, which made the Compact effective, and that construction alone, which is controlling.

As the Special Master has found, the evidence is clear that Congress, in enacting §4(a), intended to provide for the apportionment of main stream water exclusively—not water ~~of tributaries~~ as well (Rep. 173 *et seq.*).

By referring in §4(a) to provisions of Article III(a) of the Compact, either Congress construed those provisions as dealing with main stream water only, or, if it regarded them as including tributaries, it in effect modified the terms of the Compact referred to by limiting their application to main stream water.

In either event, the effect of §4(a) and the Limitation Act is to restrict California to the annual consumptive use of 4.4 million acre-feet of water from the main stream of the Colorado River plus one-half the excess or surplus above the first 7.5 million acre-feet of such water available in any one year for use in the Lower Basin.

II. The Statutory Apportionment

Section 4(a) of the Project Act, in addition to requiring limitations on California's use of main stream water as a

condition precedent to its effectiveness, authorized Arizona, California and Nevada to enter into an agreement which should provide, among other things:

> "(1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact. . . ."

No such interstate compact has been made.

Section 5 of the Project Act, after authorizing the Secretary of the Interior to contract for the storage and delivery of water in Lake Mead, provides:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Section 8(b) authorized Arizona, California and Nevada, or any two of them, to provide by compact for an equitable division of Colorado River water on different terms from those suggested by Congress in §4(a), subject to congressional approval and consent, but provided that any such compact should be subordinate to the Secretary's water delivery contracts made prior to congressional approval of the compact (Appendix B, p. 20a).

The Special Master has found that by these provisions Congress authorized the Secretary of the Interior to enter

into water delivery contracts which, in the absence of an interstate compact, would control the allocation of main stream water among Arizona, California and Nevada (Rep. 99-100, 152-54, 201). But the Master has rejected Arizona's contention that §4(a) establishes a mandatory formula of water allocation which the Secretary is required "precisely to follow" in his water delivery contracts (Rep. 162-63).

Arizona adheres to her position before the Special Master and urges its adoption by the Court (A Exc. 7, 8). It is Arizona's contention that all contracts made by the Secretary pursuant to the authority granted him by §5 of the Project Act must conform to the formula for the allocation of water established by §4(a). The formula of water allocation established by §§4(a) and 5 does not leave to the Secretary's discretion the determination of the quantity of water to be delivered within each state pursuant to contract. The statute fixed a formula for the apportionment of water stored in Lake Mead among the states of Arizona, California and Nevada and this formula is mandatory upon the Secretary and controls his water delivery contracts.

As a corollary, it follows that Arizona's existing water delivery contract, insofar as it does not conform to the formula established by the Project Act, is beyond the contractual competence of the contracting parties, exceeds the authority of the Secretary and is without legal effect (A Exc. 7).

Furthermore, the provisions of Article 7(b), (d), (f) and (g) of Arizona's water delivery contract are invalid because they are contrary to the provision of §5 of the Project Act, which requires that "contracts respecting water for irrigation and domestic uses shall be for permanent service", and because they introduce tributary considerations into a main stream apportionment (A Exc. 8).

III. Appropriative and "Perfected Rights"

The Project and Limitation Acts and the Secretary's water delivery contracts made pursuant thereto complete the "statutory apportionment" among Arizona, California and Nevada of main stream water in Lake Mead and downstream from Lake Mead (Rep. 100, 138, 152). Arizona agrees with the Special Master's holding that "this case involves a statutory, not an equitable, apportionment" of water (Rep. 100) and that "the doctrine of equitable apportionment, and the law of appropriation are . . . irrelevant to the allocation of such water among the three states." (Rep. 138; see Rep. 152).

Congress, by virtue of the structures erected under authority of the Project Act, has impounded substantially all the water of the main stream of the Colorado River (Rep. 153). Congress has done this in the exercise of its dominion and plenary power over navigable waters of the United States.

Assuming that appropriative rights in the use of the water of the Colorado River had vested before the Project Act, the enactment of the statute divested them in the absence of a congressional intention that they be recognized and preserved.

The Special Master has found that §6 of the Project Act (Appendix B, pp. 18a-19a) was intended to protect water rights in the main stream of the Colorado River within the Lower Basin states "perfected" as of June 25, 1929 (the effective date of the Act), against possible shortages in the water apportioned to the Lower Basin by the Compact (Rep. 234, 308-13).

Arizona disagrees (A Exc. 5, 6). The clause in §6—"satisfaction of present perfected rights in pursuance of

Article VIII of said Colorado River compact''—was intended to comply with the provisions of Article VIII, which discharged the Upper Basin from claims of "rights, *if any,* by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin''[11], after storage capacity of 5,000,000 acre-feet had been provided in the main Colorado River within or for the benefit of the Lower Basin. In short, Article VIII provides for satisfaction of perfected rights only basin versus basin and makes no provision for satisfaction of intrabasin rights. Congress intended in §6 of the Project Act to meet the requirements of Article VIII of the Compact for the protection of the Upper Basin, and nothing more.

Assuming, however, that the Master's construction of §6 is correct, Arizona agrees with his conclusion that the protection there provided covers only rights acquired in compliance with state law and is effective only to the extent that such rights represent actual diversions and beneficial use of specific quantities of water applied to defined areas of land or to particular domestic or industrial uses (Rep. 308).

Further, it is Arizona's position that the term "present perfected rights'' refers only to those rights which were perfected as of November 24, 1922, the date the Compact was signed, and not as of June 25, 1929, the effective date of the Project Act. Arizona asserts that the Compact speaks as of the date it was signed rather than as of the date it was confirmed and approved (A Exc. 6).

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[11] Unless otherwise indicated, italics appearing in quotations in this brief have been added for emphasis.

ARGUMENT

I

Congress in enacting the Project Act exercised its plenary power over navigable water and allocated among Arizona, California and Nevada all available water in Lake Mead and in the main stream of the Colorado River downstream from Lake Mead. Therefore, principles of equitable apportionment and priority of appropriation are not applicable to the division of main stream water among those states.

A. The Constitutional Power of Congress Over Navigable Waters

The power of Congress over navigable waters is so complete and absolute as to amount to "dominion". As this Court stated in its most recent pronouncement upon the subject:

> "It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution (Art. 1, §8, cl. 3) has dominion, to the exclusion of the States, over navigable waters of the United States."

Tacoma v. *Taxpayers of Tacoma,* 357 U. S. 320, 334 (1958). See also *United States* v. *Willow River Power Co.,* 324 U. S. 499 (1945); *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 423-24 (1940); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53 (1913); *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690 (1899); *Gibson* v. *United States,* 166 U. S. 269 (1897).

The plenary power of Congress over navigable waters was analyzed by Justice Douglas in *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224-25 (1956):

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' (see *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 391; *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 249) or 'a superior navigation easement'. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 736. The legislative history and the construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States* v. *Gerlach Live Stock Co.*, *supra*, and *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, *supra*. We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

The Court has held time and again that "the flow of a navigable stream is in no sense private property"; that therefore the United States could take over a power project on a navigable river privately operated under state license, *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424 (1940); and that Congress may decide conclusively, as a purely legislative question, whether the entire flow of a navigable stream should be conserved for

the use and safety of navigation, *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913).

Considering the conflict between so-called water "rights" of riparian owners on the one hand and operations of the federal government in aid of navigation on the other, the Court stated in *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510 (1945):

> "Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all."

In summary, as against the power of the United States under the Commerce Clause, there are no private property rights in the waters of a navigable stream. This is true whether the asserted "rights" are claimed to be riparian or appropriative in character. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899); *Gibson* v. *United States*, 166 U. S. 269 (1897).

All rights to the use of water of navigable streams, whether claimed by sovereign states or private users, are subservient to the plenary power and dominion of the United States under the Commerce Clause. Congress in the exercise of this power and dominion may abolish, limit or preserve, as it deems fit, pre-existing rights to the use of navigable water. In any case, when such claims of right are affected by the exercise of this federal control,

the question as to the extent of the effect upon them is not a question of power but one of congressional intent.

Therefore, in the case at bar, assuming the existence of appropriative or riparian rights in the main stream of the Colorado River prior to enactment of the Project Act, reference must be made to the terms, purposes and legislative history of the statute in order to determine its effect on those asserted rights.

B. Provisions of the Project Act

In the enactment of the Project Act, Congress realized that the dam authorized by the Act would impound substantially all the water in the main stream of the river at the dam site and that the water impounded would be stored in Lake Mead (Rep. 153). The situation here is akin to that in *United States* v. *Twin City Power Co.*, 350 U. S. 222, 225 (1956)—"one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

The public purposes to be served by the authorized dam and reservoir are clearly set forth in the Project Act. Exercising its plenary power over the river, a navigable stream, Congress authorized the Secretary of the Interior

> "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty-million acre-feet of water"

for

> "the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the

> United States, and for the generation of electrical energy. . . ." Project Act §1

Congress directed that the dam and reservoir should be used:

> "First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses . . . and third for power." Project Act §6

It provided that title to the dam, reservoir, plant and incidental works should forever remain in the United States and that the United States should, until otherwise provided by Congress, control, manage and operate them (§6, Appendix B, pp. 18a-19a).

Congress further provided that the water thus impounded and stored should be placed under the control of the Secretary of the Interior, subject to specific limitations on his authority prescribed by the Project Act. As sole administrator of the statute and operator of the dam and reservoir, the Secretary is empowered to retain or to release the impounded and stored water so as to achieve the enumerated purposes of the statute in the order of their priority. He can release water from Lake Mead for irrigation and domestic purposes, but only after the superior needs of navigation, flood control and river regulation have been served.

The Special Master has concluded that the Project Act is the source of authority for the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead (Rep. 151).

Section 5 authorizes the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof

at such points on the river . . . as may be agreed upon, for irrigation and domestic uses . . . ." To make its intention abundantly clear, Congress declared in §5 that: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract as herein stated." Section 5 also provides that: "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act." The intention to exert authority over the allocation and distribution of water stored in Lake Mead is likewise manifested in §8(b) of the Act. That section contemplates that Arizona, California and Nevada, or any two of them, may negotiate a compact for a division of Colorado River water but provides that this compact shall be subject to water delivery contracts made by the Secretary of the Interior prior to congressional approval of the compact (Rep. 151).

We agree with the Special Master that the terms of the Project Act, together with the general operational scheme established in the Act and the purposes of the Act explicated in the legislative history

> "make it clear that the Project Act was designed by Congress to establish the authority for an allocation of all of the available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead among Arizona, California and Nevada. . . . As to this water, principles such as equitable apportionment or priority of appropriation which might otherwise have controlled the interstate division of the River in its natural flow condition were rendered inapplicable by the Project Act." (Rep. 152) (footnote omitted)

Whether the Project Act is viewed as itself laying down a formula for the division of main stream water

among Arizona, California and Nevada to which the Secretary is required precisely to conform in his water delivery contracts, as Arizona contends (see pp. 83-99, *infra;* A Exc. 7, 8), or is construed as conferring upon the Secretary certain discretionary powers in the division of such water, as the Special Master holds (Rep. 161-63), in either event the Project Act is the source of authority for the division of main stream water and there is no occasion for the application of principles of equitable apportionment.

C. Legislative History

That Congress intended to provide in the Project Act for the allocation of stored water among Arizona, California and Nevada is demonstrated by the legislative history of the Act. Indeed, as the Special Master concluded:

> "The congressional debates are almost unintelligible except on the premise that the legislators considered that they were providing, in the Project Act itself, the authority for the allocation of impounded water among the states." (Rep. 154)

Senator Pittman of Nevada clearly considered that an apportionment was being made by the provisions of the Project Act. Discussing the Phipps amendment, he stated:

> "The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only . . . 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get. . . ."[12]

[12] 70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. 123.

Since California would be limited to 4.4 million acre-feet of the 7.5 million dealt with by §4(a), and Nevada could use only 300,000 acre-feet, the remainder of 2.8 million was to go to Arizona, and the Senate so understood. Thus Senator Pittman concluded:

> ". . . Arizona to-day has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River."[13]

Although, as we have seen, Congress suggested in §4(a) what it considered to be an equitable allocation of stored water which might be accomplished by an interstate compact among Arizona, California and Nevada, it had no intention of leaving the water in storage unallocated among these states should they fail to agree. The patience of Congress had been worn thin by the protracted controversy among the Lower Basin states over the water of the Colorado River. As Senator Pittman reminded the Senate:

> "Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason."[14]

Senator Hayden of Arizona, who like Senator Pittman, was one of the architects of the Project Act, emphasized a

[13] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126.

[14] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 130.

number of times that the bill provided for the apportionment of water among Arizona, California and Nevada regardless of interstate priorities, but that it would not affect intrastate water rights. Senator Hayden stated:

> "The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts."[15]

The amendment referred to by Senator Hayden was eventually enacted with certain modifications as the second paragraph of §4(a) of the Project Act.

The Congressional Record is replete with many instances of a recognition and realization by the Senate that the statute under consideration, if enacted, would be the authority for the division of water among the three states involved (pertinent excerpts are set forth at pp. 58-67, 90-99, *infra*).

On the basis of its language and legislative history the Master concluded that the Project Act is "the source of authority for the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead" (Rep. 151). This conclusion is wholly justified and indeed inescapable.

D. Inapplicability of Principles of Equitable Apportionment

Finding that Congress intended the Project Act to be the source of authority for the division of main stream water among the three Lower Basin states, the Master held that the doctrine of equitable apportionment and the law of prior appropriation are irrelevant to the allocation of such

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[15] 70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. 45.

water among the three states (Rep. 138). This conclusion is obviously correct.

The provisions for the apportionment of water made by Congress in the Project Act and carried out by the Secretary of the Interior in his water delivery contracts render wholly inapplicable to the main stream interstate controversy presented by this case principles of equitable apportionment applied by this Court in other cases involving interstate water controversies. In those cases no apportionment had been authorized by Congress.[16] As the Master emphasized:

> "This case involves a statutory, not an equitable, apportionment. . . ." (Rep. 100)

E. Effect on Appropriative Rights

The statutory apportionment made by the Project Act also renders inapposite the law of prior appropriation (Rep. 138).

Recognition of and delivery of water pursuant to "appropriative rights", as those terms are defined and employed in water law, is wholly incompatible with the apportionment of water authorized by the Project Act.

Furthermore, management and control of the reservoir and dam for the primary purposes of improvement of navigation, flood control and river regulation necessarily preclude the operation of those works and structures to meet demands for delivery of water at the times and in the quantities required to satisfy appropriative rights. If the Secretary in managing the reservoir and dam were compelled to meet the demands of appropriative rights in point of time and quantity, it would be impossible for him to comply with the mandate of the Project Act that "the dam and reservoir

[16] See, *e.g.*, *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945); *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

. . . be used: First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses . . .; and third, for power" (§6).

These consequences would arise from the very nature of an appropriative right. The appropriator of water is entitled, as against all subsequent claimants, to the exclusive use of the water to the extent of his appropriation, without diminution or material alteration in quantity or quality. Since appropriations vest according to and are limited by time as well as volume, an appropriator is under the obligation to divert his water at the time and in the quantities fixed when his right was established, if his failure to do so will impair rights of other appropriators. *Santa Paula Waterworks* v. *Peralta,* 113 Cal. 38, 45 Pac. 168 (1896); *Galiger* v. *McNulty,* 80 Mont. 339, 260 Pac. 401 (1927); *Davis* v. *Chamberlain,* 51 Ore. 304, 98 Pac. 154 (1908); 2 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS 1369-73 (2d Ed. 1912); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 318 (3d Ed. 1911).

A construction of the Project Act which would require the Secretary to ascertain priority rights on the river, both as to time of vesting and quantity of water, and to manage the dam and reservoir so as to respect and satisfy these varying rights would be inconsistent with and frustrative of the clear intent of Congress expressed in the plain language of the Act.

These conclusions are supported by the legislative history of the Project Act. As introduced in the 69th Congress, §5 of the third Swing-Johnson bill provided in part that "contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators."[17] However, the clause subjecting contracts to prior appropriative rights was deleted in committee,

[17] H.R. 9825, 69th Cong., 2d Sess. (1926), Ariz. Legis. Hist. 5.

the permissive provision, "may be for permanent service", was stricken and the mandatory provision, "shall be for permanent service", was substituted.[18] At the same time that Congress deleted the provisions recognizing rights of prior appropriators, it added the following requirement:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."[19]

Congress, by refusing recognition to appropriative rights and by denying any right to the use of water except by contract, evidenced a clear intent that appropriative rights should not be recognized as the basis of any claim to water stored in Lake Mead.

The legislative history further shows that Congress intended that in contracting for delivery of stored water the Secretary should be free to ignore prior appropriations. During a discussion of the effect of the Project Act on claimed appropriative rights, the following exchange occurred between Senator Johnson of California and Senator Walsh of Montana:

> "Mr. Walsh of Montana. If the City of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation or an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that it must yield up that amount of water to the city of Los Angeles?
>
> "Mr. Johnson. I rather think so, just exactly as if it were a perfected right for irrigation purposes.
>
> "Mr. Walsh of Montana. Yes; but I always understood that the interest that stores the water

[18] Ariz. Legis. Hist. 6.

[19] *Ibid.*

has a right superior to prior appropriations that do not store.

"Mr. Johnson. Possibly so. What is the point?

"Mr. Walsh of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.

"Mr. Johnson. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.

"Mr. Walsh of Montana. A contract with whom?

"Mr. Johnson. With those who utilize and take and appropriate the water.

"Mr. Walsh of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

"Mr. Johnson. Yes; under the terms of this bill.

"Mr. Walsh of Montana. Then how can it be said that the city of Los Angeles has a perfected interest?

"Mr. Johnson. It has a perfected right there unquestionably, but the bill requires the city of Los Angeles to conform to it, and the city of Los Angeles is perfectly willing to conform to it just exactly as if it had no perfected right.

"Mr. Walsh of Montana. Am I correct in the assumption that the Government of the United States must distribute the water to the various appropriators in accordance with their several appropriations?

"Mr. Johnson. If they contract.

"Mr. Walsh of Montana. Yes; but to contract means a liberty of contract. That is what I want to know. Can the Secretary give the water to them or withhold it from them as he sees fit?

"Mr. Johnson. Certainly, because before he begins work upon the dam he has to have the con-

tract in his possession for its payment, and he is the one who is to fix the sums that are to be paid.

"Mr. Walsh of Montana. Yes, but that is quite contradictory. It seems to me that the City of Los Angeles has no rights by virtue of this appropriation.

"Mr. Johnson. Certainly it has, but those rights unquestionably will be controlled by this bill.

* * * * * * *

"Mr. Walsh of Montana. I directed the inquiry merely for the purpose of trying to find out, if I can, under what kind of obligation the Government of the United States, should it build this dam, would be to those who have the appropriations.

"Mr. Johnson. The Government would be under no obligations until it makes its terms. I seem unable to make that plain. But here is everything in this scheme, plan, or design: Everything is dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction, and he is not to undertake any expenditure nor to undertake any construction until that shall have been accomplished.

"Mr. Walsh of Montana. Let us suppose the Arizona people are perfectly willing to meet the requirements and that the Los Angeles people are perfectly willing to meet the requirements, and other people who have not even attempted to make any appropriation are perfectly able and willing to meet the requirements. Who then has the right?

"Mr. Johnson. The Secretary of the Interior and the Government have the right.

"Mr. Walsh of Montana. The Secretary of the Interior may utterly ignore those appropriations?

"Mr. Johnson. Possibly so.

"Mr. Walsh of Montana. That is what I am curious to find out about."[20]

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[20] 70 Cong. Rec. 168 (1928), Ariz. Legis. Hist. 40-43.

Thus it is clear that it was the understanding and intent of Congress that rights to the use of stored water could be obtained only by contract with the Secretary of the Interior and that claims of appropriative rights would be without effect. Congress, in the exercise of its plenary control over the river, could have withheld all the water from users in the Lower Basin. It did not see fit to do this. Instead, it authorized the Secretary by §5 to contract for the delivery of water within the limits prescribed by §4(a) without regard to perfected or inchoate appropriative rights.

The evidence is uncontradicted that, since construction of Hoover Dam, the reservoir and dam have been operated consistently without regard to claimed appropriative rights (Tr. 828-29). The record is clear that no water users in California or elsewhere have demanded the release of water in accordance with and in satisfaction of asserted appropriative rights.

This practical construction reflects a realization on the part of all concerned that since enactment of the Project Act rights to stored water have as their basis the Act and the water delivery contracts, if made pursuant thereto, rather than any prior appropriations of water.

F. "Present Perfected Rights"

Congress in §6 of the Project Act (Appendix B, pp. 18a-19a) directed that Hoover Dam be operated in "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact. . . ." Article VIII of the Compact provides:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the

> Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.
>
> "All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

The Special Master has construed §6 of the Project Act as preserving whatever rights to main stream water in Arizona, California and Nevada were perfected when the Project Act became effective on June 25, 1929.[21]

We disagree (A Exc. 5) with the Special Master's view that the provisions of §6 of the Project Act regarding "present perfected rights" operate to preserve intrabasin rights of users within the Lower Basin states to the use of water in the main stream of the Colorado River (Rep. 234-35, 306 *et seq.*). The Special Master has found, and we agree, that the Compact "governs inter-basin relations exclusively" (Rep. 141). The Master further held that "Articles I and VIII [of the Compact] contemplate inter-basin and not interstate operation of the Compact" (Rep. 141). It is our view that §6 of the Project Act does not recognize or confirm any rights within the Lower Basin at all. Section 6 merely directs that the facilities authorized by §1 shall satisfy the requirements of Article VIII of the Compact—that claims of rights by appropriators and users in the Lower Basin against appropriators and

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[21] The Special Master held that the Compact became effective only upon congressional consent thereto, which was given in the Project Act, and that the Act by its terms was to become effective only when the conditions of §4(a) were satisfied and the President so proclaimed. The presidential proclamation was issued on June 25, 1929 (Rep. 152 note 20).

users in the Upper Basin shall attach to and be satisfied from water stored in the Lower Basin. The only portion of Article VIII of the Compact which provides for "satisfaction" of present perfected rights is the second sentence of the first paragraph and this provision is clearly limited to the satisfaction of perfected rights basin versus basin.

An analysis of the circumstances and conditions which existed when the Compact was negotiated strongly supports this conclusion with respect to the meaning of §6.

Prior to this Court's decision in *Wyoming* v. *Colorado*, 259 U.S. 419 (1922), in an interstate stream controversy between two states, both of which applied the doctrine of prior appropriation, it was uncertain whether claims of prior appropriators in one state would prevail against junior appropriators in the other state. While the Compact Commissioners were in negotiation, that decision was rendered, holding that in such a case principles of prior appropriation are controlling.

The decision increased the concern of the Upper Basin that construction of storage facilities on the main stream would permit a rapid expansion of irrigation and other uses in the Lower Basin and form the basis for claims of appropriative rights in the water, which would preclude its availability for the more slowly developing needs of the Upper Basin (Rep. 22, 139-41).

At the same time the predicament in which the Lower Basin users might be placed if the Compact became effective before storage was made available was apparent. Since the Compact, in the absence of the protection afforded the Lower Basin by the first sentence of Article VIII, would effectively preclude the assertion of rights under priorities claimed by the Lower Basin, it would bar recourse to the

courts to require the release of water in times of shortage. Therefore, until storage was provided "within or for the benefit of the Lower Basin", the Lower Basin could not afford to relinquish its right to demand release of water by the Upper Basin in satisfaction of claimed prior rights. Accordingly, the phrase in Article VIII, "present perfected rights . . . are unimpaired", was inserted in the Compact so that Lower Basin users might assert as against Upper Basin users their legal right to demand the release of water in satisfaction of their prior claims until such time as storage facilities were provided, thereby assuring users in the Lower Basin a dependable water supply.

This clearly appears from the provision which immediately follows the first sentence of Article VIII:

> "Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights [*i.e.*, present perfected rights], if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III."

Thus by the device of preserving perfected rights *basin versus basin* until storage was available, protection was afforded main stream Lower Basin users. After storage was provided as contemplated by Article VIII of the Compact, the first sentence of Article VIII had served its purpose and had no further effect.

The Upper Basin, on the other hand, required assurance that the Lower Basin, once storage should become available to it, would not claim rights in excess of the guarantee of

supply found in Article III of the Compact. Accordingly, Article VIII required that water should be stored "not in conflict with Article III" and that all claimed prior rights in the Lower Basin should be, in effect, discharged and released as against the Upper Basin whenever suitable storage facilities were provided "on the main Colorado River within or for the benefit of the Lower Basin."

But even if the first sentence of Article VIII of the Compact may properly be construed as a general guarantee that the Compact would not operate to affect prior perfected rights, it does not follow that §6 of the Project Act was intended to have that effect. It will be observed that §6 of the Project Act does not provide, as does the first sentence of Article VIII, that "present perfected rights . . . are unimpaired". To the contrary, Congress expressly rejected a proposed provision designed to protect appropriative rights (pp. 42-43, *supra*) and §6 says nothing about either impairing or preserving perfected rights. It speaks in terms of "satisfaction" of such rights as contemplated by Article VIII of the Compact. Since this provision of the Compact regarding satisfaction of perfected rights is limited to rights basin versus basin and does not apply to intrabasin rights (Rep. 141), it may not properly be inferred that §6 goes beyond the scope of this provision of Article VIII and operates to preserve perfected rights within the Lower Basin.

Instead of preserving appropriative rights of main stream users, the Compact contemplated that those rights, if any, would be extinguished once storage was provided "within or for the benefit of the Lower Basin". This conclusion follows logically when the Compact scheme for supplying main stream water to Lower Basin users is con-

sidered in connection with the essential nature of an appropriative water right.

Since an appropriative right is fixed and measured in relationship to the supply available from the natural flow of the stream, once the natural flow is destroyed no standard survives by which to determine the users who may take or how much each may divert. An appropriative right does not entitle the user to a full supply of water for a given acreage and may be fully satisfied only if there is enough water in the river "as it was wont to flow" when the right was acquired (pp. 41-42, *supra*). The natural flow of the river, which might be available to junior users for a portion of the year, may not be impounded so as to reserve for senior users a year-round water supply. The holder of a senior right to the natural flow has no greater claim to stored water than does a junior appropriator, since the right of the senior user is not to stored water but only to the natural flow.

The right given the Upper Basin in Article III(d) of the Compact to discharge its water delivery obligation to the Lower Basin without regard to the natural flow of the river clearly demonstrates that the intended preservation of priority of right was not to continue after storage was provided for users in the lower Basin.

The entire approach of the Compact to the problem of allocation between the two Basins of the available water supply rising in the Upper Basin is at variance with a recognition of appropriative rights within the Lower Basin. The fact that the Upper Basin in its sole discretion might vary the supply from year to year, so long as in each consecutive ten-year period the aggregate obligation of Article III(d) was fully discharged, cuts squarely across the theory of a preservation and satisfaction of rights in

natural flow. That this is true is demonstrated by the fact that the storage contemplated in Article VIII would destroy all possibility of measuring and determining the amount of water which a holder of a claimed prior right might be entitled to require at any given time.

The conclusion, therefore, is clear that users in the Lower Basin surrendered their claimed prior appropriative rights in the natural flow of the river (which was silt-laden, given to violent floods and prone to seasonal fluctuations in supply) in exchange for rights to receive from storage a guaranteed average supply of desilted water from a flood-controlled river.

The Special Master, although refusing to accept our construction of §6 and Article VIII, has concluded that a water right is a "present perfected right" within the protection of §6, if it was acquired in compliance with the formalities of state law, but only to the extent that it represented an actual diversion and beneficial use of a specific quantity of water applied to a definite area of land or to a particular domestic or industrial use (Rep. 308).[22] With this definition of "perfected right" we agree.

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[22] The water rights of federal establishments in the Lower Basin have been exempted by the Special Master from compliance with the formalities of state law as a basis for their acceptance, since he holds that the United States has the power to reserve water for the future needs of these establishments independently of state law and even though there has been no actual diversion or beneficial use of any specific quantity of water. To the contrary, the Special Master holds these rights are superior to subsequent appropriations under state law, although the subsequent appropriator may divert and use the water prior to any diversion and use in a federal establishment. Accordingly, a reservation of water by the United States before June 25, 1929 is accorded the protection given by §6, even though, as of that date, the right was not acquired under state law and all the water reserved had not been put to beneficial use (Rep. 257-66, 309-10). These conclusions, with which we disagree, are discussed in Part II of this brief.

However, on the premise that "a statute speaks as of its effective date", the Special Master reasons that the phrase, "present perfected rights", as employed in §6 of the Project Act, means rights perfected when the Act became effective on June 25, 1929 (Rep. 152 note 20).

As we have previously pointed out, the effect of Article VIII of the Compact on perfected rights is limited to claims basin versus basin (pp. 47-49, *supra*). But if that Article was intended to provide for the satisfaction of perfected rights intrabasin, analysis of the Project Act and the provisions of the Compact establishes that §6 was intended to relate only to those rights which were perfected on the date when the Compact was signed.

Although generally a statute "speaks as of" its effective date, nevertheless a statute often does "speak with reference to" circumstances, conditions or things existing at a time antecedent to its effective date.[23]

The Project Act contains no general provision for the satisfaction or preservation of all perfected rights, and the direction of Congress found in §6 that there be satisfaction of present perfected rights "in pursuance of Article VIII of said Colorado River compact" clearly requires that only the present perfected rights referred to by that Article of the Compact be discharged and satisfied. Had the Compact, in place of the phrase "present prefected rights", used the expression, "rights perfected on or before the 24th day of November, 1922", there can be no doubt that the effect of §6 would be limited to the satisfaction of rights perfected

[23] For example, state legislation conferring tax exemptions and other benefits upon veterans commonly restricts such benefits to those who were residents of the state prior to a specified date. Ariz. Const., Art. IX, §2; Ariz. Rev. Stat. Ann. §42-271 (1956); Cal. Stat. 1953, c. 1219, §1.

on or before November 24, 1922, even though the Project Act and the Compact did not become effective until December 25, 1929. Hence, in determining what perfected rights were intended to be satisfied, the meaning of the Compact phrase, "present perfected rights", must be ascertained.

In *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938), the Court dealt with the power of a state to enter into a compact regarding the water of interstate streams. It is clear from that decision that there is no compulsion on compacting states to honor, preserve or satisfy so-called vested rights to the use of water of interstate streams, even though such "rights" have been adjudicated by state courts prior to the compact and are binding upon a state and its citizens. As between states, such rights are not binding, and an apportionment of water by interstate compact may be validly made in disregard of these rights. The states negotiating the Colorado River Compact were under no legal obligation to make any provision in the Compact insuring the preservation or satisfaction of rights to the use of water of the Colorado River which might exist either at the time the Compact was negotiated or at the time the Compact was ratified and approved. The extent to which provision was made in the Compact for satisfaction of such rights must be determined by an interpretation of the language employed in the Compact, viewed in the light of surrounding circumstances and the objectives intended to be accomplished by the Compact.

It will be observed that Article VIII of the Compact carefully specifies "*present*" perfected rights. The natural and unstrained meaning of this term is that it was intended

to cover only those rights existing at the date the Compact was signed. It must have been apparent that a compact, which sought to compose problems as important and controversial as those dealt with by the Compact Commissioners and which were not resolved by them until after protracted negotiations extending over a period of almost a year, would not receive speedy approval by the legislatures of the Colorado River Basin states and the Congress of the United States. Had it been intended that the Compact, in providing for the satisfaction of present perfected rights, should cover rights which were perfected after the signing of the Compact but before its approval and ratification by the United States and the Colorado River Basin states, language clearly expressing that intent would have been employed.

One of the difficulties with which the Compact negotiators had to deal was the claim of prior vested rights. This problem was prominent among those which caused the Compact negotiators to abandon an effort to reach a division of water among the states and to content themselves with an apportionment between the basins, leaving the more difficult problem of division among the states of the two basins for future negotiation and settlement. Under these circumstances, it seems most unlikely that the Compact negotiators would have done more than make provision for the preservation or satisfaction of rights then perfected. It is not reasonable to assume that they intended to add to the difficulties of a problem which they had been unable to resolve, by providing in the Compact for the recognition of additional rights not then in existence.

G. Summary

To summarize: In enacting the Project Act Congress exercised the power conferred upon it by the Commerce Clause over the waters of the Colorado River as a navigable stream of the United States. The construction of Hoover Dam and the creation of Lake Mead, as authorized by Congress, caused all water in the main stream of the river at the site of the dam and reservoir to be impounded and stored in Lake Mead.

Congress also provided for the apportionment among Arizona, California and Nevada of the water thus impounded and stored. Such apportionment renders irrelevant and inoperative the principles and considerations which are material in a case involving the equitable apportionment of water between states.

The Project Act, properly construed, neither recognizes nor preserves any appropriative or "present perfected rights" *intrabasin*. It provides for the satisfaction and discharge of such rights only *basin versus basin*.

If, however, it should be held that any intrabasin rights were preserved by §6 of the Project Act, such protection is afforded only to a right which was perfected under state law as of November 24, 1922, and then only to the extent that it represented an actual diversion and beneficial use of a specific quantity of water applied to a definite area of land or to a particular domestic or industrial use.

The meaning, extent and effect of the statutory apportionment remain to be considered.

II

The Project Act provides for the storage of main stream water only and for its allocation among Arizona, California and Nevada.

The Project Act was not to take effect until certain conditions precedent set forth in §4(a) were met (p. 16, *supra*). Among these conditions was the requirement that California should agree irrevocably and unconditionally:

> ". . . that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

In addition, §4(a) authorized Arizona, California and Nevada to enter into an agreement which should provide, among other things:

> ". . . (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive

beneficial consumptive use of the Gila River and its tributaries within the boundaries of said state. . . ."

The principal contention upon which California rests her case, namely, that §4(a) deals with both main stream and tributary water, was rejected by the Special Master (Rep. 177-79). We agree with his conclusion that the foregoing provisions deal with main stream water only—that the words of §4(a) and the substantially identical language of the California Limitation Act (Appendix C, pp. 27a-28a), *viz.*, "waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado River compact" and "excess or surplus waters unapportioned by said compact", refer to "the water stored in Lake Mead and flowing in the mainstream below Hoover Dam" (Rep. 173).

The Special Master's conclusion is supported by other provisions of the Project Act, the general operative plan which they establish and the legislative history of the statute.

1. Interpretation of the phrase, "waters apportioned to the lower basin states by paragraph (a) of Article III" (Project Act §4(a))

A. Provisions and Purposes of the Project Act

One of the stated purposes of the Project Act is "regulating the flow of the Colorado River"—not the Colorado River *System*. Another stated purpose is to provide "for storage and for the delivery of the stored waters thereof", *i.e.*, of "the Colorado River" (§1, Appendix B, p. 9a).

To achieve these purposes, among others, the Secretary of the Interior was "authorized to construct, operate, and maintain a dam and incidental works *in the main stream of the Colorado River* at Black Canyon or Boulder Canyon

adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water. . . ." (§1)

Pursuant to the authority thus conferred, Hoover Dam —"the principal structure in the Lower Basin, impounding the waters of the Colorado River to form Lake Mead"— was erected "in Black Canyon on the main channel of the Colorado River" (Rep. 32). And, as the Special Master stated, "Congress realized that the dam authorized by the Project Act would impound substantially all the water of the mainstream. . . ." (Rep. 153)

The Limitation Act requirement of §4(a) restricts California to "the aggregate annual consumptive use (diversions less returns to the river) *of water of and from the Colorado River*"—not the Colorado River System—clearly a reference to main stream water.

Section 5 (Appendix B, pp. 14a-15a) authorizes the Secretary of the Interior "to contract for the storage of water in said reservoir and for the delivery thereof. . . ." The storage referred to is that provided for in §1, *i.e.*, storage of water "in the main stream of the Colorado River"—not the Colorado River System.

Section 6 (Appendix B, pp. 18a-19a) sets forth the purposes for which the "dam and reservoir provided for by section 1 . . . shall be used"; and §1, as we have said, provides that the dam and reservoir authorized by the Act shall be "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River" —the main stream.

The water allocation among the Lower Basin states authorized by §4(a) of the Project Act also demonstrates the intent of Congress to deal with main stream water only. Thus, as the Special Master held:

> "Section 4(a) contemplates the division of the water referred to therein only among the three states

> of the Lower Basin which have geographic access to water flowing in the mainstream of the Colorado River, namely, Arizona, California and Nevada." (Rep. 170)

And as the Master stated:

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. The very language of the Section—it refers to the Colorado River and not to the System—points in this direction. But more important, the second paragraph of Section 4(a) demonstrates that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in that Section among three states only: of the first 7.5 million acre-feet—4.4 to California, 2.8 to Arizona, and .3 to Nevada; the balance to California and Arizona equally." (Rep. 174)

Thus the division of water provided for in §4(a) disposed entirely of the 7,500,000 acre-feet, which are referred to as waters apportioned to the Lower Basin by Article III(a) of the Compact. This disposition, as the Master noted, makes no provision whatever for any apportionment to Utah or New Mexico, and it limits Nevada to 300,000 acre-feet annually (Rep. 175-76). Among the leading proponents of the §4(a) apportionment were the senators from Nevada (Pittman), Utah (King) and New Mexico (Bratton). Had the senators from Utah and New Mexico believed that the proposed §4(a) was intended to recommend a division of water among Arizona, California and Nevada which included water of Lower Basin tributaries in Utah and New Mexico, it is inconceivable that they would not have vigorously opposed these provisions instead of sponsoring and strongly advocating their adoption. It is

also most unlikely that, had Senator Pittman (Nevada) construed §4(a) as involving the water of tributaries, he would have remained silent on the subject or have taken so prominent a part, as he did, in the formulation and advocacy of §4(a).

These circumstances caused the Special Master to conclude that a construction of §4(a) as apportioning water of tributaries as well as of the main stream would require that he "attribute to Congress an intent to deprive two of the states having Lower Basin interests of any participation in the Lower Basin apportionment" (Rep. 175).

The fact that Congress proposed an apportionment among *three* rather than *five* states having Lower Basin interests, and only among those three states which geographically have access to water of the main stream, in the Master's words, "strongly indicates that the congressional intention was to provide only for the apportionment of mainstream water" (Rep. 176).

B. Legislative History of §4(a)

The historical background and legislative history of §4(a) also show that Congress intended by the enactment of the section to deal with main stream water only—that Congress construed Article III(a) of the Compact as apportioning only main stream water to the Lower Basin or at any rate employed its references to Article III(a) to signify water of the main stream only.

A brief review of the circumstances following the negotiation of the Compact and prior to the enactment of the Project Act will demonstrate this.

After the Compact had been signed, it was approved by all the states of the Colorado River Basin, except Arizona (Rep. 24-25). Between 1922 and 1927, California's representatives in Congress introduced measures which would

have authorized construction of a dam at Boulder Canyon and an All-American Canal, all of which failed of enactment (Rep. 27).[24] During the years 1925 through 1927, negotiations between Arizona, California and Nevada looking toward a compact dividing the water apportioned to the Lower Basin by the Compact were unsuccessful.[25]

In 1927 the Governors of the seven Colorado River Basin states convened in an effort to bring about seven-state ratification of the Compact. The Governors of the states of the Upper Division adopted a resolution recommending that, "of the average annual delivery of water to be provided by the States of the upper division at Lees [*sic*] Ferry, under the terms of the Colorado River compact", there be apportioned to Nevada 300,000 acre-feet, to Arizona 3,000,000 acre-feet and to California 4,200,000 acre-feet.[26]

Clearly, this suggested apportionment was of water in the main stream of the Colorado River, since the water referred to was that required by the Compact to be delivered annually "at Lees Ferry"—described by the Compact as "a point in the main stream of the Colorado River one mile below the mouth of the Paria River" (Art. II(e), Appendix A, p. 2a). It is also plain that the water referred to was that apportioned by Article III(a) of the Compact, for the total quantity dealt with by the Governors aggregated 7,500,000 acre-feet per annum, exactly the same quan-

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[24] H. R. 11449, 67th Cong., 2d Sess. (1922); H. R. 2903 and S. 727, 68th Cong., 1st Sess. (1923); H. R. 6251, 69th Cong., 1st Sess. (1925); H. R. 9826 and S. 3331, 69th Cong., 1st Sess. (1926).

[25] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 21-23; 70 Cong. Rec. 171 (1928), Ariz. Legis. Hist. 50-57; 70 Cong. Rec. 333 (1928), Ariz. Legis. Hist. 71-72.

[26] 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 51-52.

tity which was apportioned to the Lower Basin by Article III(a).[27]

This fact is further evidenced by the distinction drawn by the Governors between the water thus divided and "water to be supplied from the tributaries of the Colorado River flowing in" Arizona and "waters of the tributaries of the Colorado River emptying into the river below Lees Ferry", of which a separate and different disposition was recommended.[28]

Congress was well aware of the resolution adopted at the Governors' Conference, and in fact the division of water among the Lower Basin states recommended by the Governors of the Upper Division states was the starting point for the compromise finally worked out in the Senate and incorporated in §4(a) of the Project Act.

When the fourth Swing-Johnson bill was considered by the Senate the Governors' proposals had not been accepted, primarily because of California's demand that it should have 4,600,000 acre-feet of the water of the Colorado River and Arizona's insistence that California should be limited to 4,200,000 acre-feet.[29]

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[27] The Governors were contemporaries of the negotiators of the Compact. Indeed, Governor Emerson of Wyoming, who voted for the resolution passed at the Governors' Conference, had been the Compact Commissioner for Wyoming.

[28] It was suggested that there be apportioned to Arizona 1,000,000 acre-feet of water from tributaries flowing in Arizona, to be diverted from the tributaries before they empty into the main stream; and it was proposed further that each of the Lower Basin states should have the exclusive use of all water of tributaries within the boundaries of the state which empty into the Colorado below Lee Ferry, before those waters empty into the main stream. 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 53.

[29] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 22-23; 70 Cong. Rec. 171, 172 (1928), Ariz. Legis. Hist. 50-57.

Such was the Arizona-California controversy over water and the impasse to its settlement when in 1928 Congress took up for consideration and debate the fourth Swing-Johnson bill, which was ultimately to be enacted as the Project Act.

The Arizona-California controversy and the recommendations of the Governors' Conference for its settlement were considered at length by the Senate in the debate on the fourth Swing-Johnson bill. Senator Pittman, who had attended the Conference, gave the Senate a summary of its proceedings, including the proposals made for division among the three Lower Basin states of the water to be delivered by the Upper Basin at Lee Ferry. He explained that in dividing this water the Governors had dealt with the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) of the Compact. He then quoted the language of Article III(a) and concluded:

> "In other words, those State governors believed that there was only 7,500,000 acre-feet of water to divide, and they proposed to divide it, as I have said, 4,200,000 acre-feet to California, 3,000,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada.
>
> "California said 'We can not possibly do with that amount of water; we must have 4,600,000 acre-feet instead of 4,200,000 acre-feet.' Arizona would not yield more . . . ."[80]

The Senate fully recognized the pressing necessity for a settlement of the Arizona-California controversy and Senators expressed regret that a difference of 400,000 acre-feet of water was preventing its solution.

The Senate finally split the difference by providing in §4(a) of the Project Act for the apportionment of Article

[80] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 23.

III(a) water as follows: not to exceed 4,400,000 acre-feet to California, 300,000 acre-feet to Nevada and 2,800,000 acre-feet to Arizona.[31]

In arriving at this compromise the Senate unquestionably was dealing with water in the main stream of the Colorado River. The division was patterned upon the apportionment suggested by the Governors' Conference, which was an apportionment of main stream water.

For example, Senator Hayden, referring to the Governors' Conference, reported that the conferees had suggested the following division of water:

> "1. Of the average annual delivery of water to be provided by the States of the upper division at Lees [*sic*] Ferry under the terms of the Colorado River compact:
>
> (a) To the State of Nevada 300,000 acre-feet.
>
> (b) To the State of Arizona, 3,000,000 acre-feet.
>
> (c) To the State of California, 4,200,000 acre-feet."[32]

Senator Pittman further stated:

> "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California dividing the water *let down to the three lower States.* Of the 7,500,000 acre-feet of *water let down that river* they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together."[33]

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[31] 70 Cong. Rec. 164, 232, 333, 385, 386 (1928), Ariz. Legis. Hist. 29-30, 67, 71, 88-89, 94-97.

[32] 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 51.

[33] 70 Cong. Rec. 232 (1928), Ariz. Legis. Hist. 67.

Senator Pittman, in depicting the situation which might arise in the absence of a compromise, stated:

> "In other words, there are only 15,000,000 acre-feet *in the river*. Seven million five hundred thousand are forever to be retained in the upper States, to be put in use some time in the future.
>
> "Now, unless there was an agreement as to exactly how much water should go to the lower States *out of the 7,500,000 acre-feet that went down to them*, what might be the result? If Arizona stays out of the agreement, she would have her legal right to appropriate as much water as she could put to beneficial use. On the other hand, California would only be restricted by the *7,500,000 acre-feet that went down*, with the result that there would be nothing in the compact to prevent California from using the entire 7,500,000 acre-feet and there would be nothing in the compact to prevent Arizona from using the 7,500,000 acre-feet if she never went into the compact."[34]

Finally, Senator Pittman, in discussing the Hayden amendment to §4(a), which eliminated the Gila River from the terms of any Mexican Treaty, stated:

> "As I understand this amendment, Arizona to-day has practically allocated to it *2,800,000 acre-feet of water in the main Colorado River*. It is there for their use. As I understand it, they are willing to give up any amount that may be necessary to meet the demands of Mexico from that 2,800,000 acre-feet, provided it is matched by an equal amount of water out of California's allocation of 4,400,000 acre-feet."[35]

These repeated references in the congressional debate on §4(a) to "water let down to the three lower States", to

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[34] 70 Cong. Rec. 386 (1928), Ariz. Legis. Hist. 93.

[35] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126.

"water let down the river", to "the 7,500,000 acre-feet that went down to them" and to Arizona's share as "2,800,000 acre-feet of water in the main Colorado River", referred and could only have referred to water in the main stream. They compel the conclusion reached by the Special Master that:

> "It is clear that Congress intended Section 4(a) of the Project Act to apply only to the mainstream . . . ." (Rep. 173)

C. The Water Dealt With By Article III(a) of the Compact

We agree with the Special Master's conclusion that, since the Compact made no division of water among the Lower Basin states, it is not relevant to the allocation among Arizona, California and Nevada of water from Lake Mead and from the main stream of the river below Hoover Dam (Rep. 138-41). However, against the eventuality that the Court may differ with this conclusion, the Report sets forth the Master's interpretation of the Compact. It is only against this same eventuality that Arizona has noted, by her exceptions to the Report, disagreement with the Master's understanding of the Compact (A Exc. 1, 2).

(1) The congressional interpretation of Article III(a) of the Compact is controlling.

The Master construes the Compact as a separate and independent document wholly apart from and without reference to the Project Act (Rep. 138-51). In this we believe he is in error. The Compact cannot be properly construed apart from the Project Act, since it was not to become "binding and obligatory" until approved by the Congress of the United States (Compact Art. XI, Appendix A, p. 7a).

Further, since the consent of Congress is a condition precedent to the effectiveness of an interstate compact

(U. S. Const. art. I, §10), the interpretation given such a compact by Congress in consenting to it is controlling, for otherwise there would be no true congressional consent. Therefore, it is the congressional construction of the Compact embodied in the Project Act and subsequently accepted by the states, which is controlling and conclusive.

The meaning which Congress ascribed to the Compact in enacting the Project Act is clearly manifested by the legislative history of the statute. California had pressed for enactment of the predecessor Swing-Johnson bills through three Congresses and had been opposed not only by Arizona, but by the Upper Basin states as well. Had California advanced during the Senate debates her present interpretation of Article III(a) of the Compact and the references to it in the Limitation Act (see Rep. 177-78; p. 58, *supra*), there is little doubt that the Project Act would not have been passed, at least until and unless California had receded from her position. This is made clear by the following facts.

The Upper Basin states were vitally concerned lest, without Arizona's ratification of the Compact, California would put to use large quantities of main stream water and Arizona, free from any Compact restrictions and having large areas of irrigable land, would develop this land before the Upper Basin states could develop theirs. The Upper Basin feared that Arizona would claim prior rights to water for her land and that consequently the obligation of the Upper Basin to release water for use in the Lower Basin would be enlarged above the Compact apportionment.

The Upper Basin understood that its obligation to deliver water to the Lower Basin arose from and was limited by paragraphs (a) and (d) of Article III of the

Compact. This also was the understanding of Congress. Senator Pittman, discussing the Phipps amendment, stated:

> "Mr. President, I want to say that the amendment of the Senator from Colorado (Mr. Phipps) now offered is substantially recommended by the committee. The bill as originally introduced by the Senator from California (Mr. Johnson) had no reference in it to water at all, but it became evident to the committee that there had to be some reference with regard to water because not only were the States of California and Arizona interested in this larger supply of water but the four upper States were interested as well. This amendment was offered in committee by the Senator from Wyoming (Mr. Kendrick) for the purpose of protecting the water rights of the four upper States. In other words, there are only 15,000,000 acre-feet in the river. Seven million five hundred thousand are forever to be retained in the upper States, to be put in use some time in the future.
>
> "Now unless there was an agreement as to exactly how much water should go to the lower States out of the 7,500,000 acre-feet that went down to them, what might be the result? If Arizona stays out of the agreement, she would have her legal right to appropriate as much water as she could put to beneficial use. On the other hand, California would only be restricted by the 7,500,000 acre-feet that went down, with the result that there would be nothing in the compact to prevent California from using the entire 7,500,000 acre-feet and there would be nothing in the compact to prevent Arizona from using the 7,500,000 acre-feet if she never went into the compact.
>
> "So the upper States said: 'We have got to be assured that there is not used in the lower basin more than the 7,500,000 acre-feet, because, if there is more used, then when we get ready to use it in the future it will not exist under the law of appropria-

tion that applies in that section of the country.' Consequently, in view of the fact that Arizona might never go into the compact, might never be bound by compact, might be perfectly free to exercise her equal right and put to use as much as she could put to beneficial use, it was said in the committee, 'If Arizona does not come in and if it is limited to six States only, then we must be assured that California will not take the full 7,500,000 acre-feet and then Arizona take some more.' So the Senator from Wyoming (Mr. Kendrick) offered an amendment in committee, to which the committee agreed, and that amendment provided that California should never consumptively use of the Colorado River over 4,600,000 acre-feet.

* * * * * *

"Let me now call attention to the fact that the committee adopted the Kendrick amendment. They adopted the amount that California demanded, which was 4,600,000 acre-feet. I voted for that amendment. Why? I voted for it because otherwise Arizona would not participate in the compact and would not participate in the division of water. In other words, it was apparent to me that California was so dissatisfied with it that we had to treat without Arizona. We treated without Arizona in the committee, and we put the amount in there that California demanded before the four governors at Denver [*sic*].

* * * * * *

"Mind you, this 6-State agreement is only an expedient. It is not what any of the seven States want. All of the seven States want a fair treaty between the seven States, and we have been striving to that end for several years. It looks to me as though we are on the eve of getting an agreement.

* * * * * *

"I think it would be a terrible mistake when everyone has reached the point of compromise as we have

here. If California's allotment is reduced 200,000 acre-feet out of 7,500,000 and Arizona concedes 200,000 acre-feet to California for the purpose of compromise, we should vote for it, because if we do not bitterness is bound to exist between these States. *If we do not, there have got to be a number of other provisions in the bill to satisfy the other States, because there is fear in the four upper States with regard to any kind of a ratification except by all the States.*''[36]

Immediately following this explanation by Senator Pittman and after a brief interchange between Senators Hayden and Johnson, the Senate compromised the dispute by limiting California to 4,400,000 acre-feet of water annually.

It is quite clear, therefore, that Congress intended to limit California to the use of not more than 4,400,000 acre-feet of water per year of the supply which the Compact obligated the Upper Basin to release to the Lower Basin.

It is also clear that Congress equated the Article III(d) delivery obligation, requiring the release by the Upper Basin to the Lower Basin of 75,000,000 acre-feet of water in every ten-year period, with the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a). Following the adoption of the Bratton amendment to the Phipps amendment limiting California to an annual use of 4,400,000 acre-feet per year ''of the waters apportioned to the lower basin States by the Colorado River compact'', Senator Phipps offered a change in the language of his amendment with this explanation:

''Referring to the amendment which is now before the Senate, in order to remove any possible mis-

[36] 70 Cong. Rec. 386 (1928), Ariz. Legis. Hist. 93-96.

> understanding regarding the 4,400,000 acre-feet of water, I desire to perfect the amendment by inserting, on page 3, line 4, after the word 'by,' the words 'paragraph (a) of article 3 of,' so that it will show that that allocation of water refers directly to the seven and one-half million acre-feet of water that are mentioned in paragraph 3."[37]

Without objection, this modification of the Phipps amendment was permitted.

In reliance upon the foregoing understanding of the Compact, the Upper Basin states supported the Project Act and Congress authorized the expenditure of millions of dollars for construction of Hoover Dam and the All-American Canal, all to the great benefit of California.

The words of Justice Jackson, concurring in *West Virginia ex rel. Dyer* v. *Sims,* 341 U. S. 22, 36 (1951), are applicable:

> "After Congress and sister states had been induced to alter their positions and bind themselves to terms of a covenant, [California] . . . should be estopped from repudiating her act."

(2) The Compact apportioned main stream water.

Even without reference to the congressional interpretation, however, the Compact, properly understood, apportioned only main stream water.

The Master has construed Article III(a) of the Compact as dealing with both the main stream and tributaries of the Colorado River (Rep. 142-51). Having thus interpreted the Compact and having also found that §4(a) of the Project Act deals only with water in the main stream of the river, the Master was obliged to conclude that Congress did not use the phrase, "waters apportioned to the lower basin States by paragraph (a) of Article III of the

[37] 70 Cong. Rec. 459 (1928), Ariz. Legis. Hist. 100.

Colorado River compact", in the same sense as these words were used in the Compact. He considered the congressional reference to Article III(a) solely as "shorthand" for "7,500,000 acre-feet per annum"; and he found that Congress intended, in limiting California to 4.4 million acre-feet of "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact", simply to limit California's annual use of water to 4.4 out of the first 7.5 million acre-feet of main stream water available to the Lower Basin. Accordingly, he concluded: "I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries." (Rep. 173) (Master's italics)

We differ with this reading of the Compact. In our view, Congress correctly understood and accurately employed the clause of the Compact to which reference is made in §4(a), *i.e.*, "waters apportioned . . . by paragraph (a) of Article III of the . . . compact", as covering main stream water only, to the exclusion of water of tributaries. We base our position upon the terms of the Compact, considered in the light of the problems and conditions confronting its negotiators.

The acknowledged fact that the Compact division of water is made only between Upper and Lower Basins (Rep. 138-41), when regarded in the setting of the conditions which created the need for an interbasin agreement, leads to the conclusion that the apportionment made by the Compact to the Lower Basin was of main stream water only.

We have previously described the geography of the Colorado River Basin (pp. 10-11, *supra;* see Rep. 9-14),

which shows clearly that the only water available to both the Upper and Lower Basins and to *which both could lay claim* was water rising in the Upper Basin and descending to the Lower. The Compact was designed to accomplish a settlement of the conflicting claims of each basin to this water.

We have also reviewed the conditions—the climatic, topographical and agricultural differences between the two basins, the contrast between their respective rates of growth and expansion, the need and desire of the Lower Basin for the erection of structures on the river which would insure flood control and a stable water supply to the Lower Basin, the fears of the Upper Basin that expanded use of water in the Lower Basin would give rise to claims of water rights in the Lower Basin prior and superior to those of the Upper Basin—which brought about the appointment of the Compact Commissioners and caused them to compromise and agree upon a division of Colorado River water between the two basins rather than among the Colorado River Basin states (pp. 11, 13, 68, *supra*).

The water which the Commissioners sought to divide was certainly not the water of Lower Basin tributaries. The Upper Basin was not interested in Lower Basin tributaries. Its fears concerned Lower Basin claims to water originating in the Upper Basin. Its guiding purpose was to reserve as much of that water as possible. The water of tributaries in the Lower Basin was of no concern to the Upper Basin for the simple reason that this water was not and could never be physically available for use in the Upper Basin and therefore the Upper Basin could have no claim thereto.

The Upper Basin negotiators had as their main objective an agreement requiring the release of a minimum of water, thereby protecting the Upper Basin during its compara-

tively slow development from claims of extensive prior appropriative rights in the Lower Basin. On the other hand, Lower Basin negotiators had as their primary aim an agreement which would require the release of a maximum of water by the Upper Basin. This dominating purpose to apportion main stream water interbasin and not interstate is reflected and accomplished by the terms of the Compact.

It is true, as the Special Master notes, that Article II(a) of the Compact defines the "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America", that Article III(a) apportions "from the Colorado River Sytem . . . the exclusive beneficial consumptive use . . . of water", and that Article III(b) permits the Lower Basin "to increase its beneficial consumptive use of such waters".

The Master concludes from these provisions that Article III(a) and (b) necessarily refer to water *of* the "System" as defined in Article II(a), *i.e.*, to main stream and tributary water (Rep. 142-43). This conclusion, however, disregards the fact that the water apportioned by Article III(a) is not water *of* the System but water *"from"* the System and that Article I of the Compact declares that only "an apportionment of the use of *part* of the water of the Colorado River System" is made. In fact, Article III(f) and (g) make provision for "further equitable apportionment of the . . . waters of the . . . System . . . at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)". Article VI provides for consideration and adjustment of "any claim or controversy . . . between any two or more of the signatory states . . . with respect to the waters *of* the Colorado River System *not covered* by the terms of this Compact".

The Master rejects Arizona's position that the foregoing provisions indicate that only main stream water was apportioned to the Lower Basin by the Compact. He considers Article I to be consistent with Article III(f) and (g), in that the latter provisions simply contemplated a further equitable apportionment "of remaining *System* water" (Rep. 143). But if, as the Master says, "Article VI demonstrates that the Compact governs inter-basin and not interstate relations" (Rep. 143), it is hard to see how "a further equitable apportionment" could include water of Lower Basin tributaries, which was and is physically inaccessible to the Upper Basin.

In this connection, it is to be noted that the Compact divides the Colorado River Basin, as therein defined, into the Upper and Lower Basins and fixes the dividing point between the two at Lee Ferry, Arizona—"a point *in the main stream* of the Colorado River one mile below the mouth of the Paria River" (Art. II(e)).

Not only is Lee Ferry made the dividing point between the two basins, but it is also the point at which the Upper Basin is required to deliver to the Lower Basin water "*from* the Colorado River System". By Article III(d) the states of the Upper Division guarantee that the "flow of the river at Lee Ferry" shall not "be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years".

Similarly, Article III(c) provides that, in the event "surplus" water, as there defined, should prove insufficient to satisfy any rights which may be recognized in Mexico "to the use of any waters of the Colorado River System", the burden of the deficiency shall be borne equally by the Lower and Upper Basins and, whenever necessary, "the

States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency . . . ."

Article V provides that state and federal officials shall cooperate "to secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry". It was important to ascertain annual flow at Lee Ferry because Lee Ferry is the delivery point where water is to be let down to the Lower Basin by the Upper Basin in discharging its obligations under the Compact. If water of Lower Basin tributaries had been included in the apportionment, provision for its measurement would have been made.

Subdivision (e) of Article III provides that the states of the Upper Division "shall not withhold water" and the states of the Lower Division "shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses." These terms necessarily refer to main stream water at Lee Ferry, because it is physically impossible for the Upper Division to "withhold" water of Lower Basin tributaries—water over which the Upper Division has no control. Conversely, to have required the Upper Division to deliver at Lee Ferry water of Lower Basin tributaries would have imposed an obligation impossible of performance.

The Colorado River Commissioners, in deliberately selecting Lee Ferry as the dividing point between the two Basins and as the delivery point of water to be let down from the Upper to the Lower Basin, recognized the fact that Lower Basin tributary water was not available for the interbasin apportionment made by Article III of the Compact.

The Master apparently overlooked the significance of Lee Ferry as the dividing point between the two Basins and as the delivery point of the water to be let down by

the Upper Basin. At least, he does not discuss the subject in his Report.

The Master also rejects Arizona's claim that Article III(a) and III(d) are correlative and therefore that Article III(a) relates to the main stream. Despite the fact that the 75,000,000 acre-feet referred to in III(d) is exactly ten times the 7,500,000 acre-feet referred to in III(a), the Master considers this a mere "coincidence" and sees no correlation between the two (Rep. 188).

Article III(d) provides that the "States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification" of the Compact.

In our view, there is a clear and indeed necessary correlation between the "aggregate of 75,000,000 acre-feet" over a ten-year period, which is referred to in III(d), and the "7,500,000 acre-feet of water per annum", which is apportioned to the Lower Basin by III(a). Not only is this correlation suggested by the mathematics of multiplying 7,500,000 by ten, but it becomes even clearer when the purposes of the two clauses are considered.

Article III(d) requires the Upper Basin to let down to the Lower Basin an average of 7,500,000 acre-feet of water per annum. This is made a firm unconditional obligation on the Upper Basin—one which it must meet even though it may conceivably result in insufficient water to supply in full the quantity of water apportioned to the Upper Basin by Article III(a). One of two objectives may be ascribed to this required delivery of water: first, for use in the Lower Basin; second, for use in Mexico. The purpose could not

have been for use in Mexico, because any rights of Mexico are to be satisfied in accordance with the provisions of Article III(c), and the responsibility of the Upper Basin to deliver water for the Mexican Treaty obligation is "in addition to that provided in paragraph (d)". Therefore, the only purpose which can reasonably be ascribed to the requirement for the delivery of water imposed by subparagraph (d) is to guarantee to the Lower Basin a supply of water to meet the apportionment made to it by Article III(a) of the Compact (A Exc. 4).

Article III(d) was incorporated into the Compact to insure the Lower Basin that the apportionment made to it by Article III(a) would be satisfied out of main stream water originating in the Upper Basin and to assure that this apportionment would be met even during those periods when the water supply rising in the Upper Basin was insufficient to fulfill the total apportionment made to both basins by Article III(a).

In finding this position unacceptable, the Master held:

> "Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. . . . Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantative measurement of the flow of water at Lee Ferry." (Rep. 144)

We respectfully suggest that two fallacies underly these conclusions: (1) that Article III(a) imposes a limit on appropriations and (2) that the limit extends to appropriations on Lower Basin tributaries as well as to appropriations on the main stream.

As we have seen, Article III(a) apportions main stream water only, not the water of tributaries. In holding that Article III(a) and (b) make an apportionment "by establishing a ceiling on the quantity of water which may be appropriated in each Basin as against the other" (Rep. 140) (footnote omitted), the Master is clearly in error. The Master's construction would attribute to the Upper Basin an intent to place a ceiling on economic development on the tributaries throughout the Lower Basin—obviously a matter of no concern to the Upper Basin. The Compact itself speaks of apportionment of water and not in terms of limitation on appropriation (see, *e.g.*, Articles I, III(a), (b), (f), (g), VIII).

We believe that Article III(a) makes an apportionment of water in perpetuity to each basin, regardless of the extent of appropriations in either basin of the water so apportioned. In fact, the concern of the Upper Basin was that the acquisition of prior appropriative rights in the Lower Basin might entitle Lower Basin users to enforce their prior claims against the Upper Basin. As a result, Article VIII of the Compact provides that the right to enforce Lower Basin appropriative rights against Upper Basin users shall cease when storage facilities on the main Colorado River have been provided in or for the benefit of the Lower Basin. By making an apportionment of water in perpetuity to each basin, the Compact insures that the future development of the Upper Basin shall be protected without interfering with the increased use of water in the Lower Basin and that each basin shall be left free to expand in an orderly manner without engaging in a race with the other.

It is Arizona's position that the terms of the Compact, when considered in relation to the conflict between the two

basins, the purposes which the framers sought to achieve and the geographical and physical facts confronting them, lead directly to the conclusion that Article III(a) apportions to the Lower Basin in perpetuity 7,500,000 acre-feet of water per annum from the main stream of the Colorado River at Lee Ferry and that tributary water is not included in this apportionment.

2. Interpretation of the phrase, "excess or surplus waters unapportioned" by the Compact

A. Article III(b) water is apportioned main stream water in the Compact sense.

Arizona contends, for the same reasons advanced in regard to Article III(a) of the Compact (see pp. 67-80, *supra*), that the 1,000,000 acre-feet of water referred to in Article III(b) is main stream water only. That is to say, both III(a) and (b) deal with the same water—water of the main stream (A Exc. 1, 2).

The Special Master gives Article III(b) of the Compact a construction similar to his interpretation of Article III(a), *i.e.*, as referring to water in the Colorado River *System*, main stream and tributaries (Rep. 194-200).

The Master concurs, however, in Arizona's position that both Article III(a) and (b) make an apportionment and that the water dealt with in III(b) is apportioned water. This, he agrees, is made manifest by Article III(f), which provides for "further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c)" of Article III (Rep. 150).

B. Section 4(a) of the Project Act treats Article III(b) water as "surplus".

Although Article III(b) water is thus "apportioned" for Compact purposes, the Master holds that this fact does not control the interpretation of §4(a) of the Project Act (Rep. 150-51).

In construing the Act, the Master finds that the Article III(b) uses of water are "apportioned" for Compact purposes only and not "apportioned" for purposes of §4(a). Accordingly, he concludes that the phrase "excess or surplus waters unapportioned by said compact", as employed in §4(a), does not exclude the water referred to in Article III(b) of the Compact and includes all water above the first 7.5 million acre-feet available from the main stream in the Lower Basin in the United States in any one year (Rep. 194-200).

Before the Special Master, Arizona argued that Congress properly regarded the water dealt with by Article III(b) as water "apportioned" by the Compact and that, when Congress by §4(a), divided "excess or surplus waters unapportioned by said compact" equally between Arizona and California, it did not intend to include in the surplus "unapportioned" waters the water which had been apportioned by Article III(b); hence that §4(a) of the Project Act excluded California from the consumptive use of Article III(b) water. However, after further reflection, we are persuaded by the Special Master's reasoning that Arizona's original position is untenable (see Rep. 194-200).

Therefore we now concede that the phrase, "excess or surplus waters unapportioned by said compact", as used in §4(a), includes consumptive use of all main stream water above the first 7.5 million acre-feet available for use by the Lower Basin states in any one year.

III

The Project Act established a formula which governs the apportionment of main stream water among Arizona, California and Nevada and to which the water delivery contracts made by the Secretary of the Interior are required to conform.

A. The Formula Established by §4(a)

In §4(a) of the Project Act, as we have seen, Congress authorized what it considered to be a fair and equitable apportionment of main stream water among the Lower Basin states. On that basis, it undertook a settlement of the long-standing Arizona-California dispute regarding the division of main stream water available in the Lower Basin.

By §4(a), Congress made an overall allocation of the entire quantity of main stream water dealt with therein by establishing a formula under which the first 7.5 million acre-feet of that water should be divided in an amount not to exceed 4.4 to California, 2.8 to Arizona and .3 to Nevada and the surplus above 7.5 million to California and Arizona equally (Rep. 174).

In addition to requiring California to limit its claims, §4(a) gave the states of the Lower Basin advance congressional approval of an interstate compact which would adopt the apportionment of water thus authorized. But the Project Act did more. Section 4(a) established a formula for the division of water among the Lower Basin states which, by virtue of §5 (Appendix B, pp. 14a-15a), the Secretary of the Interior was required to follow in contracting for delivery of water from Lake Mead for use within those states, unless a different division of the water should be agreed upon by compact between the states as provided by §8(b)

(Appendix B, p. 20a). Although no interstate compact such as that contemplated by the Act was ever made, the apportionment of water approved by Congress in §4(a) nevertheless became an effective statutory apportionment by operation of §5.

B. The Requirement of §5 That Water Delivery Contracts Conform to the Formula

Section 5 provides in part that:

> "No person shall have or be entitled to have the use for any purpose of the water stored . . . [in Lake Mead] except by contract made as herein stated."

Also:

> "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses . . . ."

Further:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service and *shall conform to paragraph (a) of section 4 of this Act*. . . ."

In thus requiring that water delivery contracts conform to §4(a), Congress prescribed specific standards which the Secretary was to follow—the formula for the apportionment of water approved by Congress in §4(a).

This conclusion is supported further by the following provisions of §8(b):

> "(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and

> other works herein authorized, including the appropriation, delivery and use of water . . . shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.*"

By virtue of these provisions the states of the Lower Basin were left free to adopt, subject to congressional approval, a different apportionment if the formula set forth in §4(a) was not satisfactory to them. However, any such compact entered into and approved by Congress after January 1, 1929 was to be subject to all prior water contracts made by the Secretary of the Interior under §5 of the Act (Rep. 151).

Congress, therefore, must be held to have anticipated that there might be delay in the consummation of such a compact. Equally, Congress must have anticipated that there might be delay in the acceptance of the compact approved in advance by Congress in §4(a). Significantly, Congress made no provision in §4(a), similar to that found in §8(b), to preserve rights accruing under contracts

with the Secretary entered into prior to the making of the interstate compact authorized and approved by §4(a). The only reasonable explanation for this omission is that Congress had specified by §5 that the Secretary's contracts must conform to the allocation of §4(a) and that the Secretary was therefore without authority to deviate from the apportionment approved by §4(a). Thus there could be no conflict between the Secretary's contracts and that apportionment and hence no occasion to make provision governing rights in the event of such a conflict.

Since the Lower Basin states have not entered into any interstate compact as contemplated by §8(b), all contracts of the Secretary for delivery of water from Lake Mead must conform to paragraph (a) of §4—*i.e.*, must comply with the formula for the division of water prescribed by §4(a).

The Special Master, on the basis of an analysis of §§1, 5, 6 and 8 of the Project Act and a review of the purposes and legislative history of the Act, reached the conclusion that it was designed to establish the authority for the Secretary of the Interior to make an allocation by his water delivery contracts of all available water in Lake Mead and in the main stream downstream from Lake Mead among Arizona, California and Nevada (Rep. 151-64).

He found that §§4(a) and 8(b) of the Project Act authorized a division of water among the interested states by an interstate compact, but that in the absence of such an agreement "Congress clearly intended that the limitation on California in Section 4(a) and the Secretary's water delivery contracts made pursuant to Section 5 would impose a federal apportionment on the states" (Rep. 154).

This "federal apportionment" is also referred to in the Report as "a formula for the apportionment of mainstream

water among the three states of the Lower Basin with geographic access to the Colorado River; namely, Arizona, California and Nevada" (Rep. 99) (footnote omitted) and as "a flexible formula authorized by Congress and effectuated by the Secretary of the Interior. . . ." (Rep. 100)

However, the Special Master has refused to accept Arizona's view that the statutory apportionment thus established constitutes a mandatory "formula for the allocation [of water] which the Secretary is required precisely to follow" in making contracts for the delivery of water (A Exc. 7). The Master regards §§4(a) and 5 as requiring "substantial", not precise, compliance by the Secretary with the apportionment approved by Congress and he concludes that those sections give the Secretary "discretion" to make "contracts which apportion the water available in Lake Mead substantially along the lines which Congress proposed in Section 4(a) of the Project Act as a fair and equitable division among Arizona, California and Nevada" (Rep. 162).

In rejecting Arizona's argument that the second paragraph of §4(a) establishes a mandatory apportionment to which the Secretary's contracts must conform, the Master states that this paragraph

> " . . . merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. . . . The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b).

Arizona's contention in this respect must therefore be rejected." (Rep. 163) (Master's italics)

We believe this construction of the second paragraph of §4(a) and of §§5 and 8(b) is erroneous (A Exc. 7). So interpreted, these sections would require the Secretary's water delivery contracts to "respect" only the compact, if any, made by the Lower Basin states for the division of water among them. It must follow that, since no such compact exists, there is no standard which the Secretary is required to "respect" or to follow in contracting for the delivery of Lake Mead water. Certainly, this result was not contemplated by Congress. Section 8(b) fixed January 1, 1929 as the deadline for an apportionment of water by a compact between Arizona, California and Nevada, or any two thereof, which, when consented to by Congress, would control all contracts for water delivery made by the Secretary. Section 8(b) also authorized such a compact to be concluded subsequent to January 1, 1929, but that compact was to be "subject to all contracts, if any, made by the Secretary of the Interior under section 5 . . . prior to the date of such approval and consent by Congress". If no compact whatever was made by the Lower Basin states, either pursuant to §§4(a) or 8(b), "Congress clearly intended", as the Master holds, "that the limitation on California in Section 4(a) and the Secretary's water delivery contracts made pursuant to Section 5 would impose a federal apportionment on the states" (Rep. 154).

If §4(a) does not establish a formula governing the Secretary's water contracts, then the authority given him by §5 to make those contracts "under such general regulations as he may prescribe" may well constitute an unconstitutional delegation of legislative functions to an admin-

istrative officer. Regulations made by executive officers are valid only insofar as they are subordinate to a legislative policy adequately defined by statute and when found to be within the framework of the policy so defined. See *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529, 542 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421-30 (1935) and authorities there reviewed; *Lichter* v. *United States*, 334 U. S. 742, 785 (1948); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Yakus* v. *United States*, 321 U. S. 414 (1944).

Section 4(a) expresses the congressional policy for division among the Lower Basin states of the water apportioned to that basin by Article III(a) of the Compact and of the excess or surplus water unapportioned by the Compact. Unless the provisions of §4(a) govern and control the Secretary's water contracts, there is no sufficient frame of legislative policy to which his regulations and the contracts made pursuant thereto can be referred.

Since the Court will not so construe an act of Congress as to render it unconstitutional unless no other construction is reasonably possible, §4(a) should be interpreted as fixing the criteria for the division of water which the Secretary must follow in contracting with Lower Basin states.

The Special Master has found that the Act imposes substantial and sufficient limitations on the Secretary's discretion (Rep. 161). For example, he found that the Secretary may not contract with California for more than 4,400,000 acre-feet out of 7,500,000 acre-feet of main stream water plus not more than one-half the surplus. This does not require the Secretary to contract with California for 4,400,000 acre-feet or for any amount, nor does it provide

standards to guide him in the disposition of water not contracted for with California.

Section 5 contains detailed specifications governing the Secretary's contracts for electrical energy and its generation. In fact, all of §5, except the first two unlettered paragraphs, deals solely with contracts for the sale and delivery of electrical energy. Congress, we submit, would hardly have regulated the Secretary's contracts for allocation of electrical energy in such detail and yet have granted him broad discretionary power with respect to the allocation of water—the subject of a bitter controversy which had prevented ratification of the Compact by Arizona and had blocked passage of the Swing-Johnson bills in three previous Congresses. Moreover, when Congress intended to clothe the Secretary with discretion, it did so in plain terms (see, *e.g.*, §7). It is only reasonable to conclude therefore that Congress considered it had effectively provided in the Project Act for an apportionment of water binding on the Secretary.

The fact that Congress intended to divide main stream water among Arizona, California and Nevada is further established by reference to the legislative history of the Project Act. Throughout the debate in the Senate, the Senators who were primarily interested in finding a solution to the Arizona-California controversy repeatedly referred to the fact that the bill would apportion water among the states and was designed to settle the dispute.

For example, on December 6, 1928, Senator Hayden of Arizona proposed an amendment to §4(a) which would have required California to limit itself to 4,200,000 acre-feet per annum and to agree to a tri-state compact allocating 300,000 acre-feet to Nevada and 3,000,000 acre-feet to

Arizona.[38] This proposal was the subject of a large part of the debate which followed. Senator Hayden, in explaining his amendment, said:

> "The State of Arizona is, therefore, interested in an apportionment of the waters of the lower basin. That is what the amendment which I have offered proposes to do."[39]

Senator Johnson of California also recognized that the Hayden amendment, which formed the basis for §4(a) as enacted, was intended to make an allocation of water among the three states:

> "Mr. Johnson. . . . I did not understand the Senator from Arizona in his speech of yesterday to say that a division of water alone would lead to a composition of the differences which exist. I understood him yesterday to insist not alone upon a division of water, as he suggests now, but, as well, to rest upon a substantial prohibition in this bill of the erection by the United States Government of a generating plant at Boulder Dam. . . .
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> • • • • • •
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> "Mr. Johnson. . . . Let me say, then, to the Senator from New Mexico [Mr. Bratton], that there are two conditions annexed here: First, Arizona says, 'You must divide the water in accordance with what has been suggested.'
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>
> "Mr. Bratton. Let us separate the two things for the moment and discuss only the division of water.
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> • • • • • •

[38] 70 Cong. Rec. 162 (1928), Ariz. Legis. Hist. 27-29.
[39] 70 Cong. Rec. 163 (1928), Ariz. Legis. Hist. 29.

"Mr. Bratton. Discussing the subject of water separate and apart from all other features of the bill, there seems to be a difference of 400,000 acre-feet between Arizona and California.

"Mr. Johnson. So there seems.

"Mr. Bratton. Without taking sides either way, we in the upper-basin States desire to adjust the whole matter satisfactorily to all of the States concerned. Any other attitude would be unbecoming a State.

"Mr. Johnson. I am sure that is the attitude of the gentlemen who confront me here.

"Mr. Bratton. . . . [A] difference of 400,000 acre-feet should not be permitted to defeat the entire proposal. . . . I want to join with the Senator from Utah (Mr. King) in saying that it is the earnest desire of the upper-basin States to aid the lower-basin States in adjusting and composing these differences and passing this legislation in a form that will be reasonably satisfactory to the two States and the other five as well.

"Mr. Johnson. I am sure that is so."[40]

At one point in the debate, Senator King of Utah suggested that a suit in equity to determine the conflicting rights should be required as a condition precedent to any construction under the Act. Senator Hayden replied:

". . . The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of water. Then, who shall obtain that water in relative order of priority may be determined by the State courts."[41]

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[40] 70 Cong. Rec. 165-66 (1928), Ariz. Legis. Hist. 31-34.

[41] 70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. 45.

Senator Pittman of Nevada also recognized the necessity for a congressional division among Arizona, California and Nevada of the main stream water available to the Lower Basin, as follows:

> "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California dividing the water let down to the three lower States. Of the 7,500,000 acre-feet of water let down that river they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together."[42]

On December 8, 1928, Senator Bratton had printed an amendment to §4(a) requiring California to limit herself to 4,400,000 acre-feet plus one-half the surplus. In explaining his proposal, he stated:

> "As I understand, California holds to the belief that 4,600,000 acre-feet is an irreducible minimum. Arizona contends that a maximum of 4,200,000 acre-feet is the largest that she will consider. Personally, I am not wedded to either figure. The thing that is uppermost in my mind is to do equity and justice as nearly as can be done toward both States, and, at the same time, pass a bill that will be effectuated, and will secure the results which we all desire.
>
> "I think we should adopt that course. The two States have exchanged views, they have negotiated, they have endeavored to reach an agreement, and until now have been unable to do so. This controversy does not affect those two States alone. It affects other States in the Union and the Government as well.

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[42] 70 Cong. Rec. 232 (1928), Ariz. Legis. Hist. 67.

"Without undertaking to express my views either way upon the subject, I do think that if the two States are unable to agree upon a figure then that we, as a disinterested and friendly agency, should pass a bill which, according to our combined judgment, will justly and equitably settle the controversy. I suggested 4,400,000 acre-feet with that in view. I still hold to the belief that somewhere between the two figures we must fix the amount, and that this difference of 400,000 acre-feet should not be allowed to bar and preclude the passage of this important measure dealing with the enormous quantity of 15,000,000 acre-feet of water and involving seven States as well as the Government."[43]

* * * * * *

"Mr. President, it is perfectly obvious to all of us that we have an immense project here, respecting which the two States, California and Arizona, can not agree. The dispute has narrowed itself primarily to 400,000 acre-feet of water, California saying that 4,600,000 acre-feet is her irreducible minimum and Arizona insisting that California shall be limited to 4,200,000 acre-feet.

"If this legislation shall be effectuated, the dam constructed, and the river controlled, and the benefits designed to be accomplished by the measure given full fruition, these States must ratify the compact. In my judgment that will never be accomplished if we give to one all that she asks and deny to the other everything she seeks.

"It seems to me, therefore, Mr. President, that in justice to the two States, they having been unable to agree, we should tender our offices by dividing the difference and requiring California to limit herself in her act of ratification, irrevocably and uncondi-

[43] 70 Cong. Rec. 333 (1928), Ariz. Legis. Hist. 71.

tionally, to a maximum consumptive use of 4,400,000 acre-feet. That divides the difference and is the amount fixed in the amendment I have proposed. It differs from the proposal of the Senator from Colorado by reducing California's claim 200,000 acre-feet. It differs from the amendment of the Senator from Arizona by increasing California's consumptive use by 200,000 acre-feet.

"I believe this is an equitable solution of the problem. It may not be entirely satisfactory to either State, but in my judgment it is the best compromise that is available at this time."[44]

The Bratton amendment was adopted.[45]

After Senator Hayden had withdrawn his amendment to §4(a) for parliamentary reasons,[46] he reoffered his proposal which would require California to give advance approval to a tri-state compact and stated:

"Mr. President, an examination of the amendment offered by the Senator from Colorado (Mr. Phipps) will disclose that it proposes that the State of California shall agree with the United States, for the benefit of the States of Arizona and Nevada, that the aggregate annual consumptive use of water from the Colorado River by the State of California shall not exceed 4,400,000 acre-feet. Further, that the State of California may have one-half of any excess or surplus waters unapportioned by the Colorado River compact.

"The first part of my amendment is a mere corollary to the amendment offered by the Senator from Colorado. It provides that of the remainder of

[44] 70 Cong. Rec. 385 (1928), Ariz. Legis. Hist. 88-89.

[45] 70 Cong. Rec. 387 (1928), Ariz. Legis. Hist. 97.

[46] 70 Cong. Rec. 382 (1928), Ariz. Legis. Hist. 84.

the seven and one-half million acre-feet there shall be apportioned to the State of Nevada 300,000 acre-feet, and to the State of Arizona 2,800,000 acre-feet, which, combined with 4,400,000 acre-feet which the State of California will use, completely exhausts the seven and one-half million acre-feet apportioned in perpetuity to the lower basin.

"The second proposal in my amendment is that the State of Arizona may annually use one-half of the surplus or unapportioned water, which is likewise a corollary to the proposal made by the Senator from Colorado, which likewise disposes of the total quantity of surplus or unapportioned waters in the lower basin."[47]

Senator Pittman, in commenting on the Hayden amendment, said:

"The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get; but there is just one other phase of the matter. The amount that either one of those States is entitled to under this legislation may be reduced if at some future time it is agreed, by treaty or contract or otherwise, that a certain amount of this water should, in justice, be used in Mexico."[48]

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[47] 70 Cong. Rec. 459-60 (1928), Ariz. Legis. Hist. 101-02.

[48] 70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. 123.

And further:

> "As I understand this amendment, Arizona today has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River."[49]

Senator Pittman then objected to the provision in the Hayden amendment which would require California to give advance approval to a tri-state compact. He stated that he felt it was improper to coerce one state into agreeing with another and that they should be given full freedom to compact. Senator Hayden then agreed to change the language of his proposal to make the tri-state compact provision permissive rather than mandatory.[50] Senator Pittman then went on to say:

> "Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason."[51]

These excerpts from the Senate debate on the Project Act demonstrate that the matter of principal concern was a division of water among Arizona, Nevada and California which would bring about ratification of the Colorado River

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[49] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126.

[50] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126-30.

[51] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 130.

Compact by all the states. The Senate spent a large part of the time in working out what it considered to be a fair and equitable apportionment of the water and finally split the difference between the 4,600,000 acre-feet demanded by California and the 4,200,000 acre-feet conceded by Arizona. This resulted in the allocation of 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona and 300,000 acre-feet to Nevada, with California and Arizona to share equally in the excess over 7,500,000 acre-feet.

Senator Johnson of California agreed to accept the Hayden amendment as long as it was understood that California was not being coerced into entering into a compact. In this connection, Senator Pittman observed:

> "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that."[52]

It is inconceivable that the Senate would have devoted so much time and effort to working out the precise quantities of water which should be allocated to each state if any member supposed for a moment that there was being delegated to the Secretary of the Interior the authority to determine this matter in his discretion through the water delivery contracts. The Senators all felt they were under an obligation to settle the long-standing dispute between Arizona and California by setting forth in the Project Act an allocation of water to which the contracts made by the Secretary were required by §5 to conform.

The provisions of §5, which require the Secretary's contracts to "conform to paragraph (a) of section 4 of this Act . . .", can relate only to the division of water set out in §4(a). The Secretary has no authority to vary the formula

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[52] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 131.

thus established. His water contracts must conform precisely to this formula in the absence of a different apportionment by the states under the provisions of §8(b).

Accordingly, it is clear that the existing water delivery contracts made by the Secretary of the Interior, insofar as they do not comply with the statutory formula established by Congress, are without legal authority and void.

C. The Water Delivery Contracts

The Special Master recommends that existing water delivery contracts entered into by the Secretary of the Interior be upheld as valid and binding, with the exception of Article 7(d) of the Arizona contract (Appendix E, pp. 37a-38a), amended Article 5(a) of the Nevada contract (Appendix G, p. 56a), and a Special Use Contract between the United States and Arizona-Edison Company, Inc. (Rep. 201, 220-21, 237-47).

We agree with the finding that the articles of the Arizona and Nevada contracts referred to are invalid for the reasons assigned by the Special Master, namely: they are not for permanent service, they violate the direction of §18 of the Project Act (Appendix B, pp. 25a-26a) that state law shall govern intrastate water rights and priorities, they are inconsistent with the §4(a) limitation on California's use of main stream water and they defeat the main stream allocation by introducing tributary considerations into a main stream apportionment (Rep. 237-47). We contend that these contractual provisions are also invalid for the additional reasons discussed immediately below. Furthermore, for the reasons hereafter stated, we regard as erroneous the Master's finding that Article 7(b), (f), and (g) of the Arizona contract are valid (A Exc. 8).

(1) The Arizona Contract

In the Arizona water contract (Appendix E, pp. 35a-44a), the United States agrees to deliver to Arizona from Lake Mead "so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet" (Art. 7(a)). Article 7(b) of the contract also provides for delivery from Lake Mead storage of "one-half of any excess or surplus waters unapportioned by the . . . Compact." These quoted provisions comply with §4(a) of the Project Act.

However, Article 7(b) also provides that deliveries to Arizona of such unapportioned water shall be "less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article". In subdivision (f) Arizona "recognizes the right" of the United States and Nevada to contract for annual beneficial consumptive use within Nevada for agricultural and domestic uses of one twenty-fifth "of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact . . . ." By subdivision (g) Arizona "recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact . . . ."

This attempted contractual "recognition" of water rights in Nevada, New Mexico and Utah is a conspicuous departure from the formula prescribed by §4(a). If given effect, these provisions will result in a division of water among Lower Basin states to which Congress has not con-

sented and which it has not authorized. As such, the provisions referred to are beyond the authority of the Secretary of the Interior and are null and void.

The Arizona water contract does not conform to §4(a) in another important respect. It provides in Article 7:

> "(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead. . . ."

These provisions, insofar as they provide for the reduction of the allocation of main stream water made to Arizona by the Project Act, are likewise beyond the authority conferred upon the Secretary by the Act and are of no legal effect.

However, even if the Project Act be viewed, as the Special Master construes it, as providing authority for the Secretary to contract for the apportionment of main stream water among the States of Arizona, California and Nevada, rather than as itself making such an apportionment by prescribing a formula to which the Secretary's water delivery contracts must precisely conform, the provisions of Article 7(b), (d), (f) and (g) of the Arizona water delivery contract are nevertheless invalid because they are contrary to the provisions of the Project Act.

The Special Master has found that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract, which relieve the Secretary of his obligation to deliver main stream water to those states at or below Boulder Dam to the extent that consumptive uses in such states diminish the flow into Lake Mead, are invalid because they violate the Project Act requirement that "contracts respecting

water for irrigation and domestic use shall be for permanent service" and for the reason that they introduce tributary considerations into a main stream apportionment contrary to the provisions of the Project Act (Rep. 237-47).

The same reasoning which caused the Special Master to reject these provisions of Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract likewise establish the invalidity of those portions of Article 7(b), (f) and (g) of the Arizona contract to which we have previously objected.

Article 7(b) of the Arizona contract, after providing for the delivery to Arizona of one-half of the excess or surplus water unapportioned by the Colorado River Compact, authorizes the Secretary to subtract therefrom "such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article." Article 7(f) of the Arizona contract provides for the recognition by Arizona of the right of the United States and the State of Nevada to make a contract for the "use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III(f) and Article III (g) of the Colorado River Compact."

These provisions purport to authorize a diminution of the quantity of water required to be delivered under the Arizona contract if and when the United States and the State of Nevada should contract as provided in this Article. They clearly provide for a contingency which leaves uncertain the extent of Arizona's rights under its water delivery contract and are "contrary to the command of

Section 5 that 'contracts respecting water for irrigation domestic uses shall be for permanent service . . . .' '' (Rep. 237). The intent of Congress in requiring water delivery contracts to be for permanent service is carefully analyzed in the Special Master's Report (Rep. 238-40). The reasoning of the Special Master which demonstrates that Article 7(d) of the Arizona contract frustrates that congressional intent likewise exposes the invalidity of these provisions of Article 7(b) and (f) of the Arizona contract.

We are not at all certain that we properly understand just what was intended by Article 7(g) of the Arizona contract when considered in conjunction with Article 7(b) of that contract. Article 7(g), considered alone, gives rise to no particular difficulty, but when read in conjunction with the related portions of Article 7(b) it appears to provide for the deduction from Arizona's one-half share of excess or surplus water such quantities as shall equal the equitable shares of New Mexico and Utah of (1) water apportioned by the Colorado River Compact to the Lower Basin and also (2) water unapportioned by the Compact.

Since neither New Mexico nor Utah has access to the main stream of the Colorado River in the Lower Basin, the uses of Colorado River System water in those states must be from tributaries of the main stream. Accordingly, if Article 7(b) and (g) of the Arizona contract be construed as providing for the reduction of Arizona's share of main stream water by reason of uses in New Mexico and Utah, or in either of those states, it obviously operates to ''defeat the mainstream allocation, otherwise completely provided for in the contracts, by introducing System, *i.e.*, tributary, considerations in a mainstream apportionment'' (Rep. 242). As the Special Master said with reference to Article

7(d) of the Arizona contract: "To enforce these provisions would distort the mainstream apportionment and leave some mainstream water undisposed of." (Rep. 242)

Moreover, the terms of Article 7(g), when construed in conjunction with Article 7(b), likewise generate uncertainty regarding Arizona's entitlement under its water delivery contract by providing for contingencies which make that entitlement subject to reduction. Hence these terms are contrary to the requirement of §5 of the Project Act that water delivery contracts shall be for permanent service.

(2) The Nevada Contracts

By its water contracts with Nevada (Appendices F, G, pp. 45a-58a) the United States agrees to deliver from Lake Mead storage to Nevada "so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year" (amended Art. 5 (a), Appendix G, p. 56a).

The formula of §4(a) of the Project Act entitles Nevada to contract for delivery from Lake Mead storage for use in Nevada of 300,000 acre-feet of water per annum. Under §5(a) of Nevada's contracts, however, there are included in the 300,000 acre-feet of water to be delivered to Nevada "all other waters diverted for use within . . . Nevada from the Colorado River system," *i.e.*, water from Lower Basin tributaries in Nevada. In addition to the reasons assigned by the Special Master for the invalidity of these provisions, they do not conform to the §4(a) formula and hence are beyond the authority of the Secretary of the Interior and are of no legal efficacy.

(3) The California Contracts

We agree with the Special Master that, to the extent the delivery requirement of 5,362,000 acre-feet under the California contracts exceeds 4,400,000 acre-feet, the overage of 962,000 acre-feet may not properly be satisfied except out of California's share of excess or surplus water (Rep. 208).

We further agree that, in the event there is in any year less than 7,500,000 acre-feet of main stream water available for use by Arizona, California and Nevada, California's entitlement under its contract is 4.4/7.5 of the quantity available (Rep. 306).

D. Meaning and Measurement of "Consumptive Use"

Arizona agrees with the Master's conclusion that the §4(a) apportionment, including the California limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225).

We also concur with the Master's holding that the delivery obligations under the Secretary of the Interior's water delivery contracts are to be measured, as provided in those contracts, at the points of diversion (Rep. 186). Accordingly, Arizona takes no exception to the Master's conclusion that:

> "Consumptive use is to be measured by diversions at each diversion point on the mainstream less returns to the mainstream, measured or estimated by appropriate engineering methods, available for use in the United States or in satisfaction of the Mexican treaty obligation." (Rep. 186-87; and see Rep. 225)

In this connection, the Master has directed that each user of water shall be charged only for the amount of water actually diverted and which does not return to the main

stream and that losses of water which occur before diversion are a diminution of available supply under §4(a) and are not a consumptive use (Rep. 187).

Arizona suggests, however, that terms be incorporated in the final decree providing that ordered but unused water shall be charged to the party ordering it (A Exc. 38). The record establishes that frequently in the past water released from Hoover Dam on order was not used by the ordering party with the result that it flowed downstream to Mexico, although it was not and could not be credited to satisfaction of the Mexican Treaty obligation (Tr. 863-67, 974-75, 21143-76). Arizona submitted to the Master provisions for inclusion in his Recommended Decree which were designed to correct this situation and discourage improvident practices. Exception has been filed to the Master's failure to accept this proposal (A Exc. 38). The Court is respectfully requested to make appropriate remedial provisions in its decree.

E. Release From Storage of Apportioned But Unused Water

Arizona has excepted (A Exc. 33) to the provisions of Article II(B)(8) of the Special Master's Recommended Decree, which are as follows:

> "If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof . . . ."

The above quoted language, in providing that water apportioned to but not consumed by one state in any year may be delivered to the other states, contains no limitation that the aggregate of such water and the water apportioned to such other states shall be either within the contract entitlements of these states or within the limitation specified by the Project Act and the Limitation Act. Insofar as these provisions of the Recommended Decree vest in the Secretary of the Interior the discretion to deliver water in excess of the quantities specified by the Project and Limitation Acts or in excess of the amounts provided in the water delivery contracts of the Secretary of the Interior, they are clearly in violation of both the Project Act and the Limitation Act.

The fact that one state may not require or be in a position to utilize its full share of Colorado River water in any one year cannot operate to nullify the command of the Project Act that "the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California . . . shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact" (§4(a)). Nor does that fact sanction the delivery of water not contracted for, in violation of the provisions of the Project Act, that "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated" (§5).

We recognize that if one of the Lower Basin main stream states does not call for its full entitlement of stored water in any one year, it is only fair to allow this uncalled for water to be used to augment deliveries of water to other states up to their full entitlement under the Project and

Limitation Acts and their water delivery contracts with the Secretary of the Interior. However, to the extent that the delivery of such water would exceed the amounts permitted by the Project and Limitation Acts or the water delivery contracts, it is likewise proper and fair that such quantities of uncalled for water be retained in storage to increase the supply available for apportionment among the Lower Basin main stream states in the succeeding year or years.

Accordingly, Arizona proposes that the following be substituted for Article II(B)(8) in the Special Master's Recommended Decree:

> "(8) If, in any one year, main stream water apportioned for consumptive use in a state will not be ~~consumed~~ diverted for use in that state, ~~whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason,~~ nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states; provided, however, that nothing herein contained shall be construed as authorizing the diversion or use of water without a contract with the Secretary of the Interior as required by the Boulder Canyon Project Act or in excess of the amounts permitted by said Act, the California Limitation Act and contracts made by the Secretary of the Interior for the delivery of water pursuant to Section 5 of the Boulder Canyon Project Act. No rights to the recurrent use of such water shall accrue by reason of the use thereof. . . ."[53]

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[53] Deletions from the Recommended Decree have been lined out; additions have been underlined.

PART II

The Claims of the United States to Water

PART II

The Claims of the United States to Water

QUESTIONS PRESENTED

7. Whether, after the admission to statehood of Arizona, California and Nevada, the United States had the power to reserve water of the Colorado River, a navigable stream, for use by federal establishments within those states.

8. Whether, prior to the admission of Arizona to statehood, a reservation of water of the Colorado River for use on Indian Reservations within the Territory of Arizona could be made, without a clear manifestation of an intent to reserve such water; and as a subsidiary question:

A. Whether there was a clear manifestation of an intent to reserve water of the Colorado River for use on Indian Reservations within the Territory of Arizona.

9. Whether the power to reserve water for federal purposes resides exclusively in Congress or whether it may also be exercised by the President without authorization by Congress.

10. Whether, assuming a reservation of water for use on Indian Reservations has been made, the quantity of water reserved should be measured by the water needed to irrigate all the potentially irrigable acreage within each Reservation or by the needs of the Indians.

11. Whether, regardless of the existence or absence of a reservation of water for use on Indian Reservations, the

extent of Indian water rights should be determined by the application of equitable principles.

12. Whether, in withdrawing land for the Gila National Forest, the United States reserved water from the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the forest.

STATEMENT OF THE CASE

I. Claims of the United States to Main Stream Water

A. Indian Reservations

Of the five Indian Reservations for which the Master has found there was a withdrawal of main stream water (Rep. 260), three are situated wholly or in part in Arizona: Colorado River, Fort Mohave and Cocopah.

Colorado River Indian Reservation

This Reservation is situated on both sides of the Colorado River in Arizona and California in arid desert valley country. The inhabitants of the Reservation, the Colorado River Indian tribes, have an agricultural economy. The Master estimates that 1,100 or 1,200 of the 1957 tribal population of approximately 1,300 live on the Reservation (Rep. 86).

Water for irrigation of the Arizona portion is diverted from the Colorado River at the northern part of the Reservation by a diversion dam called Headgate Rock Dam.

In 1864, the Commissioner of Indian Affairs recommended to the Secretary of the Interior the abandonment of the system of small Indian Reservations scattered throughout the West and the adoption of a system of large Reservations sufficiently extensive to furnish homes and

means of support for all the Indians of the West (U. S. 512, p. 21).

In this connection he proposed the creation of a Reservation along the Colorado River in Arizona consisting of 75,000 acres, the plan for which had evolved at a meeting between the Superintendent of Indian Affairs and the chiefs of the Yumas, Mohaves, Yavapais, Hualapais and Chemehuevis. The combined population of these tribes was considered to be about 10,000 (U. S. 512, p. 21; U. S. 513, p. 156).

On March 2, 1865 this suggestion was considered by Congress (U. S. 502, p. 1320) and on the following day the Colorado River Indian Reservation was created by Act of March 3, 1865, 13 Stat. 541, 559 (U. S. 501). Between 1865 and 1876, the Colorado River Reservation was enlarged by executive order from 75,000 acres to about 260,000 acres.

The Special Master has concluded that for the benefit of the Colorado River Reservation the United States has the right to the annual diversion of a maximum of 717,148 acre-feet of water from the main stream or to the quantity of main stream water necessary to supply the consumptive use required for the irrigation of 107,588 acres and for satisfaction of related uses, whichever is less, with various priority dates (Rep. 273-74). This conclusion is based upon the Master's finding that the United States is entitled to sufficient water to irrigate all the irrigable land in the Reservation (Rep. 265).

Fort Mohave Indian Reservation

This Reservation is situated in the States of Arizona, California and Nevada in the general area of their common borders. Embracing approximately 38,000 acres, the Reservation's climate and topography are characteristic of an arid desert valley (Rep. 85).

On August 4, 1870, the War Department by general order set aside two tracts of land containing 14,696.81 acres, more or less, for military purposes. The first of these was called Camp Mohave and contained 5,582 acres, more or less. The second was called Camp Mohave Hay and Wood Reservation and contained 9,114.81 acres, more or less (U. S. 1301).

The Acting Secretary of War recommended, on September 18, 1890, that the "military reservation of Fort Mohave, Arizona, be transferred and turned over to the Department of the Interior for Indian School purposes under the Act of July 31, 1882, entitled 'an Act to provide additional Industrial Training Schools for Indian youth and authorizing the use of unoccupied military barracks for such purposes' ". This recommendation was approved by the President on September 19, 1890 (U. S. 1302, 1303).

On March 18, 1903, an administrative ruling held that "all that intermediate tract of land between the military and the hay and wood reservation bounded on the west by the Colorado River and on the east by a line running from Station No. 1 of the hay and wood reservation to Station No. 1 of the military reservation, was included in the tract reserved for Indian school purposes" (U. S. 1301).

By executive order dated December 1, 1910 the President directed that additional lands "not included within the present boundaries of the Fort Mohave Indian Reservation . . . be, and the same are hereby, withdrawn from settlement and entry and set apart as an addition to the present Fort Mohave Indian Reservation in Arizona, for the use and occupation of the Fort Mohave and such other Indians as the Secretary of the Interior may see fit to settle thereon . . . ." (U. S. 1304)

On February 2, 1911, the President cancelled the executive order of December 1, 1910, but again set apart addi-

tional lands for the identical purposes specified in the 1910 order (U. S. 1305).

The Special Master has found that there are 18,974 irrigable acres in the Fort Mohave Reservation and has concluded that for the benefit of the Reservation the United States has the right to the annual diversion of 122,648 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of such irrigable land and related uses, whichever is less, with priority dates of September 18, 1890, for lands transferred by the executive order of that date and of February 2, 1911, for land reserved by the executive order of that date (Rep. 282-83).

Cocopah Indian Reservation

This Reservation was established by an executive order of September 27, 1917 (Rep. 267)—after Arizona had been admitted to statehood.

The Reservation is composed of two tracts located southwest of Yuma in Arizona. Colorado River water is delivered to the Reservation lands through facilities of the Yuma Reclamation Project (Rep. 268).

The Master has found that 431 of the approximately 500 acres comprising the area of the Reservation are irrigable (Rep. 88, 268), and on this basis he has concluded that for the benefit of this Reservation the United States has the right to the quantity of main stream water necessary to supply the consumptive use required by that number of acres and for the satisfaction of related uses or to the annual diversion of a maximum of 2,744 acre-feet of water from the Colorado River, whichever is less, with a priority date of September 27, 1917 (Rep. 268).

B. Recreation Areas and Wildlife Refuges

Lake Mead National Recreation Area

This area is located in Arizona and Nevada. It is the only establishment administered by the Bureau of Land Management currently diverting water from the main stream of the Colorado River in the Lower Basin (Rep. 294).

Executive orders dated May 3, 1929 (No. 5105) and April 25, 1930 (No. 5339) withdrew lands in Arizona and Nevada pending determination as to the advisability of including such lands in a national monument. In 1936, Congress appropriated funds for the operation of the Boulder Canyon Project Area which included these lands.

Although the Master found that there is not sufficient evidence to make a determination of the ultimate water requirements of this recreation area, he nevertheless concluded that the United States has the right to divert main stream water in quantities reasonably necessary to fulfill the purposes of the area, with priority dates of May 3, 1929 and April 25, 1930 (Rep. 295).

Havasu Lake National Wildlife Refuge

An executive order of January 22, 1941 (No. 8647) established the Havasu Lake National Wildlife Refuge and set apart approximately 37,370 acres of land owned by the United States in Mohave and Yuma Counties, Arizona, and San Bernardino County, California, as a refuge and breeding ground for migratory birds and other wildlife (Rep. 298).

On February 11, 1949, the Assistant Secretary of the Interior by Public Land Order 559 added approximately 1,677 acres in Arizona and approximately 1,080 acres in California to the Havasu Lake National Wildlife Refuge.

The Master has found that in withdrawing these lands the United States intended to reserve rights to the use of enough Colorado River water to fulfill the purposes of the refuge and that annual diversion of 41,839 acre-feet and annual consumptive use of 37,339 acre-feet of Colorado River water will satisfy the estimated requirements of the refuge. He concluded that the United States has the right to either of these amounts, whichever is less, for use in the refuge, with priority dates of January 22, 1941 and February 11, 1949 (Rep. 299).

Imperial National Wildlife Refuge

An executive order of February 14, 1941 (No. 8685) established the Imperial National Wildlife Refuge and set apart approximately 51,090 acres of land owned by the United States in Yuma County, Arizona, and Imperial County, California, as a refuge and breeding ground for migratory birds and other wildlife (Rep. 299-300).

Here again, the Master has found that by withdrawal of these lands the United States intended to reserve rights to the use of so much main stream water as might be reasonably needed to fulfill the purposes of the refuge and he found also that annual diversions of 28,000 acre-feet and annual consumptive use of 23,000 acre-feet of Colorado River water will satisfy the estimated water requirement of the refuge in fulfillment of a development plan formulated for the refuge (Rep. 300). Accordingly, he concluded that the United States has the right to either the stated amount of diversion or of consumptive use, whichever is less, for use in the refuge, with a priority date of February 14, 1941 (Rep. 300).

II. Claims of the United States to Tributary Water

The Master has found that there is no justiciable controversy with respect to any of the tributaries in the Lower Basin except the Gila River System (Rep. 321-24).

Arizona agrees with the Special Master's disposition of the dispute between Arizona and New Mexico with respect to the allocation of the waters of the Gila River between these two states. Arizona disagrees, however, with the Master's resolution of the controversy between it and the United States with respect to the reservation of water for use in the Gila National Forest (Rep. 332-35) (A Exc. 29-30).

Gila National Forest

The Master found that the Gila National Forest was created as a public reservation by a presidential proclamation dated March 2, 1899 and was subsequently enlarged and modified (Rep. 342).

The Master also found that the United States intended, when it withdrew this forest from entry, to reserve the water necessary to fulfill the purposes for which the forest was created (Rep. 342). Accordingly, he has concluded that the United States has the right to divert water from the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used (Rep. 343).

SUMMARY OF THE ARGUMENT

Arizona has filed exceptions to those parts of the Special Master's Report and Recommended Decree which sustained certain claims of the United States to main stream

water of the Colorado River for use on Indian Reservations and other federal establishments created out of public land in Arizona (A Exc. 10-28).

Relying basically on a single decision of this Court,[54] which involved the reservation of water of a non-navigable stream for use on an Indian Reservation created by treaty in the Territory of Montana, the Master has concluded that the federal government has the power to reserve water of both navigable and non-navigable streams for the benefit of all federal establishments, regardless of whether the reservation is made by treaty, statute or executive order. He also fails to recognize any distinction between the power of the United States to dispose of navigable water within a territory and its power to dispose of navigable water within a state.

In upholding claims of the United States on behalf of Indian tribes, the Special Master has conceived and applied the principle that the very establishment of an Indian Reservation impliedly reserves in perpetuity for use on the Reservation whatever quantity of water may be required in the indefinite future to irrigate every irrigable acre within the Reservation, without regard to the actual needs of the Indians on the Reservation. The resulting water rights are held to be of fixed magnitude and priority and appurtenant to defined lands, so that their use is not restricted to Indians but may be transferred to non-Indians (Rep. 254-66).

The questions regarding water rights of the United States for use in the Lake Mead National Recreation Area and in the Lake Havasu and Imperial Wildlife Refuges are similarly dealt with by application of the same principles invoked in the Special Master's treatment of Indian Reservations (Rep. 297-300).

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[54] *Winters* v. *United States*, 207 U. S. 564 (1908).

The Master's Report does not examine into the source of the federal power to reserve water of a navigable stream for use on federal establishments. Rather the Master states that "it is unnecessary, for the purposes of this case, to explore the origin or limits of such power to reserve water against subsequent appropriators" (Rep. 259).[55]

The Special Master fails to recognize the distinction between the legal principles applicable to navigable waters and those which govern non-navigable streams. He fails to give effect to the well established rule that, when a state is admitted to the Union, dominion over its navigable water passes from the United States to the newly created state. Thereafter the federal government is without power to reserve the water of a navigable stream for use on federal establishments,[56] since its only authority over such water is that which is vested in it by the Commerce Clause and the treaty-making provisions of the Constitution.

Prior to statehood, the right of the United States in navigable water of a territory, unlike its title to territorial land, is not absolute but the right is held for the benefit of the people and in trust for the future state.

The power of the United States to reserve navigable water of a territory prior to statehood for use on federal establishments resides exclusively in Congress under the so-called "Public Property Clause" of the Constitution (art. IV, §3, cl. 2), which provides that "the Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other

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[55] In fairness and candor we should advise the Court that neither the briefs nor oral arguments of the parties before the Special Master presented these considerations to him in any substantial degree.

[56] All federal establishments on the main stream of the Colorado River in Arizona, except the Colorado River and Fort Mohave Indian Reservations, were created after Arizona became a state.

Property belonging to the United States". No authority exists in the Executive Department of the federal government to dispose of navigable waters for federal purposes by executive order or otherwise in the absence of a definite and explicit delegation from Congress.

In any event, wherever the power to reserve these rights may be held to reside, it must be exercised in a manner clearly manifesting the intent to make a reservation of water. An inference that such rights were reserved *in navigable water* may not be drawn simply from the fact that an Indian Reservation is created in a generally arid region adjacent or proximate to a navigable stream.

The Colorado River Indian Reservation was created by Act of Congress and enlarged by executive orders. The Fort Mohave and Cocopah Indian Reservations were created and the former was enlarged by executive orders. None of these instruments can be construed to contain an express manifestation of intent to reserve water of the Colorado River for the benefit of the Indians or Indian lands. In fact, they contain no mention of water at all. Had the Master considered these documents in the light of the applicable legal principles, he would have found no such manifestation of intent as is required to reserve navigable water and would therefore have been obliged to conclude, contrary to his Report, that there had been no reservation of water.

Finally, even should it be held that water from the Colorado River was reserved by implication for the benefit of these Indian Reservations, the quantity of water reserved should be measured by the reasonably foreseeable needs of the Indians as shown by past experience rather than by the possible needs of the potentially irrigable acres. The holding of the Master permits the maximum use of water and leads to results which are inequitable and indeed, in some instances, unrealistic.

The Special Master has held that uses of water from the main stream of the Colorado River on federal establishments are chargeable to the entitlement of the state in which the use occurs (Rep. 247). Thus uses on the Colorado River, Fort Mohave and Cocopah Indian Reservations in Arizona are charged to Arizona's share of main stream Colorado River water, even though that state has no jurisdiction or control over such uses. Therefore, whether or not there has been a reservation of water for federal establishments, the question is presented as to what principles should be applied by this Court in order to determine, as between the United States on behalf of these Reservations and Arizona on behalf of other users within the state, rights to the use of Arizona's share of Colorado River water.

We suggest that the same general considerations which have led the Court to employ principles of equitable apportionment in the allocation of water between states, absent a statutory apportionment, are applicable here. While Indian tribes today do not have the status of a true sovereign, nevertheless the laws of the state are generally without force within the boundaries of Indian Reservations within the state. In addition, since Indians are wards of the federal government, a true sovereign, it is peculiarly appropriate that equitable principles should be applied in weighing the claims of the United States on their behalf against those of the State of Arizona on behalf of other users within the state.

The Special Master has found that there is not sufficient evidence to make a finding of the ultimate water requirements of the Gila National Forest (Rep. 342), but he finds that in withdrawing lands for the use of the forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the

forest (Rep. 342). He concludes that the United States has the right to divert water from the main stream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the forest, with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used (Rep. 343). He also states that private rights in the Gila River System recognized by the Recommended Decree are subordinate to the rights of the United States to divert water for the Gila National Forest to the extent that the private rights are junior in time (Rep. 335).

Although Arizona is not in agreement with the conclusion of the Special Master that the United States possesses the power to reserve water for use in the Gila National Forest, it is not necessary that that question be resolved in this litigation, since congressional legislation demonstrates that there was no intent to reserve water for national forests, but to the contrary that Congress intended the acquisition of rights to water for national forests to be governed by the laws of the state in which the forests are located.

ARGUMENT

IV

After Arizona was admitted to statehood, the United States had no power to reserve water of the main stream of the Colorado River for the use of federal establishments within Arizona.

This Court has consistently held that upon the admission of a territory to statehood, sovereign rights in the water and beds of navigable streams become vested in the newly created state, which acquires absolute and complete sover-

eignty over them, subject only to the power of the United States over navigation under the Commerce Clause. *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935); *United States* v. *Utah,* 283 U. S. 64 (1931); *Massachusetts* v. *New York,* 271 U. S. 65 (1926); *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63 (1921); *United States* v. *Mission Rock Co.,* 189 U. S. 391 (1903); *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690 (1899); *Knight* v. *United Land Ass'n,* 142 U. S. 161 (1891); *Goodtitle* v. *Kibbe,* 50 U. S. (9 How.) 471 (1850); *Pollard* v. *Hagan,* 44 U. S. (3 How.) 212 (1845); *Martin* v. *Waddell's Lessee,* 41 U. S. (16 Pet.) 367 (1842).

Thus in *Martin* v. *Waddell's Lessee* it was said regarding the original states:

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." 41 U. S. (16 Pet.) at 410.

That the same absolute sovereignty over navigable waters exists in newly admitted states was held in *Knight* v. *United Land Ass'n,* 142 U. S. at 183:

> "It is the settled rule of law . . . that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction. . . ."

In *United States* v. *Mission Rock Co.,* the Court quoted with approval the following excerpt from *Weber* v. *State Harbor Comm'rs,* 85 U. S. (18 Wall.) 57, 65-66 (1873), regarding California tidelands:

> "'Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they [the United States] held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.'" 189 U. S. at 404.

Accordingly, it was held in *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. at 63:

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under same. . . . The character of the state's ownership in the land and in the waters is the full proprietary right. The state, being the absolute owner of the tidelands and of the waters over them, is free, in conveying tidelands, either to grant with them rights in the adjoining water area, or to completely withhold all such rights."

After statehood, then, the United States has no power whatever to reserve for the use of federal establishments water of navigable streams, title to which has passed to and vested in the state upon its admission to the Union.

The Special Master does not sustain such power under the Commerce Clause and there is no support either in this record or in the law for the conclusion that the asserted reservation of water for federal establishments is an exercise of congressional power over navigation under the Commerce Clause.

Arizona was admitted to statehood on February 14, 1912. The Cocopah Indian Reservation was created September 27, 1917 (Rep. 267). The Lake Mead National Recreation Area was established by withdrawal of lands beginning May 3, 1929 (Rep. 294) and the Havasu Lake and Imperial National Wildlife Refuges were established January 22, 1941 and February 14, 1941, respectively (Rep. 298-300).

Since these federal establishments were all created after Arizona was admitted to statehood, the federal government was without power to make any reservation of water of the Colorado River, a navigable stream, for the use of these establishments within the state of Arizona and the Special Master is in error in holding that such water was reserved for use within these areas (A Exc. 15, 16, 23-28).

For these reasons, the Recommended Decree is erroneous and should not be adopted insofar as it provides for the delivery of water from Lake Mead for the benefit of the Cocopah Indian Reservation (Article II(C)(2)(b); Rep. 350), the Lake Mead National Recreation Area in Arizona and the Havasu Lake and Imperial National Wildlife Refuges (Article II(C)(f), (g) and (h); Rep. 352-53) (A Exc. 34).

V

No reservation of water of the main stream of the Colorado River has been made for the use of Indian Reservations in Arizona.

A. Power of the United States to Reserve Navigable Waters Before Statehood

Sovereign rights in the water and beds of navigable streams were examined and defined by Mr. Justice Gray in the leading case of *Shively* v. *Bowlby,* 152 U. S. 1, 57-58 (1894)[57]:

> "At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.
>
> "Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory.
>
> "The new States admitted into the Union since the adoption of the Constitution have the same rights

[57] Referring to *Shively* v. *Bowlby,* this Court has said: "It is unnecessary, and it would be difficult, to add anything to the reasoning of that case." *United States* v. *Winans,* 198 U. S. 371, 383 (1905). Again, the Court has commented that the "whole subject has been clarified, after the fullest examination of all the authorities, in a most useful opinion by Mr. Justice Gray". *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 84 (1922).

as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

Thus, the right of the United States in navigable waters within federal territories, unlike its title to territorial lands, is not absolute, but is held by "the United States for the benefit of the whole people" and "in trust for" the future states. *Shively* v. *Bowlby,* 152 U. S. at 57.

It was once thought that this trusteeship prevented the United States from disposing of navigable streams or the beds thereof flowing within territories of the United States, even prior to their admission to statehood. *Pollard* v. *Hagan*, 44 U. S. (3 How.) 212 (1845).[58] However, the "dicta" to that effect in *Pollard* was limited in *Shively*, 152 U. S. at 28, 47, 48:

> "So much of the reasoning of the learned justice, as implied that the title in the land below high water mark could not have been granted away by the United States after the deed of cession of the territory and before the admission of the state into the Union, was not necessary to the decision, which involved only a grant made by Congress after the admission of Alabama, and which was followed in two similar cases in which Congress, after the admis-

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[58] In *Pollard* v. *Hagan*, the Court had stated in part:

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed; except for temporary purposes, and to execute the trusts created by the acts of Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the Treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana.

* * * * * *

"When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding the territories.

* * * * * *

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding . . . ." 44 U. S. (3 How.) at 221, 222-23, 228-29.

sion of the state, had undertaken to confirm Spanish grants, made after the Treaty of San Ildefonso of 1800, and therefore passing no title whatever.

* * * * * *

"Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

* * * * * *

"We cannot doubt . . . that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

In recognition of the duties of the United States as trustee of navigable waters within the territories for the benefit of future states, Congress long ago adopted a policy with regard to such waters (as distinguished from public lands), which was thus described in *Shively* v. *Bowlby,* 152 U. S. at 49-50:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public

highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community."[59]

This congressional policy of treating navigable waters within federal territories and the lands under them as being held for the benefit of future states has long since become firmly "established". *United States* v. *Holt State Bank*, 270 U. S. 49, 58 (1926).

B. Power of the Executive to Reserve Navigable Water

Since all of the Fort Mohave and Cocopah Indian Reservations and all of the Colorado River Indian Reservation, except the original 75,000 acres which were withdrawn by Congress in 1865 (pp. 110-11, *supra*), were set apart by executive order, there is squarely presented the question of the power of the executive branch of the government to reserve

[59] A more recent statement by this Court concerning the meaning and effect of the "equal footing" clause may cast doubt upon the validity of the limitations placed on the rule announced in the *Pollard* case by the decision in *Shively* v. *Bowlby* and subsequent cases. See *United States* v. *Texas*, 339 U. S. 707, 712-20 (1950).

navigable water of a territory for federal establishments.[60] The question has never been decided by this Court. It was not until the decision in *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915), that the Court sustained the presidential power to withdraw by executive order public lands from private acquisition after they had been opened by Congress to occupation and purchase. The executive power with regard to public lands was sustained despite the constitutional provision which vests in *Congress* the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (art. 4, §3, cl. 2). The issue was decided "in the light of the legal consequences flowing from a long-continued practice", 236 U. S. at 469; and on the basis of the Court's finding that during the period of eighty years before its decision the President "without express statutory authority—but under the claim of power so to do—[had] made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition". 236 U. S. at 469. The Court found congressional acquiescence in this presidential usage "on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice". 236 U. S. at 472-73.

The power to reserve by executive order federally owned lands, title to which is in the United States as absolute owner, and the power to reserve navigable territorial water, which is held by the United States in trust for future states, are of course two entirely different things. We have found no statute which authorizes the President to reserve navigable water for the benefit of federal establishments

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[60] The same question is also presented with respect to the Lake Mead National Recreation Area and Havasu Lake and Imperial National Wildlife Refuges, all of which were created and enlarged by executive orders.

nor, so far as we have been able to determine, are there any cases which have passed upon the existence of such executive power in the absence of statute.[61]

The question of the power of the Executive was raised but not decided in *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918). This Court ignored the executive order asserted as the source of the Indians' fishing rights there involved and sustained the reservation of the fishing rights as having been effected by the statute establishing the Indian Reservation.

Thirty years later, alluding to *Alaska Pacific Fisheries*, the Court noted in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 113-14 (1949):

> "This Court affirmed the decree as to the waters within 3,000 feet of the shore lines. Although in the brief a vigorous attack was made on the power to issue the proclamation covering the waters, the proclamation was not referred to in the unanimous opinion here. This Court felt compelled to decide the fisheries were included *in the language of the statute* by the purpose to assist the Indians to train themselves. Fishing was said to give value to the islands."

United States v. *Midwest Oil Co.*, 236 U. S. 459 (1915), is not a valid precedent for sustaining the existence of executive power to reserve navigable water. That decision, as we have seen, was based upon a delegation of power to set apart public lands, which was implied from long congressional acquiescence in the exercise of that particular power. Finding a similar assent and transfer of authority from Congress to the President is far more difficult, if not impos-

[61] The existence of the power in the Executive seems to have been questioned, at least impliedly, by Chief Justice Hughes in *United States* v. *Utah*, 283 U. S. 64, 88-89 (1931).

sible, with respect to the reservation of navigable water. In cases of land reserved by executive order, the acts of reservation were plain and well-known to Congress. With respect to the implied reservation of water rights by executive act, on the other hand, there can be no valid claim of congressional knowledge and acquiescence. That it was the intention to reserve water as well as land nowhere appears from any of the documents creating or enlarging the Reservations. Indeed, it was contrary to the policy of Congress itself to dispose of navigable waters so as to foreclose transfer of sovereignty over them to future states (pp. 125-29, *supra*). In the absence of knowledge or belief on the part of Congress that the Executive intended to reserve water with each withdrawal of land, it is impossible to infer that Congress acquiesced in or approved of such executive intent.

Hence, the inferred congressional delegation of power to the President which was found in *Midwest Oil* with respect to public lands cannot validly be relied upon to sustain the reservation of rights in navigable water by executive order or proclamation. As this Court stated in *Sioux Tribe* v. *United States*, 316 U. S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority. The basis of decision in *United States* v. *Midwest Oil Co.* was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued Congressional acquiescence in the executive practice. The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were

> thought by the executive and Congress to flow from the establishment of executive order reservations." (footnote omitted)

Similarly, the fact that Congress has by implication delegated to the Executive the power to reserve public lands for public purposes does not establish that Congress has impliedly delegated to him the power to reserve navigable waters for use on those lands. Additional and independent evidence of a congressional delegation of such enlarged authority is necessary.

In *Sioux,* the Court could find no such evidence. Reviewing the history of executive order Reservations, the Court concluded that the power to convey a compensable interest in lands set apart for Indian Reservations had not been delegated to the President by Congress, stating:

> "Although there are abundant signs that Congress was aware of the practice of establishing Indian reservations by executive order, there is little to indicate what it understood to be the kind of interest that the Indians obtained in these lands" 316 U. S. at 328.

The Court noted that in 1892 the Senate Committee on Indian Affairs had expressed the opinion that under an executive order "the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy".[62] It also regarded as "striking proof of the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an executive order reservation" the fact that there

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[62] 316 U. S. at 328, quoting from S. Rep. No. 664, 52d Cong., 1st Sess. 2 (1892).

was an "absence of compensatory payments in such situations". 316 U. S. at 330. The Court concluded:

> "We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of 1875 and 1876, and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding." 316 U. S. at 331..

By the same token, the Acts of Congress and the pronouncements of the Executive which recognize the need to acquire appropriative rights to the use of water in the Colorado River Indian Reservation (pp. 142-47, *infra*) are "a striking proof of the belief shared by Congress and the executive" that water had not been reserved for the use of that Reservation.

In view of the constitutional provision which vests in Congress the "Power to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (art. 4, §3, cl. 2) and since the question presented is an open one for decision in this Court, we believe its determination should be approached in the light of the principles expressed by Mr. Justice Day in his dissent in the *Midwest Oil* case, 236 U. S. at 511, quoting in part from *Kilbourn* v. *Thompson,* 103 U. S. 168, 190-91 (1881):

> " 'It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or National, are divided into the three grand departments of the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested

in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the power confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.'

"These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another."

C. Necessity for a Clear Manifestation of Intent to Reserve Navigable Water

The settled policy of the United States to hold navigable streams within federal territories in trust for future states raises a presumption against a disposal of those waters by the United States, which must be overcome in each individual case by a clear manifestation of an intention on the part of the United States to dispose of the waters as claimed. *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926); *Shively* v. *Bowlby,* 152 U. S. 1, 49, 57, 58 (1894).

In *Holt State Bank*, holding that title to the lands underlying the navigable waters within the Red Lake Indian Reservation passed to the State of Minnesota upon its admission into the Union and had not been reserved by the Chippewas through a succession of treaties whereby they had ceded to the United States their aboriginal right of occupancy to surrounding lands, this Court enunciated the governing legal principles as follows:

> "But, as was pointed out in *Shively* v. *Bowlby*, pp. 49, 57-58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U. S. at 55.

The Court considered the decisive question to be "whether the lands under the lake were disposed of by the United States before Minnesota became a state" and it answered this question in the negative on the basis of considerations stated as follows:

> "An affirmative disposal is not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. The existence of the reservation is conceded, but that it operated as a disposal of lands underlying navigable waters within its limits is disputed. We are of opinion [*sic*] that the reservation was not intended to effect such a

disposal and that there was none. If the reservation operated as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake, having an area of 400 square miles, the greater part of the Lake of the Woods, having approximately the same area, and several navigable streams. The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, by the early legislation reviewed in *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 287-289, and *Economy Light & Power Co.* v. *United States, supra,* pp. 118-120, and emphasized in the Enabling Act under which Minnesota was admitted as a State, c. 60, 11 Stat. 166, which declared that the rivers and waters bounding the State 'and the navigable waters leading into the

> same shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States.' " 270 U. S. at 57-59 (footnote omitted).

This is true where the claimed reservation of water is based upon an act of Congress. *A fortiori* it is true with respect to an alleged reservation of water by executive order, assuming for purposes of argument that the power to reserve water can be, or in the particular case has been, delegated to the Executive by Congress.

In determining whether rights in navigable waters have been reserved for the benent of Indian Reservations, this Court has distinguished between cases in which the Reservation consists of lands remaining as a residue after treaty cessions of tribal lands held in aboriginal possession and cases in which an Indian Reservation is created out of public lands of the United States set apart for occupancy as a Reservation.

For example, in *United States* v. *Winans,* 198 U. S. 371 (1905), the Court upheld rights of the Yakima Indians to take fish from a navigable stream where their fishing rights had been reserved in a treaty which granted to the United States lands held in aboriginal possession. Significantly, the Court regarded the "pivot of the controversy" to be the construction of the treaty. It found that the treaty was not a grant to the Indians but a reservation by them of rights already possessed and that the rights so reserved imposed a servitude on the land ceded to the United States by the treaty.

The Indian Reservations here involved are not treaty Reservations. All of them consist of lands set apart from the public domain for Indian occupancy by congressional act or executive order.

Moreover, it is much more difficult to find an intention to reserve the right physically to withdraw and consume the water of a navigable stream or to alienate title to the bed thereof than it is to find a reservation of rights, such as the right to fish, the exercise of which does not involve any withdrawal or consumption of the water itself. Compare for example, *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 79 (1918), which held that Congress in setting apart by statute the "body of lands known as Annette Islands" intended to reserve fishing rights in the offshore waters, with *United States* v. *Holt State Bank*, 270 U. S. 49 (1926), in which a reservation of land by Indian treaty was held not to have reserved navigable water for use on the land reserved.

D. Lack of Evidence of an Intent to Reserve Water for Indian Reservations

There is no evidence in the case at bar sufficient to warrant the finding that the United States in establishing the Colorado River and Fort Mohave Indian Reservations intended to reserve water of the Colorado River for the use of those Reservations (A Exc. 10, 19, 21).[63] Indeed the evidence is to the contrary.

(1) Colorado River Indian Reservation

On March 3, 1865, Congress established the Colorado River Indian Reservation by a statute which described the lands withdrawn for Reservation purposes as follows:

[63] Since the Cocopah Reservation was created by executive order after Arizona had been admitted to statehood, its establishment was ineffective to reserve water of the Colorado River for use on the Reservation (pp. 121-24, *supra*). In all events, the executive order creating the reservation (U. S. 1001) contains no mention of water, nor any expression of an intent to reserve water for the Reservation. Nor does the record contain any evidence of the circumstances surrounding the creation of the Reservation from which an intent to reserve water may be inferred.

> "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries."[64]

Thus, the statute does not even mention water of the Colorado River much less make any reservation of that water.

On November 22, 1873, President Grant issued an executive order directing that there be withdrawn from sale and added to the Colorado River Indian Reservation

> "all that section of bottom land adjoining the Colorado Reserve, and extending from that Reserve on the north side to within 6 miles of Ehrenberg on the south, bounded on the west by the Colorado River, and east by mountains and mesas." (US 503)[65]

Here again no water of the Colorado River was set apart for use on the Reservation.

An executive order of November 16, 1874 further enlarged the Reservation by extending it into the state of California and described the tract as "embraced within the following . . . boundaries":

> "Beginning at a point where the La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said crest of mountain in a northerly direction to the top of Black Mountain; thence in a northwesterly direction

[64] 13 Stat. 559.

[65] All of the executive orders relating to Indian Reservations have been collected and published by the Department of the Interior in two volumes entitled "Executive Orders Relating to Indian Reservations", the first volume including those orders issued up to 1912 and the second volume those issued between 1912 and 1922.

> across the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning, be, and the same is hereby, withdrawn from sale and set apart as the reservation for the Indians of the Colorado River and its tributaries." (US 504)

Once again the executive order made no mention of water of the Colorado River.

On January 31, 1876, the United States Indian Agent reported to the Commissioner of Indian Affairs that the boundaries as defined by the executive order of 1874 crossed the Colorado River twice and cut off a large tract of land on the east side of the river which was being settled by non-Indians for unlawful and improper purposes. The Agent requested that an executive order be obtained "making the ~~Colorado~~ River the boundary line". The Commissioner of Indian Affairs and the Secretary of the Interior approved the recommendations (US 505A, 505B, 505C). Thereafter on May 15, 1876, an executive order issued which re-defined the boundaries of the Reservation and contained the following description of the western boundary:

> ". . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning." (US 505)

Thus, neither the Act of Congress which created this Reservation nor the executive orders which enlarged it contain any express manifestation of an intent to reserve

water of the Colorado River for use on the Reservation. By their terms, they deal only with a withdrawal of lands from the public domain. No mention of water is made. It was undoubtedly contemplated that the United States might acquire for the benefit of the Indians a right to water by actual use, but there is no basis whatever for inferring an intent to reserve any water from the Colorado River for the Reservation or to reserve such water in an amount sufficient to irrigate all of the irrigable acreage in the Reservation.

To the contrary, as the legislation enacted by Congress following the establishment of the Colorado River Indian Reservation clearly demonstrates, Congress did not consider that there had been a withdrawal of water for that Reservation either by the statute creating the Reservation or by its subsequent enlargement by executive order.

Section 25 of the Act of April 21, 1904,[66] provides in part:

> "That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act . . . and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain."

In *United States* v. *Arizona*, 295 U. S. 174, 185 (1935), this Court construed the quoted language thus:

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[66] 33 Stat. 224.

> "The purpose was not to prescribe or regulate the means to be employed to divert water from the Colorado but to extend the reclamation law to the Indian reservations named. It was merely to empower the Secretary, if the circumstances stated should arise, to reclaim lands in these reservations by use of water to be taken from that river. The authority granted was no more than permission to appropriate them for the purpose specified."

This declared intention "to extend the reclamation law" to the Colorado River Indian Reservation is clearly inconsistent with the Master's conclusion that, long prior to the statute, sufficient water from the Colorado River had been reserved to irrigate all the irrigable acreage within the Reservation.

Section 8 of the Reclamation Act[67] provides in part:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

It is inconceivable that Congress would have thus required the Secretary to acquire water rights for this Reservation by appropriation under state law if it had thought that a reserved water right with a priority date of 1865 already existed for these lands.

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[67] 32 Stat. 390 (1902), 43 U. S. C. §383 (1958).

Section 8 of the Reclamation Act also prescribes that "beneficial use shall be the basis, the measure, and the limit of the right".[68] This requirement cannot be reconciled with the concept that a water right may be acquired by reservation without any physical application of water to a beneficial use.

Moreover, later congressional enactments demonstrate even more plainly that Congress itself did not believe that the mere creation or enlargement of the Reservation had set apart water of the Colorado River for use on the Colorado River Indian Reservation.

Congress, in the Act of April 4, 1910,[69] appropriated $50,000

> "For the construction of a pumping plant to be used for irrigation purposes on the Colorado River Reservation, together with the necessary canals and laterals, for the utilization of water in connection therewith, *for the purposes of securing an appropriation of water* for the irrigation of approximately one hundred fifty thousand acres of land . . . to be reimbursed from the sale of the surplus lands of the reservation."

This specific grant of funds to enable the Secretary to make an appropriation of water for use in the Reservation is irreconcilable with the view that, by the very creation of the Reservation, water had been reserved for use upon it.

The Secretary of the Interior in 1910 was also of the view that there had been no automatic reservation of water of the Colorado River for use on the Reservation. In a communication dated February 24, 1910 to the Chairman of the Senate Committee on Indian Affairs, the Secretary

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[68] 32 Stat. 390 (1902), 43 U. S. C. §372 (1958).

[69] 36 Stat. 273.

recommended passage of what became the Act of April 4, 1910, referred to the proposed treaty between the United States and Mexico regarding a division of the water of the Colorado River, and stated that it had been tentatively agreed between the representatives of the respective governments:

> "That each country will recognize all water rights in the Colorado River which have been initiated prior to the final adjustment of the contemplated treaty, providing such rights have been acquired through actual construction or beneficial use. That afterwards all irrigation carried out which has not initiated a right must share equally on a proportionate acreage basis in the cost of the necessary storage reservoirs."[70]

The Secretary continued:

> "If no irrigation project is entered upon by this Government, it is not at all improbable that this great area of rich, irrigable land, approximating 150,000 acres, will be deprived of a water supply, unless the construction of extensive storage reservoirs is undertaken. Even eliminating Mexico from consideration, filings are being made by citizens and corporations upon the waters of this river, and if rights are to be initiated for these Indians' lands, the work should be started at an early date, with a view to making a proper appropriation. The department is aware, and the subject has been brought to the attention of Congress, as is evidenced by the language of section 25 of the act of April 21, 1904 (33 Stat. L., 224), that a reclamation project was contemplated on the Colorado River Reservation under similar provisions to the one now under way at Yuma, Ariz. The depleted state of the reclamation fund

[70] S. Rep. No. 357, 61st Cong., 2d Sess. 14 (1910).

has, however, prevented any action toward the carrying out of this project.

"It will be observed from the foregoing that the initiation of irrigation work at an early day on the Colorado River Indian Reservation is of the highest importance, and I recommend that there be included in the Indian appropriation bill an item carrying $50,000 for establishing an irrigation system on this reservation. If this amount, which should be reimbursable from the sale of the surplus lands of the reservation, should be made available, it would be possible to install a pumping plant and distributing system to irrigate approximately 3,000 acres. Such a system could be so constructed as to fit into and become a part of any larger gravity irrigation system which might be constructed at a later date. In this manner a just claim upon sufficient water to irrigate the 150,000 acres on the reservation can be established."[71]

This is persuasive evidence that Congress and the Secretary of the Interior both recognized that neither when the Colorado River Indian Reservation was established in 1865 nor at any time thereafter had there been any withdrawal of Colorado River water for use on the Reservation; and further, that rights to that water would necessarily have to be acquired, if at all, by actual appropriation and application to beneficial use within the Reservation.

Each year after the passage of the Act of April 4, 1910 through 1919, Congress in making appropriations for the Colorado River Indian Reservation made reference to the Act of April 4, 1910, and in each instance provided expressly that the work done was "for the purposes of securing an appropriation of water" for irrigation. Thereafter, in making each annual appropriation through 1942, the inten-

[71] *Id.* at 14.

tion to provide funds to make an appropriation of water was restated by referring to the Act of April 4, 1910 (US 507).

The fact that each of these thirty-two annual appropriations of funds was, either expressly or by reference back to the Act of April 4, 1910, made "for the purpose of securing an appropriation of water" for irrigation is wholly inconsistent with the theory of the Special Master that by the establishment of the Colorado River Indian Reservation Congress intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 265), and that the President in enlarging the Reservation in 1873 and 1874 had a similar intention.

Following the enactment of a rivers and harbors improvement act in 1935,[72] Congress made a series of appropriations pursuant to §2 of the Act for, among other things, "construction, repair, and rehabilitation of irrigation systems on Indian reservations" and "*for the purchase of water rights,* ditches, and lands needed for such projects; and for drainage and protection of irrigable lands from damage by floods or *loss of water rights.*"[73] This legislation covers the period 1935 through 1949 (U. S. 507). Each act makes an appropriation specifically for the Colorado River Indian Reservation.

These statutes, which repeatedly appropriated funds for "purchase of water rights" and for "protection of irrigable lands from . . . loss of water rights", are contradictory of

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[72] Act of August 30, 1935, 49 Stat. 1028.

[73] 50 Stat. 579 (1937); 52 Stat. 307 (1938); 53 Stat. 702 (1939); 54 Stat. 422 (1940); 55 Stat. 319 (1941); 56 Stat. 517 (1942); 60 Stat. 356 (1946); 61 Stat. 467 (1947); 62 Stat. 1119 (1948); 63 Stat. 772 (1949).

the Master's theory that, upon the establishment of the Colorado River Indian Reservation in 1865 and upon its enlargement in 1873 and 1874, there was automatically reserved for its benefit all the water of the Colorado River which might ever be needed to irrigate all the irrigable acreage within the Reservation.

(2) Fort Mohave Indian Reservation

The area which is now referred to as the Fort Mohave Indian Reservation was originally set aside as a military reserve (US 1301).

In 1890, this military post was transferred to the Department of the Interior for Indian school purposes (US 1303) pursuant to the Act of July 31, 1882,[74] entitled "An Act to provide additional industrial training schools for Indian youth, and authorizing the use of unoccupied military barracks for such purpose." This Act provided:

> "That the Secretary of War be, and he is hereby, authorized to set aside, for use in the establishment of normal and industrial training-schools for Indian youth from the nomadic tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: *Provided,* That money appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous, or as

[74] 22 Stat. 181.

> Congress from time to time may authorize and provide."

The stated purpose of this transfer to the Department of the Interior was to permit the use of the military post and barracks for an industrial training school for Indian youth. The transfer did not by its terms even create an Indian "Reservation" and certainly cannot support a finding of an intent to withdraw water from the Colorado River for Reservation uses.

The first mention of a "Fort Mojave Indian Reservation" to be found in the record appears in an executive order dated December 1, 1910 (US 1304), which was superseded by the executive order of February 2, 1911 (US 1305), withdrawing additional lands and setting them apart

> " . . . as an addition to the present Fort Mojave Indian Reservation, in Arizona, for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon. . . ."

Neither of these two orders made any mention of water.

The executive order of February 2, 1911 set aside about 18,000 acres of bottom lands embraced in the even-numbered sections in the Mohave Valley. The odd-numbered sections in the area had already been granted to the Atlantic & Pacific Railroad (now the Santa Fe Railroad) which had in 1904 sold this land to the Rio Colorado Land & Irrigation Company (US 1315, Hist. of Reservation, p. 1). In 1910, the Cotton Land Company bought these odd-numbered sections from the Rio Colorado Land & Irrigation Company (US 1315, Hist. of Reservation, p. 3). As a result, alternate sections in the Mohave Valley were privately owned at the time the executive order was issued in 1911, so that land

ownership in the area was complicated by a checkerboard pattern.

In 1910, the Chief Engineer of the Indian Irrigation Service recommended the adoption of an agreement whereby the Cotton Land Company proposed to sell water rights to the Indian lands at $25 per acre (US 1315, Hist. of Reservation, p. 3; US 1316, p. 3). Obviously, he would not have made such a recommendation had he believed that the Indians were already the owners of more than sufficient water to meet all of their Reservation needs.

We find nothing in the foregoing acts of the United States in creating and enlarging the Fort Mohave Indian Reservation which gives any indication of the existence of an intent to reserve water of the Colorado River for use on that Reservation. To the contrary, the conduct of the United States negatives such an intent.

(3) Additional Considerations Applicable to Both Reservations

There is other evidence that Congress did not consider that the activities of the United States in withdrawing land from the public domain for use as an Indian Reservation operated also to reserve water for use on the Reservation. In acts specifically dealing with rights to use water on certain Indian Reservations Congress has specified that such rights should depend on appropriation under state law.[75]

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[75] For example, the Act of May 30, 1908, §2, 35 Stat. 558, 560, dealing with the Fort Peck Indian Reservation, provides: "All appropriations of the waters of the reservation shall be made under the provisions of the laws of the State of Montana." See also the Act of March 1, 1907, 34 Stat. 1035 (Blackfeet Indian Reservation); Act of June 21, 1906, 34 Stat. 375 (lands of Uncompahgre, Uintahs and White River Utes); and Act of March 3, 1905, 33 Stat. 1020 (lands of Shoshone Indians).

The fact that, when the attention of Congress was focused on the matter of the right to use water on an Indian Reservation, it provided that such rights be acquired under state law runs completely counter to the existence of an intent to secure such water rights by reserving or withdrawing water for use on Indian Reservations.

There is an additional reason for believing that the Master's theory is unsound. At the time the Colorado River Indian Reservation was created and enlarged, California had already attained statehood. It follows that any reservation of water that could be implied from the withdrawal of land for purposes of the Reservation would be ineffective as against California because, at the time the withdrawal of land was made, the United States was without power to reserve navigable water as against California (pp. 121-24, *supra*). To say that the United States intended to reserve water flowing in the Colorado River within the Territory of Arizona, when it was powerless to reserve the water of the same stream flowing in the State of California, is to impute to the United States the intent to deny the future State of Arizona the same sovereign rights then enjoyed by California. That the United States intended so to "contract the sovereignty" of Arizona prior to its admission into the Union, when the State of California on the opposite side of the stream was already in possession of full sovereign rights as to its part of that stream, is not to be implied in the absence of compelling evidence.

As was stated in *United States* v. *Texas*, 339 U. S. 707, 720 (1950):

> "For equality of States means that they are not 'less or greater, or different in dignity or power.' See *Coyle* v. *Smith*, 221 US 559, 566."

It may not be rightly assumed that the national government intended to confine Arizona to a sovereignty with respect to its navigable waters which, in dignity or power, is less than that of its sister state across the river.

At the time of the creation of the Fort Mohave Indian Reservation, California and Nevada had both been admitted to statehood. Therefore, the same considerations which mitigate against a reservation of water for the Colorado River Indian Reservation are equally applicable to the Fort Mohave Indian Reservation.

The Special Master's Report gives no recognition to any of the foregoing matters which negative the existence of an intent to reserve Colorado River water for the Colorado River and Fort Mohave Indian Reservations. Instead he finds "that the United States intended to reserve mainstream water for the reasonable future needs of the . . . Reservations" upon the grounds that "it was intended that the Indians would settle on the Reservation land and develop an agricultural economy", that the land "is too arid to support such an economy without irrigation from the Colorado River", and that it "would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable" (Rep. 259-60).

The Master's view that if the Indians "were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun" (Rep. 261) is unrealistic, to say the least.

When the Colorado River Indian Reservation was created by Congress in 1865 the vast water resources of the Colorado River were virtually untouched. The entire Colorado River basin was frontier area, sparsely settled and almost entirely undeveloped. Demands against the water

of the Colorado River were small and unimportant, as there was little irrigation practiced in the Lower Basin, no large centers of population were in existence to require water for municipal, industrial and domestic purposes and the diversion and use of large quantities of water by multi-purpose projects was not even thought of. Most of the millions of acre-feet of water which drained into the Colorado flowed practically unused to the Gulf of Mexico, and it was not contemplated or even imagined that the resources of the River would ever be inadequate to meet all foreseeable needs, both Indian and non-Indian. While it was undoubtedly assumed that the Indians of the Colorado River Indian Reservation would use some water of the river for agricultural and other purposes, the water flowing by the Reservation and there for the taking exceeded by far all anticipated requirements. The problem confronting the United States as guardian of the Indians on the Colorado River Indian Reservation was not how to compete successfully with others for a share in a limited water supply, but how best to divert and utilize a bountiful water resource, more than ample for all the Indians' needs.

Under these circumstances, there was no occasion to reserve any water for the protection of the Indians resident upon the Reservation, nor was there any thought that they would be "thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use" (Rep. 261).

What has just been said regarding the Colorado River Indian Reservation applies with equal force to the Fort Mohave Indian Reservation.

E. Indian Needs, Rather Than Irrigable Acreage, the Correct Measure of Any Reserved Water Right

Arizona does not concede that water was reserved for use on the Reservations involved. However, in the event the Court should hold that there was such a reservation of water, the question will arise as to what amount was set apart.

The Special Master concludes that there was reserved "sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses" (Rep. 262).

It should be kept in mind that the water with which we are here concerned is not only a precious and limited natural resource, but one which cannot be preserved intact or stock-piled if not used. Advance planning and construction of dams and irrigation works to store and divert the water is necessary if it is to be put to maximum beneficial use, with the result that non-Indian users cannot take full advantage of the failure of Reservation Indians, as beneficiaries of prior reserved rights, to utilize the water reserved for them. Therefore, if water is set aside or reserved for purposes which do not result in its utilization, it runs unused to the sea or evaporates and is thus irretrievably lost. Accordingly, the Court will be most reluctant, we are sure, to adopt a concept of water rights, whether for Indians or non-Indians, which would involve the waste or non-use of this rare "treasure". *New Jersey* v. *New York*, 283 U. S. 336, 342 (1931).

The only justification for the concept that presently unused and unneeded quantities of water should be set aside to meet future needs of Indians is that this action

is necessary to afford a retarded class of citizens the equality of opportunity which would be denied to them if they were forced to compete with their more advanced neighbors. If it be acknowledged that this view is sufficient justification for conferring upon our Indian citizens special prerogatives in the use of water, then a proper regard for the rights and welfare of non-Indian citizens requires that these special privileges be granted the nation's Indian wards only when and to the extent that they are necessary for the Indians' protection and advancement.

Thus the yardstick for any reserved right to use water on Indian Reservations must be one which can be justified as setting aside for the Indians the amount of water required for their reasonable needs. We do not dispute the conclusion of the Master that the quantity reserved should be sufficient for reasonable future needs. We agree that uses or needs existing either now or at the time the Reservations were established are not the only measure of the amount reserved. We also concur that an open-end decree which would leave the reserved amount uncertain and subject to fluctuation is neither desirable nor necessary. However, we submit that an unsatisfactory and indeed extreme criterion should not be adopted simply because it permits of certainty and definiteness; and we assert that any measurement of the reserved quantity must be rejected unless it is demonstrably commensurate with the reasonably foreseeable needs of the Indians themselves. The irrigable acreage yardstick does not meet that test (A Exc. 11, 15-16, 19-22).

What constitutes irrigable land is itself a matter of uncertainty and is subject to frequent change, depending upon prevailing practices in evaluating the chemical composition of soils and their depth, texture, permeability,

slope, drainage, salinity, alkalinity, elevation and topography, as well as climatic conditions and a host of other factors.

For example, the soil survey made in 1940-1941 covering 115,900 acres of bottom lands in the Colorado River Indian Reservation within Arizona resulted in the conclusion that there were 68,432 irrigable acres within that portion of the Reservation (C 2619, p. 7). But the studies made by the Office of Indian Affairs in 1955-1956 for purposes of this litigation purport to show that there are 112,402 irrigable acres in the Arizona portion of the Colorado River Indian Reservation (US 560). Only some fifteen years separate these two studies, yet the earlier figure has been increased by approximately 68%.[76] The lesson of these figures is plain: The number of acres within an Indian Reservation regarded as irrigable depends on the date the question is decided.

Certainly at the time these Reservations were created and enlarged the number of irrigable acres within them was unknown. And it seems likely that other factors such as the availability of land owned by the United States in the vicinity where the Indian tribes traditionally lived, the location of natural monuments which would permit of reasonably accurate descriptions in these unsurveyed areas, the desirability of setting aside a contiguous area of land, as well as other considerations, played a part in the selection of the lands included within these Reservations.[77] But had the lands within the Reservations been selected on the basis of the amount of irrigable acreage included and with the

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[76] The 1955-1956 studies by the Office of Indian Affairs found 105,210 acres of bottom or valley lands and 7,192 acres of mesa lands on the Colorado River Indian Reservation suitable for irrigation. These figures are gross and were reduced by 12% for rights-of-way, farmsteads, etc., leaving a net of 92,859 acres of valley lands and 6,329 acres of mesa lands (Tr. 14267-8).

[77] U. S. 505-A.

intent of reserving sufficient water to irrigate all the irrigable land within the Reservations, it is undeniable that the quantity then considered irrigable would have been far less than the latest opinion of the experts in this field.

If the amount of irrigable lands is to be the sole measure of the quantity of water reserved for use on these Reservations, it is immaterial whether the water will ever be used by the Indians or even whether any Indians occupy the Reservation to make use of the water reserved.

That the amount of water reserved under the irrigable acreage formula has no relationship to the water required to meet the needs of the Indians is strikingly demonstrated by a consideration of the amount of water reserved per member of the different tribes of the five main stream Reservations by application of the Master's irrigable acreage standard:

Tribe	Tribal Population[78]	Maximum Diversion Per Year in Acre Feet[79]	Annual Diversion per Member of Tribe in Acre Feet
Ft. Mohave Indian Tribe.....	450	122,648	272.55
Cocopah Indian Tribe.....	90	2,744	30.49
Colorado River Indian Tribes	1,300	717,148	551.65
Quecham Indian Tribe (Yuma Res.)	1,200	51,616	40.01
Chemehuevi	300	11,340	37.80

These figures expose the fundamental weakness of the irrigable acreage formula—namely, it has no necessary relationship to the reasonable needs of the Indians for whose benefit the water is set apart. The formula denies non-Indian citizens the use of a precious resource without any assurance or likelihood that it will be used by the Indians.

As the basic authority for the adoption of the irrigable acreage standard, the Master relies primarily on this

[78] Rep. 85-88.

[79] Rep. 350-51.

Court's decision in *Winters* v. *United States,* 207 U. S. 564 (1908). However, neither that case nor the others cited by the Master held that the extent of a reserved water right is measured by the quantity of water necessary to irrigate all the irrigable acreage of a Reservation. The Master states that "the *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation. . . ." (Rep. 258) He then concludes that the United States, in setting aside land as a reservation, must have intended that every irrigable acre would eventually be irrigated and therefore sufficient water was reserved for that purpose (Rep. 262). This conclusion is without precedent and, as will be demonstrated, leads to inequitable results when applied to the Indian Reservations with which we are concerned.

The Master rejects the reasonable needs of the Indians as the proper measure of the reserved right because of "the difficulty of predicting the future needs of Indian Reservations" (Rep. 264). He overlooks the fact that this "difficulty" has not prevented the use of this yardstick by the courts in the majority of the cases cited by him. Furthermore, as we have just seen, the standard of irrigable acreage is itself uncertain because of the ever changing concepts of irrigability.

The Court of Appeals in the *Winters* case[80] enjoined uses by non-Indians which would in any manner interfere with the use of 5,000 inches of water of the Milk River, a non-navigable stream, on the Fort Belknap Reservation in Montana. The decision states that there were about 30,000 acres of land within the Reservation susceptible of irrigation with the water of the Milk River but that:

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[80] 143 Fed. 740 (9th Cir. 1906).

> "... As alleged in the complaint, 'approximately 5,000 acres of land are being irrigated upon said reservation for the purpose of producing thereon crops of hay, grass, grain, and vegetables with the waters diverted by means of said canal and lateral ditches distributing said waters from said canal over the lands.' This canal has a carrying capacity of at least 5,000 inches of water, and such amount of water is required for the *present needs and requirements* of the government and the Indians, for household, domestic, agricultural, and irrigating purposes on said reserve." 143 Fed. at 741.

The Court of Appeals actually rejected the claim of the United States to all the water of the Milk River for the irrigation of all lands on the Reservation susceptible of cultivation and, instead of predicating the rights of the Indians on the amount of water required for the irrigation of the 30,000 acres of irrigable Reservation lands, limited their rights to the 5,000 inches required for the irrigation of the 5,000 acres then being irrigated and for domestic and stock-watering purposes.

The affirmance of that decision by this Court was in effect a rejection of the Government's claim to the quantity of water necessary for the irrigation of all irrigable lands and a clear recognition of the present needs of the Indians living on the Reservation as the governing criterion.[81]

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[81] This Court did not hold differently in *United States* v. *Powers*, 305 U. S. 527 (1939). All that was there decided was that the Secretary of the Interior could not completely exclude allottees of lands, within an Indian Reservation but outside the government irrigation project for that Reservation, from sharing in the use of whatever waters might have been reserved by the treaty creating the Reservation. No determination was made as to the extent of the allottees' share. See also the decision of the Court of Appeals in the same case, which disapproved the trial court's attempt to admeasure the shares of the allottees. 94 F. 2d 783, 786 (9th Cir. 1938).

The Special Master also cites *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (9th Cir. 1908). As we read that decision, it was actually based on the needs of the Indians. The United States there claimed all the waters of a non-navigable stream for use on all Reservation lands suitable for farming and ranching. Irrigable acreage within the Reservation totaled 10,000 acres. Stream flow varied from a minimum of 2,500 inches to a maximum of 150,000 inches. The trial court rejected the United States' claim to the entire flow of the stream, finding that:

> "[T]he testimony adduced does not bear them [the Government's allegations] out, and the question recurs whether the government is now entitled to the amount of water which it alleges *has been* diverted. I am of the opinion that it is so entitled." 156 Fed. 123, 130 (C. C. D. Mont. 1907).

Accordingly, a decree enjoining the defendant from making a diversion which would reduce the flow available to the United States below 1,666⅔ inches was entered by the trial court and affirmed on appeal.

The *Conrad* case therefore really involves a refusal to apply the irrigable acreage test to a determination of quantity because, had that test been applied, the United States would have been awarded at least 2,000 inches. While it is true that the trial judge found 1,666⅔ inches would have been sufficient for the irrigation of 10,000 acres, he also found that this quantity was sufficient for "the present *needs,* considering that much of the land will be irrigated for pasture only" and that the Government should "conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future *needs*. . . ." 156 Fed. 123, 129, 130-31.

Since the Ninth Circuit Court of Appeals took into account the issue of quantity in affirming the decision for less than the amount requested by the United States, it tacitly endorsed the trial court's reliance on past actual use in determining quantity.

Nor does the decision of the Court of Appeals in *United States* v. *Ahtanum Irrigation Dist.*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957), apply the irrigable acreage test. The question there presented for decision was whether the United States was bound by an agreement entered into in 1908 between the Department of the Interior and certain non-Indians which gave the latter the right to divert and use water from Ahtanum Creek, a non-navigable stream, even though the United States contended that the agreement deprived the Indians of water needed on the Reservation. Since the Court of Appeals held that the agreement was binding, there was no occasion for it to consider the question of the measurement of a reserved water right.

Although the *Ahtanum* case did not present an issue as to quantity, since it was "conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream", 236 F. 2d at 325, the court reviewed the previous decisions on the subject and concluded:

> "As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the *reasonable needs of the Indians*, not merely as those needs existed in 1908, but as they would be measured in 1915, when the Indian ditch system had been completed." 236 F. 2d at 337.

The court also said:

> "It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United States a right measured by the needs of the Indian irrigation project at that date." 236 F. 2d at 328.

Thus, the *Ahtanum* case did not approve the irrigable acreage test used by the Special Master. Instead, it held that the extent of the reserved right was sufficient water for use on the Indian irrigation project, as it was developed in 1915, and declined to say whether this right would be enlarged by bringing additional land into the project.

The needs of the Indians, rather than a determination of the amount of water necessary to irrigate all the irrigable acres, was the test applied in *United States* v. *Walker River Irrigation Dist.*, 104 F. 2d 334 (9th Cir. 1939). There the United States sued to restrain the defendants "from interfering with the natural flow of the stream, to the extent of 150 cubic feet per second to and upon" the Reservation. As the Court of Appeals stated, "the tillable lands reserved have an area of approximately 10,000 acres". 104 F. 2d at 335. The court explicitly rejected irrigable acreage as the measure of the Indian needs, stating:

> "The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary

could be demonstrated only by experience." 104 F. 2d at 340.

The Court further found that water had been reserved "to the extent reasonably necessary to supply the *needs of the Indians*". 104 F. 2d at 339-40.

The "experience" which the court considered consisted of (1) cultivated acreage data showing an increase from 1,900 acres in cultivation in 1886 to about 2,000 acres when the suit was filed some 50 years later; and (2) statistics as to the Indian population of the Reservation and the number of Indians actually engaged in farming.

Based on this evidence, the report of the Master in that case, which was accepted by the Court of Appeals, concluded that "the number of Indians is not increasing and it has not been shown that there is the necessity or demand for the cultivation of a larger area than 2,100 acres". 104 F. 2d at 340. Relying on this finding, the court entered a decree awarding the Government 26.25 cubic feet per second during the 180-day irrigation season for the irrigation of 2,100 acres of land on the Reservation, together with the flow reasonably necessary for domestic and stock-watering purposes and for power purposes to the extent then used by the United States during the non-irrigating season. Thus, the court limited the Indians' water rights to their existing and reasonably foreseeable needs as shown by past experience and rejected the irrigable acreage test.

Before the Master here the Government cited *Skeem* v. *United States*, 273 Fed. 93 (9th Cir. 1921) as authority for its contention that, "when an Indian reservation is set apart, the water right thereby reserved is large enough to irrigate the entire irrigable acreage of the reservation". No such holding was made in that case.

In *Skeem*, the court was considering the effect of a Reservation created by an 1898 treaty, which provided:

> "The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live."[82]

The court rejected the contention that this limited the Indians to the quantity of water being used in 1898, since the grant was one *by* the Indians and not *to* the Indians, so that all rights not specifically granted were reserved by the Indians. The decision was not a determination by the court that a water right which has been reserved by implication is to be measured in terms of irrigable acreage. Rather, the court construed the treaty provision to mean that the Indians themselves were retaining a right to sufficient water to irrigate all the irrigable lands withheld by them. Hence, the case is not authority for the proposition that the extent of the rights of the Reservations here involved, which at most could only have come into being by implication, is to be determined by the irrigable acreage criterion.

In addition, the principal question before the court in *Skeem* was whether the leasing of his land by an Indian allottee operated to relinquish a reserved water right. The court held that it did not.

Thus, none of the cases cited by the Special Master holds that the setting aside of lands for an Indian Reservation in itself operates by implication to reserve water for every irrigable acre. In fact, the court in each instance rejected that test and held that the quantity of water reserved by implication was to be determined by the needs of the Indians.

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[82] 31 Stat. 672, 674 (1900).

In each case where the implied reservation theory has been applied, the court has determined the quantity of water reserved for the Indians on the basis of the particular facts and circumstances involved. In no case did the court use irrigable acreage as the criterion. Instead, the attempt has been made to determine the needs of the Indians and this has usually been done by looking to past experience as a guide.

In *Winters* the court awarded water for the irrigation of 5,000 out of 30,000 irrigable acres. In *Conrad* the court looked to present use and in the *Walker River* case the reasonable needs of the Indians as shown by past experience were adopted as the standard. In *Ahtanum* the extent of the reserved right was held to be sufficient water for the Indian irrigation project as it existed in 1915. In *Powers* quantity was not in issue and was not determined.

Undoubtedly, in a proper case, a court might conclude that to satisfy the needs of the Indians it is necessary to set aside water for all the irrigable acreage on the Reservation. Arizona takes this view with respect to the Cocopah Reservation (see p. 190, *infra*). Such a situation might also arise if there were a large number of Indians on a Reservation with limited irrigable acreage. But that certainly is not the case here, where there are only a few Indians who depend for a livelihood on the acreage of the Colorado River Indian Reservation and no Indians who occupy the Arizona portion of the Fort Mohave Indian Reservation.

The historical facts relating to these Reservations demonstrate the inequities which would result from the test applied by the Special Master and the necessity for taking the needs of the Indians as the measure of the quantity of water reserved.

(1) Fort Mohave Indian Reservation

The Special Master has found that there are 14,916 acres of irrigable land on the Fort Mohave Indian Reservation in Arizona which, together with related uses, have a maximum annual diversion requirement of 96,416 acre-feet (Rep. 281). He has concluded that the United States has the right to divert this quantity of water from the Colorado River for use on this land (Rep. 283). When considered in the light of the history of the Reservation, this conclusion cannot be supported.

The so called "Fort Mohave Indian Reservation" was originally created as a military post and later transferred to the Department of the Interior to be used as an industrial training school for Indian youth. Additional land was set aside for the Mohave Indians in 1911 (p. 149, *supra*). The United States, as will be demonstrated, has abandoned any plans to develop an irrigation project on this Reservation.

No land is being irrigated on the Reservation at the present time (US 1302; Tr. 14072) and the maximum ever irrigated successfully is 23 acres (US 1320; Tr. 14000-01). The Mohave Indians are obviously not interested in farming for a livelihood since they live off the Reservation in Needles, California, where most of them are employed by the Santa Fe Railroad (Tr. 13764, 13917, 14220-22). In fact, none of these Indians resides within the Arizona or California portions of the Reservation and only one Indian family lives in the Nevada section (Tr. 14101-02). Yet, the Special Master has held that the United States has the right to divert almost 100,000 acre-feet per annum out of Arizona's share of Colorado River water for use in an area where no Indians live and where no farming operations are carried on.

In addition, the record establishes that no major irrigation project has ever been contemplated for the Fort Mohave

Indian Reservation. To the contrary, it has long been recognized that any such project is impracticable.

In his 1903 Report the Commissioner of Indian Affairs noted that "evidently a number of years ago nearly all the Indians who are now at Needles lived upon the overflow lands between Fort Mohave and Needles, but a failure of the Colorado River to overflow for a succession of years forced these Indians to seek employment on the railroad and in the shops at Needles" (US 1310). In the same report the Commissioner stated that "the school has irrigated by means of centrifugal steam pump the same lands that have been under cultivation by the school for a number of years".

In the 1912 Annual Report of the Department of the Interior it was said regarding the Fort Mohave Reservation: "There are well known and much discussed obstacles to a successful irrigation system on the lands of this Reservation. These are probably not insurmountable, and it would be of great benefit to the Indians to know, as soon as possible, whether it is to be the policy of the Government to attempt to install this system, or to make other provision for them" (US 1311, p. 25).

The 1915 Report of the Department noted that "few improvements of a permanent character have been made and but little farming done" and that although a portion of the lowlands along the Colorado had been allotted to the Mohaves, many of the allotments had been entirely destroyed by the frequent changes in the main channel of the river (US 1313, p. 88). The Report expressed the view that the expense involved in making the necessary improvements "would not be justifiable", and that, in any event, "representations have been made with a view to the removal of these Indians, or at least having them take allotments on lands not subject to overflow and which can be irrigated on the Colorado River Reservation, at Parker". The Report

added that this idea was being received favorably by some of the Indians, several of whom had gone to Parker, and added: "It seems best to encourage this irrigation and the surest way to do so will be to make no further attempt tc protect the lands at Fort Mohave, inasmuch as it has been fully demonstrated that this cannot be done with any assurance of permanence" (US 1313, p. 89).

The 1919 Report of the Department stated that 20 acres were then irrigated, that "the abandonment of this school has been contemplated, and until this matter is settled, no permanent irrigation work could well be undertaken" (US 1314).

As late as 1939, the Interior Department's Assistant Director of Irrigation reported to the Director, after reviewing the history of irrigation on the Fort Mohave Reservation, that:

> "There is no irrigation project on this reservation and prospects for developing a feasible project are not encouraging. . . ." (US 1315)

A so-called "Long Range Program" of irrigation for the Fort Mohave Reservation was referred to in a report to the Director of Irrigation dated January 29, 1944, which stated that as of that date "there is no irrigation project on this reservation. A small acreage near the school was irrigated by pumping for many years subsequent to 1891 until the school was abandoned." The report concluded:

> "Many of the Fort Mohave Indians have been allotted tentatively under the Colorado River Irrigation Project and under present conditions no plans are being considered for an irrigation project on the Fort Mohave Reservation. . . ." (US 1316)

Under § 4 of this same report there is this significant notation:

> "SECTION 4—SERVICES PROVIDED BY GOVERNMENT
>
> *Irrigation*
>
> None since early efforts to construct a small project."

In this history, covering a period of more than 70 years, we can find no justification for setting apart for the Fort Mohave Indian Reservation water of the Colorado River sufficient to irrigate 14,916 irrigable acres of Reservation land in Arizona or to meet an annual diversion requirement of 96,416 acre-feet, whichever is less (Rep. 281). To the contrary, we believe the entire history of irrigation on this Reservation evidences a purpose on the part of the United States *not* to irrigate this land on the ground that to attempt to do so would not be feasible. The Reservation was not originally established for agricultural purposes, but for use as a training school (pp. 148-49, *supra*). The school has long since been abandoned. The land set apart has never in any real sense been devoted to farming or related uses. Actually, the Mohaves themselves have abandoned the Reservation and no land is under cultivation.

For these reasons, the setting aside of such a substantial part of Arizona's share of Colorado River water for use on the Fort Mohave Indian Reservation can be of no benefit to the Indians. They are not farmers but live on wages from employment in Needles, California. None of them has shown a desire to live on the Reservation in Arizona or to engage in farming. To sustain the Master's holding would be to award a large quantity of water in perpetuity to this Reservation to the detriment of other areas in Arizona where additional water is so desperately needed (pp. 21-22, *supra*).

(2) Colorado River Indian Reservation

The Special Master has found that there are 99,375 acres of irrigable land in the Arizona section of the Colorado River Indian Reservation which, together with related uses, have a maximum annual diversion requirement of 662,402 acre-feet (Rep. 272). He has concluded that the United States has the right to divert that quantity of water from the Colorado River for use on the Reservation in Arizona (Rep. 273-74).

This conclusion is based upon the Master's holding that the United States, when it created this Reservation, had impliedly reserved sufficient water to irrigate all the irrigable acreage within the Reservation. As a result, there will be set apart from use by the general public a large quantity of water in perpetuity when no such amount has ever been used and in all likelihood never will be used on this Reservation. The facts make evident that the holding of the Master cannot benefit the Indians but will only result in depriving other areas in Arizona of water which is vital to the existing economy of the state.

The Colorado River Indian Reservation was created at the recommendation of the Commissioner of Indian Affairs to consolidate on one large Reservation a number of Indian tribes previously inhabiting numerous small Reservations scattered throughout the Southwest (US 512, p. 21). However, since the establishment of the Reservation in 1865, there has been only very limited success in relocating on it members of tribes which traditionally inhabited areas along the Colorado River.

The Yuma Indians never left their tribal home near Yuma, Arizona (US 526, p. 284; US 530). As a result, the Yuma Indian Reservation was established by executive order of January 9, 1884 for the Yumas and such other

Indians as the Secretary of the Interior might see fit to settle thereon (US 1101).

Of the estimated 2,000 Yavapais or Mohave-Apaches (US 521), only 17 were on the Colorado River Indian Reservation in July 1870 (US 522). None of these Indians was thereafter reported as being on this Reservation and they are now located on the Camp Verde Reservation, acquired through purchase by the United States, and on the Fort McDowell Indian Reservation, created by executive order on September 15, 1903 (US 2303).

Some members of the Chemehuevi tribe were living on the California portion of the Colorado River Indian Reservation in 1874 (US 530) but by 1890 all had returned to the Chemehuevi Valley about 30 miles north of the Reservation (US 539). A part of this valley was set aside as the Chemehuevi Indian Reservation by order of the Secretary of the Interior on February 2, 1907 (US 1201).

Similar attempts to locate the Hualapais on the Colorado River Indian Reservation also met with complete failure. In September 1867, 150 members of this tribe moved there but "... clandestinely left the reservation on the night of the 13th of March, and probably rejoined their former wild companions in the interior" (US 518, pp. 137-38). A report of the Commissioner of Indian Affairs indicates there were 620 Hualapais on the Reservation in 1874 (US 527, p. 61) but in 1875 "... they went off the reservation to their old range, saying they would not work or return to the reservation ..." (US 530) and they never returned (US 539). A separate reservation was created for this tribe by executive order on January 8, 1883 (US 801). See *United States* v. *Santa Fe Pacific R. R.*, 314 U. S. 339 (1941).

The resettlement of the Mohave Indians on the Colorado River Indian Reservation has been somewhat less unsuccessful. By 1867, approximately 750 of an estimated

4,000 members of this tribe had moved to the Colorado River Indian Reservation (US 516, p. 156) and in 1868 the number had increased to 2,000 (US 518, p. 137). However, only about 800 Mohaves were still there in 1869 (US 520, p. 205), 695 in 1870 (US 522, p. 116) and 830 in 1874 (US 527, p. 61). By 1890, the number of Mohaves living on the Reservation had dwindled to 640, while there were 667 at Needles and 410 at Fort Mohave (US 539, p. 2).

The Indian Agent at the Colorado River Agency reported in 1898 that "of the five tribes originally allotted to this reservation only one section of the Mohave tribe have ever been induced to locate permanently upon it. These number 683; of the remaining Mohaves, nearly all live from 80 to 125 miles above the reservation in the vicinity of Needles, Cal., and Fort Mohave, Ariz." (US 543, p. 111)

The effect of the failure of this resettlement program was before the Court in *United States* v. *Santa Fe Pacific R. R., supra,* where the history and purpose of the Act of March 3, 1865,[83] which created the Colorado River Reservation "for the Indians of said river and its tributaries", was reviewed and the intent of Congress in creating the Reservation was stated. The Court held that the Indians referred to in the Act included the Hualapais, 314 U. S. at 351 and said:

> "We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais [Hualapais], which it was hoped would be accepted as a compromise of a troublesome question." 314 U. S. at 353.

[83] 13 Stat. 559.

The Court continued:

> "Furthermore, the Walapais did not accept the offer which Congress had tendered. In 1874 they were, however, forcibly removed to the Colorado River reservation on order from the Indian Department. But they left it in a body the next year. And it was decided 'to allow them to remain in their old range during good behavior.' They did thereafter remain in their old country and engaged in no hostilities against the whites. No further attempt was made to force them onto the Colorado River reservation, even though Congress had made various appropriations to defray the costs of locating the Arizona Indians in permanent abodes . . . including the Colorado River reservation. . . . On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem." 314 U. S. at 354-55 (footnotes omitted).

The Court noted that in 1881 the Hualapais expressed a desire for the creation of a separate reservation for their benefit and that this was recommended by the Army, and said:

> "Pursuant to that recommendation, the military reservation was constituted on July 8, 1881, subject to the approval of the President. The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883. There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattlemen used it for grazing and for some years the Walapais

> received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of §2 of the Act of July 27, 1886." 314 U. S. at 357-58 (footnotes omitted).

Thus the Court has expressly held that as far as the Hualapai Indians are concerned the creation of the Colorado River Reservation failed to accomplish its purpose and was no "more than an abortive attempt to solve a perplexing problem".

It is doubtful that, in the creation of the Colorado River Indian Reservation, Congress intended that it should serve as the home for any Indians except the five tribes: the Hualapais, Yumas, Yavapais, Chemehuevis and the Mohaves (see p. 111, *supra*). These Indians (with the exception of about one-third of the Mohave tribe) refused to live on the Colorado River Indian Reservation and ultimately other Reservations were created elsewhere for their benefit.

From time to time the United States created other and separate Reservations for the use and benefit of other Indian tribes in Arizona, as follows:

Gila River	Act of Congress	February 28, 1859	(US 1801)
Navajo	Treaty	June 1, 1868	(US 201)
Fort Apache	Executive Order	November 9, 1871	(US 2401)
San Carlos	Executive Order	November 9, 1871	(US 2001)
San Xavier	Executive Order	July 1, 1874	(US 1701)
Salt River	Executive Order	January 10, 1879	(US 2102)
Havasupai	Executive Order	June 8, 1880	(US 701)
Gila Bend	Executive Order	December 12, 1882	(US 1401)
Hopi	Executive Order	December 16, 1882	(US 401)
Kaibab	Executive Order	October 16, 1906	(US 602)
Papago	Executive Order	May 28, 1912	(US 1501)
Ak Chin	Executive Order	May 28, 1912	(US 1501)
Cocopah	Executive Order	September 27, 1917	(US 1001)

It would not be reasonable to conclude that each of these many Indian tribes is entitled to the benefit of water in two places, *i.e.*, the Reservation of their choice and the Colorado River Indian Reservation where they have refused to live. Instead of the more than 10,000 Indians contemplated by Congress in 1865, by 1900 less than 700 had elected to make this Reservation their permanent home. The record indicates that approximately 1,100 Indians reside on this Reservation at the present time (Rep. 86; C 2606). We cannot find any basis for concluding that there is a right to irrigate lands in the Colorado River Indian Reservation for Indians and Indian tribes who for more than ninety years have successfully resisted all efforts to move them there.

More than fifty years ago Congress itself recognized that attempts to colonize the Colorado River Indian Reservation had failed and that the area originally set aside for the Indians was excessive. By Act of April 21, 1904,[84] the Secretary of the Interior was authorized to include the Yuma and Colorado River Indian Reservations in any reclamation project which might make possible the reclamation of the Indian lands:

> "... *Provided,* That there shall be reserved for and allotted to each of the Indians belonging on the said reservations five acres of the irrigable lands. *The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the reclamation Act. . . .*"

The Act of March 3, 1911,[85] increased the allotment to ten acres of irrigable land per Indian but again provided that the surplus lands should be sold to pay the cost of irrigating the allotted lands.

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[84] 33 Stat. 224.

[85] 36 Stat. 1063.

The 1912 annual report of the U. S. Indian Irrigation Service (US 547, p. 7) stated that "there will be about 500 allotments of ten acres each or about 5,000 acres to be irrigated in this project . . ." This in effect was an administrative finding that no more than 500 Indians resided on the Reservation at that time.

The fact that Congress, in the Act of April 21, 1904, the Act of April 4, 1910, the Act of March 3, 1911 and appropriation acts from 1910 through 1942 (pp. 142, 144-47, 175, *supra*), provided that the funds expended should be reimbursable from the sale of surplus lands of the Reservation, plainly indicates that Congress recognized that most of the Indians for whom the Reservation had been originally created or thereafter enlarged had rejected the congressional offer of that Reservation as a tribal home and that therefore lands above the needs of the Indians resident on the Reservation were surplus and should be sold.

The Government contended before the Master that, by the Navajo-Hopi Rehabilitation Act of April 19, 1950,[86] Congress has "reaffirmed" its intent expressed in the Act of March 3, 1865 to maintain the Colorado River Indian Reservation for the use of Indians of the Colorado River and its tributaries.

The record supports the conclusion that neither the Navajos nor the Hopis were among the tribes for which the Reservation was created (1 p. 110-11, *supra*). Of course, the Navajo-Hopi Rehabilitation Act of April 19, 1950 could not "reaffirm" a congressional intent which never existed.

In any event, the rehabilitation program authorized by the Act has now expired. Section 2 of the Act provides:

> "The foregoing program . . . shall be prosecuted in a manner which will provide for completion of the

[86] 64 Stat. 44, 25 U. S. C. §§631-40 (1958).

program, so far as practicable, within ten years from April 19, 1950."[87]

Even prior to the expiration of the authority conferred by the Act, the project of relocating members of the Navajo and Hopi tribes on the Colorado River Indian Reservation had failed. No Navajos or Hopis were settled on this Reservation after 1957.[88]

From 1945 to 1958 a total of 149 Navajo, Hopi and Supai families were relocated on the Colorado River Indian Reservation. By June 30, 1958, only 67 of these families remained.[89]

Although Congress authorized the expenditure of $5,750,000 for the resettlement program,[90] by 1956 only $2,939,750 had been appropriated for this purpose and after 1956 no further funds were appropriated for resettlement of these Indians on the Reservation.[91]

Among the reasons which have been assigned for the failure of this resettlement project are both domestic and health problems, as well as inability to adjust to high summer temperatures and the agricultural techniques and managerial requirements necessary for successful irrigation farming.[92]

In addition, by the Navajo Treaty of 1868 [93] the Navajos agreed not to leave their Reservation under penalty of forfeiture of all rights, privileges and annuities conferred by the treaty.

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[87] 64 Stat. 45 (1950), 25 U. S. C. §632 (1958).

[88] Navajo Yearbook, 1958 (Report No. VII) p. 89; Navajo Yearbook, 1957 (Report No. VI) p. 80.

[89] Navajo Yearbook, 1958 (Report No. VII) p. 89.

[90] 64 Stat. 45 (1950), 25 U. S. C. §631(6) (1958).

[91] Navajo Yearbook, 1957 (Report No. VI) p. 79.

[92] Navajo Yearbook, 1958 (Report No. VII) pp. 89-90.

[93] 15 Stat. 667.

It was stated by Secretary of the Interior J. A. Krug in his report to Congress in connection with the Navajo-Hopi Rehabilitation Act:

> "Another reason why many of the Navajos do not wish to leave the reservation stems from Article 13 of the Treaty of 1868. . . . Aside from the ironical fact that this section of the treaty was designed to prevent the very thing—off-reservation movement which is now deemed essential, many of the Navajos believe that the tribe may in future realize substantial benefits from tribal assets, such as oil, coal, or helium, and they do not wish to relinquish their share of such future benefits or other rights, present or future, which they possess as members of the Navajo Tribe."[94]

That this reluctance is well-founded appears from the record (Tr. 13937):

> "The Navajo tribal income for the fiscal year 1955 was $4,215,264. For the fiscal year 1956, $3,988,570. For the fiscal year 1957, $36,951,185.
>
> "The Navajo treasury balance as of June 30, 1957, was $50,780,450.11. The Navajo tribal budget for the fiscal year 1958 was $12,301,231."

Recent public announcements indicate the surface has only been scratched and that the Navajos face a very bright future on their own Reservation. Unanticipated riches accruing to the Navajos from uranium, petroleum, and other minerals plus the industrial and general development of the Reservation has removed both the need and the incentive for resettlement on the Colorado River Indian Reservation.

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[94] Hearings Before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S. 2363, 80th Cong., 2d Sess. 499 (1948).

The conclusion is warranted that there is neither equity nor reason in the proposal that the 107,588 irrigable acres of the Colorado River Indian Reservation be developed and supplied with irrigation water as a windfall for the benefit of the relatively few Indians who have made this Reservation their home.

It is impossible to ascertain from the record just how many Indians actually are living on the Reservation. Responsible government officials who should know were, to say the least, indefinite in their testimony. California Exhibit 2600-7, prepared by the United States but placed in evidence by California, does not deal with Indians actually resident on the Reservation. It is difficult to understand why the Government measured each "irrigable" acre of every Reservation with meticulous care, painstakingly surveyed the soil types and compiled a great mass of engineering data as to irrigability of land, and yet wholly neglected the most important fact—the number of Indians resident on the Reservation who are dependent upon farming of Reservation land for their livelihood. However, the Master estimated that 1,100 or 1,200 of the 1957 tribal population of approximately 1,300 live on the Reservation (Rep. 86).[95]

The evidence shows that in 1949, there were 22,315 acres in cultivation on the Colorado River Indian Reservation and in 1954 a maximum of 29,957 acres (US 575). During 1955, the last year for which there is any evidence, there were 29,271 acres in cultivation (US 575) out of a total of 107,588 acres found by the Master to be irrigable (Rep. 272).

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[95] The Master's estimate is substantially in agreement with population figures issued by the Department of the Interior late in 1960. Department of the Interior, United States Indian Population and Land 6 (1960).

In recent years the acreage actually farmed by the Indians has decreased. In 1953 the Indians farmed 18,719 acres, whereas 10,815 acres were farmed by non-Indian lessees and others (US 556, p. 7). In 1954, there were 15,153 acres farmed by the Indians and 14,804 acres by non-Indian lessees and others (US 556, p. 4). In 1955, the Indians farmed less than half the land cultivated on the Reservation. The acreage farmed by them in that year was 14,512 acres as compared to 14,759 acres farmed by non-Indian lessees and others (US 556, p. 1). In like manner, the number of Indians actively farming land on the Reservation has dropped from a maximum of 276 in 1951 to 148 in 1957, the last year of record (C. 2642). If this trend continues, the Indians will soon have the status of absentee landlords, a situation which was not contemplated by Congress when it created the Reservation nor when it appropriated funds to enable the Indians to make a livelihood by farming Reservation lands.

Presently irrigated acreage is sufficient for more than a 100% increase of use by the Indians farming on the Reservation. More than adequate provision has now been made for Indians living on this Reservation. With approximately 80% of the lands in Arizona in public ownership and hence non-taxable, she strenuously objects to diverting, for a non-taxpaying economy, water urgently needed to support the portion of her economy which is taxpaying.

One government witness testified that there are 40,000 acres ready for cultivation on the Colorado River Indian Reservation and that practically all of this land had been farmed at one time or another (Tr. 14098-99). This is substantially more than two and one-half times the 14,500 acres presently farmed by the Indians and therefore allows more than 25,000 acres for any future increase in need.

We suggest that allowance of a sufficient water supply to irrigate and farm this 40,000 acres would be more than adequate to provide for the present and reasonably foreseeable future needs of the Indians of this Reservation.

VI

Should the Court find there was no reservation of water for use on Indian Reservations, or, should the Court find such a reservation of water but reject Indian needs as the test of the quantity reserved, the amount of water to which the Reservations are entitled should be determined in accordance with principles of equitable apportionment.

If the Court should agree with our position, set forth earlier (pp. 121-53, *supra*), that the acts creating and enlarging the various Reservations were ineffective to reserve Colorado River water as well as land, we suggest that the extent of present day Reservation water rights should be determined by the application of principles of equitable apportionment akin to those used by this Court in resolving interstate water rights controversies.

Even if the Court should find that the acts creating and enlarging the Indian Reservations here in question were effective to reserve sufficient water to irrigate all the irrigable acreage in the Reservations, we again urge that the measure of the Reservation rights to water as against the rights of other users in Arizona be determined by application of principles of equitable apportionment.

Understandably, Arizona is reluctant to take a position adverse to any of her citizens. But since the Recommended Decree apportions to the Indians amounts of water far in excess of their needs, present and prospective, we

must urge the Court to modify this portion of it. We do not believe any class of citizens should be so favored at the expense of the other citizens of the state. Further, we believe that a commodity as precious to our area as water should be put to its most economical and efficient use, having equal regard for the rights and needs of all.

A. Status of Indian Tribes as Quasi-Sovereigns

Although the Indian tribes or "nations" are not sovereign in the sense that the several states are sovereign, *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U. S. 641 (1890), nevertheless "in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community". *Worcester* v. *Georgia,* 31 U. S. (6 Pet.) 515, 583 (1832) (concurring opinion).

This Court has also considered Indian tribes as states in a certain sense. In *Holden* v. *Joy,* 84 U. S. (17 Wall.) 211, 242 (1872) it was said:

> "Indian tribes are states in a certain sense, though not foreign states, or states of the United States, within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between two or more states, between a state and citizens of another state, between citizens of different states, and between a state or the citizens thereof and foreign states, citizens or subjects. They are not states within the meaning of any one of those clauses of the Constitution, and yet in a certain domestic sense and for certain municipal purposes, they are states, and have been uniformly so treated since the settlement of our country and

> throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of those treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as states; and the courts of the United States are bound by those acts."

The latest pronouncement by the Court with respect to the status of Indian tribes was made in *Williams* v. *Lee*, 358 U. S. 217 (1959), holding that the state courts of Arizona had no jurisdiction over a suit by a non-Indian trader, who operated a general store on the Navajo Reservation under a license from the Commissioner of Indian Affairs, against a Navajo Indian and his wife to collect for goods sold them on credit on the Reservation. Quoting from *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515, 561 (1832), the Court stated:

> "'The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.'" 358 U. S. at 219.

The Court went on to say in *Williams* v. *Lee*:

> "Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came

> to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." 358 U. S. at 219 (footnotes omitted).

Thus the Court has consistently held that Indian tribes are at least quasi-sovereign and are not subject to the jurisdiction of state courts unless authority is expressly granted by Congress. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940).

Although the Special Master has held that uses by Indians of Colorado River water in Arizona are to be charged to Arizona's total entitlement (Rep. 247-48), the state has no jurisdiction to supervise this Indian use and therefore cannot take any steps to prevent waste of water or to insure that this water is put to economical and beneficial use. While Reservation Indians are citizens of the state, they are immune from the operation of state law. The reasons which impelled the Court to apply equitable apportionment principles in controversies between states are equally applicable in the allotment of Colorado River water between Reservation Indians in Arizona and the other citizens of the state.

Moreover, if a contest between sovereigns is a basic essential for an equitable apportionment of water, the contest here is between the United States, as representative of Reservation Indians and legal owner of Reservation lands, on the one hand, and the State of Arizona, on the other—two sovereign governments.

B. Applicability of Equitable Apportionment

The doctrine of equitable apportionment, as applied to interstate streams, has been developed by this Court in a

series of decisions beginning with *Missouri* v. *Illinois,* 180 U. S. 208 (1901). Throughout the period of this development the Court has regarded the doctrine as flexible and designed to do justice to the conflicting claims of adjoining states, when the asserted water rights of one state cannot be wholly satisfied without some injury to the other. Thus, principles of equitable apportionment have been applied to disputes between states in a case where both states adhere to the doctrine of prior appropriation, *Wyoming* v. *Colorado,* 259 U. S. 419 (1922), or when both follow the rule of riparian rights, *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931); and the doctrine has also been invoked when one state applies the riparian rule and the other the appropriation doctrine, *Kansas* v. *Colorado,* 206 U. S. 46 (1907). In *Kansas* v. *Colorado* the Court stated the essential principles underlying the doctrine of equitable apportionment thus:

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois, supra,* the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." 206 U. S. at 97-98.

Again, in *New Jersey* v. *New York,* 283 U. S. 336, 343 (1931), Mr. Justice Holmes, speaking for the Court, stated:

> "The different traditions and practices in different parts of the country may lead to varying results but

> the effort always is to secure an equitable apportionment without quibbling over formulas."

The basic principle is stated as follows in *Colorado* v. *Kansas*, 320 U. S. 383, 393-94 (1943):

> "And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

The latest equitable apportionment case decided by this Court was *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), where Mr. Justice Douglas summarized the holdings in the previous cases:

> "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjust-

ment of interests which must be made." 325 U. S. at 618.

Although the doctrine of prior appropriation has applied in Arizona ever since it was a part of Mexico, *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339 (1909), the United States has never attempted to establish the existence of appropriative rights in the Indian Reservations in question under territorial or state law. Therefore, the present controversy is not one between two appropriation states, as in *Wyoming* v. *Colorado, supra,* but involves the claims of a sovereign state which applies the appropriation rule on the one hand, and on the other the claims of a sovereign (United States) or a quasi-sovereign (Indian tribes) which does not rely upon principles of prior appropriation. Under these circumstances, we believe that in seeking a solution to this problem the Court must look to the other "relevant factors" referred to by Mr. Justice Douglas in *Nebraska* v. *Wyoming, supra.*

C. Equitable Considerations

The inadequate case made by the United States as to the Reservations here involved presented the Special Master with a difficult choice. Ignoring the plain teaching of the *Walker River* case, which is implicit in this Court's decision in *Winters*, that proof of present and prospective Indian needs controls the determination of the quantity of water allowed, even when the reservation theory is applied, the United States made no attempt whatever to show the number of Indians who are now or may be expected to be in the future dependent upon the Reservations for their livelihood nor the amount of water which is or will be reasonably required for their needs.

If the reservation theory, even as expanded by the Master, be accepted, nevertheless the water reserved is not insulated from the exercise by this Court of its equitable powers fairly to apportion it between the competing sovereigns. We can see no reason why rights predicated on the legal fiction of an implied reservation of water should be less subject to the Court's equitable powers than a right gained through actual application of water to beneficial use under state law. This Court has not hesitated in an equitable apportionment case to subordinate prior perfected rights to junior rights when warranted by the equities of the case. *Nebraska* v. *Wyoming, supra.* In fact, the Special Master here did this very thing in deciding the conflicting claims to water of the Gila River System (Rep. 324-30).

We suggest that the following "relevant factors" should be considered in arriving at an equitable apportionment between Reservation Indians and other water users in Arizona.

(1) Fort Mohave Indian Reservation

As we have seen, no Indians presently reside on the Arizona portion of this Reservation nor are there plans to settle any there (pp. 166-69, *supra*).

The soil survey of the Fort Mohave Indian Reservation (US 1318, 1321) discloses that, of the total acres within Arizona which are classified as "irrigable", 4,775 are Class IV lands and 7,600 acres are Class III lands.[96] In other

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[96] Classes III and IV were described as follows (C 2606, pp. 8-9; Tr. 13854-55):

> "CLASS III—Moderately good land that can be used regularly for crops in a good rotation but needs intensive treatments; or complex farming practices for permanent use; subject to severe limitations in use or severe risks of

words, of the 14,916 acres of Reservation land in Arizona found by the Master to be irrigable (Rep. 281), over 12,000 are either "subject to severe limitations in use" (Class III), or can only "be cultivated occasionally" (Class IV).

Further, a great percentage of the Fort Mohave Reservation lands in Arizona which are classed as irrigable are "checkerboard" holdings (US 1318) with alternate sections in private ownership (pp. 149-50, *supra*). This crazy-quilt pattern of ownership necessarily makes development of the lands difficult and expensive.

(2) Colorado River Indian Reservation

On the Colorado River Indian Reservation, large acreages are also marginal. Of the aggregate of 107,588 acres of irrigable land within the Reservation as found by the Master (Rep 272), there are 32,626 acres in Class III and 26,670 acres in Class IV (US 561). In addition, mesa land is widely interspersed with nonirrigable land (US 561), rendering irrigation difficult and expensive. The present uses and development on this Reservation (pp. 179-80, *supra*) are more than adequate for the reasonable needs, present and foreseeable, of its Indian occupants. Indeed,

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damage, because of permanent land characteristics. Examples of Class III are: moderately steep slopes, high susceptibility to erosion, excessive wetness, moderate to severe alkali and salinity, shallow to inhibitory layers, very heavy or very light textures, and low inherent fertility.

"CLASS IV—Fairly good land that is best maintained in perennial vegetation, but can be cultivated occasionally, if handled with great care; subject to very severe permanent limitations or hazards in use for cropland. Examples of Class IV lands are: Steep slopes, very high susceptibility to erosion, excessive wetness or continuing hazards of water-logging, very light and coarse to very heavy textured soil profiles, very shallow and very low inherent fertility."

the Indians themselves are farming less than 40% of the approximately 40,000 acres which historically have been irrigated (p. 180, *supra*). Thus, the presently irrigated acreage will permit more than a 150% increase in Indian use to meet any expansion in need that may occur.

(3) Cocopah Indian Reservation

The Special Master has found that there are 431 irrigable acres in the Cocopah Indian Reservation, which, together with related uses, have a maximum annual diversion requirement of 2,744 acre-feet (Rep. 268). He has also found that the 1957 population of the tribe was about 90 Indians (Rep. 88).

It so happens that the irrigable acreage criterion, as applied to this Reservation, will not result in allotting to these Indians a quantity of water exceeding their needs.

(4) Non-Indian Needs in Arizona

The needs of non-Indian users in Arizona are such that every drop of available water must be conserved and put to beneficial use. Arizona of necessity must rely on the Colorado River for water not only to preserve its existing economy but to meet the mounting needs of its exploding population.

In 1956, during the hearings before the Master, Arizona's population was estimated at 1,060,000. Phoenix then had an estimated population of 165,000 and Tucson 85,000 (A 134, p. 7). It was expected that by 1965 the state's population would increase to 1,500,000 (Tr. 1020). However, as the 1960 census shows, the state's population is 1,302,161 the population of Phoenix is 439,170 and that of Tucson 212,892. Arizona ranks first in the nation in all major cat

gories of percentage growth in population since World War II (Tr. 1014; A 134). Unquestionably, her population will far exceed the 2,000,000 predicted in 1956 for 1975 (Tr. 1020).

Water must be provided not only for the domestic needs of this multitude of new citizens but also to meet the demands of the gigantic industrial growth which is taking place.

Taking one year as an example, in 1955 Arizona's agricultural, manufacturing and mining industries grossed over one billion dollars (Tr. 1021). Retail sales also exceeded one billion (Tr. 1021-22) and there was over $300,000,000 in new construction (Tr. 1022). Present day statistics would undoubtedly show further growth in these areas proportionate to the population increase established by the 1960 census.

While the economy of the state has been thus booming, the water supply has been becoming increasingly inadequate. In 1952, there were 923,000 acres in irrigated cultivation in Maricopa and Pinal Counties and in the Safford, Duncan and San Pedro areas, which comprise the major irrigated areas of the state, except for Yuma County, which has access to the main stream of the Colorado River for its water supply. In 1955, this irrigated acreage had decreased to 822,000 acres. Approximately 50,000 acres have been going out of cultivation yearly due to falling water tables. Unless a supplemental water supply is found, another 300,000 acres will go out of cultivation (Tr. 1483).

Since 1940 the water table has dropped in the Salt River Valley basin, the major irrigated area in the state utilizing both surface and ground water, an average of 68 feet (Tr. 1292). In the Eloy area in Pinal County it has dropped 85 feet (Tr. 1278) and in the Maricopa-Stanfield area 80 feet (Tr. 1280). From 1930 to 1954, there was a drop of

82 feet in the Mesa, Chandler, Tempe Area (Tr. 1290) and 85 feet in the Queen Creek, Higley, Gilbert area (Tr. 1290).[97] Other areas have suffered lesser lowering of the water table but it has been substantial in all irrigated areas (Tr. 1299-1300).

When the water required for salt balance is added to the problem of inflow required to satisfy the needs of these areas, the emergency which confronts Arizona becomes even more serious. Presently there is available no water to maintain salt balance. If it is not provided, large additional acreages in the lower end of the Salt River Valley basin will ultimately be "salted out" (Tr. 1283, 1295).

Surely, in the face of this grave situation, it is not without good reason that Arizona urgently requests the Court to consider and weigh the needs of all her citizens, Indians and non-Indians alike, to counter-balance the genuine water requirements of each, and, in measuring the extent of the rights of Reservation Indians in Colorado River water, to make an apportionment that is truly equitable—that is, an allowance of an amount of water, but no more than the amount, that will serve to meet adequately the present and reasonably foreseeable needs of the Indians themselves.

VII

In withdrawing public lands for the Gila National Forest the United States did not reserve water from the Gila and San Francisco Rivers for use in the forest.

The right of the United States to use the water of the Gila and San Francisco Rivers for the purposes of the Gila National Forest is the only disputed item in the disposition

[97] A 116 shows the geographical location of these areas.

of the claims made by Arizona, New Mexico and the United States to the water of the Gila River System (A Exc. 29-30) (pp. 5-6, *supra*).

The Special Master found that the Gila National Forest was created by presidential proclamation dated March 2, 1899 and enlarged and modified by later proclamations (Rep. 342). Since there was evidence that the United States diverts water for the Gila National Forest from the main stream of the Gila and San Francisco Rivers, the Special Master held that the claims of the United States with respect to its right to divert water for the purposes of this federal establishment should be decided. Although the Master found that there is not sufficient evidence from which to make a determination of the ultimate water requirements of the Gila National Forest (Rep. 342), he did find that in withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the forest (Rep. 342). He concludes that the United States has the right to divert water from the main stream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used (Rep. 343). He also holds that those rights in the Gila River System which are recognized by the Recommended Decree, to the extent that they are junior in time, are subordinate to the rights of the United States to divert water for the Gila National Forest (Rep. 335).

The Special Master reasons that the purposes of the forest cannot be fulfilled without an adequate water supply and hence that the United States must have intended to

reserve water in quantities reasonably necessary to fulfill the purposes for which the forest lands were withdrawn (Rep. 335). He then concludes that the power of the United States to make this reservation of water "cannot be logically differentiated from the power of the United States with respect to Indian Reservations and Recreational Areas" (Rep. 335).

Although Arizona is not in agreement with the conclusion of the Special Master that the United States possesses the power to reserve water of the Gila and San Francisco Rivers for use in national forests, it is not necessary that this question be resolved here, since it is clear that the Master erred in his finding of an intent to reserve water for national forest purposes.

By the Act of March 3, 1891[98] Congress authorized the President to set apart and reserve as national forests any part of the public lands covered wholly or partially with timber or undergrowth. Section 18 of the Act provided:

> "That the right of way through the public lands and *reservations* of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of

[98] 26 Stat. 1101.

such canal or ditch: *Provided,* That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, *and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*"

The Act of June 4, 1897[99] contains the following provisions regarding the use of waters within national forests:

> "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

From 1936 to 1944, funds were appropriated by Congress for the purchase and establishment by the Forest Service of water rights for use on the national forests.[100] The Act of September 21, 1944[101] authorized appropriations for that purpose as follows:

> "There are hereby authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for

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[99] 30 Stat. 36.

[100] 49 Stat. 1438 (1936); 50 Stat. 412 (1937); 52 Stat. 727 (1938); 53 Stat. 956 (1939); 54 Stat. 547 (1940); 55 Stat. 423 (1941); 56 Stat. 680 (1942); 57 Stat. 412 (1943).

[101] 58 Stat. 737, 16 U. S. C. §526 (1958).

use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests."

In its discussion of the 1936 Appropriation Act, the House Committee stated:

> "*Water rights.*—The committee has included a new item, not in the Budget, to enable the Forest Service to investigate the needs for and acquire water rights for the national forests."[102]

And with reference to the 1939 Act the House Committee Report stated:

> "*Water rights.*—An appropriation of $10,000 was provided by the committee 2 years ago and continued last year in the same amount for perfecting water rights in the national forests. Under these appropriations a total of 257 filings and land-purchase actions will have been completed by the end of the current fiscal year, all within the Colorado River drainage basin. It is estimated that 619 additional actions in that basin will be required and that 1,000 actions in national-forest territory outside the Colorado River Basin will be required—all at a total estimated additional cost of $110,400. *In view of the importance of filing on water rights before possible adverse claimants, the committee has increased the appropriation in the accompanying bill to $20,000.*"[103]

This legislation, beginning with the Act of March 3, 1891 authorizing the establishment of national forests, evidences the intent of Congress not to interfere with the

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[102] H. R. Rep. No. 2061, 74th Cong., 2d Sess. 9 (1936).

[103] H. R. Rep. No. 2130, 75th Cong., 3d Sess. 10 (1938).

control of water for irrigation and other purposes under authority of the states or territories. The Act of June 4, 1897 specifically authorizes the use of *all* water within national forests under the laws of the states in which the forests are situated. Certainly, the repeated appropriation of funds for the establishment and purchase of water rights by the Forest Service and the recognition by Congress of the importance of filing on water rights by the Forest Service before filing by adverse claimants is wholly incompatible with the notion that the United States intended to and did reserve such water at the time the national forests were created.

The department of the national government entrusted with the management and control of the national forests has "for nearly half a century" administratively construed these enactments as evidencing the intent of Congress that rights to the use of water for national forest purposes shall be obtained in accordance with state law.

The Forest Service Manual states:

> "*2514.1—Policy.* The rights to use water for national forest purposes will be obtained in accordance with State law. This policy is based on the act of June 4, 1897 (16 U. S. C. 481), which reads, in part, as follows:
>
> 'All waters within the boundaries of the national forests may be used for domestic, mining, milling, or irrigation purposes under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.'
>
> "*2514.2—Authority.* Departmental authority to secure water rights under State laws is confirmed

by the Department of Agriculture Organic Act of September 21, 1944 (58 Stat. 734).

The Assistant Secretary of Agriculture advised Congress in 1956 that:

> "For example, it has been the firmly established policy of this Department for nearly half a century to acquire, in strict accordance with State laws and procedures, the water rights needed for the administration of the national forests."[104]

None of this material was presented to the Special Master. Had it been brought to his attention, he could hardly have found that the United States, in withdrawing public land for the Gila National Forest, intended that water be automatically reserved for the forest.

The conclusion of the Special Master, that the United States is entitled to priorities as of the date of withdrawal of each area of the forest within which the water is used (Rep. 343) and that other uses from the Gila River System recognized by the Recommended Decree, to the extent that they are junior in time, are subordinate to the rights of the United States (Rep. 335), is not feasible of implementation. Priority dates were not fixed for other uses in Arizona or New Mexico, and in fact the basis of the rights recommended for New Mexico is satisfaction of present uses in disregard of senior rights in Arizona (Rep. 325-27).

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[104] Hearings Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs on S. 863, 84th Cong., 2d Sess. 179 (1956). See also *id.* at 177-78.

CONCLUSION

The Report and Recommended Decree of the Special Master should be adopted by the Court, with the modifications requested by Arizona.

Respectfully submitted,

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May 22, 1961
Phoenix, Arizona

APPENDIX A

Colorado River Compact

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Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel for the State of Arizona
W. F. McClure for the State of California
Delph E. Carpenter for the State of Colorado
J. G. Scrugham for the State of Nevada
Stephen B. Davis, Jr., for the State of New Mexico
R. E. Caldwell for the State of Utah
Frank C. Emerson for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Appendix A

ARTICLE II

As used in this compact—

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works

within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Appendix A

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL.
(Signed) W. F. MCCLURE.
(Signed) DELPH E. CARPENTER.
(Signed) J. G. SCRUGHAM.
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL.
(Signed) FRANK C. EMERSON.

Approved:

(Signed) HERBERT HOOVER.

APPENDIX B

Boulder Canyon Project Act

APPENDIX B

Boulder Canyon Project Act

[45 STAT. 1057 (1928), 43 U. S. C. §§617-617t (1958)]

AN ACT To provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtentant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside

of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

SEC. 2. (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggegate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall

be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

SEC. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

Appendix B

SEC. 4. (a) This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, *mentioned* in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benfit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus

waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

Appendix B

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and

delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions

at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

Appendix B

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Appendix B

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act of penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised

or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

SEC. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may by acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

SEC. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water

stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

SEC. 9. All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall

be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided,* That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U. S. C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this chapter: *Provided further,* That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further,* That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said

sixty-day period such lands shall be open to entry, subject to the preference in this section provided.[1]

SEC. 10. That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

SEC. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

SEC. 12. "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the

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[1] As amended by the Act of March 6, 1946 (60 Stat. 36).

United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

SEC. 13. (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter

approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights-of-way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right-of-way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

Appendix B

SEC. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

SEC. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

SEC. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

SEC. 17. Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

SEC. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the

waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

SEC. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

SEC. 20. Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

SEC. 21. That the short title of this Act shall be "Boulder Canyon Project Act."

APPENDIX C

California Limitation Act

APPENDIX C

California Limitation Act

(Act of March 4, 1929; Ch. 16, 48th Sess.; Statutes and Amendments to the Codes, 1929, pp. 38-39)

CHAPTER 16

An act to limit the use by California of the waters of the Colorado river in compliance with the act of congress known as the "Boulder canyon project act," approved December 21, 1928, in the event the Colorado river compact is not approved by all of the states signatory thereto

(Approved by the Governor March 4, 1929; in effect August 14, 1929)

The people of the State of California do enact as follows:

SECTION 1. In the event the Colorado river compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain act entitled "An act to ratify and approve the Colorado river compact, signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice be given by the governor of such ratifications and approval," approved January 10, 1929 (statutes 1929, chapter 1), is not approved within six months from the date of the passage of that certain act of the congress of the United States known as the "Boulder canyon project act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado river compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the provisions of the first paragraph of article eleven of said compact which makes the same binding and obligatory when

approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of such six states' approval and the President by public proclamation shall have so declared, as provided by the said "Boulder canyon project act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said "Boulder canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said "Boulder canyon project act," and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

SEC. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4 (a) of the said "Boulder canyon project act" and this act shall be so construed.

APPENDIX D

General Regulations Governing Contracts for the Storage of Water in Boulder Canyon Reservoir, and the Delivery Thereof

APPENDIX D

General Regulations Governing Contracts for the Storage of Water in Boulder Canyon Reservoir, and the Delivery Thereof

1. No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All contracts for delivery of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act.

2. The right is reserved to amend or extend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

3. Storage water in Boulder Canyon Reservoir will be delivered upon such terms and conditions as the Secretary may fix from time to time by regulations and contracts thereunder. Water so contracted for may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

4. Contracts respecting water for irrigation and domestic uses shall be for permanent service, and shall conform to Paragraph a of Section 4 of the Boulder Canyon Project Act.

5. No charge shall be made for water or for the use, storage or delivery of water for irrigation or for water for potable purposes in the Imperial and Coachella Valleys. Charges otherwise shall be fixed by regulation from time to time. Where water is permitted by the Secretary to be taken from the Colorado River from the reservoir above the Hoover Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make

a higher charge for water taken above the dam, than if delivery is made below the dam.

6. Subject to the provisions of Article 7 of these regulations, deliveries of water to users in California shall be in accordance with the following recommendation of the State Division of Water Resources:

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

SECTION 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

SECTION 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities

designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

SECTION 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

SECTION 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SECTION 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SECTION 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Appendix D

SECTION 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

SECTION 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations

between the said City and/or said County and such users resulting therefrom.

SECTION 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusions of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

SECTION 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

SECTION 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

7. The Secretary reserves the right to contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; *Provided,* that priorities numbered fourth and fifth in said recommendation shall not thereby be disturbed.

(Signed) RAY LYMAN WILBUR,
Secretary of the Interior.

Issued April 23, 1930;
Amended September 28, 1931

APPENDIX E

Arizona Contract of February 9, 1944

APPENDIX E

Arizona Contract of February 9, 1944

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

THIS CONTRACT made this 9th day of February 1944 pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter referred to as "United States," acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter referred to as the "Secretary," and the STATE OF ARIZONA, hereinafter referred to as "Arizona," acting for this purpose by the Colorado River Commission of Arizona, pursuant to Chapter 46 of the 1939 Session Laws of Arizona,

Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary acting under and in pursuance of the provisions of the Colorado River Compact and Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has

constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead of a capacity of about thirty-two million (32,000,000) acre-feet; and

3. Whereas said Boulder Canyon Project Act provides that the Secretary, under such general rules and regulations as he may prescribe, may contract for the storage of water in the reservoir created by Boulder Dam, and for the delivery of such water at such points on the river as may be agreed upon, for irrigation and domestic uses, and provides further that no person shall have or be entitled to have the use for any purpose of the water stored, as aforesaid, except by contract made as stated in said Act; and

4. Whereas it is the desire of the parties to this contract to contract for the storage of water and the delivery thereof for irrigation of lands and domestic uses within Arizona; and

5. Whereas nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes:

6. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER

7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, or agencies or water users therein, will accept under this contract each calendar year from

storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet.

(b) The United States also shall deliver from storage in Lake Mead for use in Arizona, at a point or points of diversion on the Colorado River approved by the Secretary, for the uses set forth in subdivision (a) of this Article, one-half of any excess or surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona under said compact and said act, less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article.

(c) This contract is subject to the condition that Boulder Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the United States and Arizona, and agencies and water users therein, shall observe and be subject to and controlled by said Colorado River Compact and the Boulder Canyon Project Act in the construction, management, and operation of Boulder Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other uses.

(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall

be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

(e) This contract is for permanent service, subject to the conditions stated in subdivision (c) of this Article, but as to the one-half of the waters of the Colorado River system unapportioned by paragraphs (a), (b), and (c) of Article III of the Colorado River Compact, such water is subject to further equitable apportionment at any time after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(g) Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights.

(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Can-

yon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

(i) Nothing in this contract shall preclude the parties hereto from contracting for storage and delivery above Lake Mead of water herein contracted for, when and if authorized by law.

(j) As far as reasonable diligence will permit, the water provided for in this contract shall be delivered as ordered and as reasonably required for domestic and irrigation uses within Arizona. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered, for the purpose of investigation and inspection, maintenance, repairs, replacements, or installation of equipment or machinery at Boulder Dam, or other dams heretofore or hereafter to be constructed, but so far as feasible will give reasonable notice in advance of such temporary discontinuance or reduction.

(k) The United States, its officers, agents, and employees shall not be liable for damages when for any reason whatsoever suspensions or reductions in the delivery of water occur.

(*l*) Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. Present

perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract.

(m) Rights-of-way across public lands necessary or convenient for canals to facilitate the full utilization in Arizona of the water herein agreed to be delivered will be granted by the Secretary subject to applicable federal statutes.

POINTS OF DIVERSION: MEASUREMENTS OF WATER

8. The water to be delivered under this contract shall be measured at the points of diversion, or elsewhere as the Secretary may designate (with suitable adjustment for losses between said points of diversion and measurement), by measuring and controlling devices or automatic gauges approved by the Secretary, which devices, however, shall be furnished, installed, and maintained by Arizona, or the users of water therein, in manner satisfactory to the Secretary; said measuring and controlling devices or automatic gauges shall be subject to the inspection of the United States, whose authorized representatives may at all times have access to them, and any deficiencies found shall be promptly corrected by the users thereof. The United States shall be under obligation to deliver water only at diversion points where measuring and controlling devices or automatic gauges are maintained, in accordance with this contract, but in the event diversions are made at points where such devices are not maintained, the Secretary shall estimate the quantity of such diversions and his determination thereof shall be final.

CHARGES FOR STORAGE AND DELIVERY OF WATER

9. No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona. A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam

cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot.

RESERVATIONS

10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III (a) of the Colorado River Compact; (3) what part, if any, is within Article III (b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III (a) of the Colorado River Compact between the Upper Basin and the Lower Basin.

DISPUTES AND DISAGREEMENTS

11. Whenever a controversy arises out of this contract, and if the parties hereto then agree to submit the matter to

arbitration, Arizona shall name one arbitrator and the Secretary shall name one arbitrator and the two arbitrators thus chosen shall meet within ten days after their selection and shall elect one other arbitrator within fifteen days after their first meeting, but in the event of their failure to name the third arbitrator within thirty days after their first meeting, such arbitrator not so selected shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit. The decision of any two of the three arbitrators thus chosen shall be a valid and binding award.

RULES AND REGULATIONS

12. The Secretary may prescribe and enforce rules and regulations governing the delivery and diversion of waters hereunder, but such rules and regulations shall be promulgated, modified, revised or extended from time to time only after notice to the State of Arizona and opportunity is given to it to be heard. Arizona agrees for itself, its agencies and water users that in the operation and maintenance of the works for diversion and use of the water to be delivered hereunder, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

13. This contract is made upon the express condition and with the express covenant that all rights of Arizona, its agencies and water users, to waters of the Colorado River and its tributaries, and the use of the same, shall be subject to and controlled by the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), as approved by the Boulder Canyon Project Act.

Appendix E

EFFECTIVE DATE OF CONTRACT

14. This contract shall be of no effect unless it is unconditionally ratified by an Act of the Legislature of Arizona, within three years from the date hereof, and further, unless within three years from the date hereof the Colorado River Compact is unconditionally ratified by Arizona. When both ratifications are effective, this contract shall be effective.

INTEREST IN CONTRACT NOT TRANSFERABLE

15. No interest in or under this contract, except as provided by Article 7(*l*), shall be transferable by either party without the written consent of the other.

APPROPRIATION CLAUSE

16. The performance of this contract by the United States is contingent upon Congress making the necessary appropriations for expenditures for the completion and the operation and maintenance of any dams, power plants or other works necessary to the carrying out of this contract, or upon the necessary allotments being made therefor by any authorized federal agency. No liability shall accrue against the United States, its officers, agents, or employees by reason of the failure of Congress to make any such appropriations or of any federal agency to make such allotments.

MEMBER-OF-CONGRESS CLAUSE

17. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

Appendix E

DEFINITIONS

18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract.

19. In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By (s) HAROLD L. ICKES,
Secretary of the Interior.

STATE OF ARIZONA, acting by and through its COLORADO RIVER COMMISSION,

By (s) HENRY S. WRIGHT, *Chairman.*

By (s) NELLIE T. BUSH, *Secretary.*

Approved this 11th day of February 1944:

(s) SIDNEY P. OSBORN,
Governor of the State of Arizona.

APPENDIX F

Nevada Contract of March 30, 1942

APPENDIX F

Nevada Contract of March 30, 1942

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

1. THIS CONTRACT, made this 30th day of March, nineteen hundred forty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Abe Fortas, Acting Secretary of the Interior (hereinafter referred to as the "Secretary"), and the STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

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Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, acting under and in pursuance of the provisions of the Colorado River Compact and the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead; and

3. Whereas the State is desirous of entering into a contract for the delivery to it of water from Lake Mead:

4. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

5. (a) Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year. The right of the State to contract for the delivery to it from storage in Lake Mead of additional water is not limited by this contract. Said water may be used only within the

State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power.

(b) Water agreed to be delivered to the State hereunder shall be delivered continuously as far as reasonable diligence will permit, but the United States shall not be obligated to deliver water to the State when for any reason, as conclusively but not arbitrarily determined by the Secretary, such delivery would interfere with the use of Boulder Dam or Lake Mead for river regulation, improvement of navigation, flood control, and/or satisfaction of perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact.

(c) The United States reserves the right, for the purpose of investigation, inspection, maintenance, repairs and replacement or installation of equipment or machinery at Boulder Dam, to discontinue temporarily or reduce the amount of water to be delivered hereunder, but so far as feasible the United States will give the State reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents, and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur.

(d) This contract is for permanent service, and is made subject to the express condition that the State, upon request of the Secretary, shall submit in writing prior to January 1st of any year, an estimate of the amount of water to be required under this contract for the succeeding calendar year.

RECEIPT OF WATER BY THE STATE

6. The State shall receive the water to be diverted by or delivered to it by the United States under the terms hereof

at the point or points of delivery to be hereafter designated as stated in the next preceding article hereof, and shall perform all acts required by law or custom in order to maintain control over such water and to secure and maintain its lawful use and proper diversion from Lake Mead. The diversion and conveyance of such water to places of use shall be without expense to the United States.

MEASUREMENT OF WATER

7. The water to be delivered to the State hereunder shall be measured at the point or points of diversion from Lake Mead, or at such point or points in any works used by the State to convey water from Lake Mead to its place or places of use as shall be satisfactory to the Secretary, and by such measuring and controlling devices or such automatic gauges or otherwise as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained in manner satisfactory to the Secretary, by and at the expense of the State, but they shall be and remain at all times under the complete control of the United States. The State's authorized representative shall be allowed access at all times to said measuring and controlling devices or automatic gauges.

RECORD OF WATER DIVERTED

8. The State shall make full and complete written monthly reports as directed by the Secretary on forms to be supplied by the United States of all water delivered to or diverted by the State from Lake Mead. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted.

CHARGE FOR DELIVERY OF WATER

9. A charge of fifty cents ($.50) per acre-foot shall be made for the diversion by or delivery of water to the State

hereunder during the Boulder Dam cost-repayment period, subject to reduction by the Secretary in the amount of the charge if studies show to his satisfaction that the charge is too high. Thereafter, charges shall be on such basis as may hereafter be prescribed by the Congress. Charges shall be made against the State only for the number of acre-feet of water actually delivered to or diverted by it from Lake Mead.

BILLING AND PAYMENTS

10. The State shall pay monthly for all water delivered to it hereunder, or diverted by it from Lake Mead, in accordance with the charge in Article nine (9) hereof established. The United States will submit bills to the State by the tenth day of each month immediately following the month during which the water is delivered or diverted and payments shall be due on the first day of the month immediately succeeding. If such charges are not paid when due, an interest charge of one per centum (1%) of the amount unpaid shall be added thereto as liquidated damages and, thereafter, as further liquidated damages, an additional interest charge of one per centum (1%) of the principal sum unpaid shall be added on the first day of each succeeding calendar month until the amount due, including such interest, is paid in full.

REFUSAL OF WATER IN CASE OF DEFAULT

11. The United States reserves the right to refuse to deliver water to the State, or to permit water to be diverted by the State from Lake Mead, in the event of default for a period of more than twelve (12) months in any payment due or to become due to the United States under this contract.

INSPECTION BY THE UNITED STATES

12. The Secretary or his representatives shall at all times have the right of ingress to and egress from all

works of the State for the purpose of inspection, repairs, and maintenance of works of the United States, and for all other proper purposes. In each contract made by the State for the redelivery of any part of the water agreed to be delivered to the State hereunder, it shall be provided, for the use and benefit of the United States, that the authorized representatives of the United States shall at all times have access to measuring and controlling devices, or automatic gauges, over the lands and rights of way of the contractee. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the State relating to the diversion and distribution of water delivered to or diverted by the State from Lake Mead with the right at any time during office hours to make copies of or from the same.

RULES AND REGULATIONS

13. There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised, and/or extended from time to time after notice to the State and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments hereof, or to protect the interests of the United States. The State hereby agrees that in the operation and maintenance of its diversion works and conduits, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

14. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at

Appendix F

Santa Fe, New Mexico, November 24, 1922, pursuant to an Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved in section 13 (a) of the Boulder Canyon Project Act.

PRIORITY CLAIMS OF THE UNITED STATES

15. Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

CONTRACT CONTINGENT UPON APPROPRIATIONS

16. This contract is subject to appropriations being made by Congress from time to time of money sufficient to provide for the doing and performance of all things on the part of the United States to be done and performed under the terms hereof, and to there being sufficient money available in the Colorado River Dam Fund for such purposes. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient money not being so appropriated, or on account of there not being sufficient money in the Colorado River Dam Fund for such purposes.

EFFECT OF WAIVER OF BREACH OF CONTRACT

17. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States. The Waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any provision hereof, or of any other subsequent breach of any provision hereof.

Appendix F

REMEDIES UNDER CONTRACT NOT EXCLUSIVE

18. Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States or the State of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

TRANSFER OF INTEREST IN CONTRACT

19. No voluntary transfer of this contract, or of the rights of the State hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the State, whether by voluntary transfer, judicial sale, trustee's sale, or otherwise, shall be subject to all the conditions of the Boulder Canyon Project Act, and also subject to all the provisions and conditions of this contract to the same extent as though such successor or assign were the original contractor hereunder; provided, that the execution of a mortgage or trust deed, or judicial or trustee's sale made thereunder, shall not be deemed a voluntary transfer within the meaning of this Article.

NOTICES

20. (a) Any notice, demand, or request required or authorized by this contract to be given or made to or upon the United States shall be delivered, or mailed postage prepaid, to the Director of Power, United States Bureau of Reclamation, Boulder City, Nevada, except where, by the terms hereof, the same is to be given or made to or upon the Secretary, in which event it shall be delivered, or mailed postage prepaid, to the Secretary, at Washington, D. C.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the State shall be delivered, or mailed postage prepaid, to the Secretary of the Colorado River Commission of Nevada, Carson City, Nevada.

(c) The designation of any person specified in this article or in any such request for notice, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

OFFICIALS NOT TO BENEFIT

21. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

UNCONTROLLABLE FORCES

22. Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed, for the purposes of this contract, to mean any cause beyond the control of the party affected, including but not limited to inadequacy of water, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall exercise due diligence to remove such inability with all reasonable dispatch.

In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By ABE FORTAS,

Acting Secretary of the Interior.

Appendix F

STATE OF NEVADA, acting by and through its Colorado River Commission,

By E. P. CARVILLE, Chairman.

Attest:

ALFRED MERRITT SMITH, *Secretary.*

By E. P. CARVILLE, *Chairman.*

COLORADO RIVER COMMISSION OF NEVADA,

[SEAL]

Attest:

ALFRED MERRITT SMITH, *Secretary.*

Ratified and approved this 21st day of April 1943.

E. P. CARVILLE,
Governor of the State of Nevada.

[GREAT SEAL OF THE STATE OF NEVADA]

Attest:

MALCOLM MCEACHIN,
Secretary of State.

Approved as to form:

ALAN BIBLE,
Attorney General of Nevada.

[Resolution and certificate omitted.]

APPENDIX G

Nevada Contract of January 3, 1944

APPENDIX G

Nevada Contract of January 3, 1944

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

SUPPLEMENTAL CONTRACT FOR DELIVERY OF WATER

1. THIS SUPPLEMENTAL CONTRACT made this 3rd day of January nineteen hundred forty-four, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Harold L. Ickes, Secretary of the Interior (hereinafter styled "Secretary"), and STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this supplemental contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

Witnesseth:

Appendix G

EXPLANATORY RECITALS

2. Whereas, under date of March 30, 1942, the parties hereto entered into a contract providing, among other things, for the delivery of water to the State each year, from storage in Lake Mead, subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year, and it is now desired to amend said contract so as to provide for the delivery each calendar year of not to exceed an additional 200,000 acre-feet of water to the State;

3. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

4. Article 5 (a) of the aforesaid contract of date March 30, 1942, is hereby amended to read as follows:

"Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power."

Appendix G

MODIFICATION OF PRIOR CONTRACT

5. Except as expressly herein amended, the aforesaid contract of date March 30, 1942, shall be and remain in full force and effect.

EFFECTIVE DATE OF SUPPLEMENTAL CONTRACT

6. This supplemental contract shall be of full force and effect immediately upon its execution for and on behalf of the United States.

OFFICIALS NOT TO BENEFIT

7. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In witness whereof, the parties hereto have caused this supplemental contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By /s/ HAROLD L. ICKES,
Secretary of the Interior.

STATE OF NEVADA, acting by and through its Colorado River Commission,

By /s/ E. P. CARVILLE, *Chairman.*

Attest:

/s/ ALFRED MERRITT SMITH, *Secretary*

Appendix G

COLORADO RIVER COMMISSION OF NEVADA,

By /s/ E. P. CARVILLE, *Chairman.*

Attest:

/s/ ALFRED MERRITT SMITH, *Secretary*

Ratified and approved this 3rd day of January 1944:

/s/ E. P. CARVILLE
Governor of the State of Nevada.

Attest:

/s/ MALCOLM MCEACHIN,
Secretary of State.

Approved as to form:

/s/ ALAN BIBLE,
Attorney General of Nevada.

APPENDIX H

Palo Verde Irrigation District Contract of February 7, 1933

APPENDIX H

Palo Verde Irrigation District Contract of February 7, 1933

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

UNITED STATES AND PALO VERDE IRRIGATION DISTRICT CONTRACT FOR DELIVERY OF WATER

(1) THIS CONTRACT, made this 7th day of February nineteen hundred thirty-three, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter styled the Secretary, and PALO VERDE IRRIGATION DISTRICT, an irrigation district created, organized, and existing under and by virtue of an act of the Legislature of the State of California approved June 21, 1923 (Chapter 452, Statutes of California, 1923), as amended, known as and designated "Palo Verde irrigation district act", with its principal office at Blythe, Riverside County, California, hereinafter referred to as the District;

Witnesseth:

EXPLANATORY RECITALS

(2) Whereas, for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other

beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and

(3) Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir, and it is to the mutual interest of the parties hereto that such contract be executed and the rights of the District in and to waters of the river be hereby defined.

(5) Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

(6) The United States shall, from storage available in the Boulder Canyon Reservoir, deliver to the District each year at a point in the Colorado River immediately above the District's point of diversion known as Blythe Intake (or as relocated within two miles of the present intake) so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to availability thereof for

use in California under the Colorado River Compact and the Boulder Canyon Project Act):

"The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

"SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

"SEC. 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

"SEC. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"SEC. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los

Angeles. for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

"SEC. 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"SEC. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"SEC. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

"SEC. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet

in the aggregate) by reason of reducing diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

"SEC. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

"SEC. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

Appendix H

"SEC. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

"SEC. 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties."

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation. The District reserves the right to establish, at any time, by judicial determination, its rights to divert and/or use water from the Colorado River. In the event the above stated recommendation as to the District is superseded by an agreement between all the above allottees or by a final judicial determination, the parties hereto reserve the right to further contract in accordance with such agreement or such judicial determination; *Provided*, that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the areas for which the District is allotted water as described in the above-stated recommendation. This contract is for permanent water service but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and

controlled by, said Colorado River Compact in the construction, management, and operation of Hoover Dam, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements, or installation of equipment and/or machinery at Hoover Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents, and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract neither prejudices nor admits any claim of the District on account of alleged changes in elevation of the river bed, howsoever caused, or the effect of such alleged changes on the District's diversion of water delivered hereunder. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River.

RECEIPT OF WATER BY DISTRICT

(7) The District shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated, and shall at its own expense convey such water to its distribution system, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

MEASUREMENT OF WATER

(8) The water to be delivered hereunder shall be measured at Blythe Intake by such measuring and con-

trolling devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained by and at the expense of the District, but they shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the land and rights-of-way of the District.

RECORD OF WATER DIVERTED

(9) The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

NO CHARGE FOR DELIVERY OF WATER

(10) The District shall not be required to pay to the United States any tolls, rates, or charges of any kind for or on account of the storage or delivery of water hereunder.

INSPECTION BY THE UNITED STATES

(11) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

Appendix H

DISPUTES OR DISAGREEMENTS

(12) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

RULES AND REGULATIONS

(13) There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of its diversion works at Blythe Intake, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

(14) This contract is made upon the express condition and with the express understanding that all rights based

upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which compact was approved by the Boulder Canyon Project Act.

PRIORITY OF CLAIMS OF THE UNITED STATES

(15) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

CONTINGENT UPON APPROPRIATIONS

(16) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work contemplated hereby, and to there being sufficient moneys available in the Colorado River Dam fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam fund to permit of said allotments. This agreement is also subject to the condition that if for any reason construction of Hoover Dam is not prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

RIGHTS RESERVED UNDER SECTION 3737, REVISED STATUTES

(17) All rights of action for breach of any of the provisions of this contract are reserved to the United States as

provided in Section 3737 of the Revised Statutes of the United States.

REMEDIES UNDER CONTRACT NOT EXCLUSIVE

(18) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

INTEREST IN CONTRACT NOT TRANSFERABLE

(19) No interest in this agreement is transferable, and no sublease shall be made, by the District without the written consent of the Secretary, and any such attempted transfer or sublease shall cause this contract to become subject to annulment, at the option of the United States.

MEMBER OF CONGRESS CLAUSE

(20) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

Appendix H

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By RAY LYMAN WILBUR,
Secretary of the Interior.

Attest:

NORTHCUTT ELY.
RICHARD J. COFFEY.

PALO VERDE IRRIGATION DISTRICT,

By L. A. HAUSER, *President.*

Attest:

O. W. MALMGREN,
Assistant Secretary.

Approved as to form, February 7, 1933:

(Sgd.) RAY LYMAN WILBUR,
Secretary of the Interior.

[Acknowledgments and resolution omitted.]

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FILED
MAY 22 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 8 Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

UNITED STATES OF AMERICA,
Intervener

STATE OF NEVADA,
Intervener

STATE OF NEW MEXICO,
Impleaded Defendant

STATE OF UTAH,
Impleaded Defendant

ARIZONA'S LEGISLATIVE HISTORY OF SECTIONS 4(a), 5 (1ST PARAGRAPH), and 8 OF THE BOULDER CANYON PROJECT ACT

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CALVIN H. UDALL
JOHN GEOFFREY WILL
W. H. ROBERTS

THEODORE KIENDL,
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 9 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

ARIZONA'S LEGISLATIVE HISTORY OF SECTIONS 4(a), 5 (1ST PARAGRAPH), and 8 OF THE BOULDER CANYON PROJECT ACT

Introduction

This document is designed to present as far as possible the complete legislative history of Section 4(a), the first paragraph of Section 5* and Section 8 of the Boulder Canyon Project Act, commencing with the third Swing Johnson bill.**

In general, the evolution of these sections is treated chronologically. For convenience, Section 4(a) and the first paragraph of Section 5 are treated together as they were in the main considered together.

Since repeated reference is made during the course of congressional debate to the California-Nevada proposal of 1925, the Arizona counter proposal of 1925 and the recommendations of the Governors' Conference of 1927, these documents are attached as appendices.

This Legislative History is cited in Arizona's brief as "Ariz. Legis. Hist." followed by a page reference. In order that the Court, in reading the Master's Report, may be able to refer to the Master's references to Arizona's Legislative History, we have preserved by bold face bracketed page numbers the pagination of the Legislative History as it was submitted to the Master.

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* The balance of this section deals with electric power and therefore is not considered pertinent.

** The evolution of Section 8 commenced with H. R. 6251 and that of Section 4(a) and the first paragraph of Section 5 with H. R. 9826 and S. 3331, all introduced in the 69th Congress.

[1]

Sections 4(a) and 5 (1st paragraph)

H.R. 9826 (69th Congress, 2nd Session), introduced by Representative Phil D. Swing on February 27, 1926 as a substitute for H.R. 6251 (his earlier bill), contained the following language for Sec. 4(a):

> "SEC. 4. (a) No work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be initiated hereunder, until the respective legislatures of at least six of the signatory States mentioned in section 12 hereof shall have approved the Colorado River Compact mentioned in said section 12, and shall have consented to a waiver of the provision of the first paragraph of article 11 of said compact making the same binding and obligatory when it shall have been approved by the legislatures of each of the seven signatory States, and until the President, by public proclamation, shall have declared that the said compact has been approved by and become binding and obligatory upon at least six of the signatory States."

In the Hearings before the House Committee on H.R. 9826 certain amendments were proposed (mainly by the Upper Basin States) and set forth in part in the committee print of April 10, 1926 (p. 91 of Hearings) and in full in the committee print of April 14, 1926 (p. 115 of Hearings). The Upper Basin amendment follows and consists of all after "provided" (Hearings p. 115):

> "SEC. 4. (a) No work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or

perfect any claims to the use of water pertinent to such works or structures until the States of California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have approved the Colorado River compact mentioned in section 12 hereof and shall have consented to a waiver of the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States mentioned in said section 12, and shall have approved said compact without condition save that of such six-State approval, and until the President by public proclamation shall have so declared."

This section was reported out of the House Committee in this form. (At p. 145 *et seq.* of the Hearings, Delph Carpenter states this was designed to force compliance with the Colorado River Compact.)

[2]

Also in the 69th Congress, Senator Johnson introduced S. 3331 in which Sec. 4(a) was identical with that in H.R. 9826 and it underwent the same changes in Committee.

As was true with Sec. 4(a), the evolution of the first paragraph of Sec. 5 began with H.R. 9826 (69th Congress), the third Swing-Johnson bill introduced by Hon. Phil Swing on February 27, 1926. Sec. 5, as introduced, read:

"SEC. 5. That the said Secretary is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and delivery at the switchboard to municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenues accruing to the said subfund under the reclamation law or hereunder,

will cover operation and maintenance expense of works constructed hereunder, interest on bonds after completion of the works, and provide for the amortization of said bonds within fifty years. Contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators."

The same language appeared in the companion bill introduced in the Senate by Senator Johnson on February 27, 1926.

The House Committee on Irrigation and Reclamation made certain changes in Sec. 5 at the suggestion of the Upper Basin group and others. (Stricken words deleted from original and italicized words added. (U.B.) means Upper Basin amendment. (Pro.) means proponent's amendment. (Conf.) means to conform to Treasury amendments.)

"SEC. 5. That the (U.B.) ~~said~~ Secretary (U.B.) *of the Interior* is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and delivery at the switchboard to municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenues (Conf.) ~~accruing to the said subfund under the reclamation law or hereunder, will cover operation and maintenance expense of works constructed hereunder interest on bonds after~~

[3]

~~completion of the works, and provide for the amortization of said bonds within fifty years~~ *accruing under the reclamation law and under this act, will cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under*

subdivision (b) of section 4. Contracts respecting water for (Pro.) *irrigation and* domestic uses (Pro.) ~~may~~ *shall* be for permanent service (U.B.), ~~but subject to rights of prior appropriators~~. *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*"

This language appears in the committee prints of April 10 and April 14, 1926. (It should be noted that the original bill provided that only contracts for domestic use *may* be for permanent service but *subject to the rights of prior appropriators,* whereas the committee amendment struck the last clause and provided that contracts for *irrigation* and domestic use *shall* be for permanent service. The committee amendment also added the last sentence prohibiting use of stored water without a contract.)

Delph Carpenter of Colorado, appearing as a witness, discussed the proposed changes in Sec. 5 with particular emphasis on the addition of the last sentence (p. 161 *et seq.,* House Committee Hearings on H.R. 9826):

> "Referring to the amendments in the section just read, the upper States suggested a formal amendment at the beginning, on line 15, page 8, by striking out the word 'said' and after the word 'Secretary,' inserting the words 'of the Interior.'
>
> On page 9 the main amendment at the top is a Treasury Department amendment, submitted by that department.
>
> However, at the bottom of the first paragraph of section 5, beginning on line 10, are the words:
>
> > No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.
>
> That amendment is proposed by the upper States for the fundamental reason I assigned at the outset of

my statement to-day, which is that we insist that no use occur by reason of this structure which may later be said to be independent of the compact and be asserted as adverse to the upper States. If the Secretary of the Interior should contract for the use of water to somebody in a manner that did not

[4]

obligate them to respect the compact, then they would later come in and say, 'we are not bound and we therefore disclaim any obligation under the compact,' and it would provoke litigation.

While the upper States do not fear the outcome of litigation, they do insist that they be protected by interstate compact from any unwarranted assertions or threats by the States of the lower basin against present or future development in the upper basin by reason of further development in the lower basin. Such uncertainties embarrass the upper States in encouraging private capital to develop their resources and the natural, just, and legitimate improvement of their territory.

Mr. Taylor. Colorado has had 25 years of litigation with Kansas and Wyoming over these matters, and other States have had trouble and we want to avoid it in the future if possible.

Mr. Carpenter. Yes; and that litigation has been unsatisfactory to all litigants, has put a cloud on the title of water rights of great river valleys and has worked no good to anyone. Nevertheless, it was effective in destroying development in the upper country until settled. After years of such foolish litigation the people of the lower States finally awakened to the fact that upper State development had resulted in headwater 'land storage' of the river supplies to the benefit of the lower States and without cost to the latter.

Mr. Hayden. Mr. Hopkins stated the other day that a number of the amendments asked for by the upper basin States might or might not be effective.

At least there is some doubt about their legality. It was suggested that if the State of Arizona filed a suit in the Supreme Court of the United States and thereby stopped the construction of the Boulder Canyon dam that would be just as effective protection to the upper basin as though the Congress approved these amendments. In other words, nothing would be done and therefore the upper basin States would lose no rights.

Mr. Carpenter. As I understand, your statement of Mr. Hopkins' ideas is a little broad. Unquestionably, a suit filed by the State of Arizona would tend to delay construction of the project, but you would not deny the fact that there should be a compact at an early date. A suit could not be as effective as the provisions of this bill, because the mere filing of suit would settle nothing.

Mr. Hayden. I am in thorough accord with your idea that the best way to avoid litigation and accomplish desirable results is by compacts or agreements wherein each of the States recognize the rights of the other States in order that all may receive a fair share of the benefits. I am convinced that it is a mistake to expect any profit from interstate lawsuits. The history of such suits in the Supreme Court proves that there is no advantage in them. Neither do I believe that anything is to be gained by seeking to have Congress enact legislation which takes away from a State the rights or benefits that it might otherwise secure from a development of this kind.

[5]

Mr. Carpenter. It is not our thought in insisting upon amendments to this bill to embarrass the State of Arizona or to put her in an unfavorable situation. Arizona has many problems in common with us. She is entitled to full protection. She is our friend and we insist on justice to her. We are not the proponents of this bill. We have always insisted upon a seven-State compact before construction of any further works

anywhere in the basin. But if Congress is to proceed now, then we insist on protective amendments.

Mr. Hayden. Without an understanding with the States of California and Nevada, should this bill pass, the water will be first applied to a beneficial use in California, and when the time comes for development in Arizona, my State may have no water.

Mr. Carpenter. What you have said is true in part, but I must respectfully disagree with any thought that, physically, California could legitimately beneficially use all the water of the river. There is too much. It is also true that, under this bill, the Secretary of the Interior could contract with water users in the State of Arizona for the use of water or power without let or hindrance, except that the party contracting with the United States would agree that his particular claim should be subordinate to the Colorado River compact, not subordinate to the rights of the State of California —simply subordinate to the rights of the upper States as defined in the compact.

Mr. Hayden. The purpose of this amendment is that no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Mr. Carpenter. 'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any person in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unencumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, inter sese, as to their portion of the water.

Mr. Swing. The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California.

Mr. Hayden. How tight would you tie Arizona?

Mr. Carpenter. The thought of this amendment is that any water stored in this reservoir under the terms of the compact, when released from storage shall be burdened by the compact wherever it goes. As far as water is concerned, existing claims of the lower

[6]

States are protected by the compact. Water must pass through this reservoir to take care of the present existing lower claims.

As to future development from the main river, we insist that water stored in this structure by the United States be stored and released upon the express condition that the persons who receive the water shall respect and do so under the compact. It has nothing to do with the interstate relations between Arizona and California.

Mr. Swing. And also they shall make a fair contribution to the burden of returning this money to the Treasury of the United States.

Mr. Carpenter. Yes; that goes without saying. Anybody benefiting from this reservoir should help pay.

Mr. Swing. Whether he lives in the State of Arizona or the State of California or the State of Nevada?

Mr. Leatherwood. It goes without saying that as to any use of the water of the Colorado River by the State of Arizona, so long as she remains without the compact, that part which she would use which is not part of the stored water of this proposed dam, would be wholly without any restriction so far as the Colorado River compact is concerned and would be adverse to the upper basin States.

Mr. Swing. That would be true as to present vested rights only.

Mr. Leatherwood. Any rights that may be initiated.

Mr. Carpenter. Your question is answered by the fact that as to future uses from the main stream of the river, all water going to those uses will be stored water because the reservoir is so large that it will store everything that comes. Under the compact it does not impair any established, perfected uses.

Mr. Leatherwood. The upper States would have a right to rely upon the fact that there can be no use made by the nonratifying States of the waters of the Colorado River that are not stored?

Mr. Carpenter. Generally speaking, yes. But there will be cases where people along the river would take and use the water, because it would be going by. They could take it on the Arizona side and use it. We have felt that whatever rights they acquired would not materially jeopardize us.

Mr. Hayden. Suppose that a group of individuals in my State should apply to the Arizona Water Commissioner for the right to divert water from the Colorado River and apply it to beneficial use on their lands, and the commissioner gave them all the rights he could under the laws of the State, how would you keep them from diverting the water if it was flowing by their lands?

Mr. Carpenter. It would be a navigable stream and under the jurisdiction of the Federal Government. The Secretary of War would

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protect this structure. Again, other matters might enter in. However, I do not believe there will be any particular disposition to prevent them from taking the water. There is plenty of water down there if stored. We are not alarmed about claims against us by the State of Arizona. California is the State which will first take water.

Mr. Hudspeth. Where do you provide in the six-State compact for the distribution of water, as to Arizona, that is to be stored? What does she get?

Mr. Carpenter. There is no disposition as to Arizona. The so-called six-State compact is misleading. It refers to the six-State ratification of a seven-State compact.

Mr. Hudspeth. If you should store a certain amount of water there, and California should desire to take all of that water, could she do so?

Mr. Carpenter. Assuming she could use it all.

Mr. Arentz. And Arizona would not want hers for 20 years.

Mr. Carpenter. That would be a matter, in the first place, for the United States controlling this dam, to say.

Mr. Hudspeth. Is it controlled by this compact—taken out of the hands of the United States?

Mr. Carpenter. The rights of the State of Arizona are not prejudiced. She is not included or excluded. The door is open and she may either come in or stay out. So far as any rights she may have are concerned, of course, they are not impaired. She may continue to remain on the side line, looking on as it were, and taking such action as she may see fit to protect her own interest or she may join. Her quarrel is not with the upper States, but is a fear of future conditions between herself and California. It is a local situation. Under the compact we make no attempt to allocate between those three lower States. We allocate to the lower group so much water. We do the same with the four upper States.

In the upper country we had a controversy between New Mexico and Colorado over the La Platte River. We settled that by a local compact entered into immediately after and in harmony with the main compact. It is intended that these local problems, involving only two or more States, shall be settled by supplemental compacts. And so here we would leave to Arizona, California, and Nevada the disposition of the water

given to the lower basin under the Colorado River compact. They are now engaged in an attempt to arrive at a compact, and that endeavor should be encouraged. It is desired by all that such an agreement should be reached.

They should not be prejudiced in the sense of shutting them out from any ultimate benefits so long as they act in good faith. But they should not stand by and leave those below in peril. Reasonable speed is to be expected.

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Mr. Hudspeth. Suppose California should appropriate all of the water, would not that all go to her to the detriment of the State of Arizona?

Mr. Carpenter. The best answer to that question is that it cannot be done. California could not possibly appropriate all of that water if she tried to do so. She would drown herself out. Physical inhibitions would come into play."

After certain other minor changes were made by the House Committee, the first paragraph of Sec. 5 was reported out as follows:

"SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and delivery at the switchboard to municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments

to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

S. 3331 underwent the same changes before the Senate Committee in the 69th Congress insofar as Sec. 5 is concerned.

The first suggestion of a limitation was made by Senator Ashurst (February 25, 1927) in an amendment proposed to Sec. 5 of S. 3331 which would restrict the authority of the Secretary of the Interior to contract as follows:

"*Provided,* That the Secretary of the Interior in the delivery of water shall limit the amounts used in Arizona and California so that neither of said States shall use in excess of one-half of the water available in the lower basin out of the main Colorado River after three hundred thousand acre-feet has been deducted for use within the State of Nevada."

No action was taken on this proposal and the 69th Congress adjourned without passing either H.R. 9826 or S. 3331.

In the 70th Congress, Mr. Swing introduced H.R. 5773 in which Sec. 4(a) was included without change in language (except for one typo)

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from that approved by the House Committee in the 69th Congress. No amendment was made in committee, except to correct the typo.

No change was made in Sec. 4(a) on the House floor. H.R. 5773 was passed and sent to the Senate during the 1st Session of the 70th Congress.

Senator Johnson's companion bill (S. 728) contained a radical change requiring only *four*-state ratification of the Colorado River Compact. This was amended in committee to restore *six*-state ratification as follows (stricken in original; italicized "*five*" in amendment):

> "SEC. 4. (a) No work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures until the State of California and at least ~~three~~ *five* of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have approved the Colorado River compact mentioned in section 12 hereof and shall have consented to a waiver of the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States mentioned in said section 12, and shall have approved said compact without condition save that of such approval by the State of California and at least ~~three~~ *five* of the other States mentioned and until the President by public proclamation shall have so declared."

The next suggestion of a limitation on California uses appeared in an amendment to Sec. 5 (not Sec. 4(a)) of S. 728 as reported out (on March 20, 1928) by the Senate Committee. The amendment appears in the italicized words following "Provided":

> "SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, *and generation*

of electrical energy and delivery at the switchboard to *States,* municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United

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States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service: *Provided, however, That said contracts shall not provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the Lower Basin by the Colorado River compact mentioned in section 12 and one-half of the unallocated, excess and/or surplus water: Provided, further, That no such contracts shall be made until California, by act of its legislature, shall have ratified and approved the foregoing provision for use of water in said State.* No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

On April 26, 1928, Senator Johnson discussed the foregoing amendment to Sec. 5 (69 Cong. Rec. 7250):

"Section 5 provides that the contract must be general for storage and delivery of water and the Secretary shall fix charges to meet the revenue requirements, and that contracts for irrigation and domestic uses must be for permanent service. An amendment has been inserted there at the request of the upper basin States, offered, I think, in the committee, by the Senator from Wyoming which provides that—

Provided, however, That said contracts shall not provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the lower basin by the Colorado River compact mentioned in section 12 and one-half of the unallocated, excess, and/or surplus water:

Provided further, That no such contracts shall be made until California, by act of its legislature, shall have ratified and approved the foregoing provision for use of water in said State.

That is another rigorous provision, a rigorous provision to which those who represented California were willing to consent in order that legislation might be accorded, but binding California perpetually and forever to a use not to exceed 4,600,000 acre-feet of water.

I repeat and repeat how we have endeavored to protect these upper basin States. We write the bill around the compact, we make every drop of water that comes from the storage and the regulation of the Colorado River under this scheme subject to the compact. We write, then, that California shall use perpetually only a specific amount of water, naming the maximum amount which may be used.

All these things are done in the good-faith endeavor to protect in every possible way the States of the upper basin and those who claim that they want protection under the Colorado River compact. Yet some of them would prefer to let this water continue to flow down to the sea for an indefinite period, to go to waste in the Gulf of California, the land remain in drought to the detriment of people in southern Arizona and southern California, to permit that to be

done indefinitely, rather than to permit the measure of protection—and it is a full measure of protection that is accorded them—under this bill."

Also during the 1st Session of the 70th Congress the Senate received certain amendments to S. 728 on which no action was taken in that session. The first (to Sec. 5 but relating to a limitation) was by Senator Waterman on March 27, 1928, which was printed, but not offered. It limited the authority of the Secretary to contract, as follows:

> "On page 7, line 9, strike out the words 'That no', together with the following lines numbered 10, 11, and ending with the words in line 12, to wit 'in said State', and insert in lieu thereof: 'That no such contracts nor any contract whatever, of any kind, shall be made under any provision of this Act until and unless the State of California, by a valid and binding act of its legislature, approved by its governor, shall have first ratified and approved all the provisions of this section of this Act, in any way relating to the use of the waters of the main stream of the Colorado River within or by the State of California, or by any person or corporation of said State, and shall also in and by such act of its legislature, solemnly declare and agree, as an express covenant and in express consideration of the passage of this Act, that any and all water demanded and required, or lawfully appropriated and applied to a beneficial use by the State of Arizona or any of its inhabitants, including corporations, municipal or otherwise, or any of them, out of the main stream of the Colorado River at any time in excess of two million nine hundred thousand acre-feet, per annum, plus one-half of the said unallocated excess and/or surplus water, will be furnished and supplied by the said State of California exclusively out of the said four million six hundred thousand acre-feet of water and said one-half of the said unallocated water last aforesaid, so that in no event shall there ever be demanded or required, out of the main stream of the Colorado River, by the States of Arizona, California, and Nevada, or either of them, any water in excess of the amount apportioned

to them by Article III of the Colorado River compact, to be delivered to them, or any of them, at Lee Ferry designated in said Colorado River compact or elsewhere.'"

The next amendment was printed (but not offered) by Senator Bratton on April 20, 1928—to Sec. 4(a):

"SEC. 4. (a) This Act shall not take effect, and no authority shall be exercised hereunder, unless and until (1) the States of California, Colorado, Nevada, New Mexico, Utah, Arizona, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proclamation, shall have so declared, or (2) if after one year from the date of the passage of this Act the said States shall fail to ratify the said compact, then six

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States, including the State of California, shall ratify said compact, and shall consent to waive the provisions of the first paragraph of Article II of said compact, which makes the same binding and obligatory only when approved by each of the seven States mentioned in said section 12, and shall have approved said compact without conditions, save that of such six States' approval, and the President, by public proclamation, shall have so declared: *Provided,* however, That if ratification should be upon a six-State basis, then California shall agree in the ratifying Act that the aggregate annual consumptive use in California of waters of the Colorado River shall never exceed four million two hundred thousand acre-feet, and that the use by California of the excess or surplus waters unallocated by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters, such use always to be subject to the terms of the Colorado River compact."

The next amendment to Sec. 4(a) was printed by Senator Phipps on April 20, 1928 as follows:

"On page 5, strike out lines 7 to 10 inclusive, and insert in lieu thereof the following 'until the Colorado River compact, mentioned in section 12 hereof, shall have been approved by the Seven States signatory thereto or until the State of California and at least five of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have approved said compact and shall have consented to a.' "

On May 3, 1928 there was printed the first so-called Phipps Amendment to Sec. 4(a), deleting the limitation language in Sec. 5 but adding the "shall conform to 4(a)" to Sec. 5, which limited the Secretary's authority to contract.

"SEC. 4 (a). This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River Compact, mentioned in section 12 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this Act, then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven states signatory thereto, and shall have approved said compact

without conditions, save that of such six State approval, and the President by public proclamation shall have

so declared, and, further, until the State of California, by Act of its legislature, shall agree with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual diversions of water of and from the Colorado River for use in the State of California, including all diversions under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million six hundred thousand acre-feet of the waters apportioned to the Lower Basin States by the Colorado River Compact and/or more than one-half of any excess or surplus waters unapportioned by said compact, such diversions always to be subject to the terms of said compact.

On page 7, strike out lines 4 to 12, inclusive, and insert in lieu thereof the following: 'permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall.' "

On May 28, 1928 (69 Cong. Rec. 10259) Senator Pittman (Nev.) discussed the recommendations of the Governors' Conference and stated that Nevada accepted those terms. He asked that an amendment to Sec. 4(a) drawn by Mr. Wilson of New Mexico be printed in the record, although he did not suggest action on the proposal. His discussion follows:

"Now, briefly, I desire to refer to another phase of this question. I have opposed final adjournment; I still believe if we shall be given sufficient time we may bring about action on the Boulder Dam bill. My fear has been, there being so many other matters before the Senate which Senators think of importance, and on which time is taken in discussion, that delay might eventually cause Senators to leave. Let me say that the States of Arizona, California, and Nevada are not

very far apart on any of the questions involved. We spent four weeks at Denver, Colo., last summer and last autumn discussing them. At that time California's representative and Arizona's representative presented to a commission representing the seven Colorado River States their position. California asked Arizona, 'If we agree on the equitable distribution of the benefits of the power development will you then be satisfied?' Arizona said, 'If you will agree on two things, the equitable distribution of water and of power; yes.' So they worked for weeks. I say that the question of power distribution has already been agreed upon; that is out of the way. The two power provisions, which I offered in committee as an amendment to the bill of the Senator from California (Mr. Johnson) and which were reported out favorably by the Senate committee, were also reported out favorably by the House committee and are now included in the House bill as it comes over here.

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Those provisions satisfied Nevada and those provisions satisfied the people of Arizona. So we have nothing but a question of the division of water that separates the two States. Nevada is not complaining about water; she has always accepted the little handful of water that has been given her; but when we assembled at Denver the governors of the four upper Colorado River Basin States, trying to reconcile the difference on water between California and Arizona, finally made this proposition:

	Acre feet of water
California	4,200,000
Arizona	3,000,000
Nevada	300,000

How did they get at that? Under what is called the seven-state agreement we find this clause in Article III:

(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

In other words, those State governors believed that there was only 7,500,000 acre-feet of water to divide, and they proposed to divide it, as I have said, 4,200,000 acre-feet to California, 3,000,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada.

California said, 'We can not possibly do with that amount of water; we must have 4,600,000 acre-feet instead of 4,200,000 acre-feet.' Arizona would not yield more. Then, we came back here, and while no agreement was reached and never has been, and there is no provision in the bill with regard to the division of water, in a meeting that was held in my office between friendly representatives of California and friendly representatives of Arizona and the Nevada delegation it was discovered that there was another paragraph of Article III, which is (b) which reads as follows:

(b) In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

In other words, we discovered that there were 1,000,000 acre-feet of water more to divide than we had discussed at Denver. Then we said, 'Divide that 1,000,000 acre-feet between California and Arizona.' What is the result? California will get 4,700,000 acre-feet which is 100,000 acre-feet more than she finally insisted on at Denver; Arizona will get 500,000 acre-feet more than she insisted on, and Nevada would get exactly the same as originally planned. So there is plenty of water there.

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While that tentative agreement was reached, between certain representatives of the three states after the bill was reported out of the Senate, because this extra million feet was not discovered until after the bill had been reported, for one reason and another, we have the deadlock which we find here. I am not here for the purpose of criticizing anyone as to why this deadlock exists, but it does exist, and it may continue notwithstanding how close we are to reaching a compromise. Therefore, we should pass this joint resolution as a safety measure.

I wish to place in the RECORD at this point a suggested amendment. It is not to be proposed, because that would be perfectly useless, but it has been suggested. It is in accordance with the conference to which I have just referred and it is designed to carry out that idea at some date. It was largely drawn by Mr. Wilson, the commissioner of New Mexico, in the course of the conference to which I have just referred. It is only to be published in the RECORD; it is not offered as an amendment.

The Presiding Officer. Without objection, the suggested amendment will be printed in the RECORD.

The suggested amendment is as follows:

Strike out all of lines 1 to 18, both inclusive, and insert in lieu thereof the following:

'SEC. 4(a) This act shall not take effect and no authority shall be exercised hereunder, unless and until the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proclamation, shall have so declared: *Provided,* That the ratification act of the State of California shall contain a provision agreeing that the aggregate annual consumptive use by that State of waters of the

Colorado River shall never exceed 4,200,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of Article III of said compact, and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said Article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters; and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by the agreement described in the following paragraph, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes.

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'The said ratifying act shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada and Arizona the foregoing limitations are accepted and approved as fixing the apportionment of water to California, then California shall and will therein agree (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 3,000,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) of the 1,000,000 acre-feet in addition which the lower basin has the right to use annually by paragraph (b) of said article there shall be apportioned to the State of Arizona 500,000 acre-feet for beneficial consumptive use, and (3) that the State of Arizona may annually use one-half of the excess or surplus waters unappor-

tioned by the Colorado River compact, and (4) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (5) that the waters of the Gila River and its tributaries shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico; but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters apportioned by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply one-half of any deficiency which must be supplied to Mexico by the lower basin, and (6) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water which can not reasonably be applied to domestic and agricultural uses, and (7) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact.' "

When the Senate reconvened in the 2nd Session of the 70th Congress on December 5, 1928, the first order of unfinished business was S. 728. Since the House had already passed H. R. 5773, Senator Johnson asked unanimous consent to substitute H. R. 5773 for S. 728 (70 Cong Rec. 67). There was no objection and the substitution was ordered (70 Cong. Rec. 68). Senator Johnson then asked unanimous consent to strike out all after the enacting clause of H. R. 5773 and in lieu thereof to insert all after the enacting clause of S. 728 as reported out of committee. This was granted (70 Cong. Rec. 68).

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On December 6, 1928, Senator Hayden made the following comment (70 Cong. Rec. 161):

> "Mr. Hayden. Mr. President, yesterday, just prior to the adjournment of the Senate, I offered an amendment to the Senate bill that has been offered as a substitute for House bill 5773, which relates to an apportionment of the waters of the Colorado River to the lower basin of that stream. The amendment was taken from the Congressional Record of May 28, 1928. On that date the senior Senator from Nevada (Mr. Pittman) asked to have the amendment printed in the Congressional Record, for the information of the Senate."

He then offered the amendment in the following language (70 Cong. Rec. 162):

> "SEC. 4(a). This act shall not take effect and no authority shall be exercised hereunder, unless and until the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proclamation, shall have so declared: Provided, That the ratification act of the State of California shall contain a provision agreeing that the aggregate annual consumptive use by that State of waters of the Colorado River shall never exceed 4,200,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of Article III of said compact, and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said Article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or sur-

plus waters; and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by the agreement described in the following paragraph, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes.

The said ratifying act shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada, and Arizona the foregoing limitations are accepted and approved as fixing the apportionment of water to California, then California shall and will therein agree (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 3,000,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) of the 1,000,000 acre-feet in addition which the lower basin has the right to use annually by paragraph (b) of said article, there shall be apportioned to the State of Arizona 500,000

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acre-feet for beneficial consumptive use, and (3) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (4) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (5) that the waters of the Gila River and its tributaries shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico, but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States

of Mexico from waters apportioned by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply one-half of any deficiency which must be supplied to Mexico by the lower basin, and (6) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water which can not reasonably be applied to domestic and agricultural uses, and (7) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact."

Following this was a lengthy discussion of the proposal, during which Senator Hayden commented at 70 Cong. Rec. 163:

". . . The State of Arizona is, therefore, interested in an apportionment of the waters of the lower basin. That is what the amendment which I have offered proposes to do."

Senator King, in regard to the California demand for 4,600,000 acre-feet and Arizona's desire to limit California to 4,200,000 acre-feet a year, commented (70 Cong. Rec. 164):

"There is a difference now of 400,000 acre-feet between the two States. I do not pretend to determine which of the two States is right in this controversy, although I will say frankly to my friend from California that my sympathies have been with Arizona in some phases of the issues between the two States. I have felt that California has been rather too exacting, and that the rights of Arizona under the Constitution have not been fully recognized. In view of the fact that California furnishes no part of the water, that the dam site is in Nevada and Arizona, it has seemed to me that California ought to modify the demands

which she has made. If there are only 400,000 acre-feet dividing the two States, I suggest to the Senator that earnest efforts in the most conciliatory and Christian-like spirit should be made between the representatives of the two States to reach some common ground so that the compact may be ratified.

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I make no comment at this time—I may later on—in regard to the scheme which has been proposed in the pending bill, but I do make an earnest appeal to my friends from Arizona and California to reach an agreement upon all controversial matters."

Senator Bratton of New Mexico again pointed up the fact that only 400,000 acre feet were separating Arizona and California (70 Cong. Rec. 165):

"The Senator from Arizona now is proposing an amendment to this legislation looking to an adjustment of the differences between Arizona and California. As I understand the purport of the amendment, it is to provide that in the act of ratification the State of California shall obligate herself not to claim more than 4,200,000 acre-feet annually of the apportioned water, and no more than 500,000 acre-feet annually of the unallocated or unapportioned water.

Mr. Hayden. No; the Senator has not had an opportunity, perhaps, to read the amendment carefully.

Mr. Bratton. I have not read it carefully, and I shall appreciate it if the Senator will correct me.

Mr. Hayden. The provision in the amendment is that the State of California shall agree not to use more than 4,200,000 acre-feet of the water apportioned in perpetuity to the lower basin, and not more than 500,000 acre-feet of the additional 1,000,000 acre-feet which the compact authorizes to be appropriated in the lower basin.

Mr. Bratton. That is the thought I had in mind, although I did not express it accurately.

If the State of California is willing thus to bind herself, is it the opinion of the Senator from Arizona that that will result in composing the differences among the lower-basin States, and will bring about a 7-State ratification?

Mr. Hayden. Certainly. That is exactly what we are trying to do.

Mr. Bratton. I understand that. The Senator believes that the adoption of this amendment probably will lead to an early ratification by all seven States?

Mr. Hayden. I certainly do, or I would not offer it.

Mr. Bratton. I appreciate that. I should like very much to know if the proposition is entertainable by the State of California.

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Mr. Johnson. No; the amount is not one that it is possible to accept. I am very glad to use it as a basis for an endeavor to reach some conclusion, to do everything that lies within my power to the end that that conclusion will lead either to the ratification of the 7-State pact or to the passage of this bill; but I did not understand the Senator from Arizona in his speech of yesterday to say that a division of water alone would lead to a composition of the differences which exist. I understood him yesterday to insist not alone upon a division of water, as he suggests now, but, as well, to rest upon a substantial prohibition in this bill of the erection by the United States Government of a generating plant at Boulder Dam. Is not that what was said yesterday by the Senator from Arizona?

Mr. Hayden. The Senator from Arizona stated yesterday that there were three essentials to a complete settlement of this controversy: First, the insistence of the States of the upper basin on a 7-State ratification of the Colorado River compact; second, subordinate to that, an apportionment of the waters of the lower basin,

as authorized by the compact; and, third, a provision in this bill which will carry out the recommendations made in the President's message with respect to power.

Mr. Johnson. But the Senator stated yesterday distinctly what he desired, and that was that only private enterprise could erect a generating plant at the Boulder Dam; and he stated the reason. He said that his State desired to charge a taxable amount for the property thus created by private enterprise. Is not that correct?

Mr. Hayden. I interpreted the President's message to mean that the legislation enacted would provide for private development of power at Boulder Dam.

Mr. Johnson. Correct.

Mr. Hayden. In that event everything that Arizona has ever asked for would be accomplished.

Mr. Johnson. All right. Let me say, then, to the Senator from New Mexico, that there are two conditions annexed here: First, Arizona says, 'You must divide the water in accordance with what has been suggested.' Secondly, 'You must forbid the great Government of the United States from erecting, if it desires in the future, a generating plant at Boulder Dam.'

Mr. Bratton. Mr. President, will the Senator from Arizona yield?

The Presiding Officer. Does the Senator from Arizona further yield to the Senator from New Mexico?

Mr. Hayden. I do.

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Mr. Bratton. Let us separate the two things for the moment and discuss only the division of water.

The Senator from Arizona now says that, in his opinion, a restriction to 4,200,000 acre-feet will bring about a ratification of the compact by all seven States, including Arizona. I understand the Senator from California to say that the amount thus designated is not altogether satisfactory.

Mr. Johnson. The Senator is quite right. That is correct, sir.

Mr. Bratton. Is the Senator in position to say what is entertainable?

Mr. Johnson. The lowest amount conceivable from the standpoint of the information now at hand with me is 4,600,000 to be put in as an amendment to this bill by the Senator from Wyoming; but what I was calling to the attention of the Senator was this:

Of what avail is it to say, 'You ought to make sacrifices of water and water rights that are now perfected'; of what avail is it to say to California, 'You must yield that which you practically have today, and that is absolutely necessary to the welfare of your people, to have a composition,' when the second condition is annexed that 'You, too, must say that your Government never shall be permitted to erect a generating plant at the Boulder Dam'?

Mr. Bratton. But if we pass the bill in the alternative condition in which it now stands that will govern; will it not?

Mr. Johnson. But you have not reached a composition between Arizona and California, then. That is the difficulty.

I will say to the Senator from New Mexico that in my opinion I could sit down with him, and possibly with the Senator from Arizona—because our relations are most friendly—and we might reach an agreement as to water. I am not clear as to that; I would be glad to; but I can not, sir, reach an agreement as to water that shall be a composition of the differences existing and pledge myself that the Congress of the United States will enact a law that a generating plant never can be erected by the United States Government.

Mr. Bratton. Discussing the subject of water separate and apart from all other features of the bill, there seems to be a difference of 400,000 acre-feet between Arizona and California.

Mr. Johnson. So there seems.

Mr. Bratton. Without taking sides either way, we in the upper-basin States desire to adjust the whole matter satisfactorily to all of the States concerned. Any other attitude would be unbecoming a State.

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Mr. Johnson. I am sure that is the attitude of the gentlemen who confront me here.

Mr. Bratton. We entertain the friendliest feeling toward each State; but it does seem to me, representing one of the upper-basin States deeply and vitally concerned in the matter, that when we are dealing with 15,000,000 acre-feet, a difference of 400,000 acre-feet should not be permitted to defeat the entire proposal. I think each side could afford with profit to yield something, and not let a controversy respecting that slight volume of water defeat one of the most important measures that Congress has considered during a long time in the past and perhaps one of the most important that it will consider during a long space of time in the future. I want to join with the Senator from Utah (Mr. King) in saying that it is the earnest desire of the upper-basin States to aid the lower-basin States in adjusting and composing these differences and passing this legislation in a form that will be reasonably satisfactory to the two States and the other five as well.

Mr. Johnson. I am sure that is so.

Mr. Bratton. I want to urge that this difference of 400,000 acre-feet be not allowed to stand as a barrier to the passage of this legislation. There are no two men in the Senate more willing or disposed to discuss a thing dispassionately and progressively and constructively than the Senator from California and the Senator from Arizona."

During this debate, an important exchange was commenced at 70 Cong. Rec. 167 by Senator Hayden:

"I want the Senate to understand why it was that Arizona did not approve the compact. The reason was perfectly simple. The Legislature of Arizona, after the most careful consideration, arrived at the conclusion that it was unsafe for the State of Arizona to approve that agreement unless there should be an understanding as to how the waters of the lower basin should be apportioned between the States of Arizona and California. They found on record filings by the State of California which claimed all of the water of the Colorado River.

Mr. Johnson. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. Johnson. Can the Senator state how much of perfected water rights there are in the State of California to-day from the Colorado?

Mr. Hayden. The best way I can answer the Senator from California is to read to him from a proposal made by the commissioners representing the State of California on the 1st day of December, 1925, wherein those commissioners suggested an allocation of water:

> That there is hereby allocated from the waters of the Colorado River in the State of California in present perfected rights,

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> in addition to all other allocations of beneficial consumptive use, 2,146,600 acre-feet of water.

In other words, in the year 1925 the State of California claimed to have perfected a right to the use of 2,146,600 acre-feet of water.

Mr. Bratton. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. Bratton. Can the Senator tell us what the present perfected rights in Arizona amount to?

Mr. Hayden. I cannot; I have not that information at hand.

Mr. Johnson. Let me call the attention of Senators to the fact in that connection, too, that the amounts

that are now actually appropriated, and that are being applied to use, or are in process of being put to use, in either of which events the appropriation is perfectly good and the water cannot be taken away, are 4,508,708 acre-feet.

Mr. Hayden. Does the Senator include in that amount an appropriation filed by the city of Los Angeles for water for domestic use?

Mr. Johnson. Yes; it is a perfectly good filing and a legal filing. It has its standing to-day.

Mr. Hayden. I will say to the Senator very frankly and in the best of spirit that that filing, without the passage of legislation by Congress, without the construction pursuant to that legislation of a dam to impound the water of the Colorado River, will produce no more water for the city of Los Angeles than was contained in the ink used by the person who signed the document in behalf of that city.

Mr. Johnson. Let us even concede that——

Mr. Hayden. As a practical matter, the filing is utterly worthless unless the Congress of the United States appropriates money to build the Boulder Dam.

Mr. Bratton. How much is involved in that filing?

Mr. Johnson. One million and ninety-five thousand acre-feet.

Mr. Bratton. How far has that filing progressed?

Mr. Johnson. It has progressed to the extent that every legal formality has been complied with and over $1,000,000 have been expended already by the city of Los Angeles in respect to it.

In addition to that, I want to make clear—although I ought not to interrupt the Senator from Arizona, and I will conclude with just this statement—in addition to that there are rights to which appropriation rights have not yet attached, but which, under the known feasibility,

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with the all-American canal, will be equal to not less than 338,800 acre-feet, making a total of 5,264,300 acre-

feet. I am giving these figures because I am going to compare them ultimately, and ask the Senator from Arizona to compare them, first, with the number of acre-feet which thus far have been appropriated by Arizona and the number possible to be used by Arizona under the construction that is contemplated by this bill; and I want those figures to be borne in mind by Senators when they consider water and water rights.

Mr. Walsh of Montana. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. Walsh of Montana. I would like to inquire of the Senator from California what is the character of the diversion contemplated in the Los Angeles appropriation?

Mr. Johnson. The character is a pumping from the river over 1,400 feet of hills into an aqueduct.

Mr. Walsh of Montana. Does it contemplate any dam or any storage at all?

Mr. Johnson. No; not that I am aware of. I think no dam is contemplated there.

Mr. Walsh of Montana. Is any such amount of water available from the natural flow of water without storage?

Mr. Johnson. I do not think that amount of water is available at all at the present moment.

Mr. Walsh of Montana. I would think that the appropriation, to be of any value, must contemplate works making it feasible.

Mr. Johnson. Those works thus far have been commenced in the expenditure of a million dollars in surveys and the like, and somebody sometime—the city of Los Angeles or the Government or somebody—will unquestionably construct a dam.

Mr. Walsh of Montana. That is what I wanted to know. The dam would be constructed somewhere in the State of Nevada or Arizona?

Mr. Johnson. I presume that is likely, although this diversion is from Arizona.

Mr. Walsh of Montana. Would the city of Los Angeles be authorized, without specific authority from Congress, to throw a dam across the Colorado River in Arizona?

Mr. Johnson. I think not. My offhand 'shotgun' opinion would be no.

Mr. Walsh of Montana. Then, it seems to me there is some question about it.

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Mr. Johnson. There is one aspect in which it might be done, and that is by the Federal Power Commission. It strikes me that under the Federal water power act the privilege could be accorded to the city of Los Angeles to erect a dam.

Mr. Walsh of Montana. Would not the appropriation be nugatory in the absence of that authority in view of the existing statute under which the water power commission is without power?

Mr. Johnson. I would change the adjective. I would not say 'nugatory.' I would say 'futile.'

Mr. Walsh of Montana. Suspended?

Mr. Johnson. Suspended is a better word still.

Mr. King. Mr. President, will the Senator from Arizona suffer an interruption?

Mr. Hayden. I yield to the Senator from Utah.

Mr. King. As I understood the Senator in reading from the document a few moments ago, it showed that there is a claim of 2,000,000 acre-feet plus of perpetual water right in California.

Mr. Hayden. That is right.

Mr. King. I would like to know if the document states just what was done to perfect those rights and whether there was any water used under those rights other than in the Imperial Valley?

Mr. Hayden. I have here a proposal made in 1925 by the commissioners appointed by the State of California to the State of Arizona for an apportionment of the water of the lower basin. The best way to

answer the Senator from Utah is to read just what the proposal says:

> ART. 3. The States of California and Nevada hereby release to the State of Arizona any and all claims of every kind and nature to the use of the waters of the Gila River, the Williams River, and the Little Colorado River and all of their respective tributaries for agricultural and domestic use, and the States of Arizona and California hereby release to the State of Nevada any and all claims of every kind or nature to the use of the waters of the Virgin River and all of its tributaries for agricultural and domestic use, in consideration of which there is hereby allocated from the waters of the Colorado River to the State of California 1,095,000 acre-feet of water per annum in perpetuity for beneficial consumptive use.

It will be observed that at that time the State of California asked the States of Arizona and Nevada to allocate for the use of that State 1,095,000 feet of water upon condition that California would waive any claim that it might have to the waters of the tributaries of the Colorado River in Arizona and Nevada. At that time apparently the

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State of California had not made any filing, had not posted a notice on a stone or post somewhere near the Colorado River, had not filed a document in some public office, asserting an appropriation of water for domestic use by the municipalities of southern California.

I take it from the similarity of the figures, 1,095,000 acre-feet, that they represent an equal quantity of water desired by the cities of southern California, as was just expressed by the Senator from California. At that time California was seeking to obtain water for domestic purposes; and it was indeed very kind and very generous of the California commissioners to say that they would waive any and all claims to the waters of the

tributaries of the Colorado River in Arizona and Nevada in consideration of California being allowed to have that amount of water. They were willing to give Arizona and Nevada what the two States already possessed in order to obtain the use of 1,095,000 acre-feet of the water for domestic purposes.

Mr. Walsh of Montana. Mr. President, if the Senator will pardon me, I would like to pursue a little further the colloquy I had with the Senator from California.

Mr. Hayden. I yield to the Senator from Montana for that purpose.

Mr. Walsh of Montana. If the city of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation or an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that it must yield up that amount of water to the city of Los Angeles?

Mr. Johnson. I rather think so, just exactly as if it were a perfected right for irrigation purposes.

Mr. Walsh of Montana. Yes; but I always understood that the interest that stores the water has a right superior to prior appropriations that do not store.

Mr. Johnson. Possibly so. What is the point?

Mr. Walsh of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.

Mr. Johnson. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.

Mr. Walsh of Montana. A contract with whom?

Mr. Johnson. With those who utilize and take and appropriate the water.

Mr. Walsh of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

Mr. Johnson. Yes; under the terms of this bill.

Mr. Walsh of Montana. Then how can it be said that the city of Los Angeles has a perfected interest?

Mr. Johnson. It has a perfected right there unquestionably, but the bill requires the city of Los Angeles to conform to it, and the city of Los Angeles is perfectly willing to conform to it just exactly as if it had no perfected right.

Mr. Walsh of Montana. Am I correct in the assumption that the Government of the United States must distribute the water to the various appropriators in accordance with their several appropriations?

Mr. Johnson. If they contract.

Mr. Walsh of Montana. Yes; but to contract means a liberty of contract. That is what I want to know. Can the Secretary give the water to them or withhold it from them as he sees fit?

Mr. Johnson. Certainly, because before he begins work upon the dam he has to have the contract in his possession for its payment, and he is the one who is to fix the sums that are to be paid.

Mr. Walsh of Montana. Yes, but that is quite contradictory. It seems to me that the city of Los Angeles has no rights by virtue of this appropriation.

Mr. Johnson. Certainly it has, but those rights unquestionably will be controlled by this bill.

Mr. Walsh of Montana. I should like to have a very much clearer understanding about that than I have.

Mr. Johnson. I fear I cannot make it any clearer to the Senator. I would like to do so if I were able.

Mr. Walsh of Montana. Let me inquire of the Senator, then, of what value to the city of Los Angeles is this appropriation? It goes to the Secretary of the Interior to furnish water pursuant to its appropriation. The Secretary of the Interior says, 'I do not accept your terms at all. I will not contract with you upon

that basis.' Someone else comes along who offers to make a contract with the Secretary of the Interior for the water, that is satisfactory to him and to them. Where, then, does the city of Los Angeles come out?

Mr. Johnson. I doubt very much if the Secretary, under the circumstances, would make such a contract.

Mr. Walsh of Montana. Then he is obliged to contract with the city of Los Angeles?

Mr. Johnson. No; he is not obliged to do so, but he is obliged to contract with somebody that makes the same claims to the same waters,

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and unless the contract is by mutuality agreed upon then he will not build the dam. That is the condition precedent to the construction of the dam.

Mr. Walsh of Montana. Then he is at liberty to contract with the city of Los Angeles, which has an appropriation, or with someone else that has not an appropriation?

Mr. Johnson. Yes; he is at liberty to contract with the city of Los Angeles, which has an appropriation.

Mr. Walsh of Montana. But can he disregard the city of Los Angeles?

Mr. Johnson. I doubt very much if he can.

Mr. Walsh of Montana. And contract with someone else who has no appropriation?

Mr. Johnson. I doubt very much, first, if he would, and I doubt secondly, if he could.

Mr. Hayden. Mr. President, if the Senator from Montana will permit me, I want to assure him that so far as these paper appropriations of water are concerned there are just as many of them on the Arizona side of the river as there are on the California side.

Mr. Walsh of Montana. I rather assumed so.

Mr. Hayden. I am quite sure one paper appropriation of water is just as valuable as another. I do know that the Arizona High Line Canal Association has filed an application for all of the water of the Colorado

River in due and legal form in the State of Arizona. If that is of real and substantial value, then Arizona has good title to all the water in the Colorado River.

Mr. Walsh of Montana. I directed the inquiry merely for the purpose of trying to find out, if I can, under what kind of obligation the Government of the United States, should it build this dam, would be to those who have the appropriations.

Mr. Johnson. The Government would be under no obligations until it makes its terms. I seem unable to make that plain. But here is everything in this scheme, plan, or design: Everything is dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction, and he is not to undertake any expenditure nor to undertake any construction until that shall have been accomplished.

Mr. Walsh of Montana. Let us suppose the Arizona people are perfectly willing to meet the requirements and that the Los Angeles people are perfectly willing to meet the requirements, and other people who have not even attempted to make any appropriation are perfectly able and willing to meet the requirements. Who then has the right?

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Mr. Johnson. The Secretary of the Interior and the Government have the right.

Mr. Walsh of Montana. The Secretary of the Interior may utterly ignore those appropriations?

Mr. Johnson. Possibly so.

Mr. Walsh of Montana. That is what I am curious to find out about.

Mr. King. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. King. It occurs to me that the Secretary of the Interior would be derelict in his duty, if this bill were to become a law, if he should spend one penny in the construction of a dam until he had determined the

different rights existing either in California or in Arizona with respect to the waters of the river. If there are suspended or inchoate rights in either of those States which might not ripen into perfected rights through a contract or recognition of the same, and there is sufficient water to meet all of those suspended or inchoate or perfected rights, it will be the duty of the Secretary of the Interior, if he were fully to discharge his duty, to obtain from those claimants a waiver of their rights, inchoate or perfected. If not, when the dam was constructed and the water impounded the Government of the United States might have a dozen law suits; persons who had made filings might insist that the water impounded was theirs; that they had been interfered with by a superior physical power, to wit, the Government of the United States, and that they had been prevented from completing rights which they had initiated either under State laws or by reason of acts of Congress. It is obvious that there are claims here for a vast amount more water than flows in the Colorado River.

Mr. Hayden. Mr. President, if the Senator will permit me, I should like to say that that is not an unusual situation. On every stream throughout the entire western part of the United States where irrigation is practiced appropriations have been filed for many times more water than flows in the streams. There is nothing to prevent any qualified citizen of the United States or any corporation organized under the laws of any State from posting a notice, upon a rock, or tacking it to a monument on the bank of the river or going to some county recorder's office and making a filing, claiming a vast quantity of water out of the stream. That condition exists everywhere and it does not alarm anyone. Appropriations of that kind have been made in California, and have been made in Arizona, and none of them are of any value whatsoever so far as the future is concerned until the Government of the United States spends some sixty or seventy

million dollars to build a dam and impound the waters of the Colorado River and make the same actually available for diversion and use.

Mr. King. Mr. President, if the Senator will pardon me, I think that the last statement made by him is a little too broad. The

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Senator in the plenitude of his experience in the Western States knows that sometimes a right is initiated by the weaker party, if I may use that expression, and a superior party, sometimes by physical force, comes in and builds a dam sooner than the other man. I have known them to be driven from the construction by guns. It is obvious that the man who has been driven off or been prevented from completing his rights would have some standing in a court of equity if he were to attack the rights or the claimed rights of the superior party who had perhaps control of the dam and had taken the water out of the stream.

It seems to me that the statement made by the Senator should admonish us that if this bill is to be passed there should be a provision in it that there shall be no work done under the law until the conflicting rights, if there be any, shall be determined, and, if necessary, that a bill in equity be filed against all persons who claim water in the stream, in order that the rights may be adjudicated and waivers obtained.

Mr. Hayden. Let me say to the Senator from Utah that I do not concede that any such provision is at all necessary. The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.

Mr. King. If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful

hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes.

Mr. Hayden. The amendment that I have offered contemplates no such possibility.

Mr. Walsh of Montana. Mr. President, let me remark——

Mr. Phipps. Mr. President, will the Senator from Arizona yield to me?

The Presiding Officer. Does the Senator from Arizona yield; and if so, to whom?

Mr. Hayden. I yield first to the Senator from Montana.

Mr. Walsh of Montana. Let me remark in that connection that if, as contended apparently by the Senator from California, the city of Los Angeles has a right, inchoate in character, in process of perfection, which entitles it to a certain amount of water out of the Colorado River, if we allocate so much of the water to the State of Arizona as interferes with its rights, would not we be taking property from the people of Los Angeles without due process of law?

Mr. Hayden. If the right were of a character that must be recognized, I would agree with the Senator.

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Mr. Walsh of Montana. That, I understand, is the contention of the Senator from California, that the hands of the Government are tied; that if we shall erect a dam there at all we shall have to give enough water out of that dam to the city of Los Angeles to satisfy its appropriation.

Mr. Hayden. But I am quite sure, if I understood correctly the Senator from California, that he qualified that statement by saying that, after all, the Secretary of the Interior could allow the city of Los Angeles to

have such quantity of water as might be determined by contract."

Senator Hayden also commented at 70 Cong. Rec 171:

"Mr. Hayden. I really cannot tell the Senator, because I have at hand no accurate figures on the total quantity of water in the Arizona tributaries.

Since that subject has been mentioned, let me say to the Senate that in the case of a river—for example, the Gila River—wholly within the State of Arizona, whose waters are used in the very heart of the State, if those waters were released from a reservoir when needed at a time of drought they must flow down a wide, sandy river bed for some 200 miles before they could reach any other State. It is perfectly obvious that under those conditions the water never would arrive. It would simply be lost by evaporation. Therefore we say that the physical situation is such that it is utterly impossible for any water out of the Gila River or its tributaries to be delivered to any other State or to Mexico during a time of drought, when water is needed; and that is the only time when Arizona would be called upon for a delivery of water. Therefore the physical facts are such that it is utterly impossible, even though some State had a right to acquire the use of water from that stream, for any other State to obtain any of the water. Therefore no State other than Arizona has any interest in the waters of the Gila River. That would be equally true of a tributary such as the Bill Williams, which in time of drought goes down to a mere trickle; or of the Little Colorado River, a tributary in northern Arizona which likewise goes dry in places during a period of drought. There is no water in the tributaries of the Colorado River in the State of Arizona that could be of any possible benefit to any other State in time of drought. If reservoirs existed on these tributaries, and any other State had a right to come into the State of Arizona and insist that the reservoir be opened and the water turned down its natural course to flow into some

other State, not a drop of water would arrive during the dry period. Therefore we have felt, naturally, that no other State had any interest in those tributary streams, and particularly so in the case of the Gila River, which empties into the Colorado River below the Laguna Dam.

Under the terms of this bill under the plan of the United States Reclamation Service the last and lowest point on the Colorado River where any water will be diverted from that stream is at Laguna Dam, and Laguna Dam is some 10 or 12 miles above the mouth of the Gila River.

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It is true that at the present moment water is diverted from the Colorado River into the State of California just a short distance above the international boundary line at what is known as Hanlon Heading. It is possible for waters which come down the Gila River in time of flood to flow from that stream into the Colorado and then a short distance down the Colorado and into Hanlon Heading and over into Imperial Valley. But the diversion at Hanlon Heading, which is in existence at the present moment, is to be superseded by a transfer of the heading up the stream to Laguna Dam. The Imperial irrigation district is under contract with the Secretary of the Interior to move its heading to Laguna Dam and is now paying annually on that contract. The privilege that they can have of diverting water at Hanlon Heading is only temporary. There is in existence a restraining order of the courts to prevent a diversion there, and each year the court requires the posting of a bond that if any damage results to the United States reclamation project at Yuma by reason of the placing of a weir to divert water from the Colorado River into Hanlon Heading the United States will be made safe from all such damage. Everyone knows that under the terms

of the Swing-Johnson bill California never can obtain a drop of water out of the Gila River.

Mr. King. Mr. President, will the Senator permit an inquiry?

Mr. Hayden. Certainly.

Mr. King. Have the owners of the waters in Imperial Valley, or the irrigation district, at any time ever claimed the Gila River or any part of its waters as necessary for the irrigation of Imperial Valley, or as a proper tributary to their stream?

Mr. Hayden. Whether they have claimed it or not, there is no question but that they have used the waters of the Gila River when that stream happened to be flowing into the Colorado. But, as I stated to the Senator a moment ago, there are long periods in almost every year when, for more than a hundred miles from its mouth, the Gila River is absolutely dry. The Gila River, in truth and in fact, has been more of a menace to the Imperial Valley than a benefit. The people of the Imperial Valley would much prefer to move their point of diversion up the stream to Laguna Dam, and then obtain water from the Boulder Canyon Reservoir, than to depend upon any rights they may have to the waters of the Gila River, because the supply is so unstable as to be practically valueless to them.

Mr. King. I have understood from the records, and from my observation, that the Gila River is what some denominate as a 'flash' stream; that when they amounted to anything, and might be of any value for irrigation purposes in the Imperial Valley, the waters in the Gila came down at a time when there was ample water flowing down the Colorado River from above to answer all the demands of the Imperial Valley, and therefore the Imperial Valley had never used the waters of the Gila River.

I do not mean by that to say that the waters of the Gila River did not commingle with the waters of the Colorado River, and at a time when there was water being taken out of the Colorado River at that

point for the Imperial Valley, but my understanding is that whenever there was water flowing from the Gila River into the Colorado River, at that time there was more than sufficient water flowing down the Colorado River to answer all the demands of the Imperial Valley.

Mr. Hayden. The flow of the Gila is so spasmodic and so irregular that no rule can be laid down as to when a flood may be expected. A study of the records will show that during some months each year the river has been dry, and in other years during some months water has flowed from the Gila River into the Colorado. But, in truth and fact, from the best information I have from residents of the Imperial Valley, they have not depended upon the Gila River for any part of their water supply. When the Gila River is in flood it carries large quantities of silt, and they would much prefer, for that reason, if for no other, to move the point of diversion up the Colorado River to Laguna Dam."

In discussing the 1925 California proposal and the 1927 Governors' Conference proposal, Senator Hayden commented (70 Cong. Rec. 171):

"These two documents express the demands of Arizona and California, made prior to the Denver conference. When the Denver conference was held, the governors of the four upper-basin States asked each State to indicate just how much water they wanted out of the Colorado River. The State of Nevada again asked for 300,000 acre-feet out of the seven and a half million acre-feet apportioned in perpetuity to the lower basin.

The State of Arizona again agreed that Nevada should have that quantity of water, and asked for one-half of the water in the Colorado River.

The State of California submitted a demand for 4,600,000 acre-feet of water. How they arrived at

that figure I do not know. It may have been based, first, upon present perfected rights, as they asserted, of 2,146,600 acre-feet, plus 1,095,000 acre-feet desired by the municipalities of southern California. But those two figures do not equal 4,600,000 acre-feet of water. Adding the amount of water asserted by California on December 1, 1925, to be a perfected right which is 2,146,000 acre-feet, to 1,095,000 acre-feet, which they did not at that time assert to be such a right, but as a mere desire on the part of the municipalities of southern California to obtain that amount, the two combined amount to 3,241,000 acre-feet. But in Denver, California asked for 4,600,000 acre-feet of water.

The governors of the four upper-basin States, having carefully considered the proposals made by the three States of the lower basin, made the following finding:

> The governors of the States of the upper division of the Colorado River system suggest the following as a fair apportionment of water between the States

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> of the lower division, subject and subordinate to the provisions of the Colorado River compact:
>
> 1. Of the average annual delivery of water to be provided by the States of the upper division at Lees Ferry under the terms of the Colorado River compact:
>
> (a) To the State of Nevada, 300,000 acre-feet.
>
> (b) To the State of Arizona, 3,000,000 acre-feet.
>
> (c) To the State of California, 4,200,000 acre-feet.

The governors have not explained in any printed document, so far as I know, how they arrived at this compromise. I was told that it was based upon the following facts: They endeavored, by questioning the California representatives at that conference, to ascer-

tain not only what California claimed but the quantity of water to which California had actually perfected rights to use, based upon the normal flow of the Colorado River, unregulated by any reservoir; and they determined that amount.

They also endeavored to determine how much water was being actually used in the State of Arizona, or how much water the State of Arizona had acquired a perfected right to use, and from the total quantity ascertained to be the amount that California had a right to use; they subtracted the amount that Arizona now has a similar right to use and found the difference to be 600,000 acre-feet of water. So the governors said: 'Perfected rights must be respected. California has a larger perfected right to the use of water than Arizona. Therefore we will deduct from the demand of Arizona for one-half of the total quantity of the water of the stream, 600,000 acre-feet.'

Subtracting 300,000 acre-feet for Nevada from seven and one-half million acre-feet, and then dividing the remainder, would give to Arizona 3,600,000 acre-feet and to California 3,600,000 acre-feet. The governors, after careful consideration, recommended that from Arizona's demand of half the water, or 3,600,000 acre-feet, there be subtracted 600,000 acre-feet, leaving 3,000,000 acre-feet for the State of Arizona. They added to the other half of the water 600,000 acre-feet, increasing California's proportion of the water from 3,600,000 to 4,200,000 acre-feet. That was the recommendation of the governors.

The State of Arizona, through its legally appointed commissioners, consisting of the governor of the State, five members of the legislature of the State, and two other citizens of the State, by a formal vote, accepted the recommendation of the governors of the upper-basin States, and agreed to accept, out of the main Colorado River, 3,000,000 acre-feet.

Mr. Johnson. Is the Senator certain there was no condition attached to that?

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Mr. Hayden. I can read the last expression made by the Arizona-Colorado River Commission.

Mr. Johnson. I am just asking the Senator; is he certain there was no condition attached to it?

Mr. Hayden. There were conditions, yes; but nothing of grave importance. I shall very shortly read the last statement on the subject of water as made by the Arizona commissioners.

The governors at Denver went on further and stated, in addition:

> 2. To Arizona, in addition to water apportioned in subdivision (b), 1,000,000 acre-feet of water to be supplied from the tributaries of the Colorado River flowing in said State, and to be diverted from said tributaries before the same empty into the main stream. Said 1,000,000 acre-feet shall not be subject to diminution by reason of any treaty with the United States of Mexico, except in such proportion as the said 1,000,000 acre-feet shall bear to the entire apportionment in (1) and (2) of 8,500,000 acre-feet.
>
> 3. As to all water of the tributaries of the Colorado River emptying into the river below Lees Ferry not apportioned in paragraph (2) each of the States of the lower basin shall have the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty into the main stream, provided, the apportionment of the waters of such tributaries situated in more than one State shall be left to adjudication or apportionment between said States in such manner as may be determined upon by the States affected thereby.

That last provision referred particularly to the Virgin River, which was partly in Utah, partly in Arizona, and partly in Nevada, the only important tributary that is a stream of interstate character.

4. The several foregoing apportionments to include all water necessary for the supply of any rights which may now exist, including water for Indian lands in each of said States.

5. Arizona and California each may divert and use one-half of the unapportioned waters of the main Colorado River flowing below Lees Ferry, subject to future equitable apportionment between the said States after the year 1963, and on the specific condition that the use of said waters between the States of the lower basin shall be without prejudice to the rights of the States of the upper basin to further apportionment of water as provided by the Colorado River compact.

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As I said, the State of California refused to accept the Denver apportionment. At the close of the conference the Arizona-Colorado River Commission addressed this statement to the governors of the upper division of the Colorado River Basin:

> The lawful representatives of the State of Arizona, members of the Colorado River Commission of said State, and their advisers, in attendance upon the conference called by you and convened at the City of Denver, Colo., on July 22, 1927, deeply regret that the full purpose of the conference, to bring about an agreement which would result in complete ratification by seven States of the Colorado River compact and solution of the Colorado River problem, has not been effected.
>
> Such agreement not having been reached, we desire at this time to state concretely Arizona's position, as taken by her representatives at this conference and disclosed by the record, in a sincere and earnest effort to accomplish the purposes thereof.

This is the important part of the document with respect to water:

We hold that Arizona possesses the land, the natural facilities, to economically utilize within her borders a very large proportion, if not all, of the waters of the Colorado River system available for irrigational use in the lower basin; that as a matter of justice, right and equity, if the law of prior appropriation is to be superseded by a compact, she is entitled to the undisturbed, undisputed, and unlimited use, to the extent that such use is feasible, of the waters of her tributary streams, just as the State of California is entitled to and has the use of the water of her streams, and that she is equally entitled to at least one-half of the flow of the main stream of the Colorado River available for use in the States of the lower division, after due allowance is made for the practical irrigational requirements of the State of Nevada. Nevertheless, for the purpose of effecting an agreement at this time, and out of consideration for the untiring efforts of the governors of the States of the upper division to bring about such an agreement, and in deference to their judgment as to what under the circumstances would be fair and reasonable, we have accepted, with certain interpretations of language relating to the immunization of Arizona's tributaries against depletion for the benefit of Mexico, the proposal of the governors of the States of the upper division submitted on September 19, 1927, which said proposal, so interpreted, would allocate to the State of California 4,200,000 acre-feet of water per annum; to Arizona, 3,000,000 acre-feet and the right to the use of such of the waters of her tributaries as may be diverted therefrom for beneficial use; and would divide the unallocated flow of the river,

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available for the use of the lower-division States, equally between Arizona and California.

Nothing was accomplished by the Denver conference with respect to a division of water by reason of the fact that California refused to accept the recommendation made by the four governors, and so the matter stood when Congress met.

Mr. Johnson. Mr. President, may I ask the Senator a question?

Mr. Hayden. Certainly.

Mr. Johnson. Does the Senator assert that Arizona accepted the recommendations made by the governors?

Mr. Hayden. I have just read the last word that Arizona said on that subject.

Mr. Johnson. With certain reservations.

Mr. Hayden. Arizona accepted the water proposal of the upper-basin governors with certain reservations, interpretative only with respect to any demand for water that might be made by Mexico. We will not disagree at all that the Arizona acceptance of the proposal was not consummated by a further negotiation and understanding until the minds of the governors and the representatives of all the States actually met and agreed upon the document. If they had done so, the controversy would have been over.

When Congress assembled in December, 1927, no agreement had been made. The senior Senator from Nevada (Mr. Pittman), in continuation of the earnest efforts that he has made all these years to bring about a settlement of the controversy between the States with respect to the Colorado River, invited a number of us to conferences in his office and there we talked over the situation.

It was discovered at that time, as the Senator said, that instead of being able to divide the 7,500,000 acre-feet of water, which was not enough to satisfy the demands of all the States, we could legally, under the terms of the Colorado River compact, divide an additional million acre-feet. Therefore the proposal was made that the recommendation made by the governors of the four upper-basin States be accepted and that

there be added thereto the additional million acre-feet of water apportioned by the compact to the lower basin, and that that quantity of water be divided equally between California and Arizona, which would increase the total apportionment to each State by 500,000 acre-feet. By the new plan the State of California would have 4,700,000 acre-feet of water in the main stream of the Colorado River, or 100,000 acre-feet more than that State asked for at Denver, and the State of Arizona would have 3,500,000 acre-feet, or within 100,000 acre-feet of the quantity she originally asked for at Denver. By such an arrangement it was felt that the rights and the desires of all of the States could be accommodated. That arrangement has been incorporated in the amendment which I have offered to the bill and which is now pending. I would like to discuss that amendment in detail."

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Senator Hayden continued the explanation of his amendment at 70 Cong. Rec. 174:

"Mr. Hayden. The hour is getting late. If I may, I should like to continue the reading of the amendment that I have offered so that I may explain its terms. I have read the proposal now contained in the bill as reported to the Senate and as recommended by the Senate Committee on Irrigation and Reclamation for the purpose of pointing out that the committee placed in the bill the 4,600,000 acre-feet of water, which, as I have said, was the demand made by California; whereas in the amendment that I have offered is 4,200,000 acre-feet of water, which is the quantity recommended for apportionment to California by the governors of the four upper basin States. Thus far the provisions are the same except for the difference of 400,000 acre-feet. To go on with the amendment, which provides further—

and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said Article III—

That refers to the extra million acre-feet apportioned to the lower basin by the Colorado River compact. So that, adding together the 4,200,000 acre-feet apportioned by paragraph (a) of Article III of the Colorado River compact and the 500,000 acre-feet apportioned to the lower basin by paragraph (b) of the same article of the compact the total quantity of water which we ask the State of California to be limited to is 4,700,000 acre-feet out of the main stream of the Colorado River, which is 100,000 acre-feet more than California demanded at Denver.

In addition my amendment provides—

and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters.

A similar provision is found in the committee amendment, and a similar provision is found in the recommendation of the governors, that the excess or surplus water be divided equally between the two States—

and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by the agreement described i the following paragraph, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes.

That last phrase appears in the amendment as a sort of supercaution, so to speak. There were those who feared because the water used for irrigation upon the Yuma project in Arizona was first diverted from the Colorado River in California, carried for some distance in that State, and conveyed into Arizona by a siphon which goes under the Colorado River, that unless specific mention was made of the fact, California, because the water was diverted in that State, might be charged with water used in Arizona. Of course, we had no intention of doing anything of that kind and protected that point accordingly.

I have read what California is required to do and how that State is limited. Let me now tell the other side of the story, as it appears in the amendment.

The said ratifying act—

That is, the ratifying act of the Legislature of California—

> shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada, and Arizona the foregoing limitations are accepted and approved as fixing the apportionment of water to California, then California shall and will therein agree (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet—

That is, the quantity apportioned to Nevada by the governors' conference at Denver—

> and to the State of Arizona 3,000,000 acre-feet for exclusive beneficial consumptive use in perpetuity—

That likewise agrees with the recommendation made by the governors of the upper basin States—

and (2) of the 1,000,000 acre-feet in addition which the lower basin has the right to use annually by paragraph (b) of said article, there shall be apportioned to the State of Arizona 500,000 acre-feet for beneficial consumptive use—

Again dividing the water equally with California so far as the additional million acre-feet are concerned—

And (3) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (4) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State—

As I have already explained to the Senate, the Gila River empties into the Colorado River below the Laguna Dam. It empties into it at a point where neither the State of California nor any other State can use any of its surplus waters. Therefore we felt justified in asking

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the State of California to exclude from any computation of water the Gila River and its tributaries. The only other area that could have any possible claim upon the waters of the Gila River is Old Mexico, and even Mexico could not obtain any water from that stream in time of drought when the water was needed—

and (5) that the waters of the Gila River and its tributaries shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters apportioned by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply

one-half of any deficiency which must be supplied to Mexico by the lower basin.

During the consideration of the Colorado River compact by the Arizona Legislature those who opposed the approval of that agreement asserted that if the Legislature of Arizona ratified the Colorado River compact it would place a cloud upon the appropriation of all waters in the State of Arizona. Some were even so frightened as to think in case the Senate should ratify a treaty with Mexico granting a certain quantity of water to that country and the demand was made for it, that the treaty would be the supreme law of the land, and that the gates of the Roosevelt Dam or the gates of the Coolidge Dam would have to be opened and water turned down to Old Mexico.

It is an utterly foolish thing, a thing that it is physically impossible to do, but at the time it made an impression upon the minds of many people in the State of Arizona. They felt that they had in existence at this time actual, completely protected, bona fide, vested rights—if I knew of any other term that would describe the perfect water right which they possess I would use it—and they did not want to agree that a cloud of any kind could be placed upon their title to the use of that water. I refer particularly to the water now being used under the Salt River project. Therefore there has been insistence from time to time that the Gila River, of which the Salt River is the principal tributary, be exempt from any claim in the future so far as water for Mexico is concerned. But it will be noticed, Mr. President, that the State of Arizona and the State of California, if this agreement shall be carried out, will mutually agree to share equally the Mexican burden out of the waters of the main stream of the Colorado River.

In truth and in fact that is the only place where any water could be obtained for use in Mexico. In our arguments with our California brethren we have

found a peculiar situation. It was their desire to place upon paper the total amount of water running in every little stream in the State of Arizona which was tributary to the Colorado River, add that to the total quantity of water in the main stream, and then say, 'This total quantity of water is subject to the burden of furnishing water to Old Mexico, or may be subject under some future treaty. Taking the total water of the Arizona tributaries and the

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total water flowing in the main stream, we will divide the obligation to furnish water to Mexico upon that basis.'

The water that is to be furnished to Mexico must all come out of the main river; we all agree to that; but the net result of such figuring on paper would result in Arizona being compelled to supply the great bulk of the water that must be supplied to Mexico under any treaty, and would practically exempt California from furnishing any appreciable quantity of water at all.

Arizona's answer to that contention has been that it would be just as reasonable and just as sensible to include in the total quantity of water to be calculated the flow of the Sacramento or the San Joaquin Rivers in California as to include the flow of the Gila River. In time of drought, when Mexico would make the demand for water, it would be as impossible to obtain any water out of the Gila River and deliver it to Mexico as it would be to obtain water from the Sacramento River or the San Joaquin River and deliver it to Mexico. Therefore we have said, and I think justly and fairly, that we were willing to divide with California the burden of furnishing water to Old Mexico, to assume an equal part of that burden, but that the delivery must be made and the division must be made out of the water that is divisible, and from the only source where water is obtainable for Mexico; to wit,

the main stream of the Colorado River. That is the only place where Mexico could get it, and that is the only water that could be divided. It is unfair to add up the total quantity of water that could be impounded by the Roosevelt Dam and the Coolidge Dam and some other reservoir upon some other tributary stream in Arizona, for the reason, as I say, that, if in time of drought the gates of the reservoir were opened and the water allowed to flow out, not one drop would ever reach Mexico, because it would be compelled to flow down during the time of drought in a wide sandy river bed for hundreds of miles, and the water would be totally evaporated and lost, and Mexico could not obtain a drop of it.

We, therefore, say that it is unfair and unjust and that it is not equitable to use the quantity of water that exists in the Arizona tributaries, or may be found in them, as a basis for determining what quantity of water must be allocated to Mexico. The physical facts are against any such plan. We do say that Arizona is willing, as this amendment provides, to agree that if, under any treaty with Mexico, it is necessary for the States of the lower basin to furnish water to lands in Mexico, Arizona will furnish an equal quantity of that water with California out of the main stream of the Colorado River. We believe that to be a fair and a reasonable proposition, and one that upon investigation I am sure the senior Senator from California and his colleague will find is the only practical way in which the burden of furnishing water to Mexico can be met.

Mr. Shortridge. Mr. President, may I ask the Senator a question?

Mr. Hayden. I yield.

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Mr. Shortridge. Do you proceed upon the theory that Arizona is entitled to the same quantity of water as California?

Mr. Hayden. In the main stream of the Colorado; yes.

Mr. Shortridge. Quite regardless of the population of the two States?

Mr. Hayden. If that were the issue, Mr. President, the State of Arizona would be entitled to much more water than the State of California. That is to say, in the total area within the drainage basin of the Colorado River there is a much larger population in the State of Arizona than there is in the State of California.

Mr. Shortridge. I merely wish to know the position the Senator is taking.

Mr. Hayden. We found——

Mr. Shortridge. Will you pardon me to put the question in this form, for it may hereafter be the subject of some comment:

Do you contend, as to two States divided by a given stream, that each State's right to the water is dependent upon population, present or future, or upon present irrigated lands or lands subject to future reclamation and irrigation? Is it dependent upon territory, or is it dependent upon population—upon one, or the other, or both?

Mr. Hayden. It seems to me that it would be impossible to use one or the other or both of those factors as a means of determining what the relative rights of the States are.

Mr. Shortridge. Would the Senator contend that State A, for example, which had a very limited population, was entitled to as much of the given water as State B, with a very great population?

Mr. Hayden. If State A, with limited population, were so situated that because of the topography of the country or for other reasons it could not use the water within any reasonable period of time, then the fact that an adjoining State happened to have a larger population which could use it would be one that should receive very careful consideration. That, I believe, is the view of the State of Nevada at this time.

The State of Nevada is so situated that it can not use the water, and therefore it does not ask for more than a reasonable amount. But where the two States, State A and State B, regardless of their population, have lands upon which the water can be placed to beneficial use, it does not appear to us in Arizona that merely because one State happened to be settled sooner than another, that is any reason why the development of the other State should be denied.

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Mr. Shortridge. May I ask the Senator, then, a final question? I have gathered from his remarks thus far that he seemed to insist that Arizona was entitled to one full half of the given water. Has not that been the contention of the Senator?

Mr. Hayden. Yes; that has been the contention of my State; and so far as I am personally concerned I think that contention can still be urged in all equity and all justice. But inasmuch as the commissioners representing the State of Arizona have submitted the matter to the mediation of four governors, who went into the matter very carefully and found that they were entitled to a less amount, in order to compromise our differences we have agreed to accept less.

Mr. Shortridge. I merely wished to know the position of the Senator.

Mr. Pittman. Just a minute, Mr. President. The Senator has mentioned Nevada as claiming only 300,000 acre-feet. I wish to say that the position of Nevada in the matter is this:

That the sovereignty of States is equal, without regard to population; that the State of Nevada, under the law of appropriation, if it had irrigable lands to put it on, could take all of the water of the Colorado River legally and proceed to put it on those lands, if it did it without interfering with prior rights of some other State or some other people. We contend also

that the State of Nevada has at least an equal right in the benefits to be derived from the use of the water from that dam, whether for power or whatever it can legitimately use it for.

The facts are stated accurately, however. While the State of Nevada might contend for one-third of this water to be used at some future date in the development of the State, our engineers have come to the conclusion that there are only about 100,000 or so acres of land that it would be practicable to irrigate; and we estimate that 300,000 acre-feet will accomplish that. We have therefor entirely removed from consideration, as far as Nevada is concerned, the legal question which was raised by the Junior Senator from California. We know we can not use it—at least, we are so advised—and we are perfectly willing and glad to allow all the rest of that water to be divided, if it may be equitably, between the other two States.

Mr. Hayden. Mr. President, in conclusion, let me say that I have offered this amendment in good faith. I have offered it in the exact language in which it appeared in the CONGRESSIONAL RECORD of May 28, 1928, when printed at the request of the senior Senator from Nevada (Mr. Pittman). I have offered it in the exact language as prepared by Mr. Francis Wilson, of New Mexico, the interstate river commissioner of that State, a disinterested person, a lawyer of great ability, a man of high character, who honestly and sincerely has sought on every and all occasions to bring about a settlement of this controversy between the States of Arizona and California with respect to the water of the lower basin.

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I hope that the senior Senator from California and his colleague will take the amendment and study it. If they can suggest any better way of arriving at a settlement of our difficulties based upon this amendment, if they can suggest changes in it that will be

equitable as between the two States, I shall be delighted to confer with them and to do everything within my power to bring this matter to an adjustment.

As I understand the parliamentary situation, the House bill has been substituted for the Senate bill, and there now appears upon our desks as an amendment to the House bill the Senate bill as reported to this body. So there is one amendment pending; and the amendment which I have now offered, and which is now pending, is the only amendment to the bill at the present moment upon which a vote could be taken. Am I correct in that assumption?"

The debate on H. R. 5773 and the proposed amendments continued on December 7, 1928 at which time Senator Pittman of Nevada commented (70 Cong. Rec. 232):

"What is the difficulty? We have only minor questions involved here. There is practically nothing involved except a dispute between the States of Arizona and California with regard to the division of the increased water that will be impounded behind the proposed dam; that is all. An agreement has been entered into between the seven States interested in this river by which half of that water is retained to the four upper States and half of it let down to the three lower States. The four upper States have ratified the agreement. The question is now for Arizona to ratify the agreement. Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California dividing the water let down to the three lower States. Of the 7,500,000 acre-feet of water let down that river they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together."

There followed a lengthy discourse by Senator Johnson on California rights, which is of some importance but not

vital to this compilation, except for the following passage beginning at 70 Cong. Rec. 235:

"Mr. Hayden. Mr. President, will the Senator yield?

The Presiding Officer. Does the Senator from California yield to the Senator from Arizona?

Mr. Johnson. I yield.

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Mr. Hayden. Can the Senator tell me how many acres are now being irrigated in Imperial Valley?

Mr. Johnson. Approximately 400,000.

Mr. Hayden. The district comprises a larger area?

Mr. Johnson. Very much larger.

Mr. Hayden. I understood the Senator to say 476,000 acres.

Mr. Johnson. The Senator may be right. Under the appropriation the canals constructed and now in use provide for about 515,000 acres.

Mr. Hayden. The reason why less than the total area under the canal is irrigated is, as I understand it, because with the present unregulated flow of the river there is not water enough to irrigate those lands.

Mr. Johnson. That is true in large measure.

Mr. Hayden. So that it could not be reasonably expected that there would be any material increase in the area of land irrigated within the present limits of the Imperial irrigation district unless Boulder Canyon Dam were built.

Mr. Johnson. To a large extent that is true.

Mr. Hayden. So that whatever these water rights may be, although they may date back to 1896, there is no way in which the water to supply those lands can be obtained except by the construction of Boulder Canyon Dam.

Mr. Johnson. Adequate water, I will say. I think that is quite so. There are constant accretions and constantly new land, as the Senator knows, is being put under irrigation, but to take a large area I think we

would need the storage capacity in order to accomplish the desired results.

Mr. Hayden. Warning in that respect has come to the farmers of Imperial Valley on more than one occasion, because they have suffered a shortage of water and have lost large sums in perishable crops.

Mr. Johnson. Quite so. In one year there was a drought, which, I think, caused a loss of $5,000,000.

Mr. Hayden. I am merely bringing out the fact to illustrate that however far back this water right may date—and it may go back to 1896, indeed—it is not a perfected water right in the sense that it supplies all the water necessary for the irrigation of the land in the Imperial Valley and that something must be done to perfect

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it, to wit, secure appropriations from Congress, build a dam and impound the water. It is the contention of the people of Arizona that under those circumstances it shall not be urged that the maximum amount applied for in 1896, which can not be obtained from the river's natural state, is the limit of California's water right.

Mr. Johnson. That is a very natural contention, too. I am not going to quarrel with the Senator about his contention in that regard. In fact, I would rather not quarrel with him at all. But the difficulty is that I think he makes it necessary. He thinks I make it necessary, and so there we are."

On December 8, 1928, Senator Bratton of New Mexico had printed a proposed amendment to section 4(a) as follows:

"SEC. 4. (a) This Act shall not take effect and no authority shall be exercised hereunder, unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proc-

lamation, shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared: Provided, That in either event the ratification act of the State of California shall contain a provision agreeing that the aggregate annual consumptive use by that State of waters of the Colorado River shall never exceed 4,400,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of article III of said compact, and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters; and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by mutual agreement subsequently entered into by all of the States affected, to wit: Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes."

In explanation of his amendment, Senator Bratton said (70 Cong. Rec. 333):

"As I understand, California holds to the belief that 4,600,000 acre-feet is an irreducible minimum. Arizona contends that a maximum of 4,200,000 acre-feet is the largest that she will consider. Personally, I am not wedded to either figure. The thing that is uppermost in my mind is to do equity and justice as nearly as can be done toward both States, and, at the same time, pass a bill that will be effectuated, and will secure the results which we all desire.

I think we should adopt that course. The two States have exchanged views, they have negotiated, they have endeavored to reach an agreement, and until now have been unable to do so. This controversy does not affect those two States alone. It affects other States in the Union and the Government as well.

Without undertaking to express my views either way upon the subject, I do think that if the two States are unable to agree upon a figure then that we, as a dis-interested and friendly agency, should pass a bill which, according to our combined judgment, will justly and equitably settle the controversy. I suggest 4,400,000 acre-feet with that in view. I still hold to the belief that somewhere between the two figures we must fix the amount, and that this difference of 400,000 acre-feet should not be allowed to bar and preclude the passage of this important measure dealing with the enormous quantity of 15,000,000 acre-feet of water and involving seven States as well as the Government.

Mr. King. Mr. President, will the Senator yield?

Mr. Bratton. I yield.

Mr. King. I will ask the Senator if it is not a fact that at the time when the governors' conference considered the matter and recommended a settlement upon a basis of 4,200,000 acre-feet to California there had not been fully discussed and fully appreciated the fact that there was probably a million acre-feet subject to capture which, under the compact, was allocated to Arizona and to California, so that if 4,200,000 acre-

feet were awarded out of the 7,500,000 there would be an additional 500,000 acre-feet out of this 1,000,000 acre-feet which, under the compact, was to be allocated to the two States, so California in the aggregate would get 4,700,000 acre-feet?

Mr. Bratton. That is true if the estimated surplus actually exists. At the same time, Arizona would get her 3,000,000 acre-feet agreed to by the governors as her just share of the allocated water, plus 500,000 acre-feet, being one-half of the unallocated surplus, so that while California would get 4,700,000 acre-feet Arizona would get 3,500,000 acre-feet. The surplus to which the Senator from Utah refers would be equally divided between Arizona and California. Neither State would get an advantage by reason of the division of the surplus."

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The Phipps Amendment to the Hayden amendment to the Johnson substitute (of the language of S. 728 for that of H. R. 5773) was offered on December 10, 1928 (70 Cong. Rec. 324):

"Mr. Phipps. Mr. President, will the Senator from New Mexico yield to me for a moment for the purpose of presenting an amendment?

Mr. Bratton. I yield to the Senator.

Mr. Phipps. I understand that the pending amendment is the one offered by the junior Senator from Arizona (Mr. Hayden). I desire to offer an amendment to that amendment, which I believe is permissible under the rule in force.

The Presiding Officer. The Chair will ask the Senator from New Mexico whether he has submitted his amendment? Is it pending?

Mr. Bratton. It has been printed and is lying on the table, but has not been formally proposed.

The Presiding Officer. Then the amendment of the Senator from Colorado to the amendment will be in order.

Mr. Phipps. I ask to have my amendment to the amendment printed in the RECORD.

There being no objection, the amendment was ordered to be printed in the RECORD as follows:

SEC. 4(a). This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 12 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act,

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that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California,

including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million six hundred thousand acre-feet of the waters apportioned to the lower basin States by the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

On page 7, strike out lines 4 to 12, inclusive, and insert in lieu thereof the following: 'permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall'.

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Senator Phipps' amendment (in the last portion quoted) consisted of an amendment to Sec. 5 requiring that all water delivery contracts executed by the Secretary of the Interior should be for "permanent service and shall conform to paragraph (a) of Section 4 of this Act".

The question of division of water continued in an exchange between Senators Johnson and King (70 Cong. Rec. 330):

"Mr. Johnson. Speaking in round numbers, the annual consumption of water that is constantly, continually utilized is 2,100,000 acre-feet, I think, in the Imperial Valley; but I will segregate the figures as best I can if the Senator desires them.

Mr. King. Mr. President, the hearings disclose that the volume in the Colorado River often is less than 1,200 second-feet, and, as I read the record, I am inclined to believe that the quantity of water used in the Imperial Valley is less than that indicated by the Senator from California. The Senator knows that even if I had the power I would not deprive the people of Imperial Valley of a single drop of water to which they are entitled. The quantity of water which they

have used from year to year they are entitled to have in the future. If they have actually applied to beneficial use 2,000,000 acre-feet, then they should in the future have the same amount.

As I have indicated, in view of the claims of the Senator from California that his State should have 4,600,000 acre-feet and in addition 500,000 acre-feet of a claimed unappropriated 1,000,000 acre-feet, and in view of the fact that the necessity for the 4,600,000 acre-feet partly rests upon the assumption that the Imperial Valley has used 2,000,000 acre-feet, then it is important to determine just what amount the Imperial Valley has used.

If but 300,000 acres have been cultivated annually and twelve or fifteen hundred thousand acre-feet are all that have been actually applied and all that are actually necessary to cultivate the lands which annually have been irrigated, then it would seem that there is sufficient reason for the contention of Arizona that California should not receive the 4,600,000 acre-feet as claimed.

Mr. Johnson. I do not know whether the Senator is speaking from the legal standpoint now or from an equitable standpoint that ultimately he would like to see adopted. From the legal standpoint they are entitled under their filings to water for the purpose of irrigation that they put to beneficial use in the territory covered by the particular filing. There is no question on that score.

Mr. King. I am not certain that I understand the Senator, but

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if I interpret his position correctly there would be some question. To illustrate my meaning, if the people of Imperial Valley have made filings for 5,000,000 acre-feet of water and have used only 1,000,000 acre-feet annually, that would be the measure of their vested right for which Congress should legally and equitably provide.

Mr. Johnson. No; as I understand, the filings are made for the use of water for a particular designated territory, and then the water is appropriated for beneficial use for that particular designated territory.

Mr. King. Mr. President, if pursuant to the filing for a particular designated territory, water is used upon that territory, and a right acquired, then there would be no disagreement between my friend and myself. If, however, there is a filing by the Imperial Valley corporations or by individuals or corporations in Arizona or California which is not followed by actual physical appropriation upon the lands in question, that would not be the basis of a vested right so far as we desire to provide for vested rights in the bill which is under consideration.

Mr. Johnson. No, Mr. President—and I hope the Senator from New Mexico will pardon me, for this will be my last interruption upon that subject, and only in response to my friend from Utah do I trespass upon the time of the Senator from New Mexico—when an appropriation is made for a particular territory, if the water is put to beneficial use and then reasonable diligence is exercised in utilizing additional water in that territory for additional land, the right is a perfected right under the water law of the West."

The problem of the Gila River was discussed by Senators Hayden and Phipps at 70 Cong. Rec. 335 and 336:

"Mr. Hayden. Under the circumstances I should like to inquire of the Senator from Colorado how he arrives at the figure 4,600,000 acre-feet of water instead of 4,200,000 acre-feet as proposed in my amendment?

Mr. Phipps. It was just about as difficult for me to arrive at 4,600,000 acre-feet as it would have been to arrive at 4,200,000 acre-feet. The arguments pro and con have been debated in the committee for quite a period of time. The contentions made by the Senators from Arizona have not been conclusive to my

mind. For instance, I will refer to the fact that Arizona desires to eliminate entirely all waters arising in the water-shed and flowing out of the Gila River.

Mr. Hayden. There is nothing of that kind in the Senator's amendment.

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Mr. Phipps. There is nothing of that kind in the Senator's amendment, but that has been one of the arguments advanced by California as being an offset to the amount to which Arizona would try to limit California.

Mr. Hayden. If the Senator thought there was force in that argument, I should think that he would have included in his amendment a provision eliminating the waters of the Gila River and its tributaries, as my amendment does.

Mr. Phipps. I do not consider it necessary because the bill itself, not only the present substitute measure but every other bill on the subject, ties this question up with the Colorado River compact.

Mr. Hayden. My amendment does that.

Mr. Phipps. Yes; that is true, but under estimates of engineers—one I happen to recall being made, I think, by Mr. La Rue—notwithstanding all of the purposes to which water of the Gila may be put by the State of Arizona, at least 1,000,000 acre-feet will return to the main stream. Yet Arizona contends that that water is not available to California; whereas to-day and for years past at least some of the waters from the Gila River have come into the canal which is now supplying the Imperial Valley.

It is not a definite fixed fact that with the enactment of this proposed legislation the all-American canal is going to be built within the period of seven years; as a matter of fact, it may not be built at all; we do not know as to that. But I do not think that the water from the Gila River, one of the main tributaries

of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.

Mr. Hayden. I will state to the Senator that the primary reason why the Colorado River compact was not approved by the State of Arizona was that the Gila River and its tributaries were included in the Colorado River Basin. The people of Arizona felt—and justly so—that they had appropriated and put to beneficial use all of the waters of that stream, and that by remaining out of the compact under no circumstances could the waters of that stream be burdened with furnishing any water to Old Mexico, while by entering the compact they would assume a liability that does not at the present moment exist. Such being the case, since the Gila River is the very lifeblood of our State and the great majority of the people of Arizona live within its drainage, they felt that they were asked to do more than they should be required to do in approving that Interstate Agreement.

Mr. Pittman. Mr. President——

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The Presiding Officer. Does the Senator from Arizona yield to the Senator from Nevada?

Mr. Hayden. I do.

Mr. Pittman. I think it is true, as stated by the Senator from Colorado, that Mr. La Rue has estimated that even after all of the water of the Gila that may be put to beneficial use by every means, even including pumping, is taken out, the return flow will still supply 1,000,000 acre-feet at the mouth of that river where it flows into the Colorado.

Mr. Hayden. No; the Senator from Nevada is mistaken. If the Senator will examine Mr. La Rue's report, he will find this to be the fact: That if three or more million acre-feet of water were diverted out of the main stream of the Colorado River and conveyed

into the lower Gila Valley, and there used for irrigation, after a water table was established in irrigating some 800,000 acres of land, the return flow from that land would provide a very substantial amount of water for Mexico, because it could be used at no other place. Originally, however, that water must be diverted from the main Colorado River, diverted out of the Colorado River for irrigation of lands in the Gila Valley, and would represent but little, if any, water from the watershed of the Gila River in Arizona.

Mr. Pittman. Does the Senator know what he figured the present return flow is to the Colorado from the Gila?

Mr. Hayden. The figures that Mr. La Rue used must have been derived from the record of stream measurements made by the United States Geological Survey. Over a long period of years the Geological Survey records will show an average run-off into the Colorado River of somewhere in the vicinity of a million acre-feet. That record goes back over a long period of years. The record will show a continual diminution of the run-off, first, because of the construction of the Roosevelt Dam; second, other uses for irrigation in the drainage area of the Gila; and, more recently, the construction of the Coolidge Dam. So that as reservoirs are constructed on the Gila and its tributaries, the quantity of water that will run out of that stream into the Colorado River will be reduced. The only way in which the water discharged from the mouth of the Gila River can be increased is by diverting water from the Colorado as proposed in the plan of irrigation which the State of Arizona has recommended, using that water to irrigate lands in the lower Gila Valley.

* * * * * *

Mr. Hayden. Nothing could prevent the return and drainage water from passing into Mexico.

But there is another side of the story. What I have stated is true of every acre irrigated in Colorado, Wyoming, New Mexico, Utah, Nevada, or Arizona, because in each case when the water is applied to the land some part of it can return to the stream, and ultimately go down to Mexico. In the Imperial Valley, however, there is no chance there for any return flow. There you are at the bottom of the bowl, with the result that from a broad national point of view it is uneconomic to irrigate lands in the Imperial Valley.

An acre-foot of water used in Colorado will probably return 50 per cent to the stream. An acre-foot of water used in Arizona will return at least 25 per cent to the stream for additional use; but an acre-foot of water diverted for use in the Imperial Valley is gone forever. There is no place where any part of it can be used again. Therefore, when the Californians appear before the Congress of the United States they set up not the highest use of water, not the most economic advantage that could be taken of a national asset. That is not the basis of their claim. The basis of their demand is that of necessity, that they must have so much water. The senior Senator from California (Mr. Johnson) himself in his remarks the other day, stated that the Imperial irrigation district claimed the right to waste 900,000 acre-feet of water into the Salton sink. If that water were used in the upper basin, if it were used in Arizona, it would irrigate more than 200,000 acres of land. Its use in the Imperial Valley, where there is no land below that the water can be again applied to beneficial use, means a loss to the Nation of farms and homes for thousands of American citizens.

Let me make it perfectly clear to the Senator from Nevada that if that is all the objection any one has to the amendment I have offered—that it lays a claim to return waters of the Gila River passing out of the mouth of that stream into old Mexico—we can very

readily change the amendment to cure that fault without difficulty.

But I return to the question that I addressed to the Senator from Colorado (Mr. Phipps). He states that the State of California shall be allowed 4,600,000 acre-feet of water. The only basis there is for fixing that figure is that the State of California has demanded that much water. The State of California has said that her necessities are such that she must have that much water to irrigate lands within the State and to furnish water for domestic use in the State of California.

Mr. Shortridge. Mr. President, may I ask the Senator a question?

The Presiding Officer. Does the Senator from Arizona yield to the Senator from California?

Mr. Hayden. I yield.

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Mr. Shortridge. Suppose it is agreed that California shall have that quantity of water. In view of the physical facts, will not Arizona have ample for all her purposes and uses? Will there not be plenty left for her?

Mr. Hayden. I am sorry that there will not. That the total quantity of water is so limited is the basis of the controversy between Arizona and California.

Mr. Shortridge. Including, of course, all your tributary waters, which you claim to own, I take it, in fee simple, absolutely?

Mr. Hayden. The State of Arizona claims the waters of her tributaries to no more or no less extent than any other State would claim the tributaries of the Colorado River within its boundaries. If the water has been placed to beneficial use, then a right has been acquired to use it. If it has not been placed to beneficial use, of course the water will pass into the main stream of the Colorado River and become part of the body of water which is divisible.

Mr. Shortridge. Arizona does not claim title to the water after it has passed into the stream on its way to the gulf?

Mr. Hayden. Not at all."

At 70 Cong. Rec. 339 Senator Phipps modified his proposed amendment in two respects:

1. He suggested that California's limitation should be irrevocable and unconditional.

2. He suggested a change from the one year period for 6-state ratification of the compact to six months.

The debate on this phase was:

"Mr. Bratton. Mr. President, a parliamentary inquiry.

The Presiding Officer. The Senator will state it.

Mr. Bratton. Is the amendment offered by the senior Senator from Colorado (Mr. Phipps) subject to amendment?

The Presiding Officer. It is not at this stage.

Mr. Bratton. That is the inquiry I wanted to propound. In view of that, if the Senator from Arizona will permit me——

Mr. Hayden. Certainly.

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Mr. Bratton. I suggest to the Senator that on page 2, line 18, following the word 'agree,' there should be inserted the words 'irrevocably and unconditionally.'

Mr. Phipps. Will the Senator give me a reference to the substitute bill, the Johnson bill, now before the Senate?

Mr. Bratton. I refer to the amendment offered by the Senator himself as a substitute.

Mr. Johnson. Will the Senator state again the line and page?

Mr. Bratton. It is the amendment of the senior Senator from Colorado, page 2, line 18. Following the word 'agree' insert the words 'irrevocably and unconditionally.'

Mr. Phipps. Mr. President, it had not occurred to me that should be necessary. An agreement on the part of a State by its legislature may be looked upon as binding upon the State as a moral obligation. However, I do not see that any harm would be done by making the modification the Senator suggests; therefore I will ask permission——

The Presiding Officer. Does the Senator from Colorado withdraw his amendment?

Mr. Phipps. No. I was about to ask permission to perfect my amendment by adding the words which have been suggested by the Senator from New Mexico.

The Presiding Officer. The Senator from Colorado modifies his amendment by adding the words suggested by the Senator from New Mexico.

Mr. Phipps. I desire to perfect my amendment by adding after the word 'agree,' in line 18, on page 2 of my amendment, the words 'irrevocably and unconditionally.' Then the amendment would stand in that form.

Mr. President, at this point I want to make the request that I be further permitted to make another change in the pending amendment and that is to make the term for agreement under the 7-State compact, the time during which the 7-State compact may be entered into before a 6-State compact shall become effective, six months instead of one year. It seems to me that one year is perhaps longer than necessary in which all of the seven States might, if they are going to at any time, agree to a 7-State compact.

The Presiding Officer. The Chair will state that the Senator has a right at any time before his amendment is acted upon to modify it as he desires.

Mr. Phipps. I was aware of that, but I desired that those who are deeply interested in this amendment should know my reasons and the modus, and then I desire to perfect my amendment by changing 'one year' to 'six months.'"

On December 11, 1928, Senator Hayden, for parliamentary reasons, withdrew his proposed amendment. As a result, Senator Phipps' proposed amendment to the Hayden amendment to Sec. 4(a) lost its status and was again proposed by Senator Phipps without change in language (including the proviso added to Sec. 5) (70 Cong. Rec. 382):

"Mr. Hayden. Mr. President, I should like to have the attention of the Senate, that I may discuss the parliamentary situation as it exists and what I may do, if possible, to remedy it, in order that the amendment offered by the Senator from Colorado (Mr. Phipps) may be perfected.

As I understand the situation, the amendment offered by the Senator from Colorado (Mr. Phipps) is an amendment in the second degree, an amendment to the amendment which I have offered, and therefore not subject to amendment. The Senator's amendment contains three substantive propositions, upon which there is a difference of opinion between the States of Arizona and California, and we must vote upon all of them as one if his amendment is not subject to amendment. But if the Senator's amendment could be made subject to amendment the Senate could vote upon the various propositions separately. For example, the Senator has taken from another part of the bill a provision that the State of California shall have 4,600,000 acre-feet of water on the Colorado River. Arizona agrees that the State of California shall have 4,200,000 acre-feet of water.

I desire it arranged so that the Senate may vote upon the question of whether it shall be one figure or the other.

I should like to inquire of the President of the Senate, whether, if I should withdraw the amendment which I have offered, would then the amendment offered by the Senator from Colorado be an amendment in the second degree and subject to amendment?

The Vice President. Will the Senator state his question again?

Mr. Hayden. If I should withdraw the amendment which I have offered, to which the amendment of the Senator from Colorado is a substitute, will his amendment then be an amendment in the first degree and subject to amendment?

The Vice President. The amendment of the Senator from Colorado would have to go along with the amendment of the Senator from Arizona if the Senator from Arizona withdraws his amendment.

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Mr. Hayden. Would it not then be possible for the Senator from Colorado to immediately reoffer his amendment?

The Vice President. The Senator from Colorado could do that.

Mr. Hayden. I want to state to the Senate that what I am trying to accomplish is to get a vote on the one particular question of whether the quantity of water which the State of California may divert from the Colorado River should be 4,200,000 acre-feet or 4,600,000 acre-feet. I can state in 15 or 20 minutes all the reasons why Arizona favors the lesser figure, and then the Senate may have a vote upon that question.

Mr. Phipps. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. Phipps. I desire to call attention to the fact that 4,600,000 acre-feet was the figure adopted by the

Senate committee and was written in the substitute bill offered by the Senator from California (Mr. Johnson). Therefore it seems to me that the point comes right down to the question of 4,600,000 acre-feet as recommended by the Senate committee and 4,200,000 acre-feet as written in the amendment of the Senator from Arizona.

Mr. Hayden. And upon that particular issue and upon nothing else I desire to have a vote of the Senate at this time.

Mr. Phipps. The other item that is in the amendment to which the Senator calls attention, as I understand, is the provision regarding the Federal Power Commission. That is the only other matter, is it not?

Mr. Hayden. My amendment as originally offered provides for a 7-State ratification of the Colorado River compact. The Senator from Colorado in his amendment provides for a 6-State ratification. That is another question upon which I should like to have the Senate take a vote. If the Senate will bear with me for a moment, I desire to say that it is only fair to the State of Arizona that the several substantive propositions which are contained in the amendment of the Senator from Colorado and in my amendment be voted upon, each upon its own merits by the Senate, and not grouped together in one particular amendment. If I am privileged to do so, Mr. President, I withdraw, without prejudice, the amendment I have offered.

The Vice President. The Senator has that right. The amendment of the Senator from Arizona to the so-called Johnson amendment is withdrawn.

Mr. Hayden. Now, if the Senator from Colorado (Mr. Phipps) will again offer his amendment just as it is, we can proceed to debate it, to amend it, and to vote upon it.

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Mr. Phipps. Mr. President, I understand the Senator from Arizona has withdrawn his amendment.

I desire again to offer my amendment as it is now before the Senate.

The Vice President. The question is on agreeing to the amendment offered by the Senator from Colorado (Mr. Phipps).

Mr. Hayden. I offer the following amendment to the amendment offered by the Senator from Colorado.

Mr. Smoot. Let the amendments be now read.

The Vice President. The clerk will state the amendment of the Senator from Colorado and the amendment of the Senator from Arizona to the substitute amendment.

The Chief Clerk. On page 4 it is proposed to strike out all of lines 22 to 25, inclusive, and on page 5 to strike out lines 1 to 14, inclusive, and to insert in lieu thereof the following:

Sec. 4(a). This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the work of structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 12 hereof, and the President, by public proclamation, shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said

compact without conditions save that of such 6-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,600,000 acre-feet of the waters apportioned to the lower basin States by the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.'

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On page 6, strike out line 25, and on page 7, lines 1 to 8, inclusive, and insert in lieu thereof the following: 'permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall.'

At 70 Cong. Rec. 383 Senator Hayden proposed an amendment to the Phipps amendment to Sec. 4(a) which would reduce the limitation on California from 4,600,000 to 4,200,000 acre feet per annum. This was defeated on a roll call vote (70 Cong. Rec. 384).

Senator Bratton then proposed a substitute to the Phipps amendment which would change the 4,600,000 to 4,400,000 acre-feet per annum for California (70 Cong. Rec. 385) and in explanation, he commented (70 Cong. Rec. 385):

"Mr. President, it is perfectly obvious to all of us that we have an immense project here, respecting which

the two States, California and Arizona, can not agree. The dispute has narrowed itself primarily to 400,000 acre-feet of water, California saying that 4,600,000 acre-feet is her irreducible minimum and Arizona insisting that California shall be limited to 4,200,000 acre-feet.

If this legislation shall be effectuated, the dam constructed, and the river controlled, and the benefits designed to be accomplished by the measure given full fruition, these States must ratify the compact. In my judgment that will never be accomplished if we give to one all that she asks and deny to the other everything she seeks.

It seems to me, therefore, Mr. President, that in justice to the two States, they having been unable to agree, we should tender our offices by dividing the difference and requiring California to limit herself in her act of ratification, irrevocably and unconditionally, to a maximum consumptive use of 4,400,000 acre-feet. That divides the difference and is the amount fixed in the amendment I have proposed. It differs from the proposal of the Senator from Colorado by reducing California's claim 200,000 acre-feet. It differs from the amendment of the Senator from Arizona by increasing California's consumptive use by 200,000 acre-feet.

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I believe this is an equitable solution of the problem. It may not be entirely satisfactory to either State, but in my judgment it is the best compromise that is available at this time.

Mr. Ashurst. Mr. President, for years, in some portions of the press and on the floor of the Senate, Arizona has been accused of being unwilling to extend the hand of amity, compromise, and friendship on this bill. The accusation is false. Arizona scorns all bribes and wears no chains.

I am going to vote for the amendment just offered by the Senator from New Mexico, and by so doing

Arizona takes another step looking toward a compromise of the differences surrounding this legislation. In making this advance looking toward some composition of our differences, and in hope of reaching some *modus vivendi,* I trust that Arizona shall no longer be accused of stubbornness.

Mr. Johnson. Mr. President, the offer that has been made by the Senator from New Mexico (Mr. Bratton) is, I take it, an offer by way of compromise. The Senator from New Mexico represents one of the States of the upper Colorado River Basin. He, of course, is intensely interested in what shall be done with the waters of the Colorado, just as the States of the lower basin are equally interested in what shall be done with the waters of the Colorado.

It is a fact, sir, that in the State of California there are rights perfected to-day and those which may be perfected in the near future, rights indeed that under the law no human agency can take from the people who reside in the State of California, that far exceed the amount of water that is fixed as the maximum in the amendments that California ever shall use. Were I here in disinterested position, Mr. President, were the dire necessity of Imperial Valley not so clearly before me, sir, if I did not understand as few men upon this floor understand the absolute necessity of legislation of the character that has here been proposed, never for one instant would I assent to an amendment such as has been presented by the Senator from Colorado or that which has now been presented as an amendment by the Senator from New Mexico.

I venture the assertion, and I call upon men whose vision is greater perhaps than a mere limit[illegible] territory that they may represent, that never in the history of legislation has there been written into a law such a drastic provision as that which is suggested by the Senator from Colorado and that which is in part suggested by the Senator from New Mexico.

Do Senators realize what this provision is? In order that its citizens may be protected from flood, in order that its citizens may have what God gives even to the birds of the air and the beasts of the field, which is potable drinking water, it compels the State of California, before it shall consider even legislation of this sort, by act of its legislature 'irrevocably and unconditionally'—and I read the language of the amendment itself—to agree with the United States and for the benefit of

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the other States of the Colorado River Basin——

> as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,600,000 acre-feet.

More than that and within a brief period by perfected rights, that the law can not touch in this particular territory that is thus assured, can be obtained. Talk to me of taking water from the State of California? Not a bit of it! Not a bit of it! All the expert testimony—and I have put in the RECORD that of the distinguished engineer of the State of Nevada—is that if we give to the State of Arizona the water that the State of Arizona now asks, she can not by any possible process of irrigation use that water to the full or utilize all of it. All of the testimony that has been adduced reaches that conclusion, save that, of course, of some of the gentlemen connected with the State of Arizona.

But that is neither here nor there. I want Senators to understand what the amendment is. It is the most drastic amendment that was ever written into a law

against the people of a State, the most drastic thing that was ever asked of them. I would stand here and never tolerate it if I did not know that 60,000 people are in jeopardy in the Imperial Valley who demand and who ask and who beg and who pray that they may have the consideration of the Congress.

I say to the gentlemen from Arizona, 'You say that California shall have but 4,200,000 acre-feet.' We say, and the testimony of Mr. Francis Wilson is the best upon that subject, that the irreducible minimum of the State of California is 4,600,000 feet. You say to us, 'You must bind your people for all time in the future never to go beyond it by this amendment.' The amendment does not divide the water between Arizona and California. It fixes a maximum amount beyond which California can not go. I say to the gentlemen from Arizona, though I think it is a wicked amendment, though I think it is an amendment that harnesses the State of California and its people as they never should be harnessed in the days to come, though I believe it to be an injustice against those who reside in California and in its southern part to-day and those who may reside there in the future—I say to you that if 200,000 acre-feet of water will settle this controversy with them, whatever the wrong, whatever the injustice, whatever may be the yoke that is put upon our people, I will take that as a compromise and a settlement of the differences that exist.

But unless it be by compromise, this injustice ought not to be put upon us and the compromise should be that the amendment as written, with the permanent amount of water that the Senator from New Mexico (Mr. Bratton) offers, shall be adopted, and then that the bill shall be passed without further delay and without any filibuster

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at all. If we can compromise, let it be done upon that basis, but do not require us to do what is unnecessary

and what ought not to be crowded down our throats unless it be actually by way of compromise.

Mr. Pittman. Mr. President, I want to say that the amendment of the Senator from Colorado (Mr. Phipps) now offered is substantially recommended by the committee. The bill as originally introduced by the Senator from California (Mr. Johnson) had no reference in it to water at all, but it became evident to the committee that there had to be some reference with regard to water because not only were the States of California and Arizona interested in this larger supply of water but the four upper States were interested as well. This amendment was offered in committee by the Senator from Wyoming (Mr. Kendrick) for the purpose of protecting the water rights of the four upper States. In other words, there are only 15,000,000 acre-feet in the river. Seven million five hundred thousand are forever to be retained in the upper States, to be put in use some time in the future.

Now, unless there was an agreement as to exactly how much water should go to the lower States out of the 7,500,000 acre-feet that went down to them, what might be the result? If Arizona stays out of the agreement, she would have her legal right to appropriate as much water as she could put to beneficial use. On the other hand, California would only be restricted by the 7,500,000 acre-feet that went down, with the result that there would be nothing in the compact to prevent California from using the entire 7,500,000 acre-feet and there would be nothing in the compact to prevent Arizona from using the 7,500,000 acre-feet if she never went into the compact.

So the upper States said: 'We have got to be assured that there is not used in the lower basin more than the 7,500,000 acre-feet because, if there is more used, then when we get ready to use it in the future it will not exist under the law of appropriation that applies in that section of the country.' Consequently,

in view of the fact that Arizona might never go into the compact, might never be bound by the compact, might be perfectly free to exercise her equal right and put to use as much as she could put to beneficial use, it was said in the committee, 'If Arizona does not come in and if it is limited to six States only, then we must be assured that California will not take the full 7,500,000 acre-feet and then Arizona take some more.' So the Senator from Wyoming (Mr. Kendrick) offered an amendment in committee, to which the committee agreed, and that amendment provided that California should never consumptively use of the Colorado River over 4,600,000 acre-feet.

The Phipps amendment does not do anything else except that it states how California shall ratify. The Congress of the United States could not impose it upon California unless California assented to it, because California already has sovereign rights over the water, and the law recognizes her right to use as much

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as she can put to beneficial use. Consequently the Senator from Colorado (Mr. Phipps) has simply taken the amendment which was recommended by the committee and put it in legal language and provided a legal method for California to ratify it. I do not think it is any harder on California than it was before.

Let me now call attention to the fact that the committee adopted the Kendrick amendment. They adopted the amount that California demanded, which was 4,600,000 acre-feet. I voted for that amendment. Why? I voted for it because otherwise Arizona would not participate in the compact and would not participate in the division of water. In other words, it was apparent to me that California was so dissatisfied with it that we had to treat without Arizona. We treated without Arizona in the committee, and we put the amount in there that California demanded before the four governors at Denver.

I participated as a representative of Nevada for four weeks in the hearing at Denver, where the governors of the seven States met. Those governors decided that California was entitled to only 4,200,000 acre-feet of that water. They may have been right or wrong. The dispute has been going on for a long time. On the other hand, California contended that she had to have 4,600,000 acre-feet.

Now, we have this situation: We have the committee, which adopted the Kendrick amendment, standing for 4,600,000 acre-feet. We have the four governors of the upper States who arbitrated, standing for 4,200,000 acre-feet. We have a difference of just 400,000 acre-feet out of a total of 7,500,000. I think the proposition of splitting that in two is going to accomplish more good and get rid of more disputes than anything else that can possibly be done. I believe that if the two Senators from Arizona vote for 4,400,000 acre-feet, in accordance with the amendment of the Senator from New Mexico (Mr. Bratton), they will be able to go before their legislature and sustain that position and I believe if they do go before their legislature and sustain the proposition, that Arizona will ratify the 7-State agreement.

Mind you, this 6-State agreement is only an expedient. It is not what any of the seven States want. All of the seven States want a fair treaty between the seven States, and we have been striving to that end for several years. It looks to me as though we are on the eve of getting an agreement. I do not believe it is possible for the two Arizona Senators to pledge what the Arizona Legislature will do in this matter, but I believe that they have influence with it, and I believe when they go before the legislature and say 'We stated on the floor of the Senate that this was a fair compromise, and we were representing the sentiment of the people of the State,' the legislature will ratify it.

I think it would be a terrible mistake when everyone has reached the point of compromise as we have here. If California's allotment

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is reduced 200,000 acre-feet out of 7,500,000 and Arizona concedes 200,000 acre-feet to California for the purpose of compromise, we should vote for it, because if we do not bitterness is bound to exist between these States. If we do not, there have got to be a number of other provisions in the bill to satisfy the other States, because there is fear in the four upper States with regard to any kind of a ratification except by all the States. That fear does not exist in my mind; I think it is perfectly groundless. I think it is as groundless as is the fear of Mexico getting any more water than she is getting now. However, I plead with the Senators to allow us to make the first compromise that has ever been made in seven years with regard to this matter, and vote to split these 400,000 acre-feet and make the quantity that California will receive 4,400,000 acre-feet.

Mr. Johnson. Mr. President, I thought I made myself plain upon this matter, but I want to make it doubly so. If we are compromising on the question of water, I will submit to what I think is an injustice; if we are compromising our controversy, I am willing to accept it; but I want to know first whether we are settling the controversy and whether or not we are settling the matters of difference. The junior Senator from Arizona (Mr. Hayden) has been very active, and I ask him if that is the situation?

Mr. Hayden. Mr. President, I have been very active submitting various suggestions of compromise to those who spoke for the State of California. I have had no response to those offers. The only thing that I could do was what I have done this morning, to submit the issues separately to the judgment of the Senate, and that is what we are doing now. We are taking up the

question of the quantity of water that the State of California shall receive, and let the Senate vote on it. When we come to other issues we shall again ask the Senate to vote on those. That is all we can do."

The Bratton amendment to the Phipps amendment was put to a vote and approved (70 Cong. Rec. 387), thereby establishing the 4,400,000 acre-feet per annum limitation on California.

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Senator Hayden then stated that he proposed to offer an amendment differing in some respects from his original proposal (70 Cong. Rec. 387 *et seq.*):

"Mr. Hayden. Mr. President, as the senior Senator from California is well aware, there have been other issues in controversy between the States of California and Arizona with respect to the apportionment of water, one issue being whether or not the States of Arizona and California should share equally the burden of furnishing water to Mexico. Another was whether the Gila River, one of the principal tributaries of the Colorado River in Arizona, should be completely reserved for use in the State of Arizona.

In offering my original amendment I provided for both of those matters. I have had conferences with some gentlemen from California, and they have suggested some changes in that part of my proposal. I intend to submit it now, so that it may be printed for the information of the Senator from California and the entire Senate, in order that we may take it up for consideration later.

I now send the amendment to the desk and ask the clerk to read it for that purpose. I shall offer it later.

Mr. Johnson. Mr. President, has the amendment been printed.

Mr. Hayden. My original amendment was printed. I have made some changes in it.

Mr. Johnson. The original amendment that the Senator refers to is the one we passed upon, is it not?

Mr. Hayden. No, sir. The Senator will remember that I offered an amendment which was pending, which comprised——

Mr. Johnson. Why not have the amendment printed and lie on the table?

Mr. Hayden. I desire to have it read and printed and lie on the table.

Mr. Heflin. Let us have it read.

Mr. Johnson. Let us dispense with the reading of it for the moment and go on with the bill. Of course, the Senator has that right if he wishes.

Mr. Hayden. I prefer to have it read, so that the Senate may understand what it contains.

Mr. Johnson. All right.

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The Vice President. The amendment will be read for the information of the Senate.

The legislative clerk read the amendment, as follows:

Amendment by Mr. Hayden to the amendment offered by the Senator from Colorado (Mr. Phipps): On page 3, after line 7, insert a new paragraph, as follows:

'The said ratifying act shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada, and Arizona the foregoing limitations are accepted and approved as fixing the apportionment of water to California, then California shall and will therein agree (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive

beneficial consumptive use in perpetuity and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water which can not reasonably be applied to domestic and agricultural uses and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact.'

The Vice President. The amendment will be printed and lie on the table."

Before action was taken on the above proposal Senator Hayden offered (70 Cong. Rec. 388) an amendment which would strike the provision for six-state ratification of the Colorado River Compact as contained in

the Phipps version of Sec. 4(a).

The amendment offered by Senator Hayden was defeated (70 Cong. Rec. 394) and the authorization for a six-state compact remained.

On December 12, 1928 the Senate again considered the Phipps amendment to Sec. 4(a). Senator Phipps suggested two changes in his proposal, which changed the first paragraph of 4(a) to read as finally adopted. The suggestions were made as follows (70 Cong. Rec. 459):

> "Mr. Phipps. Referring to the amendment which is now before the Senate, in order to remove any possible misunderstanding regarding the 4,400,000 acre-feet of water, I desire to perfect the amendment by inserting, on page 3, line 4, after the word 'by' the words 'paragraph (a) of article 3 of,' so that it will show that that allocation of water refers directly to the seven and one-half million acre-feet of water that are mentioned in paragraph 3.
>
> Mr. Hayden. I will state that I have no objection to the amendment offered by the Senator from Colorado to his own amendment, because it makes it even more in conformity with the amendment that I now offer.
>
> The Presiding Officer. The Chair will state that the Senator from Colorado has the right to modify his amendment.
>
> Mr. King. Mr. President, will the Senator yield?
>
> The Presiding Officer. Does the Senator from Arizona yield to the Senator from Utah?
>
> Mr. Hayden. I yield.
>
> Mr. King. If I may have the attention of the Senator from California and the Senator from Colorado, I direct attention to line 5, page 3, of the amendment offered by the Senator from Colorado. Let me read back a few words:

'plus not more than one-half of any excess or surplus waters unapportioned by said compact.'

I was wondering if there might not be some uncertainty as to what surplus waters were therein referred to. I think it was the intention to refer to the surplus waters mentioned in paragraph (b) of article 3 of the compact, being the 1,000,000 acre-feet supposed to be unappropriated.

Mr. Johnson. No; that is not quite my understanding. It is by no means certain that there is any other, and it is by no

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means certain that there is the 1,000,000; but the language referred to any other waters.

Mr. King. Speaking for myself, I have no objection; but I was under the impression that the purpose was to link it with paragraph (b) so as to be sure that California was to receive one-half of the 1,000,000 acre-feet.

Mr. Johnson. Not necessarily. This gives one-half of the unapportioned water, and I think it is a better way to leave the matter.

Mr. King. If it is sufficiently certain to suit the Senators of the lower basin, I have no objection.

Mr. Johnson. I think it is."

Senator Hayden then formally offered his amendment which would add the second paragraph of 4(a), providing for a tri-state compact. In explanation, he said (70 Cong. Rec. 459 *et seq.*):

"Mr. Hayden. Mr. President, an examination of the amendment offered by the Senator from Colorado (Mr. Phipps) will disclose that it proposes that the State of California shall agree with the United States, for the benefit of the States of Arizona and Nevada, that the aggregate annual consumptive use of water

from the Colorado River by the State of California shall not exceed 4,400,000 acre-feet. Further, that the State of California may have one-half of any excess or surplus waters unapportioned by the Colorado River compact.

The first part of my amendment is a mere corollary to the amendment offered by the Senator from Colorado. It provides that the remainder of the seven and one-half million acre-feet there shall be apportioned to the State of Nevada 300,000 acre-feet, and to the State of Arizona 2,800,000 acre-feet, which, combined, with 4,400,000 acre-feet which the State of California will use, completely exhausts the seven and one-half million acre-feet apportioned in perpetuity to the lower basin.

The second proposal in my amendment is that the State of Arizona may annually use one-half of the surplus or unapportioned water, which is likewise a corollary to the proposal made by the Senator from Colorado, which likewise disposes of the total quantity of surplus or unapportioned waters in the lower basin.

Mr. King. And that is provided in the compact, is it not?

Mr. Hayden. Yes; and the compact has been so interpreted. If the Senator from Utah is interested in an interpretation of the meaning of surplus unapportioned water, I might well

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read to him an answer to a question I addressed to Mr. Hoover shortly after the compact was written. I asked Mr. Hoover:

> What is the estimated quantity of water which constitutes the undivided surplus of the annual flow of the Colorado River and may the compact be construed to mean that no part of this surplus can be beneficially used or consumed in either the upper or the lower basins until 1963, so that the entire quantity above the apportionment must flow into Mexico,

where it may be used for irrigation and thus create a prior right to water which the United States would be bound to recognize at the end of the 40-year period?

Mr. Hoover's answer to that question was:

The unapportioned surplus is estimated at from 4,000,000 to 6,000,000 acre-feet, but may be taken as approximately 5,000,000 acre-feet.

He referred to the unapportioned surplus in both basins.

The right to the use of unapportioned or surplus water is not covered by the compact. The question can not arise until all the waters apportioned are appropriated and used, and this will not be until after the lapse of a long period of time, perhaps 75 years. Assuming that each basin should reach the limit of its allotment and there should still be water unapportioned, in my opinion, such water could be taken and used in either basin under the ordinary rules governing appropriations, and such appropriations would doubtless receive formal recognition by the commission at the end of the 40-year period.

There is certainly nothing in the compact which requires any water whatever to run unused to Mexico, nor which recognizes any Mexican rights, the only reference to that situation being the expression of the realization that some such right may perhaps in the future be established by treaty. As I understand the matter, the United States is not 'bound to recognize' any such rights of a foreign country unless based upon treaty stipulations.

So Mr. Hoover, who was the chairman of the commission which made the compact, expresses it as his opinion that surplus and unappropriated waters above the allocation in the compact are unaffected by the compact, and are subject to appropriation in any State. I think that is not only a very important interpretation

of the compact, but it is a sane, logical, and legal conclusion.

Mr. King. Mr. President, will the Senator yield?

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Mr. Hayden. I yield.

Mr. King. Does the Senator interpret the compact to mean that if there is any unappropriated water in addition to the 1,000,000 acre-feet referred to in the compact, that that is subject to the same disposition or division as the 1,000,000 acre-feet?

Mr. Hayden. There is no question about it, in the light of the statement I have just read, which was written to me in answer to a specific question which I propounded to Mr. Hoover.

Now, I direct the attention of the Senate—and Senators will find on their desks a copy of my amendment—to the fifth and sixth items of it. The fifth item, beginning in line 22, reads:

> That the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses.

That is a mere repetition of language which appears in the Colorado River compact. In section (e), Article III, of the Colorado River compact are found these words:

> The States of the upper division shall not withhold water, and the States of the lower division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

I will state frankly that I placed that provision in my amendment after conferences with gentlemen representing the State of California, who thought it proper that there should be the same pledge as between the

three States in the lower basin as is contained in the original compact with respect to the upper and the lower basins. I could see no harm in it; on the contrary, it might, in time, be a valuable provision for the benefit of some State which might otherwise be injured. If a provision of that character is found in the original compact, it would therefore be well to repeat it in any supplemental agreement between Arizona and Nevada.

The sixth provision in my amendment is:

> That all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact.

That provision conforms to a similar provision in the Phipps amendment, which states that such uses, that is, by the State of California, shall always be subject to the terms of said compact. So that as to five of the substantive propositions

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that are contained in my amendment, as numbered in it, there can be no controversy. I have mentioned these matters first so that we may get down to the gist of my amendment.

Proposal No. 3 in my amendment is——

> That the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State.

The fourth provision is——

> that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are

surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River one-half of any deficiency.

Let me read the portion of the compact to which reference is made in my amendment. It is paragraph (c) of Article III:

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b).

That is, over and above the seven and a half million acre-feet apportioned in perpetuity to each basin, a total of 15,000,000 acre-feet, and over and above 1,000,000 acre-feet additional which the lower basin is given the right to use. From that surplus of unapportioned water Mexico must first be satisfied.

Continuing the reading of paragraph (c) of Article III of the compact:

> And if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lees Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

In paragraph (d) the upper basin is required to deliver

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75,000,000 acre-feet during the course of any 10-year period, but, in addition to that, the upper basin assumes the duty of supplying one-half of any water that may

be demanded by Mexico under any treaty, in the event that the surplus waters are not sufficient to meet the Mexican demand.

My proposal is that as far as the lower basin is concerned the State of Nevada shall be exempt from furnishing any water to Mexico under any conditions. The State of Nevada has been so modest in its demands, asking for only 300,000 acre-feet of water, which quantity of water is so small that we have felt in Arizona that there should never be any question but that the State of Nevada should have all of it.

Mr. King. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. King. Does the Senator interpret the compact to mean that if there should be, for instance, 16,000,000 acre-feet of water in the river, and by any treaty negotiated between the two Governments Mexico should be allocated a million acre-feet, that that million acre-feet should be taken from the million surplus; that is, the 16,000,000 and not any part of the 15,000,000 be called upon to meet that payment?

Mr. Hayden. The compact, from the literal interpretation of its words, means that the upper basin and the lower basin shall meet that deficiency equally, regardless of how much water is apportioned in each basin.

In further answer to the question of the Senator from Utah, the compact states that any water must first be supplied to Mexico out of the surplus or unapportioned water; but if it is necessary to supply Mexico with any water out of that water which is apportioned in each basin—that is to say, the 7,500,000 acre-feet apportioned to the upper basin and the 8,500,000 acre-feet apportioned to the lower basin—then the upper basin is burdened with furnishing one-half of the water, and these words, I think, should convince the Senator:

> And if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall

be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lees Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

Mr. King. I am not quite sure yet, in view of the statement of the Senator. My understanding is that if there should be, as an illustration, 18,000,000 acre-feet in the river, and the upper States should subtract from the stream 7,500,000 acre-feet and there should flow down the difference between 7,500,000 acre-feet

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and 18,000.000 acre-feet, and by treaties Mexico should be allotted 3,000,000 acre-feet, 500,000 acre-feet more than that surplus, then the upper States would be called upon to furnish one-half of that 500,000 acre-feet and the lower States one-half of that 500,000 acre-feet. But suppose Mexico should be allocated only 2,000,000 acre-feet, and that quantity of water was there plus the 7,500,000 acre-feet allocated to the lower basin, then that unappropriated 2,000,000 acre-feet—unappropriated because it is above the 7,500,000 acre-feet—would be taken from the lower basin States and there would be left 7,500,000 acre-feet and the upper States would not be compelled to contribute anything.

Mr. Hayden. I do not so interpret the Colorado River compact. The compact is perfectly clear to me not only because of the specific reference to the 7,500,000 acre-feet apportioned to each basin but also to the additional 1,000,000 acre-feet:

> Such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b).

That is, over and above the 7,500,000 acre-feet plus the 1,000,000 acre-feet, and then in addition thereto, if

it is necessary to furnish water to Mexico, each basin shall share the burden equally.

All that my amendment seeks to accomplish is to follow the same rule that was laid down as between basins, which is an equality of obligation to furnish water to Mexico under any treaty, of which each basin must furnish an equal amount. My amendment seeks to establish the same principle with respect to that part of the water which must be furnished by the lower basin to Mexico by requiring California and Arizona to share that burden equally.

Mr. McKellar. How would they do it under the bill as now proposed?

Mr. Hayden. The bill does not cover the subject at all.

Mr. McKellar. This, then, is an addition to the bill.

Mr. Hayden. Yes; and I want to make that certain. The effect of my amendment would be, if carried out by the tri-State agreement that is contemplated under it, to use round figures, in the event that a million acre-feet of water must be furnished to Mexico under some treaty, 500,000 acre-feet of that amount would be furnished by the upper basin, 250,000 by Arizona and 250,000 by California. Arizona and California would each assume one-quarter of the burden devolving upon the lower basin. I would relieve Nevada from furnishing any water at all, because of the very small amount of water allotted to that State under the tri-State agreement. It seems to me if it is fair to divide the burden between the basins equally, then likewise it is fair to divide the burden equally between Arizona and California.

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Mr. Shortridge. Mr. President——

The Presiding Officer (Mr. Fess in the chair). Does the Senator from Arizona yield to the Senator from California?

Mr. Hayden. Yield.

Mr. Shortridge. The Senator's position is that the States of Arizona and California shall contribute equal amounts quite regardless of whether one or the other has used or needs the water to be delivered to Mexico. Is not that the position of Arizona? So that if that contingency should arise, a treaty having been entered into and a demand having been made upon the United States for a certain quantity of water, California must contribute as much as Arizona contributes.

Mr. Hayden. No more and no less.

Mr. Shortridge. No more and no less, even though California has not the water to deliver, having devoted it to beneficial uses, and Arizona not having devoted its portion to such uses.

Mr. Hayden. In that event, if Arizona had not used her water, of course it would be surplus water and there could be no question about calling upon California for any water. It is only in the contingency that both States are using all of their water, having made valid appropriations of it by applying it to their lands. Then the question comes that there will be a shortage of water in order to supply Mexico under the treaty. Who is going to bear the shortage? It means that certain farm lands in both States will not receive as much water as they otherwise would. In that event Arizona says that California and Arizona should bear that burden equally.

Let me point out to the Senator the other side of the picture. The time when the demand would be made would be during a period of drought. The Senator is well aware that we have long cycles of dry years in the West. The record of a study of the flow of the Colorado River will show that for a period of years by reason of lack of rainfall there is a great reduction in the flow of that stream. For another period of years we may have floods that will greatly increase the average flow of the river. During periods of flood or rainy years Mexico would have all the water she would want, and everybody

else would, too. The pinch comes only during a period of drought. Then by reason of the decreased flow of the river there would not be delivered to Mexico all the water she was entitled to receive under the treaty.

Mr. Shortridge. Mr. President——

The Presiding Officer. Does the Senator from Arizona yield to the Senator from California?

Mr. Hayden. I yield.

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Mr. Shortridge. Taking it as of that condition of affairs and as of that time—Arizona is not then using her water, but California is using her water—does the Senator still think that California should contribute one-half of the waters demanded by Mexico?

Mr. Hayden. If Arizona were not using the water, it would not disappear. It would remain in the channel of the Colorado River and would go down to Mexico, and Mexico would be supplied without any demand upon California at all. If Arizona were not using the water, out of Arizona's share of that water Mexico would be fully supplied. It is only in the contingency that both States are using the full allotment of water provided in the bill, and in that event, if a demand comes from Mexico for water, what is the situation? A period of drought has arrived. Mexico has certain rights to water under a treaty. The water is taken out in the upper basin and in California and Arizona and Nevada, and diverted to such an extent that there does not cross the Mexican border line the quantity of water Mexico has a right to receive. Under the terms of the treaty, the Mexican Government would request of our Government that there be delivered at the boundary whatever shortage existed. Where should that water be obtained? Only in the main stream of the Colorado River.

Mr. Shortridge. May I ask the Senator a further question?

Mr. Hayden. Certainly.

Mr. Shortridge. Does the Senator construe the compact and the proposed amendment to make it necessary for either California or Arizona to discontinue the use of water which it may have put to beneficial use in order to meet the demands of Mexico?

Mr. Hayden. Certainly. A treaty would be the supreme law of the land.

Mr. Shortridge. Certainly.

Mr. Hayden. And if the treaty provided that a certain quantity of water should be delivered to Mexico, the compact contemplates that then and in that event, out of the waters appropriated and used in both States, if there were a shortage, the upper basin would be compelled to let down half of the quantity necessary to supply Mexico. Under my amendment California would furnish one-quarter and Arizona the other quarter until the total quantity was furnished to Mexico, and it would then of necessity deprive land of irrigation water.

Mr. Shortridge. Does not that excite some fear in the mind of the Senator as applied to his own State?

Mr. Hayden. That is exactly what it does; and it was fear which prevented the Legislature of the State of Arizona from ratifying

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the Colorado River compact when first presented to it. The Legislature of the State of Arizona viewed the matter in this light. It was said that by the inclusion of the Gila River and its tributaries in the Colorado River system and then placing upon that system in its entirety the burden of furnishing water to Mexico under any treaty, if Arizona ratifies and approves the compact, she takes on an obligation which may in time to come interfere with the proper irrigation of land now under existing irrigation projects in the Gila River or its tributaries. If anyone does not approve the

compact the only place the water can be obtained from Mexico is out of the main stream of the Colorado River, because, as I have said a number of times to the Senate, this demand would be made during a time of drought, during a time when the tributaries were diminished by reason of a long dry season; and anyone who is acquainted with the Gila River knows that in such a period it is absolutely dry."

Senator Hayden commented on the relationship of the Gila River to Mexico and California as follows (70 Cong. Rec. 464):

"Under the plan contemplated by the Swing-Johnson bill, once it is put into effect, neither the State of California, nor any other State for that matter, would ever obtain any water out of the Gila River. That would be ended. So we in Arizona say that if that is the case, what interest has the State of California in the Gila River? Her wants and needs will be completely supplied by the water impounded at Boulder Dam. The Gila River has never been anything but a menace to the State of California. Senators who are familiar with the facts will remember that the original break in the levee, which inundated a part of the Imperial Valley, was caused by a flood which came down the Gila River. The Gila River broke the levee and the Colorado River entered the break and kept it open. That was what happened. At all times the flash floods of the Gila, which vary tremendously in their volume, are a greater menace to the Imperial irrigation district than the floods of the Colorado River, so far as breaking the levee is concerned.

In addition to that, talk with any farmer in the Imperial Valley, and he will tell you that the muddy, silty flood waters of the Gila River—and that is the only kind they ever get out of that stream—are a positive detriment to their land and they will be most happy

when they can escape from the necessity of accepting any water from the Gila River.

Under the new scheme the Colorado River water will be desilted at Boulder Dam and will come down relieved of a great burden of silt which now fills the canals or is deposited upon the lands of the Imperial Valley farmers.

In fact, under the plan proposed in this bill the State of California, once the Boulder Dam is built and once the

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all-American canal is connected with the Laguna Dam, will have no further interest in the Gila River, and can have none. Whatever water can flow in that stream will be of use not to California but to Mexico and to Mexico alone.

Such being the case, the people living on the Gila River in the State of Arizona feel that they should not have their present rights burdened by any demand that may be made by Mexico. They are willing that the State of Arizona shall assume one-half of the burden of furnishing water to Mexico under any treaty that may be made, notwithstanding the fact that in the main stream, which is the only place where the water can be obtained, Arizona will be allocated but 2,800,000 acre-feet and California 4,400,000, a difference of 1,600,000 acre-feet in favor of California. Yet, notwithstanding the fact that Arizona has 1,600,000 acre-feet of water less than California in the main stream, Arizona will will equally assume the burden. We will pay that price in order that there may be no cloud upon the water rights of the existing irrigation projects on the Gila River."

Senator Johnson obtained the floor to state his views on the Hayden amendment (70 Cong. Rec. 466):

"However that may be, there are certain reasons it seems to me, why the amendment should not be adopted.

The vice of it is, first, in the exemption of the tributaries of the State of Arizona, particularly the one to which he has just adverted, the Gila River, and, secondly, in the endeavor to divide, in the fashion which he says is a perfectly plain and perfectly frank and perfectly open division, the burden that may come to the Colorado River in relation to Mexican lands. He is quite right in one thing. The desideratum that ought to be a desideratum of everybody connected with this bill, whether he represents a State or whether he represents some outside influence, should be entirely the ratification of the Colorado River compact, and anything that will enable us to reach the ratification of that compact that is within reason I am very glad indeed to undertake and very glad indeed to accept.

The argument to me has grown somewhat stale, in relation to every amendment that is presented, that if we would accept that particular amendment then we may at some time in the future accomplish the desideratum that is ours and ratify the Colorado River pact. I need but refer to the very frank statement of the Senator from Arizona (Mr. Ashurst), for which I thanked him yesterday, in that regard, where he said, and said without equivocation in the slightest degree:

> If the Senator from California (Mr. Johnson) beguiles himself into the belief that because of the adoption of this amendment, opposition will relax as to other features of this bill, he is sadly mistaken. The adoption

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> of this water division amendment will by no means remove the thorns and blades of injustice that would yet remain in the bill respecting power and other subjects, and we shall contend to the last, indeed we shall retire into the rocky passes of the Senate rules and there fight until we secure a bill which will, amongst other features, require a 7-state ratification of the so-called Santa Fe—or Colorado River—compact.

That was a statement frankly made by the senior Senator from Arizona yesterday. When upon every amendment it is insisted that if that particular amendment should be adopted we may reach a conclusion and a compromise, I confess, with the eloquence of the Senator from Arizona ringing in my ears, I receive such assurance with a wee bit of skepticism.

Let us see what the Colorado River compact relates to. I read first from the purposes of the Colorado River compact, Article I:

> The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system.

Now, what is the Colorado River system? The Colorado River system then, with meticulous care, is described in the compact in Article II:

> As used in the compact (a) the term 'Colorado River system' means that portion of the Colorado River and its tributaries within the United States of America.

Again, sir, we find in Article III the reference to the Mexican situation, and I read it because I have in my hand at the present time the compact itself. We find in paragraph (c) of Article III the following:

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right in the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantity specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lees Ferry water to supply one-half of the

deficiency so recognized in addition to that provided in paragraph (d).

We find, therefore, that the compact toward which we are all devoting our efforts in order to get everybody satisfied and to unite in agreeing upon it provides for a division of the

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water of the Colorado River basin, and we find, sir, that in this compact the Colorado River basin embraces not alone the main stream, but embraces the tributaries of the main stream as well.

Sir, the distinguished Senator from Arizona (Mr. Hayden) read remarks that were made in answer to queries of his in writing of Mr. Herbert Hoover, who is to be inaugurated soon as President of the United States. He laid great stress upon Mr. Hoover's ability. He said Mr. Hoover knew more about the Colorado River and its intricacies and all the technical aspects of it than probably any other one man, and read to his purposes, as was his right, certain questions that he had propounded in writing to Mr. Hoover and answers which Mr. Hoover had in writing made to him.

But, Mr. President, in reading the queries that thus the Senator put in writing to Mr. Hoover, and which he says were answered so elaborately, so well, so intelligently, and so accurately, the Senator omitted to read one of the very first of the queries that thus he propounded to President-elect Hoover. This is one of the queries that he then propounded to Mr. Hoover that Mr. Hoover in writing answered to him:

> Question 4. Why was the term 'Colorado River system' used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins respectively?

That is the question propounded in writing by the junior Senator from Arizona to Mr. Herbert Hoover,

who at that time was the president of the Colorado River Commission, and here is the reply that was made by Mr. Hoover to the distinguished Senator from Arizona:

This term is defined in Article II—

I have just read Article II to Senators—

> as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt.

What is the Senator asking by this amendment? He is asking, indeed, that we amend the Colorado River compact by the action

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of the Congress of the United States; and then, followed to its logical conclusion, what must occur? Every State must in like fashion take up the amendment of the Colorado River compact, possibly, and thereafter amend it in conformity with this particular amendment.

Mr. Hayden. Mr. President, if the Senator from California will be kind enough to yield, I am sure he does not want to overstate my position. I am not asking that the Colorado River compact be amended in any particular.

Mr. Johnson. I am stating the effect of the Senator's amendment.

Mr. Hayden. I am asking that this effect be secured: That the State of California, which has and will have

no interest in the Gila River, waive any claim to the waters of that stream.

Mr. Johnson. The Senator from Arizona is asking, in effect, sir, that the Colorado River compact be amended. I stand by that statement because it is entirely accurate. That would be the effect of the Senator's amendment if adopted, that the Colorado River compact shall be amended. No one here ought to wish that to be done, and when the definition is made by the compact itself as to what the Colorado River system means, we ought not to be required here to take as a condition precedent to legislation by the Congress of the United States another definition entirely. That in reality and in effect is what is sought by the amendment that is submitted by the Senator from Arizona.

There is, however, another thing in this amendment, too. It sounds well; how fair it is smilingly to say to us, 'Why, we will divide this water into two parts, and each of us will bear a like burden.' It is all well enough to say that the Gila River is this and the Gila River is that; that no water of the Gila River comes down under certain circumstances and too much water comes down under other circumstances; it is all well enough to say when the all-American canal ultimately shall be constructed that that all-American canal will be above where the Gila River runs into the Colorado River and that there will be no occasion for differences at all; all those things may be well enough as matters of speculation; but the fact is, sir, that there comes from the Gila River 3,500,000 acre-feet, all of which is claimed by the State of Arizona—every drop of it. When Arizona says that she has but 2,800,000 acre-feet of water, to that must be added the Gila River with its 3,500,000 acre-feet, and it will then be found that Arizona has in reality two-thirds of the water of the Colorado River itself. If we should exempt, as possibly we may should this amendment be adopted, the Gila River from any burden or any servi-

tude that might thereafter attach because of water to Mexico, we should then exempt a large portion of the water of the stream from bearing its part at all, and say the rest of the stream, owned in equal shares, shall bear the burden equally, so far as California is concerned and so far as Arizona is concerned.

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Mr. Hayden. Mr. President, will the Senator from California yield to me?

Mr. Johnson. I yield.

Mr. Hayden. Taking the statement that there are three and one-half million acre-feet of water in the Gila River in Arizona, if Arizona obtains 2,800,000 acre-feet, from the Colorado the combined sum amounts to 6,300,000 acre-feet. The State of California has allocated to it——

Mr. Johnson. California has allocated to it 4,400,000 acre-feet of water.

Mr. Hayden. It is the Senator's contention that when the time comes to supply water to Mexico the proportion borne by Arizona and California should be in that ratio?

Mr. Johnson. By no means; I am not asking that at all, because we hope by the storage in this dam to control Mexican water; and if the Senator from Arizona will follow the testimony of Mr. Hoover, which he has read to-day, he will find that that is one of the designs; but what I do not wish to do is to exempt the Gila River at this time and put the whole burden upon the two States subsequently in the proportion the Senator has indicated.

Mr. Hayden. The Senator is unwilling that California should divide the burden equally with the State of Arizona?

Mr. Johnson. Not a bit; but there would not be an equal division under the system the Senator proposes. It is a division, on the one hand, by which it is pro-

posed to exempt from the stream, first, 3,500,000 acre-feet—and sometimes the people of Arizona have said that there were 6,000,000 acre-feet in that stream, as the Senator is well aware, but taking the lower figure, 3,500,000 acre-feet—the Senator is seeking to deduct that first and then have a division made of the waters that are in the main stream itself.

There is not any necessity for any action in this regard at all. It is an uncertain thing to do to-day; it is a thing from which no man can tell what the consequences may be; and it ought not to be done. Particularly, it ought not to be done in view of the definitions that are found in the Colorado River compact, and which I have read here. Sufficient it is, for us to accomplish that purpose subsequently when the dam shall have been erected. Into this bill write, if you desire, any notice to Mexico that you wish—and I want no water to go down there in excess of that which any law permits Mexico to have to-day—do anything in regard to international comity that you desire, but do not write into this measure in this fashion an exemption which would destroy in one aspect, the definitions that are contained in the Colorado River compact and would put an additional

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burden on the waters that are to bear the burden of Mexico. That is unjust and unfair from our standpoint.

Mr. Hayden. Mr. President, if the Senator will yield to me, I want to find out what he thinks is just and fair.

Mr. Johnson. I think it is just to do nothing in relation to that portion of this amendment. It has no place in this bill at all. What are the reasons why the Senator wants this amendment?

Mr. Hayden. The reason I want this amendment is that I may say to the people of Arizona that the State

of California has agreed with them to furnish one-half of any water that may be demanded by Mexico.

Mr. Johnson. But the Senator does not say anything of the kind in the amendment. He says after exempting the tributaries in the State of Arizona that then the State of California agrees out of the main stream to bear one-half of the burden.

Mr. Hayden. Would the Senator be willing to have incorporated in this bill the simple proposition that California shall accept one-half of that burden?

Mr. Johnson. I do not want anything to interfere with the compact.

Mr. Hayden. There would be no interference with the compact. The compact provides for an equal division.

Mr. Johnson. No; I am speaking as to the exemption of the tributaries in Arizona. Let them alone; let the situation remain as it is. We will bargain with Arizona ultimately or agree with her ultimately, as the case may be, but this is neither the time nor the place to alter the compact that is now the desideratum of everybody connected with this enterprise.

Mr. Hayden. If the Senator will permit me to say so, I am not seeking in any manner to interfere with the compact. The only effect that the compact can have upon his State is that that State will be bound to furnish one-half of the water which Mexico may receive under any treaty. Beyond that the State of California has no interest in the matter."

Senator Pittman expressed his views on the Hayden amendment and offered two changes: (1) To strike the preamble requiring California to agree to a tri-state compact, and (2) To add a seventh provision dealing with the effective date of the tri-state compact, as follows (70 Cong. Rec. 468):

"Mr. Pittman. Mr. President, the Senate is apt to forget that

any States are interested in this legislation except the States of Arizona and California. As a matter of fact, one of the reasons that started this whole compact was the realization of four States in the upper Colorado River that unless this impounding of water at Boulder Dam was regulated, when they got ready to use the water of the Colorado River in the future there would not be any; it would all be appropriated in the lower basin. Consequently, we started out in 1921, with the aid of Congress, which authorized the seven Colorado River States to try to agree on the distribution of water and the terms upon which it would be used.

Now we come down to this proposition:

The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get; but there is just one other phase to the matter. The amount that either one of those States is entitled to under this legislation may be reduced if at some future time it is agreed, by treaty or contract or otherwise, that a certain amount of this water should, in justice, be used in Mexico.

Presently, as I have said before, I think the amount that can be used in Mexico is insignificant. I think, also, that under the comity that exists between nations the only water that Mexico could claim would be water that she has appropriated from the natural flow of the stream, and that she could claim none of the benefits of the water increased by our own impounding works. That, however, is not the question. The question is one of satisfying the States.

Why should we satisfy the States? Because if you do not satisfy a State as to the exact thing that is going to happen to it under legislation, it will oppose the legislation.

As a matter of fact and as a matter of law, I do not believe that the Gila River is in any danger whatever from any demands for water in Mexico for two reasons: In the first place, there is bound to be enough overflow or return flow to satisfy that demand. In the second place, the Congress of the United States has no constitutional authority through the passage of any act to take away a vested water right. If the people of Arizona on the Gila River have put to beneficial use the water of that stream—and they claim that they have—then there is no power in Congress to take it away from them, nor would there be any power by treaty to take it away from them. A treaty certainly is nothing more than a statute and in my opinion we could not make a treaty that would violate the Constitution of the United States any more than we could a statute. That, however, is not the question. The question is, Are we going to reach a settlement

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with Arizona?

A majority of the people of Arizona believe that there is danger of their vested rights in water, of the water that they are actually using, being taken in part to supply Mexican demands. As I have said before, I do not think there is any ground for that belief; but if that is the belief of the majority of the Legislature of the State of Arizona and their governor, then we have, if possible, to remove their fear before we can get their ratification.

Do we want their ratification? Is their ratification necessary to this legislation? I think it is. Why?

This bill provides that no construction shall take place—nothing shall be done until six of the seven States, including California, ratify. Where are we

going to get the States to ratify? We had six States that ratified the 7-State agreement; but since that ratification the Legislature of Utah has solemnly annulled its ratification. Now we stand in the position that there are no six States in the humor at the present time to ratify. Utah has refused to ratify the agreement and is out of it. Arizona has refused to ratify it. We must get one of those States to ratify in order ever to work under the bill if we pass it—one of them. We must either get Utah back or we must get Arizona.

As a matter of fact, there have been rumblings in the State of Colorado against the safety of a 6-State compact. Personally, I do not agree with them. I do not think there is any ground for any fear. I think the 6-State compact protects the upper basin; but there is a fear there, nevertheless, and a fear expressed by some very able lawyers in Colorado.

Colorado might pull out of a 6-State compact. It would be a splendid consummation if we could get all seven States to agree with regard to this whole legislation.

Let us see what we are up against. There is no question but that we have settled satisfactorily to all States the water question. Now we have gotten down to the question of liability to Mexico, which, while to my mind it amounts to nothing, arouses a great deal of fear in the minds of some people in Arizona.

Admitting that all of the water of the Gila is now being put to use, except the return flow—and in this amendment the return flow is subject to the demands of Mexico—if it is all put to use, as a legal matter, that can never be disturbed. The Senator says, 'Why mention it if it can never be disturbed?' There is only one reason I know of and that is to overcome the fears of the people who do not believe as I do, that the fears are groundless.

Our engineer in Nevada, Mr. Malone, agrees with Mr. La Rue

with regard to the return flow of the river. At the present time it is at least five or six hundred thousand acre-feet. It will undoubtedly be increased greatly with further irrigation from the Colorado River water. The Department of the Interior has estimated that there never can be, from the waters of the Colorado, over three or four hundred thousand acres irrigated, and that not by subsurface pumping but by diversion. There is such a limit on it.

As I understand this amendment, Arizona to-day has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River. It is there for their use. As I understand it, they are willing to give up any amount that may be necessary to meet the demands of Mexico from that 2,800,000 acre-feet, provided it is matched by an equal amount of water out of California's allocation of 4,400,000 acre-feet.

In the circumstances, I am exceedingly anxious to bring about a condition that will cause the Legislature of Arizona to ratify the 7-State agreement. I am afraid if we do not make that possible, we may go on trying to get a 6-State agreement for a year or so and maybe find we will have to come back here and try to get legislation for a 5-State agreement or something else.

I would not ask of California to bear any additional burden over what Arizona bears. I can not see that it does. I can not see that there is any danger. But there is one thing in this amendment—and I want the attention of the Senator from Arizona to this—which I do not like. I do not like the form of it. I do not like the method of getting at it. It provides:

> The said ratifying act shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada and Arizona the foregoing limitations are accepted and approved as

fixing the apportionment of water to California, then California shall and will therein agree.

That does not seem to be the regular form of entering into an agreement, to have California first proceed to limit herself as to what she will do as consideration for the passage of this measure. I think it should be a mutual agreement between the three States. I do not think we should bind up this tri-State agreement with ratification. I did believe that it was essential to have California limit herself as to the amount of water she would take in a ratification, in view of the fact that possibly Arizona would never ratify. But this is attempting to have the State of California in advance, as a condition of the taking effect of this measure, state that she will enter into certain agreements with Arizona. In other words, it is coercive.

Mr. Hayden. Is it any greater coercion, if the Senator will permit me, than for the State of California to insist that, as a condition to her ratification of the main contract, Congress

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shall do certain things, to wit, provide storage to the extent of 20,000,000 acre-feet of water in the main stream.

Mr. Pittman. I do not consider that coercion.

Mr. Johnson. It was impossible to hear what the Senator from Arizona said. All I heard was, 'the State of California.'

Mr. Hayden. I withdraw the remark, because I do not want to have any remark I might make misinterpreted.

Mr. Pittman. I do not think that the demand on the part of California that there should be a storage of at least 20,000,000 acre-feet of water is coercion. I think it is essential, as shown by the report of the commission. A demand for what is essential is not coercion.

This is what I suggest, that we provide for an agreement between the three States, and let them enter into it if they want to, but if they do not want to, let them stay out of it. That is not coercing a State.

This is what I propose, to strike out all of the Hayden amendment down to and including the word 'agree' on page 1, in line 6, and in lieu thereof insert the following:

> The States of Arizona, California, and Nevada are authorized to enter into an agreement, which shall provide.

Then go ahead and put down the provisions of the Hayden amendment, and at the end of the Hayden amendment put in a seventh paragraph, which shall read:

> Said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California and Nevada.

The Constitution requires that before States may enter into an agreement they shall be authorized by Congress to enter into the agreement. I start out by having Congress, by this act, authorize an agreement. I make the agreement specific by reason of the fact that otherwise it might be held that they would have to come back to Congress for approval of the agreement they entered into. They approve a specific agreement in advance and authorize it. The terms are set out. It does not take effect unless all three States ratify the Colorado River compact.

Mr. Hayden. It should not.

Mr. Pittman. It should not. It does not require California to enter into that agreement. It does not require Arizona to enter into that agreement. It does not require Nevada to enter into that

agreement. If they do not enter into that agreement, then we have the bill as it stands. Whatever States

do not ratify are not bound by this measure. That, then, becomes an optional matter and not a coercive matter.

I am confident, however, that if the State of Arizona were willing to enter into such an agreement she would, of course, ratify the Colorado River compact, and if she were not willing to ratify the Colorado River compact she would not want California bound by these conditions, because she would not be in the 7-State compact, and would have nothing to do with it.

Therefore I say that the fair and practical way is to set out the terms of an agreement which the Congress of the United States would be satisfied for the States to enter into, and say that if they see fit to enter into it they may, but it shall not become effective as a subsidiary agreement to the main 7-State compact until those three States do ratify the 7-State compact.

I offer that as a suggestion. I do not want to interfere with the vote on this amendment, but I would like very much to have it in a voluntary agreement, rather than impose it upon California as a condition of the ratification.

Mr. Hayden. Mr. President, I am not at all insistent that my amendment be adopted in the exact language in which it is offered. The suggestion made by the Senator from Nevada is entirely satisfactory to me.

Mr. Pittman. Then I offer it.

The Presiding Officer. The amendment would be an amendment in the third degree, and it would not be in order.

Mr. Hayden. Have I the privilege of perfecting my amendment so as to carry out the suggestion of the Senator from Nevada?

The Presiding Officer. The Senator can do that.

Mr. Hayden. Then I am pleased to do that."

Senator Pittman continued his comments (70 Cong. Rec. 471):

"Mr. Pittman. Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason.

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Has the State of California or Arizona or Nevada asked for any different kind of an agreement than the one that is here? Does the State of New Mexico desire that there should be a different agreement between California, Arizona and Nevada than the one that has been suggested? If so make another suggestion. Why be so fearful with regard to the imposition upon Nevada, Arizona and California when the representatives of neither one of those States so far have got up here and raised such an objection? California has not asked for any particular form of agreement between the States; Nevada has not asked for any particular form of agreement between the States; Arizona has not asked for any particular form of agreement between the States. Arizona, however, has stated that unless certain things are agreed to by California this bill shall not go into effect. I objected to that. I do not think that California alone should be made to agree to anything. I think, however, that if we have in mind a certain agreement that might be entered into by the three of them, if something better shall be submitted we ourselves ought to submit it. That is all that is happening here.

We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that. We have already agreed that the 7-State pact shall be binding."

Senator Johnson voiced his feelings (70 Cong. Rec. 471):

"Mr. Johnson. Here is the difficulty which strikes me in the matter: First of all, we are authorizing the doing of something that already the States have the right to do. Secondly, we are stating the things that the three States are to do, and we are making a sort of Procrustean bed upon which they must lie in the determination of matters that are suggested within this amendment, without any elasticity, without any opportunity to alter phraseology or possibly terms. What is done by the amendment is to put the impress of the Federal Government upon the necessity of agreement, and, if one of the States should not agree, leave that State in a position which would not be particularly enviable.

With the distinct understanding that this authorization is one that is after all an authorization that is wholly unnecessary, because the parties may, in any fashion they desire, meet together and contract and subsequently come to Congress for ratification of that contract; that there is no impress of the Congress upon the terms, which might be considered coercive to any one of those States, I am perfectly willing to accept the amendment.

Mr. Pittman. There is nothing necessary at all, of course, so far as the adoption of this amendment is concerned, unless the element of time is considered valuable. If it should happen, mind you, that two weeks from now the legislatures of the three States,

being in session, should be perfectly satisfied with the terms of this proposed agreement and should ratify

it, they could on the next day also ratify the 7-State agreement. On the other hand, if we do not adopt this amendment now, but allow the three States to meet together and agree and they should agree, then it will be necessary for them to come to Congress next fall; and we might find that Congress next fall would not ratify the agreement entered into by the three States, might we not?

Mr. Johnson. That is possible.

Mr. Pittman. Suppose, for instance, a majority of the Senate found there were certain things in the agreement it did not like.

Mr. Johnson. That is all right; but what I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.

Mr. Pittman. Exactly, not.

Mr. Johnson. Very well, then.

Mr. Pittman. It is not the request of Congress.

Mr. Johnson. I accept the amendment then."

The Vice President then put the question on the Hayden amendment (as modified by the Pittman suggestions) to the Phipps amendment to Sec. 4(a) of the Johnson substitute bill and it was adopted without a roll call (70 Cong. Rec. 472).

The Phipps amendment to the Johnson substitute was approved without roll call (70 Cong. Rec. 473).

(Note: The Phipps amendment at all stages dealt not only with Sec. 4(a) but also included the provision in Sec. 5 that all contracts executed by the Secretary "shall conform to paragraph (a) of section 4 of this Act".)

On December 14, 1928, H. R. 5773 as amended was approved by the Senate.

The House concurred in the Senate Amendment (70 Cong. Rec. 837-38) without further change.

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Section 8

The evolution of Sec. 8 of the Project Act commenced with H. R. 6251 (69th Congress, 1st Session). This section as introduced read:

"SEC. 8. (a) That the United States, in managing and operating the dam, canals, and other works herein authorized, including the delivery of water for the generation of power, irrigation, or other uses, shall observe and be subject to and controlled by the Colorado River Compact[1] as signed at Sante Fe, New Mexico, on November 24, 1922, and particularly described in section 13 herein.

(b) Also all rights of the United States in or to waters of the Colorado River, howsoever acquired, as well as the rights hereafter arising of those claiming under the United States, shall be subject to and controlled by said compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River, or for the generation or transmission of hydroelectric power generated by means of the waters of said river, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river, for the use of which the same is necessary, convenient, or incidental, shall likewise be subject to and controlled by said compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit,

license, right-of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water thereunder, by way of defense or otherwise, in any litigation respecting the waters of the Colorado River."

In the hearings on H. R. 6251 before the House Committee on Irrigation and Reclamation, (69th Congress, 1st Session), at p. 39, Charles P. Squires, a witness from Nevada suggested an addition to the then language of Sec. 8(a) as follows:

"I would respectfully suggest to your committee that a clause be added to the committee print bill now under consideration,

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directing that the Secretary of the Interior, in the allocation of rights, shall make such allocation in accordance with the terms of a compact now in process of negotiation between the States of Arizona, California, and Nevada, provided such a compact shall be negotiated and ratified by the legislatures of said three States and consent thereto be given by Congress on or before March 4, 1927.

Such a clause, permitting Arizona, California, and Nevada to proceed with the orderly and peaceful solution of their own problems, but leaving the Secretary of the Interior free to act under the terms of the bill as now drawn in case no agreement is arrived at, may be added, substantially as follows:

Page 9, section 8(a), line 7, add, following the word 'herein':

and by the terms of a compact between the States of Arizona, California, and Nevada for the division of the benefits accruing to said three States, under

said Colorado River compact, provided such a compact between said three States shall be negotiated and ratified by the legislatures thereof and consent thereto be given by Congress on or before March 4, 1927.

Mr. Hayden. You are a member of the commission that is negotiating the compact between the three States of the lower basin?

Mr. Squires. Yes, sir.

Mr. Hayden. When do you expect to have your next meeting?

Mr. Squires. It has been my hope to have one very soon. When I left Nevada some of the members of the California commission were absent, and prior to that some members of the Arizona commission had been absent from the State. I anticipate that we will have a meeting very soon.

Mr. Hayden. Do you sincerely believe that the representatives of the three States can reach an agreement with respect to an apportionment of water and other matters of difference between them?

Mr. Squires. I sincerely do.

Mr. Hayden. Is that opinion based upon meetings that have been held and your information as to the general situation?

Mr. Squires. Yes, it is.

Mr. Hayden. I believe you stated that Nevada wanted an assurance of sufficient water for her land, and would be satisfied with about 300,000 acre-feet.

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Mr. Squires. Yes, sir; probably not quite that. We don't know just what it will amount to, but that will be ample. That figure was suggested by the California and Arizona commissions in these sessions we had.

Mr. Hayden. Are you satisfied that 300,000 acre-feet will fully take care of all of the needs of the State of Nevada?

Mr. Squires. I am satisfied that it will be ample.

Mr. Hayden. What is the proposed division of the water?

Mr. Squires. The unconsumed portion would run back and flow down the stream and then divide between the other States.

Mr. Hayden. Between California and Arizona?

Mr. Squires. Yes, sir.

Mr. Hayden. After Nevada has been cared for?

Mr. Squires. Yes, sir.

Mr. Hayden. Upon what basis?

Mr. Squires. Upon such basis as the States agree upon.

Mr. Hayden. Has there been any tentative division of the waters between the two States?

Mr. Squires. There have been some proposals back and forth, which have not been mutually satisfactory, but which have shown rather a tendency toward coming to an agreement, I think."

Mr. Squires proposal was not then accepted by the committee.

On February 27, 1926 Mr. Swing introduced H. R. 9826, as a substitute for H. R. 6251, without change in Sec. 8. On the same date S. 3331 was introduced in the Senate and Sec. 8 was the same as in H. R. 9826 and as originally proposed in H. R. 6251, *supra*.

The committee print of April 10, 1926 (at p. 93 Hearings before House Committee on Irrigation and Reclamation) deleted Sec. 8 (a) and (b) and (at pp. 93 and 94 of the reported hearings) substituted the following:

"SEC. 8(a) The United States, its permittees, licensees, and

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contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized,

shall observe and be subject to and controlled by said Colorado River compact and the terms of such compact, if any, between the States of Arizona, California, and Nevada, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before March 4, 1927; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: Provided, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress in the construction, management, and operation of said reservoir, canals and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said the Colorado River compact."

A second committee print of April 14, 1926 contained several amendments to Sec. 8, including the Nevada proposal which appeared as subsection (d). The new section appears at pp. 117 and 118 of the printed committee hearings:

"SEC. 8(a) All appropriations of water from the Colorado River, incident to or resulting from the construction, use, and operation of the works herein authorized, shall be made and perfected in and in con-

formity with the laws of only those states which may or shall have approved the Colorado River compact ratified in section 12 of this Act.

(b) The place of application to use of the waters impounded, discharged, delivered, or carried by the works or structures herein authorized, whether for domestic, irrigation, generation of power, or for other beneficial purposes, and whether the use be by the United States or by others shall be confined in each and every instance to the States that shall have approved said Colorado River compact, and nothing herein contained shall be construed to interfere with the State control of the use of water in any of said States, but present users of water in any nonapproving State shall not be affected by the requirements of

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this paragraph.

(c) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(d) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal,

including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, for the equitable division of the benefits including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before March 4, 1927; and the terms of any such compact concluded between said States and approved and consented to by Congress after said dates; Provided, That in the latter case such compact shall be subject to all contracts—if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

(e) Nothing in this Act shall be deemed to waive any of the rights or powers reserved or granted to the United States by paragraph 7 of section 20 of the Act providing for the admission of Arizona, approved June 20, 1910, and by the 10th paragraph of Article XX of the constitution of Arizona, but the Secretary of the Interior is authorized on behalf of the United States to exercise such of said rights and powers as may be necessary or convenient for the construction and use of the works herein authorized and for carrying out the purposes of this Act."

Mr. Delph Carpenter, a witness from Colorado commented on the proposal for a lower basin compact at pp. 202 and 203 (House Committee Hearings):

"SECTION (d) is proposed by Nevada, which State makes a proposal, I might observe out of consideration for the protection of the three lower States—in the recognition of any compact that may

hereinafter be entered into between them respecting the use and disposition of the Colorado River water allocated by the Colorado River compact. On the phraseology of this amendment we have no comment. That is more a matter for the proponents of the amendment. We do, however, heartily join in the request of Nevada that this or some such provision be put in this bill, because it was the thought of the framers of the Colorado River compact that the water allocated to the lower basin would be ultimately apportioned between the three States of the lower basin by separate subsidiary compacts concluded between them. The suggestion has recently been made that the upper States should have joined in an apportionment of the lower basin water between the lower States. The upper basin States refrained from considering any such proposition because it became very evident at the outset that the problems of the Colorado River, because of the climatology and geography, and all other natural features controlling the water of that river, irrespective of the will of man and the works he might create—all those features divided the river into two natural basins, in which the natural features were to be contrasted rather than compared.

Therefore it would be very presumptuous for the upper States to have stepped in and tried to force a local apportionment between the three lower States. The negotiations now proceeding, or which recently proceeded, between Nevada, Arizona, and California, are in harmony with the intent of the compact and should be encouraged; and anybody who attempts to interfere with those negotiations should be discouraged in such effort."

and at page 204 of the Hearings:

"Mr. Hayden. I desire to inquire as to the desirability of fixing a time limit, such as March 4, 1927, within which the State of Arizona must agree.

Mr. Carpenter. I have been fearful that the section would be misconstrued in the very manner that you suggest. I think it is the intent of the framers of the amendment that the compact when entered into and approved by Congress should be controlling upon the works herein authorized, but they wish to fix a reasonable time within which to arrive at a compact to deal with the waters with perfect freedom, knowing that if the Secretary of the Interior enters into contracts for disposition of water and power to be generated, that any compact between the three States would confront those contracts, and the three lower States might be put in a position of recognizing those contracts irrespective of their effect upon any one State. It was the thought of the framers of the amendment to stay the hand of the Secretary of the Interior in any such contracts for such a time as may be necessary for the three lower States to conclude a compact. That is the reason for inclusion of the date."

SEC. 8 was reported out of committee without further change,

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except the deletion of subsection (b). Section 8 of S. 3331 went through similar changes before the Senate committee and was reported out in the same form.

On the Senate floor, Senators Pittman of Nevada (Feb. 22, 1927) and Ashurst of Arizona (Feb. 25, 1927) each proposed an amendment to Sec. 8 of the committee version of S. 3331 which would give to their two states a share of the energy generated at Boulder Canyon in the event the compact provided for was not entered into by Arizona, California and Nevada. This suggestion was again made in the 70th Congress but was not adopted.

Mr. Swing introduced H. R. 5773 in the 70th Congress. SEC. 8 provided:

"SEC. 8(a) All appropriations of water from the Colorado River, incident to or resulting from the construction, use, and operation of the works herein authorized, shall be made and perfected in and in conformity with the laws of those States which may or shall have approved the Colorado River compact ratified in section 12 of this Act.

(b) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(c) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, for the equitable division of the benefits, including power, arising from the use of water accruing to said States,

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subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by

said States and to which Congress shall give its consent and approval on or before June 1, 1928; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

(d) Nothing in this Act shall be deemed to waive any of the rights or powers reserved or granted to the United States by paragraph 7 of section 20 of the Act providing for the admission of Arizona, approved June 20, 1910, and by the tenth paragraph of Article XX of the constitution of Arizona, but the Secretary of the Interior is authorized on behalf of the United States to exercise such of said rights and powers as may be necessary or convenient for the construction and use of the works herein authorized and for carrying out the purposes of this Act."

S. 728 was introduced by Senator Johnson and Sec. 8 was similar except for a reservation of power rights for Arizona and Nevada, which reservation was deleted by the Senate Committee on Irrigation and Reclamation (See S. Rep. No. 592, 70th Congress, 1st Session 3).

Both the House (69 Cong. Rec. 9984) and Senate (S. Rep. No. 592, *supra* at 3) Committees amended Sec. 8(c) to provide for a compact between Arizona, California and Nevada "or any two thereof" and to change the pertinent date from "June 1, 1928" to "January 1, 1929". In addition the Senate deleted Sec. 8(a) in committee (S. Rep. No. 592, *supra* at 3) and Sec. 8(d) (70 Cong. Rec. 586-92), thereby perfecting the present language of Sec. 8 of the Boulder Canyon Project Act.

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PROPOSAL BY CALIFORNIA AND NEVADA FOR A LOWER BASIN COMPACT (DECEMBER, 1925)*

The States of Arizona, California, and Nevada by their proper authorities have appointed representatives for the purpose of negotiating a compact between said States in reference to the use of the waters of the Colorado River, and after negotiations between said respective representatives they have agreed upon the following articles:

ART. I. The purposes of this compact are to provide for the equitable division and apportionment of the use and benefits of the waters of the Colorado River; to establish the relative importance of different beneficial uses of said water; to promote interstate comity; to remove causes of future controversies; to bring about the effectiveness of the Colorado River compact; and to secure the development of the Colorado River.

ART. II. As used in this compact (a) the term "Colorado River" means the main stream of the Colorado River at and below Lee Ferry, together with any and all tributaries within any of the signatory States entering said river below Lee Ferry, except the Gila River and its tributaries, the Williams River and its tributaries, the Little Colorado River and its tributaries, and the Virgin River and its tributaries; the mouth of each said rivers above excepted shall be deemed to be the highest point to which the flood or back waters from the Colorado River may extend, whether caused by artificial means or otherwise.

(b) The term "Colorado River compact" means that certain instrument or compact respecting the Colorado River signed by the commissioners from the States of

* The text is copied from the Hearings before the Senate Committee on Irrigation and Reclamation on S. Res. 320 (68th Congress, 2d Session), pp. 626-28.

Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and approved by Herbert Hoover, as representative of the United States of America, at Santa Fe, N. Mex., November 24, 1922.

(c) The term "operative horsepower" shall be understood to mean the average for the year at the plant switchboard of the daily maximum generated horsepower that is sustained continuously for a period of 90 minutes.

(d) All other terms, words, phrases, or expressions used in this compact shall be understood to be used in the same sense and with the same meaning as used in the Colorado River compact hereinabove defined.

ART. III. (a) The States of California and Nevada hereby release to the State of Arizona any and all claims of every kind or nature to

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the use of the waters of the Gila River, the Williams River, and the Little Colorado River, and all of their respective tributaries, for agricultural and domestic use, and the States of Arizona and California hereby release to the State of Nevada any and all claims of every kind or nature to the use of the waters of the Virgin River and all of its tributaries for agricultural and domestic use, in consideration of which there is hereby allocated from the waters of the Colorado River to the State of California 1,095,000 acre-feet of water per annum in perpetuity for beneficial consumptive use.

(b) There is hereby allocated to the State of Nevada such waters of the Colorado River as can be put to beneficial use within the State not exceeding 300,000 acre-feet of water per annum for beneficial consumptive use in perpetuity.

(c) There is hereby allocated from waters of the Colorado River to the State of Arizona its present perfected

rights to the beneficial consumptive use of 232,000 acre-feet of water per annum in perpetuity.

(d) There is hereby allocated from the waters of the Colorado River to the State of California its present perfected rights, in addition to all other allocations, the beneficial consumptive use of 2,146,600 acre-feet of water per annum in perpetuity.

(e) The use of waters of the Colorado River not otherwise hereinabove expressly allocated is hereby allocated in equal shares to the States of Arizona and California, it being the intention of the signatory States, subject to the terms of the Colorado River compact, to divide for use in said States all of the waters of the Colorado River: *Provided,* That any water allocated by this paragraph (e) but not actually applied to agricultural or domestic use by January 1, 1975, shall thereafter, notwithstanding the foregoing allocation, be subject to appropriation for use in either Arizona or California.

ART. IV. It is the intention of the signatory States to so divide the waters of the Colorado River as to provide for the maximum thereof within said States, and notwithstanding the foregoing allocations no State shall withhold water and no State shall require the delivery of water which can not reasonably and beneficially be applied to agricultural or domestic use within said State.

ART. V. The chief official of each signatory State charged with administration of water rights, together with the Commissioner of Reclamation of the United States, shall cooperate ex officio to promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water from the Colorado River and the interchange of available information on such matters.

ART. VI. That in the event the United States of America shall construct a dam in the main stream of the Colorado

River at or near Boulder Canyon, creating a reservoir of not less than 20,000,000 acre-feet of water, at which hydro-electric power shall be generated by persons or agencies other than the United States of America, then such persons or agencies

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generating such power at said dam shall each pay to the Secretary of the Interior $1. per annum, for each operative horsepower which may be installed by him or for his or its benefits, in addition to any and all other requirements by the United States, which said sums so paid shall be paid by the Secretary of the Interior to the States of Arizona and Nevada in equal parts annually, said payments to be made at such times and under such reasonable regulations and in such installments as the Secretary of the Interior may by general order prescribe. No payment under this article shall be required until power-generating machinery upon which said payment is based shall have been placed in actual operation. The provisions of this article shall not be construed as affecting or intending to affect the taxing power of any of the signatory States, but that in the event any of such persons or agencies generating power at said dam shall pay any tax, assessment, impost, or other liability, demand or charge upon said power or works therefor, under the taxing power of the State or subdivision thereof, then and in that event, for the year immediately following such payment, the amount of money so paid shall be deducted from the amount to be paid to the Secretary of the Interior as hereinabove in this article provided for the benefit of the State to whom such payment was made. The payment of said sums to the said Secretary of the Interior for the benefit of Arizona or Nevada shall be in lieu of all license or other fees now or which may hereafter be required by the said States or either of them for the use, license, or privilege of storing water, or building and operating generating plants, transmission lines or otherwise, in connection with the said dam.

ART. VII. Should any claim or controversy arise between any two or more of the signatory States over the meaning or performance of any of the terms of this compact, then upon the request of the governor of any one or more of the signatory States it shall be the duty of the governors of the signatory States to appoint a commission with power to consider and adjust such claim or controversy, subject to ratification by the legislatures of the States affected and by the Congress of the United States.

Nothing herein contained, however, shall prevent the adjustment of any such claims or controversies by any then present method or by direct legislative action of the interested States, with the approval of the Congress of the United States.

ART. VIII. In the event this compact should at any time be terminated by unanimous agreement of the signatory States, all rights established under it shall nevertheless continue unimpaired.

ART. IX. The provisions of this compact have reference to the use of the waters of the Colorado River for agricultural and domestic use only and have no reference to the use of said waters for the generation of electric power except that the use of said waters for the generation of electric power shall forever be and remain subordinate to the use thereof for agricultural and domestic purposes, and except further as hereinbefore expressly provided in Article VI hereof.

ART. X. Jurisdiction in the United States of America to construct the said dam and incidental works referred to in Article VI hereof is

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hereby conceded, and consent is hereby expressly given by the signatory States to said construction and to the use and benefit of any property of the respective signatory

States which may be found necessary or convenient of use by the United States of America for said purpose.

ART. XI. This compact shall become binding and obligatory when the Colorado River compact has become binding and obligatory upon all of the signatory States thereto and when this compact shall have been approved by the legislatures of each of the signatory States hereto and by the Congress of the United States. Notice of the approval of the legislature shall be given by the governors of each of the signatory States to the governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the governors of the signatory States of the approval by the Congress of the United States.

In witness whereof the representatives of the States of Arizona, California, and Nevada have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America, and of which a duly certified copy shall be forwarded to the governor of each of the signatory States.

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ARIZONA COUNTERPROPOSAL

(DECEMBER, 1925)*

The States of Arizona, California, and Nevada have appointed representatives for the purpose of negotiating an agreement among said States in reference to the waters of the Colorado River, who after negotiations have agreed upon the following articles:

ARTICLE I

It is recognized by the parties hereto that the unregulated normal flow of the Colorado River is insufficient to

* The text is copied from Hearings before the Senate Committee on Irrigation and Reclamation on S. Res. 320 (68th Congress, 2d Session), pp. 820-24.

properly irrigate the lands already under cultivation by irrigation from the waters of said river; that the benefits of the storage of the flood waters of said river within the United States belong wholly to the citizens of the respective States; that without disparagement of the treaty making power of the United States Government, the States party hereto and Congress of the United States in consenting to this agreement shall be understood as declaring: That it is their purpose to utilize within the borders of such States all of the waters of the normal flow of the Colorado River heretofore appropriated and put to beneficial use in accordance with the laws of the States in which the same are being put to beneficial use, and all of the flood waters of the Colorado River capable of being utilized within the borders of the United States, for any purpose, by the construction of storage dams within the United States, and particularly that the Republic of Mexico and the citizens thereof shall take notice that they can not acquire any moral or equitable claim to the waters of the Colorado River temporarily made available for use in said Republic of Mexico by the regulatory effect of any dam or dams constructed in pursuance of this agreement as it is the intention and purpose of the States party hereto and the United States to ultimately utilize all of such waters within their own borders. Any express or implied acknowledgement of rights to the Republic of Mexico to the waters of the Colorado River by any instrument, agreement or compact signed prior to this agreement which is inconsistent with the declarations of this paragraph, if there be any such inconsistent acknowledgement or declaration is hereby withdrawn and shall not be renewed or reasserted without the consent of the States party hereto.

Article II

The States of Arizona, California, and Nevada hereby agree that the waters of the Colorado River and its tributaries in said States shall be divided, allotted, and appropriated as follows:

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(a) All of the waters of the tributaries of the Colorado River which flow into said river below Lee Ferry, Ariz., are hereby allotted and appropriated exclusively in perpetuity to the States in which such tributaries are located and may be stored in and diverted from said tributaries or the main channel of the Colorado River for use in said States.

(b) There is hereby allotted and appropriated to the State of Nevada for use in said State that portion of the total amount of water of the main Colorado River as measured at Lee Ferry, which can be beneficially used for agricultural and domestic purposes, not exceeding 300,000 acre-feet per annum.

There is hereby allotted and appropriated for agricultural and domestic use to each of the States of Arizona and California from the remainder of the water available as measured at Lee Ferry, one-half of the waters of the Colorado River.

(c) Any dimunition [*sic*] of the amount of water allotted to each State between the point of measurement and the point of delivery, caused by evaporation and seepage in storage or in transit, shall be borne by each State from its original allotment.

(d) The States of Arizona, California, and Nevada hereby agree to limit and control future appropriations and beneficial use of water in said respective States to such an amount and in such manner as will insure that present perfected rights in each State will be fully protected and supplied out of waters hereby allotted to said State.

ARTICLE III

The following rules shall apply to the use and storage of water under this agreement:

(a) The use of water for irrigation and domestic purpose allotted in Article II hereof shall be superior to any

right of storage for power purposes or navigation and any of said States may divert from the river the water allotted to it at any point on the river, provided that if any State shall take any water so allotted to it out of the main channel of the Colorado River at a higher elevation than the highest elevation of the bed of said river in said State, the works constructed for such purpose shall not interfere with a beneficial development in the State entitled to develop such fall of the river and the State or States taking out water at such higher elevation shall fully compensate the other States affected thereby for the loss of power caused thereby to such States.

(b) The prior construction of any dam or reservoir for power purposes shall not give any prior or superior right to such dam or reservoir to the regulation of the flow of the river for the benefit of such dam or reservoir but the rights of all dams and reservoirs constructed under this agreement for power purposes shall be on

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equality regardless of the date of construction thereof subject to the following:

(1) Yearly and seasonal stored water shall be held at as high elevations on the river as possible in order to reduce evaporation losses and provide regulation for power as well as for irrigation, domestic and flood control purposes.

(2) Reregulation storage for seasonal and daily variations in demand shall be located as close to the land to be irrigated as possible and water for irrigation and domestic purposes shall be supplied first from the nearest reservoir above the point of diversion of such waters.

ARTICLE IV

The territory of no State shall be entered upon for the purpose of construction or maintaining works utilizing the

water of the Colorado River except with the consent, and subject to the laws of such State.

ARTICLE V

The necessity for flood protection and development of the Colorado River as herein provided for is hereby recognized and established. All private or public lands in Arizona, California, and Nevada that are necessary for the construction and operation of works for the control and utilization of the Colorado River for flood protection, irrigation and domestic uses of water and the construction of dams for power purposes in pursuance of the provisions of this agreement shall be subject to the right of eminent domain of the State wherein such lands are located unless they have already been put to a more necessary public use.

ARTICLE VI

Each of the States party hereto, and the United States, recognize the acute necessity for flood and drought protection for lands now in cultivation by irrigation from the waters of the Colorado River and hereby pledge their good faith to grant the necessary permits and licenses for such construction, also rights of way to any district or agency that may be created in pursuance of the terms of this agreement for the immediate construction of a reservoir in the main channel of the Colorado River at such point as may be determined upon by the Federal Government, if it be a Government project, or by the majority of the States party to this agreement, if by some other agency. Such permits, licenses, and rights of way shall include those necessary for the construction of the dam and reservoir and appurtenant works including hydro-electric power plants and transmission lines provided, that no dam or other works shall be built in the bed of the Colorado River at any point in the river which when constructed will back up the water of the river so as to limit or interfere with the construction of a dam selected by any of the States for

the diversion of water for irrigation or domestic purposes in that State.

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ARTICLE VII

Any State in which reservoir sites exist in the Colorado River or its tributaries, directly or through any district or agency created in pursuance of and hereafter authorized by the laws of said State, may build dams, hydro-electric power plants and appurtenant works in such State and operate or lease the same. Where the reservoir is situated in two or more States, such dams, power plants and appurtenant works may be built, operated or leased jointly by the two or more States, or by any district or agency that may be created in pursuance of the laws of such States. Such State or States may sell or lease the power produced by such dams or power plants, and may impose taxation on such dams, power plants, transmission lines, and other property incident thereto, and may collect royalties on the power produced by such dams or power plants or any of them or impose a tax on such power or provide for both such tax and royalties on such power. Where development works are constructed in two or more States, the entire hydroelectric plant, including dams, reservoirs, power houses and appurtenant works shall be considered a unity in all matters relating to the financing of construction, the operation, lease, collection of royalties, and taxation, regardless of the location of the power plants with reference to State boundaries. The cost of the construction of all such development works shall be borne by the respective States, districts, or agencies created in pursuance of the laws of such States, and all power and revenue from the sale or lease of power, or royalties on the same, or taxation of such power or works, shall be divided among the States in direct proportion to the present amount of fall which the

river makes in each State between the dam and the elevation of the bed of the stream reached by the back water when the reservoir is filled. Where the river forms the boundary between two States, each State shall be allotted one-half of the fall which occurs in the present river bed on such joint boundary for the purpose of computing the relative proportions allotted to each State.

ARTICLE VIII

The use of power developed by such dams and works shall never vest in perpetuity in any private person or corporation, but the States and citizens of States in which such power is developed shall have preferred rights to its use whenever the need for it may arise: *Provided,* That leases for the use of power for terms not exceeding 50 years may be made by any such State or States or any district or agency hereafter created in pursuance of law when approved in such manner as may be provided by the laws of such State or States in which the power sites are situated: *Provided further,* That any State party hereto shall have the right to grant in perpetuity to any political subdivision or municipality of such state the share of the power to which such state is entitled under the provisions of Article II hereof.

ARTICLE IX

In the construction and operation of all dams and power

plants for the utilization of the waters of the Colorado River, undertaken in pursuance of the terms of this agreement the following rules shall apply:

Where such dams and power plants are located wholly in one State, the laws of that State shall govern such construction and operation. Where such dams and power plants are located in more than one State the States affected

shall agree upon the plans and rules and regulations for such construction and operation, and upon the agency to be adopted for such joint construction and operation, *provided:* That in the event two States are affected and they shall be unable to agree upon any such matter each of said States shall appoint a competent person as arbitrator and the two arbitrators so appointed shall agree upon a third arbitrator and the three arbitrators so appointed shall determine all such matters not agreed upon by said States.

ARTICLE X

Whenever the construction of a reservoir in two or more States shall be determined upon, the States in which the same is situated shall agree upon the royalties and taxes to be collected on the power to be produced by such reservoir and the works connected therewith and make any agreement that may be necessary to the taxation of such reservoir and works, provided said States shall be unable to agree or it shall be found impracticable to carry out a satisfactory agreement because of restrictions in the constitutions of said States or any of them, said States shall have allotted to them for their several use, benefit, and disposition their proportionate share (as determined by Article VII) of the power produced by such reservoir and works.

ARTICLE XI

In the event the United States shall undertake the construction, financing, and operation of any development on the Colorado River for flood control, irrigation, or power purposes, and requires the repayment of funds advanced for such purposes, such repayment to the Government shall be made in accordance with the reclamation act and amendments thereto. Each State shall assume an obligation in proportion to the allotment of water and power as provided in this agreement, and assure the Government the repay-

ment of all construction costs together with any interest charged for the full amount so advanced.

The allocation of water and power as in this agreement provided shall inure to the benefit of the States party hereto. Operation and administration of the same shall be under such State agencies as are created in accordance with the irrigation laws of the respective States. After all obligations to the Government have been met, the entire benefits shall become the property of the States interested, as provided in Article VII of this agreement. The contract with the United States to construct works in the States shall provide for dams, power plants, irrigation works, canals, and pumping plants which will enable each of the respective States to irrigate in each State an amount of land proportionately equal to the allotment

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of water of such State. Any irrigation development where there is a cost for pumping shall be the beneficiary of the revenues derived from the sale of any portion of the power which is allotted to the respective States. Contracts for the sale of power shall be made agreeable to the respective States within which the power is developed.

Article XII

This agreement shall not become effective until it is approved by the Legislatures and Governors of the States of Arizona, California, and Nevada and by the Congress of the United States.

Submitted by the Arizona committee.

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RECOMMENDATIONS OF GOVERNORS' CONFERENCE (1927)*

The governors of the States of the upper division of the Colorado River System suggest the following as a fair apportionment of water between the states of the lower division subject and subordinate to the provisions of the Colorado River Compact in so far as such provisions affect the rights of the upper basin states:

1. Of the average annual delivery of water to be provided by the states of the upper division at Lees Ferry, under the terms of the Colorado River Compact

(a) To the State of Nevada, 300,000 acre-feet.

(b) To the State of Arizona 3,000,000 acre-feet.

(c) To the State of California, 4,200,000 acre-feet.

2. To Arizona, in addition to water apportioned in subdivision (b), 1,000,000 acre-feet of water to be supplied from the tributaries of the Colorado River flowing in said State, and to be diverted from said tributaries before the same empty into the main stream; said 1,000,000 acre-feet shall not be subject to diminution by reason of any treaty with the United States of Mexico, except in such proportion as the said 1,000,000 acre-feet shall bear to the entire apportionment in 1 and 2 of 8,500,000 acre-feet.

3. As to all waters of the tributaries of the Colorado River emptying into the river below Lees Ferry, not apportioned in paragraph 2, each of the States of the lower basin shall have the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty

* Text copied from Wilbur & Ely, Hoover Dam Documents 38 (2d Ed. 1948). See also 70 Cong. Rec. 172 (1928).

into the main stream, provided the apportionment of the waters of such tributaries flowing in more than one state shall be left to adjudication or apportionment between said states in such manner as may be determined upon by the states affected thereby.

4. The several foregoing apportionments to include all waters necessary for the supply of any rights that now exist, including water for Indian lands for each of said states.

5. Arizona and California each may divert and use one-half of the unapportioned water of the main Colorado River flowing below Lees Ferry, subject to further equitable apportionment between the said states after the year 1963, and on this specific condition, that the use of said waters between the states of the lower basin shall be without prejudice to the rights of the States of the upper basin to further apportionment of water, as provided by the Colorado River Compact.

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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1961

No. 4 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master

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OPENING BRIEF OF THE CALIFORNIA DEFENDANTS IN SUPPORT OF THEIR EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

MAY 22, 1961

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OPENING BRIEF*

This single consolidated brief of all eight California defendants[1] is filed in accordance with the notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961.[2]

REPORT OF THE SPECIAL MASTER**

On January 16, 1961, this Court received and ordered filed (364 U.S. 940) the Report of the Special Master, dated December 5, 1960, which was submitted under this order of reference (347 U.S. 986 (1954)):

> "The master[3] is directed to find the facts specially and state separately his conclusions of law thereon, and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him. The findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or approval by the Court."

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[1]State of California *(parens patriae)* and seven public agencies of this state: Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

[2]Pursuant to that notice, exceptions to the Special Master's Report were filed with the Court on February 27, 1961; this opening brief is filed on May 22, 1961; our answering brief is to be filed August 14, 1961; and our reply brief is to be filed October 2, 1961.

[3](Footnote ours.) Hon. Simon H. Rifkind was appointed Special Master in 1955, succeeding Hon. George I. Haight, deceased. 350 U.S. 812.

*The appendix of this brief consists of (1) a description of the California projects and their development and (2) tables 1-6 and plates 1-11 referred to during the course of this brief.

**In this brief, "Rep. 103" refers to page 103 of the Report; "Rep. app. No. 2" refers to appendix number 2; "Rep. app. 416" refers to page 416 which is in the appendixes.

JURISDICTION

This Court has jurisdiction of the parties and of the subject matter of the case as tendered by the pleadings of all parties, under the provisions of article III, section 2, clause 2, of the Constitution of the United States, and 28 U.S.C. § 1251(a)(1) (1958). Arizona's motion for leave to file her bill of complaint against the California defendants was not opposed, and the motion was granted on January 19, 1953. (344 U.S. 919.)

Two further jurisdictional issues remain: (1) Is this suit presently ripe for adjudication as a "case" or "controversy" within the judicial power of the United States Supreme Court? U.S. CONST. art. III, § 2, cl. 2. (2) Is this suit appropriate for adjudication within the original jurisdiction of this Court over suits among states by presenting a "threatened invasion of rights" which is "of serious magnitude" and "established by clear and convincing evidence"? *New York v. New Jersey,* 256 U.S. 296, 309 (1921). See Rep. 130, 319-20. These questions of justiciability, inseparable from the water supply issues, are considered in detail in the Argument *infra* pp. 235-36, 246-53.

DOCUMENTS INVOLVED

The text of the Compact, statutes, and some of the contracts involved in this litigation are set forth in the appendixes to the Report of the Special Master (Rep. app. Nos. 2-8).

1. Colorado River Compact (Rep. app. No. 2)[4]

[4]Ariz. Ex. 1 (Tr. 214).

2. Boulder Canyon Project Act of Dec. 21, 1928, 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1958) (Rep. app. No. 3)[5]

3. California Limitation Act, CALIF. STATS. 1929, ch. 16, at 38 (Rep. app. No. 4)[6]

4. Water delivery contracts executed over a 50-year period between the Secretary of the Interior and states, public agencies, and individuals, most of which are tabulated in appendix F, volume 2 of California's Proposed Findings of Fact and Conclusions of Law[7] (see Rep. app. Nos. 5-8 for the contracts with the states of Nevada and Arizona and the Palo Verde Irri-

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[5]Ariz. Ex. 7 (Tr. 222).

[6]Ariz. Ex. 14 (Tr. 232).

[7]The following water delivery contracts are not included in appendix F:

(a) Contract between the Secretary and the City of Yuma, Arizona, approved in 1960 after the trial had concluded (Calif. Ex. 7611 for iden. (Tr. 22,760)).

(b) Water right applications with individual water users in the Bard Irrigation District (Tr. 8,819-20; Calif. Ex. 50 (Tr. 6,898)), the non-Indian portion of the Yuma Project in California, which has no water delivery contract. On approval by the Secretary, the water right applications become the only contracts for the use of water within that project. Exemplary contracts (executed both before and after the Project Act) are Calif. Exs. 378-380 (Tr. 8,852), discussed *infra* pp. 152-55.

(c) Contract between the Secretary and the Yuma County Water Users' Association, executed in 1906 for use of water within the Valley Division of the Yuma Project (U.S. Ex. 19-T (Tr. 15,518)). This contract controlled deliveries of water to the Valley Division of the Yuma Project until the parties executed a supplemental contract in 1951 (Ariz. Ex. 92 (Tr. 357)).

(d) Contract between the Secretary and the North Gila Valley Irrigation District, executed in 1918 for use of water within the North Gila Valley (Ariz. Ex. 91 (Tr. 356)). This contract controlled deliveries of water to the North Gila Valley until the parties executed a supplemental contract in 1953 (Ariz. Ex. 95 (Tr. 360)).

gation District, representative of the California agency contracts)

QUESTIONS PRESENTED

1. The critical words in the first paragraph of section 4(a) of the Boulder Canyon Project Act, repeated substantially *in haec verba* in the reciprocal California Limitation Act, are identified by bracketed numbers and emphasis in the following quotation from the statute (Rep. app. 382):

> "California . . . shall agree . . . that the aggregate annual consumptive use . . . of water . . . from the Colorado River for use in the State of California . . . shall not exceed four million four hundred thousand acre-feet of the [1] *waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact,* plus not more than one-half of any [2] *excess or surplus waters unapportioned by said compact,* such uses always to be subject to the terms of said compact."

The questions presented are:

(a) Do the emphasized words identified by the bracketed [1] refer to Article III(a) of the Colorado River Compact which apportions to the lower basin the beneficial consumptive use of 7,500,000 acre-feet per annum from the waters of the Colorado River system (main stream and tributaries); or do those words refer, not to the Compact or any provision thereof, but to the first 7,500,000 acre-feet of water per annum available for consumptive use from the "mainstream" (defined by the Report as Lake Mead and the main Colorado

River below Lake Mead, excluding all tributary systems in the lower basin and the main Colorado River between Lee Ferry and Lake Mead)?

(b) Do the emphasized words identified by the bracketed [2] refer to any provisions of the Compact; or do those words refer, not to the Compact, but to all water available for consumptive use from the "mainstream" (as defined in the Report) in excess of the first 7,500,000 acre-feet?

2. Did the Boulder Canyon Project Act abrogate equitable apportionment and priority of appropriation principles within the "mainstream" (as defined in the Report), excepting only "present perfected rights" (however defined), and delegate authority to the Secretary of the Interior to make an interstate allocation of "mainstream" waters among Arizona, California, and Nevada by the execution of water delivery contracts?

3. If Congress delegated such authority to the Secretary, did successive Secretaries of the Interior between 1930 and 1944 allocate the first 7,500,000 acre-feet of "mainstream" water available for consumptive use 28/75 to Arizona, 44/75 to California, and 3/75 to Nevada, disregarding all priorities except "present perfected rights," (defined in the Report as (a) quantities of water consumptively used as of June 25, 1929, and (b) rights of the United States pursuant to federal reservations made prior to June 25, 1929, without regard to use), and did they allocate "excess or surplus" above that 7,500,000 acre-feet equally between California and Arizona (subject to reduction of Arizona's half by future contract with Nevada)?

4. Is the existence of a justiciable controversy ascertainable in the absence of a determination of the dependable (permanent) water supply of the main Colorado River in the lower basin?

5. Is the determination of the dependable (permanent) water supply of the main Colorado River necessary to resolve the issues on the merits?

STATEMENT OF THE CASE

I. PROCEDURAL STATEMENT

The present case is the fifth suit in the original jurisdiction of this Court affecting the lower basin of the Colorado River, although it is the first in which evidence has been taken.[1]

Arizona's present suit against the California defendants was precipitated by her claim for a dependable and permanent water supply for the proposed Central Arizona Project. (Rep. 30-31, 130-31.) That project was designed to divert 1,200,000 acre-feet of water from the main Colorado River for irrigation in the Phoenix area of central Arizona.[2] Alternative diversion points for the project were considered at Parker Dam (below Lake Mead) and at Bridge or Marble canyons (above Lake Mead).[3]

In 1948, the Secretary of the Interior reported to Congress that there would be a dependable water supply for this new project if the legal contentions then advanced by Arizona were correct, but not if the legal contentions of California were correct. After exhaustive congressional consideration of bills to authorize the project, the House Interior and Insular Affairs Committee in 1951 by resolution refused to consider Central

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[1]Prior suits were Arizona v. California, 283 U.S. 423 (1931); Arizona v. California, 292 U.S. 341 (1934); United States v. Arizona, 295 U.S. 174 (1935); Arizona v. California, 298 U.S. 558 (1936).

[2]Ariz. Ex. 71 (Tr. 310) (Dep't of the Interior report on the Central Arizona Project), at 116, 150-52.

[3]Rep. 227. See also Ariz. Ex. 71, *supra* note 2, at 117; H.R. Doc. No. 419, 80th Cong., 1st Sess. 179-80 (1947), other portions of which are Ariz. Ex. 64 (Tr. 290); Tr. 4,121 (Akin). *Accord,* 13 ARIZ. INTERSTATE STREAM COMM'N ANN. REP. 31 (1960), quoted *infra* p. 125.

Arizona Project legislation further until that controversy was resolved by agreement or by litigation. (Rep. 30-31, 130-31.)

Arizona brought the controversy to this Court in 1952 (Rep. 1). The California defendants welcomed the opportunity for its resolution.[4] The United States (an indispensable party)[5] intervened, as did Nevada, and, on motion of the California defendants, Utah and New Mexico were joined with respect to their interest in "Lower Basin waters."[6] (Rep. 2.) Thus, all states of the lower basin as defined in the Colorado River Compact[7] are now before the Court.

Issues were joined on the pleadings of all parties, and the case was referred to the Special Master for hearing and recommendation. After pre-trial conference and a trial conducted over a three-year period, the parties simultaneously submitted proposed findings of fact, conclusions of law, and supporting briefs[8] and,

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[4]Calif. Return To Rule To Show Cause and Brief in Support of Return, filed Dec. 8, 1952, pp. 1-2, 5-6, 13.

[5]Arizona v. California, 298 U.S. 558 (1936).

[6]California moved to join as necessary parties the states of Colorado, New Mexico, Utah, and Wyoming. The Court denied our motion to join Colorado and Wyoming, but granted the motion to join Utah and New Mexico "only to the extent of their interest in Lower Basin waters." 350 U.S. 114 (1955) (5-3 decision).

[7]Colorado River Compact art. II(g) (Rep. app. 372):

"The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

[8]Tr. 21,666-71. During the course of this brief we shall occasionally refer to our own proposed findings and conclusions, which are part of the record before the Court, as a convenient way of avoiding multiple references to the transcript and exhibits. Each proposed finding is annotated with citations to the evidence.

subsequently, simultaneous answering and rebuttal briefs. On July 1, 1959, the matter was submitted for consideration. (Rep. 2-3.) On May 5, 1960, the Master circulated among the parties his draft report for the purpose of receiving their suggestions. On motion by the California defendants, oral argument was held in New York City on August 17-19, 1960, on the draft report and recommended decree. (Rep. 3-4.)

The Report of the Special Master, dated December 5, 1960, which makes no material changes in the decision proposed by the draft report, was received and ordered filed by this Court on January 16, 1961 (364 U.S. 940).[9] The parties are now before the Court on exceptions to that Report, which the parties filed on February 27, 1961.

II. THE CALIFORNA DEFENDANTS

The California defendants are the State of California, *parens patriae,* and seven public agencies of this state which depend upon Colorado River water.[1] These de-

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[9]To avoid multiple citations to the transcript, exhibits, and other materials, we cite the Master's Report as a convenient reference to factual and procedural matters not in dispute.

[1]These defendants are Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego. The latter cities and county are included within the boundaries of, and are served with Colorado River water by, Metropolitan Water District.

fendants divert and use Colorado River water for three projects:[2]

(1) Palo Verde Irrigation District Project (Rep. 35, 58-60).

(2) All-American Canal Project (Rep. 35, 36-38), which serves defendants Imperial Irrigation District (Rep. 53-55) and Coachella Valley County Water District (Rep. 55-58), and the Yuma Project (Reservation Division, including the Bard District[2a]) in California (Rep. 60-61).

(3) The Metropolitan Water District of Southern California (Rep. 61-69), whose Colorado River Aqueduct (Rep. 38-39) serves the southern California coastal plain, including defendants City of Los Angeles and City and County of San Diego (see Rep. 69-71).

A detailed description of each California project and agency, the area served by each, and the progressive stages of development of each is appended to this brief. (See also table 1 *infra.*)

Water rights were first initiated for the Palo Verde area in 1877 (appendix, p. A4), for the Imperial and Coachella areas in 1893-1899 (appendix, p. A10), for the Yuma area in 1905 (appendix, pp. A13-14), and for what is now the Metropolitan Water District service area in 1924 and 1926 (appendix, pp. A28-29).

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[2]There are no tributaries of the Colorado River system in California (Rep. 11), and all three California projects now have access to its waters only from the main Colorado River below Hoover Dam. (See map of Colorado River basin, plate 11 *infra.*)

[2a]Tr. 8,819-20; Calif. Ex. 50 (Tr. 6,898).

Although there is some dispute about exact quantities, there is no dispute that several hundred thousand acres requiring the consumptive use[3] of substantially more than 2,000,000 acre-feet per annum of Colorado River water were irrigated in California in the Palo Verde, Imperial, and Yuma areas by November 24, 1922,[4] when the Colorado River Compact was signed by its negotiators (Rep. 24). Nor is there any dispute that nearly a half million acres requiring the consumptive use of more than 2,900,000 acre-feet per annum of Colorado

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[3]Meaning diversions less return flows. See Rep. 148-49, 186, 345 (Decree art. I(A)).

[4]Consumptive use in 1922 is computed to have been 106,560 acre-feet for 32,644 acres in Palo Verde (Calif. Ex. 356 (Tr. 8,729)) and 48,522 acre-feet for 13,122 acres in Yuma Project (Reservation Division), California (Calif. Ex. 376 (Tr. 8,842)). In 1922, Imperial diverted 2,890,282 acre-feet with 413,400 net acres irrigated and in 1920 had diverted over 3,000,000 acre-feet with 414,720 net acres irrigated (Calif. Ex. 270 (Tr. 8,127)). Because Imperial is outside of the natural drainage basin of the Colorado River, its consumptive use is very nearly equal to its diversions. From 1901 to 1942, Colorado River water was diverted for Imperial Valley through the Alamo Canal, which ran partly through Mexico (Rep. 54-55). The portion of the water taken from the Alamo Canal for use in Mexico was a necessary loss incurred in bringing the water to Imperial Valley. This loss, which has been salvaged by construction of the All-American Canal, averaged less than 20% of the total annual diversion during the 1926-1930 period. (Calif. Ex. 273 (Tr. 8,140).)

See Ariz. Reply to Calif. Answer, par. 4, p. 13: "Admits that on November 24, 1922, irrigation distribution systems were in operation providing service to Palo Verde, Imperial, and the Yuma Project in California. . . . [A]lleges that as of said date the irrigated acreage so served did not exceed 461,000 acres and the beneficial consumptive use thereon of Colorado River System water did not exceed 2,350,000 acre-feet per year."

River water were irrigated in those three areas by June 25, 1929,[5] when the Boulder Canyon Project Act, the California Limitation Act, and the Compact itself (as among six of the seven signatory states, except Arizona) all became effective simultaneously upon presidential proclamation thereof (Rep. 26-27).

Construction of the All-American Canal,[5a] which was

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[5]Arizona and Nevada concede that by June 25, 1929, about 2,900,000 acre-feet had been put to use in these three areas. Ariz. Reply to Calif. Answer, par. 28(b), p. 26: "Alleges that on June 25, 1929, projects had been constructed and were in operation in California for the irrigation of no more than 473,500 acres of land which required a net main stream depletion of about 2,902,000 acre-feet of water per annum"; Nev. Comments on Draft Report, dated June 6, 1960, pp. 10-13, 24-26, submitting that "present perfected rights" in California for non-Indian projects (limited, as defined in the Report, to the quantity of water put to consumptive use by June 25, 1929 (Rep. 307-08)) be determined from the record as 2,944,560 acre-feet per annum, comprising present perfected rights for "Palo Verde Valley" (120,560 acre-feet); "Yuma Project, Bard Dist." (17,000 acre-feet), and "Imperial Irr. Dist." (2,807,000 acre-feet).

California submitted Supplemental and Alternative Findings of Fact and Conclusions of Law, dated June 1, 1959 (bound with Calif. Responses of that date), showing that as of June 25, 1929, approximately 3,275,000 acre-feet had been put to beneficial consumptive use in these three areas (including all necessary losses in Mexico from the Imperial diversion, *supra* note 4) for the irrigation of 461,000 acres (supplemental conclusion 19D:202, pp. XIX-27 through 28); that as of June 25, 1929, diversion works and canals had been constructed in these three areas for the irrigation of approximately 703,600 acres with a beneficial consumptive use requirement of approximately 3,707,100 acre-feet per annum (supplemental conclusion 19D:201, pp. XIX-25 through 26); and that these three water users could have taken and consumed from the natural flow of the Colorado River without Hoover Dam regulation about 4,490,500 acre-feet per annum under their senior rights preexisting June 25, 1929 (supplemental findings and conclusions, part XIX-C, pp. XIX-18 through 23).

[5a]For early reports on the All-American Canal, see, *e.g.*, Calif. Ex. 185 (Tr. 7,647) ("Report of the All-American Canal Board," dated July 22, 1919); Ariz. Ex. 45 (Tr. 254) (S. Doc. No. 142, "Fall-Davis Report," 67th Cong., 2d Sess. 11-12, 64-71, 77-92 (1922), plates 49-52 following 187). Ariz. Ex. 45 is reproduced and bound with Calif. Exhibits, vol. 24.

authorized by section 1 of the Boulder Canyon Project Act (Rep. app. 379), began in 1934, and the first significant use of the canal was made in 1940 (Rep. 37). It replaces the Alamo Canal, the former diversion canal for Imperial, which ran partly through Mexico (Rep. 54-55). Construction of the Coachella Canal, which turns out from the All-American Canal, began in 1938, and it was completed in 1947 and 1948 (Rep. 38, 57).

Engineering and surveying work on the Colorado River Aqueduct took place continuously from 1923 to 1933; construction, which began in 1932, was completed in 1940; and water was first delivered by Metropolitan Water District in 1941. (Rep. 39, 65-66.)

Between 1930 and 1934, the Secretary of the Interior, acting for the United States, executed water delivery contracts for the delivery of stored water from Lake Mead with California public agencies (Rep. 28): Palo Verde Irrigation District,[6] Imperial Irrigation District[7] (amended by a supplementary contract in 1952),[8] Coachella Valley County Water District,[9] Metropolitan Water District,[1] and the City of San Diego[2] (merged in 1947 with Metropolitan[3]). Non-Indian users in the Yuma Project (Reservation Division) in California hold individual water right applications executed pursuant to the reclamation laws both before and after enactment of the Project Act,[4] but there is no water delivery contract for this area which purports to be executed pursuant to the Boulder Canyon Project Act.

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[6]Ariz. Ex. 33 (Tr. 249).
[7]Ariz. Ex. 34 (Tr. 249).
[8]Ariz. Ex. 37 (Tr. 250).
[9]Ariz. Ex. 36 (Tr. 250).
[1]Ariz. Ex. 39 (Tr. 252), amending Ariz. Ex. 38 (Tr. 251).
[2]Ariz. Ex. 40 (Tr. 252).
[3]Ariz. Ex. 42 (Tr. 253).
[4]Exemplary contracts are Calif. Exs. 378-380 (Tr. 8,852).

The water delivery contracts executed with the California public agencies (see notes to preceding paragraph) call for delivery of stored water in accordance with the Seven-Party Agreement[5] signed in 1931 by all California defendants (except the state) in response to a request from the Secretary of the Interior.[6] By its terms (the effect of which is tabulated in appendix, p. A3), priorities among its signatories and the Yuma Project (Reservation Division) in California, *inter sese,* are assigned for the consumptive use in California of 5,362,000 acre-feet per annum of Colorado River water. Briefly summarized, the first three priorities, totaling 3,850,000 acre-feet per annum, belong to Palo Verde, Yuma, Imperial, and Coachella; the fourth priority, 550,000 acre-feet per annum, is now held by Metropolitan, as is the fifth priority of 662,000 acre-feet per annum; the sixth priority, 300,000 acre-feet, is shared by Palo Verde, Coachella, and Imperial. This priority schedule from the Seven-Party Agreement is incorporated *in haec verba* in each of the California water storage and delivery contracts (Rep. 28; Rep. app. 425-28).

As of the date to which the evidence related (1955-1957), the California projects were consuming approximately 4,600,000 acre-feet per annum of Colorado River water.[7] In 1960, the Colorado River Aqueduct of Metro-

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[5]Ariz. Ex. 27 (Tr. 242).

[6]Calif. Ex. 1810 (Tr. 12,244).

[7]The table at Rep. 128 shows the "Approximate Consumptive Use of Mainstream Water in California" as 4,483,885 acre-feet per annum as of 1955-1957. The quantity shown for Metropolitan Water District is 481,493 acre-feet in 1956, but this should be increased to 584,000 acre-feet for 1957 (Rep. 128 n.73). California's total consumptive use would thus be 4,586,392 acre-feet per annum as of the date of evidence, rounded to 4,600,000 acre-feet per annum.

politan Water District[8] diverted about 900,000 acre-feet for consumptive use or about twice its use of four years ago.[9] In the early months of 1961, and as this brief was printed, the aqueduct was running at full capacity. Under ultimate development, these California projects are capable of putting at least 5,362,000 acre-feet per annum of Colorado River water to beneficial consumptive use, which is the quantity specified in the Seven-Party Agreement.[10] Total investments by the projects, excluding private investments, exceeded $500,000,000 as of the date of the evidence (appendix, pp. A7, A20-21, A27, A28, and A33-34).

There are in California certain federal establishments for which the United States claims rights to Colorado River waters. These federal claims, which are relatively minor in California, have been sustained by the Special Master.[11] The Yuma Indian Reservation, which

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[8]The aqueduct is capable of diverting at least 1,212,000 acre-feet per annum from the Colorado River.

[9]The aqueduct diverted 481,493 acre-feet in 1956 (Rep. 128) and 584,000 acre-feet in 1957 (Rep. 128 n.73). See appendix, pp. A35-36, for data on consumption since the close of evidence.

[10]Even under the decree proposed by the California defendants, only 4,600,000 acre-feet of Colorado River water is available for consumptive use in California from the dependable or permanent supply. See *infra* p. 21.

[11]These are for the Chemehuevi Indian Reservation (Rep. 267); Yuma Indian Reservation (Rep. 268-69); portions of the Colorado River Indian Reservation within California, Rep. 271-72 (findings 8-13, 15, 17), Rep. 273 (conclusions 1, 5-7), and Rep. 274-78 (opinion); and portions of the Fort Mohave Indian Reservation within California, Rep. 281 (finding 14). These rights are adjudicated in the recommended decree, Rep. 350-52 (Decree art. II(C)(2)(a), (c), (d), and (e)).

In addition to the Indian claims, the Report also sustains federal claims for the Havasu Lake National Wildlife Refuge, Rep. 298-99, 352 (Decree art. II(C)(2)(g)) and Imperial National Wildlife Refuge, Rep. 299-300, 352-53 (Decree art. II(C)(2)(h)), both of which are partly in California.

is one of these federal establishments in California, is included within the Yuma Project (Reservation Division), California, discussed above. (See Rep. 60-61, 87-88.)

III. EXISTING PROJECTS IN OTHER LOWER BASIN STATES

A. Arizona Projects

Arizona pleaded that on November 24, 1922, the "Arizona irrigated acreage served by water diverted from the main stream of the Colorado River amounted to 73,000 acres with appropriative rights for sufficient water to irrigate said acreage."[1] As of June 25, 1929, Arizona projects consumed less than 250,000 acre-feet per annum of water from the main Colorado River.[2]

The ultimate beneficial consumptive use requirements of existing Arizona projects diverting from the main Colorado River are approximately 1,200,000 acre-feet

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[1]Ariz. Reply to Calif. Answer, par. 4, pp. 13-14.

[2]Nev. Comments on the Draft Report, submitted June 6, 1960. pp. 12, 24, show, with citations to the record and explanation of the calculations, the following consumptive use in 1929 by non-Indian projects in Arizona (in acre-feet per annum):

North and South Gila Valleys	23,900
City of Yuma	200
Yuma Project	164,700
Total	188,800

The record does not show the historic consumptive use (diversions less returns to the stream) for the Colorado River Indian Reservation, the only federal establishment in Arizona which made any significant consumptive use of main stream water by 1929. However, U.S. Ex. 575 (Tr. 14,498) shows a computed diversion requirement of 39,508 acre-feet for 5,683 irrigated acres in 1929 for that reservation, and consumptive use (diversions *less* returns) would obviously have been less.

per annum.[3] (See table 2 *infra.*) The consumptive use by these projects in 1955 was substantially less than their total requirements.[4]

In 1944, the Secretary of the Interior executed a water delivery contract with the State of Arizona[5] for delivery of certain quantities of stored water in Lake Mead to users within that state as may contract therefor with the Secretary, and as may qualify under the reclamation law or other federal statutes, or to federal lands within Arizona.[6] The contract also provides, *inter alia,* that "present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract."[7]

There are also in Arizona certain federal establishments for which the Master has sustained the United States claims for Colorado River water based on fed-

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[3]See Calif. Findings and Conclusions, part IV-D, pp. IV-29 through 43, and parts XIV-A through XIV-F, pp. XIV-3 through 56.

[4]The Master reports that "Approximate Diversions of Mainstream Water in Arizona" in 1955 totaled 1,239,140 acre-feet (Rep. 127). Consumptive use (diversions from the main stream *less* return flow thereto) is a lesser figure; however, the Master asserts that the Arizona diversions "cannot, on this record, be translated into consumptive use" because no figures are available for return flow from Arizona projects diverting at Imperial Dam (Rep. 126). The Master does report two figures of partial return flow totaling 269,600 acre-feet from Arizona projects (Rep. 126, 127 n.71), so that consumptive use in Arizona of water diverted from the main Colorado River in 1955 was surely less than 1,000,000 acre-feet (1,239,140 minus 269,600).

[5]Ariz. Ex. 32 (Tr. 248), Rep. app. No. 5.

[6]Art. 7(*l*) (Rep. app. 403).

[7]*Ibid.*

eral reservations of public lands.[8] The Colorado River Indian Reservation in Arizona is one of the existing projects discussed above.[9]

Arizona projects on the Gila River system take and consume the major portion, about 1,715,000 acre-feet per annum, of the safe annual yield of that system, which is 1,750,000 acre-feet per annum.[1] In addition, Arizona projects require about 82,500 acre-feet per annum from other lower basin tributaries (Little Colorado, Kanab Creek, Virgin, and Bill Williams river systems, and other very minor tributaries).[2]

B. Nevada Projects

Nevada's use from the main Colorado River by June 25, 1929, was nil.[3] Projects authorized or constructed to date will require, under ultimate development, the consumptive use of about 120,500 acre-feet per annum

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[8]These are the Cocopah Indian Reservation (Rep. 267-68); Colorado River Indian Reservation, most of which is in Arizona (Rep. 269-74); Fort Mohave Indian Reservation, part of which is in Arizona (Rep. 279-83) (findings 1-13 and 16, and conclusions 1-6); and portions of the Lake Mead National Recreation Area (Rep. 294-95), Havasu Lake National Wildlife Refuge (Rep. 298-99), and Imperial National Wildlife Refuge (Rep. 299-300). These federal rights are adjudicated in the recommended decree, art. II(C)(2)(b) and (d) through (h) (Rep. 350-53).

[9]See Calif. Findings and Conclusions, part XIV-B, pp. XIV-8 through 20.

[1]See Calif. Findings and Conclusions, parts V-G and V-H, pp. V-35 through 48; Calif. Findings 4F:101, p. IV-54; 16A:101-02, pp. XVI-3 through 5. Uses of Gila River system water in excess of safe annual yield, made possible by overdrawing ground water basins, are not included in the figures in text.

[2]See Calif. Finding 4F:102, p. IV-55; parts XIV-H through XIV-L, pp. XIV-77 through 103.

[3]*E.g.*, Nev. Comments on Draft Report, dated June 6, 1960, pp. 10-13, 15, 24.

of Colorado River water,[4] but their consumptive use in 1956 was only 24,450 acre-feet.[5]

In 1944, the Secretary of the Interior executed a water delivery contract with the State of Nevada[6] (amending an earlier contract of 1942[7]) for delivery of certain quantities of water stored in Lake Mead.

There are also in Nevada certain minor federal establishments for which the Master has sustained United States claims for Colorado River water based on the federal reservations of the public lands.[8]

Nevada users also require about 51,000 acre-feet per annum from the Virgin River system, a lower basin tributary.[9]

C. Utah and New Mexico Projects

Existing projects in Utah and New Mexico require about 100,000 acre-feet from lower basin tributary systems.[10] (These two states have no access to the main Colorado River in the lower basin (see plate 11 *infra*).) New Mexico takes a minor portion of the safe annual yield of the Gila River system which is common to that state and Arizona.[11]

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[4]Calif. Findings and Conclusions, part IV-E, pp. IV-43 through 53, and part XV-A, pp. XV-3 through 9.

[5]Rep. 128. See also table 3 *infra*.

[6]Ariz. Ex. 44 (Tr. 254).

[7]Ariz. Ex. 43 (Tr. 253).

[8]These are portions of the Fort Mohave Indian Reservation (Rep. 279-83, particularly finding 15, Rep. 282) and of the Lake Mead National Recreation Area (Rep. 294-95), which are adjudicated in the decree, art. II(C)(2)(e) and (f) (Rep. 351-52).

[9]Calif. Findings and Conclusions, part XV-B, pp. XV-10 through 16.

[10]See Calif. Findings and Conclusions, part XVI for New Mexico projects on the Gila and Little Colorado river systems; part XVII for Utah projects on the Virgin River and Kanab Creek systems.

[11]See Rep. 76, 78-79; Calif. Findings and Conclusions, part XVI-A, pp. XVI-3 through 5. See also *supra* p. 18 note 1.

IV. INTERSTATE APPORTIONMENT PROPOSED BY THE CALIFORNIA DEFENDANTS OF THE DEPENDABLE LOWER BASIN WATER SUPPLY

A. The Evidence on Water Supply

The California evidence, closely corroborated by the Arizona evidence (except for one study by an Arizona witness based on a Compact interpretation supplied by Arizona counsel and later disowned by counsel[1]), clearly establishes that the dependable or permanent water supply available for consumptive use from the main Colorado River is approximately 6,000,000 acre-feet per annum.[2] That dependable supply requires an inflow at Lee Ferry of 8,700,000 acre-feet per annum, together with other usable lower basin tributary inflow, to meet Mexican Treaty deliveries and reservoir and other unavoidable river losses as well as consumptive use.[3] The dependable supply of all lower basin tributary systems is approximately 2,000,000 acre-feet per annum.[4] Thus, the dependable or permanent supply available for

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[1]See Ariz. Ex. 358 (Tr. 18,097) and Tr. 21,840, discussed *infra* pp. 245-46 note 4.

[2]Calif. Findings and Conclusions, parts V-A through V-E, pp. V-3 through 33. The California evidence showed a net usable supply available to the lower basin from the main stream of 6,175,000 acre-feet per annum, reduced by a 5% safety factor to 5,850,000 acre-feet per annum (see Calif. Finding 5E:102, table, p. V-31). See also plate 8 *infra,* comparing various elements of water supply studies in evidence.

[3]Calif. Findings and Conclusions, parts V-D and V-E, pp. V-17 through 33; plate 7 *infra,* a schematic diagram of the California water supply study.

[4]Calif. Findings and Conclusions, parts V-G and V-H, pp. V-35 through 48, showing the safe annual yield from the Gila River system in Arizona and New Mexico of 1,750,000 acre-feet per annum; part V-I, p. V-49 (see also Calif. Finding 4F:102, p. IV-55), re other lower basin tributary systems (Little Colorado, Virgin, Kanab Creek, and Bill Williams river systems) showing a safe annual yield of 200,000 acre-feet per annum.

allocation for consumptive use in this suit is somewhat less than 8,000,000 acre-feet per annum from the entire lower basin, including both main stream and tributaries.[5]

B. Interstate Apportionment Proposed by California

The decision proposed by California would provide California three quarters of a million acre-feet less from the permanent supply of the main Colorado River than the quantity of water required by California's constructed projects. It would permit from that supply full future development of all existing Nevada projects and of all existing Arizona main stream projects except for 80,000 acre-feet per year.

Under the decision proposed by the California defendants, California claimed approximately 4,600,000 acre-feet per annum from the dependable or permanent supply of the main Colorado River.[6] Under the Seven-Party Agreement[7] (and ignoring small additional and senior federal claims for Indian reservations in California sustained by the Master),[8] that quantity would provide 3,850,000 acre-feet per annum to satisfy the first three priorities of the four California agricultural agencies (Palo Verde, Yuma, Imperial, and Coachella), or about 144,000 acre-feet less than those districts' combined consumptive use as of the date of the evidence

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[5]The 8,000,000 acre-feet is a rounded quantity. The dependable main stream supply of 5,850,000 acre-feet per annum proposed in our findings is rounded up to 6,000,000 acre-feet per annum, and the dependable tributary supply of 1,950,000 acre-feet per annum is rounded up to 2,000,000 acre-feet.

[6]Calif. Findings and Conclusions, part XII, particularly table 2, p. XII-25; Calif. proposed decree (bound in vol. 1, Calif. Findings and Conclusions), table 1, p. Decree-10, at col. (7).

[7]Ariz. Ex. 27 (Tr. 242), discussed *supra* p. 14.

[8]*Supra* pp. 15-16.

(1955-1957).[9] That quantity would supply 750,000 acre-feet per annum under the fourth and fifth priorities for Metropolitan Water District,[10] or only 166,000 acre-feet more than Metropolitan's 1957 consumptive use,[1] and 462,000 acre-feet less than its 1,212,000 acre-feet of constructed capacity. California would be dependent, for the balance, on water temporarily available.

Under our proposed decree, Arizona would receive 1,129,500 acre-feet per annum from the dependable main stream supply, only 80,000 acre-feet less than the full ultimate requirements of her existing main stream projects.[2] Nevada would receive the full requirements of her existing main stream projects, 120,500 acre-feet, from the dependable main stream supply.[3]

In addition, Arizona would receive from the dependable or permanent supply of the Gila River system 1,715,000 acre-feet per annum, plus her use by existing projects of 82,500 acre-feet per annum from the dependable supply of other lower basin tributary systems.[4] Thus, Arizona would receive 2,927,000 acre-feet per annum from the dependable supply of the Colo-

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[9]Rep. 128 shows that consumptive use in Coachella, Imperial, Palo Verde, and Yuma as of 1955-1957 was 3,994,392 acre-feet per annum, which is 144,392 acre-feet more than 3,850,000 acre-feet.

[10]4,600,000 acre-feet less 3,850,000 acre-feet for the first three priorities ahead of Metropolitan.

[1]Metropolitan's 1957 consumptive use was 584,000 acre-feet (Rep. 128 n.73). The district's present use is already more than 750,000 acre-feet per annum (appendix, pp. A35-36).

[2]Calif. Findings and Conclusions, part XII, particularly table 1, p. XII-24; Calif. proposed decree, table 1, p. Decree-10, cols. (7) and (8); *supra* pp. 16-17.

[3]Calif. Findings and Conclusions, part XII, particularly table 3, p. XII-26; Calif. proposed decree, table 1, p. Decree-10, col. (7); *supra* pp. 18-19.

[4]Calif. Findings and Conclusions, part XII, particularly table 1, p. XII-24; Calif. proposed decree, table 3, p. Decree-15; *supra* p. 18.

rado River *system* (main stream and tributaries) in the lower basin. Nevada would also receive her use by existing projects of 51,000 acre-feet per annum from the Virgin River system.[5] Thus, Nevada would receive 171,500 acre-feet per annum from the Colorado River *system* in the lower basin.

New Mexico and Utah would receive the full requirements of their existing projects from the dependable supply of the lower basin tributary systems in each state, 45,500 acre-feet per annum to New Mexico and 56,000 acre-feet per annum to Utah.[6]

C. The Master's Determinations on Water Supply

The Master asserts that the future supply of main stream water in the lower basin is irrelevant to the legal issues in this case (Rep. 99-102) and that the dependable or permanent supply of the main Colorado River is undetermined and undeterminable from the record (Rep. 102-13). (The Master does not mention the permanent supply of lower basin tributary systems.) These water supply questions, which are bound up closely with the resolution of the issues on the merits, are treated in the Argument, Part Five *infra* pp. 232-78.

D. California Motions re Water Supply

In our comments on the draft report, submitted to the Special Master on June 10, 1960, California moved,

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[5]Calif. Findings and Conclusions, part XII, particularly table 3, p. XII-26; Calif. proposed decree, table 5, p. Decree-17; *supra* p. 19.

[6]Calif. Findings and Conclusions, part XII, particularly table 4, p. XII-27, showing New Mexico's allocations from the Gila and Little Colorado river systems, and table 5, p. XII-28, showing Utah's allocations from the Virgin River and Kanab Creek systems; Calif. proposed decree, table 6, p. Decree-18 (New Mexico) and table 7, p. Decree-[illegible] (Utah); *supra* p. 19.

inter alia, that the Master appoint or recommend that the Court appoint a disinterested expert or experts skilled in hydrology as the Court's own witness to testify (1) whether the dependable or permanent water supply available for consumptive use each year from the main Colorado River in the lower basin is determinable within reasonable and useful limits of accuracy and (2), if so, what that supply is.[7] The Master denied this motion.[8]

On August 31, 1960, the California defendants moved that the Special Master reopen the trial for the taking of evidence relating to depletion of the Colorado River at Lee Ferry by existing and anticipated projects in the upper basin. The motion was occasioned by the revelation during oral argument in New York City on August 19, 1960, that the Master believes that unused upper basin water (*i.e.,* water legally and physically available for use in the upper basin) will be available for use in the lower basin into the "foreseeable" and "unforeseeable" future.[9] This assumption of the Master was not disclosed by the draft report, although it is now discussed in the Master's final Report (Rep. 111-15).[10] The Master denied the motion (Rep. 112 n.41).

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[7]Calif. Comments, Suggestions, and Motions re Draft Report, submitted June 10, 1960, pp. 62-63, 68-90.

[8]Tr. 22,599-600.

[9]Calif. Motion To Reopen the Trial for the Taking of Evidence re Depletion of the Colorado River at Lee Ferry by the Upper Basin, submitted August 31, 1960, pp. 5-20.

[10]The errors in the Master's discussion of upper basin depletions are treated in the Argument, Part Five *infra* pp. 246-53, 257-61.

V. DECISION RECOMMENDED IN THE MASTER'S REPORT

The Master's Report and proposed decree recommend the following decision for this Court:

A. The "Mainstream" and "Tributary" Waters

The "mainstream" is defined as Lake Mead and the main Colorado River below Lake Mead within the United States, including the inflow from the Bill Williams River, and miscellaneous lesser tributary inflow (Rep. 183-85, Decree art. I(B) (Rep. 345)). The Bill Williams River enters the main Colorado River approximately 150 miles below Hoover Dam (see Rep. 33-34; map of Colorado River basin, plate 11 *infra*).

The "tributary" waters are all other lower basin waters; *i.e.,* the waters in all tributary systems in the lower basin as well as in the main Colorado River itself from Lee Ferry to Lake Mead. (Decree art. I(F) (Rep. 345-46).)

B. The "Mainstream" Allocation

1. *Basis of Water Rights*

The Report concludes that the Boulder Canyon Project Act nullified principles of priority and equitable apportionment which would otherwise control the interstate allocation of "mainstream" waters. Instead, the Project Act authorizes and directs the Secretary to allocate the "mainstream" waters among Arizona, California, and Nevada, the only three states having physical access thereto, by means of water delivery contracts authorized by section 5 of the act. This conclusion is based on the Master's construction of sections 1, 5, and 8(b) of the Project Act, and on legislative history. (Rep. 151-64.)

2. *The Limitation on California*

The Report construes the limitation on California's

consumptive use,[1] set forth in the first paragraph of section 4(a) of the Project Act and the reciprocal California Limitation Act (Rep. 164-65), as follows:

(1) The limitation on California's consumptive use to 4.4 million acre-feet of the "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" makes an "inappropriate" reference to the Compact. It was intended by Congress to refer to 4.4 million acre-feet of the first 7.5 million acre-feet of consumptive use from the "mainstream" alone, although Article III(a) of the Compact relates to the first 7.5 million acre-feet of consumptive use from all Colorado River system waters (main Colorado River and all tributaries) in the lower basin. (Rep. 173-94; see also Rep. 142-44.)[2]

[1]The Master concludes that the limitation on California relates to consumptive use of "mainstream" water measured by the quantity of "mainstream" water diverted at points of diversion in California less return flow to the "mainstream," measured or estimated by appropriate engineering methods, available for use in the United States or in satisfaction of the Mexican Treaty obligation. (Rep. 185-94.)

[2]The Master's proposed construction of the limitation on California was first revealed in his Draft Report of May 5, 1960. In our Comments on the Draft Report (pp. 90-93), we moved that the Master reopen the hearings to take evidence on whether the limitation's reference to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" is controlled by whatever meaning is properly to be given to Article III(a) of the Colorado River Compact. The Master by letter directed the California defendants to submit at the time of oral argument in New York City an offer of proof in support of our motion which would serve as the basis for determining whether the hearing should be reopened (Tr. 22,600). Our offer of proof and brief in support thereof, dated August 17, 1960, and the California exhibits which constitute the evidence offered (now bound as vol. 25, Calif. Exhibits) were submitted to the Special Master and all parties on August 17, 1960. The Report concludes that "it would not be provident to reopen the hearings for the purpose of receiving [the exhibits submitted in California's offer of proof] as well as any evidence which might then be tendered by the other parties in contradiction." (Rep. 253; see Rep. 248-53.)

(2) The limitation on California's consumptive use to one half of any "excess or surplus waters unapportioned by said compact" does not refer to the Compact. It refers to one half of the consumptive use of "mainstream" waters over and above 7.5 million acre-feet although the Compact deals with all Colorado River system waters in the lower basin. (Rep. 194-200.)

The Report asserts that the limitation set forth in the first paragraph of section 4(a) cannot be read literally because Article III(a) in the Compact which is described as a "limitation on appropriative rights" cannot be identified with Article III(a) in the limitation which is described as "a source of supply." (Rep. 149.) The Report also asserts that the limitation cannot be read literally to refer to the Compact also because of provisions of a tri-state compact (never ratified) set forth in the second paragraph of section 4(a) which would render such a construction impractical and unreasonable (Rep. 170-72). Legislative history is also relied upon (Rep. 174-80). The Master also holds that if the limitation is read literally to refer to the Compact, the 1 million acre-foot increase in use permitted to the lower basin by Article III(b) of the Compact is not "excess or surplus waters unapportioned by said compact," and California could not acquire rights thereto (Rep. 150, 180 n.40, 194-96).

The Report reasons that Congress intended the limitation to refer to "mainstream" waters because these were the waters to be impounded and controlled by the United States with the dam and reservoir authorized by the Project Act (Rep. 173-74, 183). The "mainstream" waters include the inflow from the Bill Williams River (150 miles below Hoover Dam) because of

administrative difficulties in segregating its inflow from the other "mainstream" waters released from Lake Mead and because Congress treated that inflow as *de minimis* (Rep. 184-85).

3. *The "Contractual Allocation Scheme"*

The Report concludes that the Project Act vests in the Secretary of the Interior the discretion to determine the quantity of "mainstream" waters which he will make available each year for consumptive use in Arizona, California, and Nevada. This discretion is controlled only by the obligation to release water pursuant to the Mexican Treaty obligation, and to follow the priorities for the use of Hoover Dam and Lake Mead specified in section 6 of the Project Act (Rep. 221-22, 224, 305). The Master also concludes that "in view of the control of the mainstream vested in the Secretary of the Interior, he will in effect administer the decree" (Rep. 314).

The Report concludes that the water delivery contracts executed by the Secretary of the Interior with California public agencies (between 1930-1934), with Nevada (in 1942 and 1944), and with Arizona (in 1944) establish a "contractual allocation scheme (or system)" (Rep. 221, 232) which "forever allocates" all "mainstream" waters available for consumptive use[3] in these three states in the following manner (Rep. 221-28, 232-37, 305-14, Decree art. II(B) (Rep. 347-50)):

If there is 7,500,000 acre-feet of "mainstream" water available for consumptive use each year:

[3] "[D]iversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation." Decree art. I(A) (Rep. 345).

To Arizona	2,800,000 acre-feet
To California	4,400,000 acre-feet
To Nevada	300,000 acre-feet

If there is less than 7,500,000 acre-feet of "mainstream" water available for consumptive use each year, the shortage is shared ratably by each state in proportion to its allocation:

By Arizona	28/75 (37⅓%)
By California	44/75 (58⅔%)
By Nevada	3/75 (4%)

However, section 6 of the Project Act requires that if the "mainstream" waters available for consumptive use in any year are insufficient to supply "present perfected rights" in one or two states, the allocations of the other states or state must be cut back proportionately to supply those rights. If the "mainstream" waters are insufficient to supply all "present perfected rights" in all three states, shortages are borne in inverse order of priority of such rights across state lines. "Present perfected rights" are defined as the quantity of water put to consumptive use by June 25, 1929, or reserved by the United States for federal reservations made prior to that date whether put to use by that date or not.

If there is excess "mainstream" water available for consumptive use in any year over and above the first 7,500,000 acre-feet:

To Arizona 50% (subject to a reduction to 46% in favor of Nevada if the Secretary should so contract with Nevada)

To California 50%

The foregoing apportionments are subjected by the Report to the following qualifications: Under the Proj-

ect Act, intrastate priorities control the distribution of a state's allocation within a state, but those priorities are not determined in this suit.[4] No water may be delivered to a user or for a use in violation of state law, or to any person without a water delivery contract, with certain exceptions for Indian reservations and other federal establishments operated by the Secretary of the Interior. The Secretary is permitted to release water apportioned but unused by one state for use in another state or states. (Rep. 312, 314, Decree arts. II(B)(7)-(8) and II(C)(1) (Rep. 349-50).) Neither the Report nor the recommended decree gives any instructions to the Secretary as to how water unused by one of the "mainstream" states shall be allocated by the Secretary if it is insufficient to satisfy competing demands of the two other "mainstream" states.

This "contractual allocation scheme" is "deduced" by the Master from the water delivery contracts construed with the gloss that the Secretary intended thereby to effectuate substantially, although not precisely, the allocation set forth in the second paragraph of section 4(a) of the Project Act (authorizing an interstate compact which no state ratified), in conjunction with the limitation specified in the first paragraph of that section (Rep. 222-25).

4. *Federal Reservations*

The Report adjudicates in the United States rights to "mainstream" waters, both as to quantities and priorities, based on federal reservations of public lands for

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[4]Although the Report does determine priority dates of federal rights based on federal reservations, their relative priorities as against other users within a state are not determined. (Rep. 218-19.)

Indian reservations and for other federal purposes[5] (Rep. 254-304, Decree art. II(C)(2) (Rep. 350-53)).

The Report also concludes that the rights of the United States to the full quantities of "mainstream" waters reserved by the United States by June 25, 1929, for Indian reservations and for other federal establishments constitute "present perfected rights," regardless of any history of beneficial use or nonuse (Rep. 309-11), entitled to the protection which the Report accords to such rights (*supra* p. 29). The federal rights and uses are chargeable to those states in which the use is made, and the federal rights within each state are limited by the allocation to each state (Rep. 247-48, 300-02, 312-13, proviso to Decree art. II(C) (Rep. 353)).[6]

C. The "Tributary" Waters

1. *"Tributary" Users Inter Sese*

The Report determines that principles of equitable ap-

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[5]Lake Mead National Recreation Area (Rep. 292-95) and Havasu and Imperial National Wildlife refuges (Rep. 296-300).

[6]California excepted to the Master's determinations of (1) the quantities of water reserved by the United States for Indian reservations (Rep. 254-87) and for other federal lands and purposes (Rep. 291-300), (2) the priorities accorded to such federal reservations, and (3) the bases upon which the Report predicates water rights for such federal reservations. (Calif. Exception IV-5, p. 25.) Although we disagree in principle with these determinations for the reasons summarized in our comments on the Master's draft report, pp. 45-53, we do not brief the point herein. First, the quantities of Indian water in dispute in California are relatively small. Second, the Master has correctly decided, as noted above, that federal uses in Arizona and Nevada are chargeable to those states out of water from which California users are excluded by the California Limitation Act, and the Master asserts that "all of the parties seem to agree to this accounting." (Rep. 247.) No party appears to have excepted to this conclusion. However, if the decision that federal uses are so chargeable should be attacked by any party in briefs, we reserve our challenge to the determinations which sustain the federal claims.

portionment continue to control the interstate allocation of "tributary" waters among users of those waters *inter sese* (Rep. 325). However, there is presently no justiciable controversy over the waters of any tributary system except the Gila River system waters which are used in New Mexico and Arizona (Rep. 322-25). This latter controversy among these two states and the United States is adjudicated (Rep. 325-43, Decree art. IV (Rep. 354-58)) under equitable apportionment principles (Rep. 325-28, 331) in conjunction with a minor stipulation between those two states (Rep. 329-30). No other "tributary" rights are adjudicated.

2. "Tributary" Users Vis-a-vis "Mainstream" Users

The Report determines that principles of equitable apportionment also continue to control interstate controversies between "tributary" users and "mainstream" users (Rep. 316-18; see also Rep. 247), but any waters reaching the "mainstream" are allocated among the "mainstream" users according to the formula earlier propounded (Rep. 317). It further determines that there is presently no justiciable controversy between "tributary" users and "mainstream" users, and, accordingly, no such rights are adjudicated (Rep. 318-21).

VI. EXCEPTIONS OF THE CALIFORNIA DEFENDANTS

The California defendants have excepted to the Report of the Special Master in the respects specified in our exceptions filed with this Court on February 27, 1961. This consolidated opening brief of all eight California defendants is filed in support of those exceptions.

SUMMARY OF THE ARGUMENT

Preliminary Statement

The Master proposes a resolution of this suit which is only obliquely related to the issues pleaded and litigated. The Master concludes that the issues which were brought by the parties to this Court, referred to the Master, and litigated during the course of three years of trial, are irrelevant to the disposition of the case. He concludes that the question which precipitated the suit is undeterminable: Is there a *dependable* water supply for the proposed Central Arizona Project?

The Master proposes a decree which, if adopted, will affect the construction of the Central Arizona Project in no perceivable way if Arizona and Congress decide to make diversions for that project from any of the planned alternative diversion points on the main Colorado River above Lake Mead (about 275 miles of the main stream of the Colorado River in the lower basin), newly defined by the Master as a "tributary," and excluded from this adjudication. If the Central Arizona Project should make diversions above Lake Mead (the 1960 Annual Report of the Arizona Interstate Stream Commission states that surveys for such diversions are now underway)[1] the Master's decision proposes that the principal protagonists begin anew in this Court. On the next trip, California as a "mainstream" user sues Arizona as a "tributary" user under the principles of priority of appropriation and equitable apportionment which the Report preserves for that future suit, but which are otherwise abolished by the Master in the "mainstream," defined by the Master as the Colorado River from Lake Mead to Mexico. This unattractive

[1]See p. 125 *infra*.

prospect results from the Master's divorcing the Project Act from the Colorado River Compact.

Arizona brought the present suit to quiet an asserted title to 3,800,000 acre-feet of consumptive use of the waters of the Colorado River system (*i.e.*, main stream and tributaries) in the lower basin. Arizona asserted, and all parties recognized, that Arizona's claim (alleged to include 1,700,000 acre-feet Arizona was not using), and the claims of California for existing and long-established projects, were mutually exclusive. California had built three projects at a cost in excess of a half billion dollars of public investment.

That controversy exists solely by reason of the Colorado River Compact. Were it not for the apportionment in perpetuity which the Compact makes to the upper basin of the consumptive use of 7,500,000 acre-feet per annum, there would be an adequate supply of unappropriated water available for Arizona's proposed Central Arizona Project without impinging on any rights or requirements of the other lower basin states.

Issues joined in the pleadings and the evidence taken during three years of trial related in large part to the pleaded and long-standing controversy over the meaning of the Compact as "enthroned" by the Boulder Canyon Project Act.[2] Major issues litigated were (1) the meaning and method of measurement of "beneficial consumptive use" under the Colorado River Compact as applied to lower basin tributaries; (2) Arizona's asserted identification of her uses on the Gila River sys-

[2]The Senate committee which reported the Boulder Canyon Project bill described it as "enthroning the Colorado River Compact." S. REP. No. 592, to accompany S. 728 (fourth Swing-Johnson bill), 70th Cong., 1st Sess., pt. 1, at 16 (1928). All of part 1 of the above report is in evidence as Calif. Ex. 203 (Tr. 7,715).

tem with the 1,000,000 acre-feet specified for the lower basin by Article III(b) of the Compact. Their significance lay in the fact that the Project Act had incorporated the Colorado River Compact; to what extent, therefore, must Arizona account for her uses on the tributaries against the 3,800,000 acre-feet which she sought? Her claim was based (1) on provisions of that act which had exacted from California a limitation on California's uses (duly enacted by the California Legislature), in the event that Arizona should fail to ratify the Compact, and (2) on a contract with the Secretary of the Interior.

The Master has resolved most of the pleaded and litigated issues relating to the Compact in accordance with California's contentions. Arizona's uses on the tributaries are encompassed by the Compact, and measured as California contended. He holds, however, that the Compact is not relevant to this controversy (Rep. 138): that the explicit incorporation of the Compact into the limitation on California must be excised: that the Compact includes the tributaries in the apportionment it makes to the lower basin, but the California Limitation Act and the Project Act exclude them (Rep. 173); that the Compact's apportionments in perpetuity to each basin are ceilings on appropriations (Rep. 140, 149): that there is nothing to show that the upper basin users will ever appropriate and use anything approaching the quantity of water within that ceiling (Rep. 111). He rejects California's offer to prove that the upper basin, by about the year 1990, will reach or approach the limits of its use physically possible consistent with the Compact (Rep. 112 n.41).

Upon the Master's reasoning, the Arizona and California claims are not mutually exclusive: "Existing California uses are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed." (Rep. 115.) If there were sufficient water available upon application of the Master's formula to supply California's existing uses, there would necessarily be more water available to Arizona than Arizona sought in her Complaint.

The Master's decision generates two great unresolved paradoxes:

(1) It is neither possible nor necessary to determine the dependable water supply, if the Master's premises with respect to the Compact are correct. The upper basin's apportionment, except to the undetermined extent of existing upper basin appropriations, is no longer treated as an existing claim against the lower basin; the claims therefore do not exceed the supply; on these premises the controversy is not justiciable. But he concludes that it is justiciable. Although this is a jurisdictional issue, we postpone its treatment to Part Five of the Argument, since the relationship of the Compact (which the Master holds irrelevant) to the Project Act is at the heart of every substantive issue earlier considered.

(2) In 1928, the Arizona delegation in Congress unanimously, strenuously, and emphatically resisted the Boulder Canyon Project Act, and Arizona continued to do so in three suits in this Court, in Congress, and in every public forum available. In 1960, the Master discovered that, contrary to every contention earlier

made, the Project Act had in fact allocated to Arizona the lion's share of the stored water made available by the Boulder Canyon Project. This paradox is revealed only when the dependable water supply is determined. Absent such a determination, it is impossible to test the result accomplished by the Project Act against its legislative objectives.

I. INTRODUCTION: THE BASIS OF WATER RIGHTS

The source of California's water rights is the law of equitable apportionment and priority of appropriation confirmed, not abrogated, by the Project Act. Appropriation is the law of the arid West created by imperative necessity. That law is more firmly established in the Colorado River basin than anywhere else. This is not by accident, but because this is the area where water is most precious. See plate 1. California water users have initiated appropriations by licenses and permits to appropriate and by federal water contracts; they have diligently prosecuted construction of works to put those waters to beneficial use; and today great projects in California are beneficially using the water. Under the principles of equitable apportionment and priority of appropriation, California's projects have prior rights to the use of all water necessary to sustain them,[3] whether these rights are considered as derived from state or federal law, because federal statutes and state law embody identical principles.

[3]In Part Two we discuss the quantitative limitation imposed upon these rights by the statutory compact between the United States and California evidenced by the Boulder Canyon Project Act and the reciprocal California Limitation Act. This limitation did not destroy the priorities of these rights, but limited their magnitude to stated quantities.

There is no disagreement about the source and characteristics of water rights in the lower basin prior to June 25, 1929, the date upon which, by presidential proclamation, the Boulder Canyon Project Act, the Colorado River Compact (ratified by six states), and the California Limitation Act became simultaneously effective: The controlling law was equitable apportionment and priority of appropriation. Priority of appropriation, the principal ingredient of equitable apportionment, contains three fundamental elements: (1) Water rights are founded upon beneficial use of water and are lost by nonuse; (2) the water user prior in time is prior in right (the priority concept); (3) the water user who initiates an appropriative right and who diligently constructs a project to put the water to beneficial use is given a priority from the date of initiation of his project. This relation-back principle protects the diligent appropriator from losing his water supply before his project is completed to a water user whose project is later initiated but earlier completed. Equitable apportionment, applied consistently by this Court in interstate suits between states which internally apply principles of priority of appropriation, modifies priorities to the extent necessary to take equitable considerations into account; the primary respect in which priority of appropriation is thus modified is the protection of existing economies built upon interstate priorities which are junior. This Court has never countenanced the impairment or destruction of an existing economy, even though founded on junior interstate priorities, for the benefit of a project not yet built. (*Wyoming v. Colorado,* 259 U.S. 419 (1922); *Nebraska v. Wyoming,* 325 U.S. 589 (1945).) *A fortiori,* the Court has pro-

tected economies which are built on senior rights. Such is the California economy which is sustained by the Colorado River Aqueduct of The Metropolitan Water District of Southern California. This project would be the primary victim of the Special Master's recommended decree. (See pp. 260-61, 266-70, 272-76 *infra.*)

The Special Master concludes that the Boulder Canyon Project Act, by implication, destroyed the principles of priority of appropriation and equitable apportionment in the "mainstream" (the truncated main Colorado River as defined by the Report) and all water rights founded upon that law (excepting only certain narrowly defined "present perfected rights" existing in 1929), although (a) those principles survive and control water rights in every part of the Colorado River system in the lower basin except the "mainstream" and although (b) "mainstream" appropriative rights survive vestigially to permit senior "mainstream" users to vindicate their rights against upstream junior "tributary" users (including, as a "tributary," the main Colorado River above Lake Mead). (Rep. 316-18, 325.)

By thus abrogating on the "mainstream" the water law principles which have been settled in the West for a hundred years, and all interstate water rights depending upon those principles, the Master proposes, in 1961, to remit all existing projects and all future projects to a pro rata share of a water supply left undetermined and, according to the Master, undeterminable.

II. CONSTRUCTION OF THE LIMITATION ON CALIFORNIA'S RIGHTS

Our disagreement with the Special Master begins with the event which took place on June 25, 1929, when

the President's proclamation made simultaneously effective (1) the Boulder Canyon Project Act, (2) the California Limitation Act, and (3) the Colorado River Compact. There is agreement that prior to that date all rights of all states in the lower basin were based on the law of equitable apportionment and priority of appropriation. There is also agreement that the Boulder Canyon Project Act, section 4(a), first paragraph, together with the California Limitation Act placed limits on those rights in California. We sharply disagree with the interpretation the Special Master has placed upon that statutory limitation. We also sharply disagree that our rights within that quantitative limitation were at any time shorn of priority by the Project Act, the Limitation Act, or the Secretary's water delivery contracts.

In the California Limitation Act, California agreed to limit her uses of Colorado River waters in consideration of the passage of the Project Act, in response to Congress' specification of the terms of the agreement tendered in the first paragraph of section 4(a) of the Boulder Canyon Project Act. The specified limitation is that California should agree that her aggregate annual consumptive uses of Colorado River waters, including "all water necessary for the supply of any rights which may now exist," shall not exceed 4.4 million acre-feet of (1) the "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," plus (2) not more than one half of any "excess or surplus waters unapportioned by said compact." The California Limitation Act, accepting that agreement, repeats the specified words virtually *in haec verba.*

Article III(a) of the Colorado River Compact apportions, from both the main stream and the tributaries of the Colorado River system, 7,500,000 acre-feet of beneficial consumptive use in perpetuity to each basin. The phrase "excess or surplus waters unapportioned" does not appear in the Compact, but Article III(a) of the Compact is the only Compact provision which in terms purports to apportion water between the basins. The issue has long been whether the 1,000,000 acre-feet of increase in beneficial uses permitted the lower basin in Article III(b) can be construed as an apportionment within the meaning of the limitation's phrase, "excess or surplus waters unapportioned." California has insisted that the waters specified in Article III(b) of the Compact are "excess or surplus waters unapportioned" and Arizona has insisted that they are "apportioned." This phrase clearly refers to the Compact although it is not clear which Compact classification is referenced. (See *infra* pp. 72-73, 107 note 9.)

The Master rewrites the words of the limitation agreement. He says that the words do not refer to the Colorado River Compact (which is irrelevant), nor to any of its provisions, nor to the main stream and the tributaries in the lower basin (Rep. 173):

> "Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam,[4] despite the fact that Article III(a) of the Compact deals with

[4](Footnote ours.) Because of loss to nature's toll and the Mexican Treaty, 7,500,000 acre-feet of consumptive use from the truncated "mainstream" requires a flow of about 10,000,000 acre-feet to the lower basin at Lee Ferry. The California projection of net losses, including Mexican treaty requirements, below Lee Ferry is about 2.5 million acre-feet per annum. See plate 7 *infra*.

the Colorado River *System*, which is defined in Article II(a) as including the entire mainstream and the tributaries."

The Master holds that the words in the limitation are "shorthand" meaning "7,500,000 acre-feet per annum" (Rep. 173), a figure which does not appear in the limitation agreement, but which the Master holds must be derived from some source other than the Colorado River Compact. He regards as irrelevant the intention and the understanding of the California Legislature in agreeing to the limitation. But if the intention and understanding of the California Legislature were relevant, California must be conclusively presumed to have accepted the limitation interpreted as the Master now interprets it, although he concedes that this meaning contradicts the literal meaning of the offer to California.

The Master's proposal, he admits, is a patentable novelty.[5] It is entirely unsupported in the language of the statute, in the legislative history upon which the Master relies, and in 30 years of judicial, administrative, and practical construction of those words. It occurred to no one until after the trial in Arizona's fourth lawsuit over these documents had closed. The reference to the Colorado River Compact in the limitation was deliberate, rational, and purposeful. The limitation was insisted upon by the upper basin states to protect their apportionment under the Colorado River Compact and required by section 4(a) of the Project Act in the

[5]Referring to this construction, the Master conceded: "If we were issuing patents on it, I think we should have to claim novelty." (Tr. 22,762.) Novelty is a rewarded virtue in patent law; less can be said for it in construing a statute upon which whole economies have come to depend.

event, and only in the event, that Arizona did not ratify the Compact. The limitation, by restricting California's appropriative rights in the lower basin quantitatively, left a margin for exploitation by Arizona, thereby reducing the possibility that Arizona, unrestricted by the Colorado River Compact, would invade the upper basin's apportionment. The Compact purpose, by which Congress required a limitation only in consequence of Arizona's failure to ratify the Colorado River Compact, is defeated unless it is recognized that the law of the river is a seamless web: The words in Article III(a) of the Compact must have only one meaning, whether read in the Compact or read in the Project Act by specific incorporation. The quantitative difference between the two meanings which the Master discovers is 2 million acre-feet per annum, the magnitude of the lower basin supply which is consumed on the tributaries.

The Master's patentable novelty has these results:

(1) It permits the Master to resolve the major issues in a 30-year controversy related to the Compact in California's favor, and in accord with the Compact's express definitions, but to dismiss the Compact as irrelevant to anything to be here decided.

(2) It creates—if the upper basin's Compact apportionment is to be given any effect at all beyond the upper basin's present appropriations—a disparity between lower basin claims and supply far more severe than the worst drought which can be imagined. California's 4,400,000 acre-feet *and* the 3,100,000 acre-feet from which California is excluded must be satisfied, if at all, from the supply available from a newly created "mainstream" alone, and not—as the Compact would

dictate—from the Colorado and its tributaries in the lower basin. The utter impossibility of finding a permanent supply in the main stream adequate to sustain 7.5 million acre-feet of claims of the three states, undiminished by their uses on the tributaries, creates a shortage of some 2 million acre-feet, not by diminishing the main stream supply physically, as a drought would do, but by inflating the claims against that supply.

(3) It creates an entirely new river (the "mainstream"), in which water rights are on a basis of "sovereign parity"—a concept that states have equal priorities in unequal quantities of water—entirely different from water rights in the rest of the Colorado River system, except that equitable apportionment and priority are preserved as the basis and source of every "mainstream" right against the users on all of the tributaries which feed water to that river. How the two systems of rights can conceivably be adjudicated or administered together without total confusion is left unexplained, and we think no explanation is possible. The Court will be left with that problem as soon as a Central Arizona Project diversion from the Master's newly christened tributary above Lake Mead is again presented for federal authorization, or for construction as a nonfederal project. (See pp. 7 *supra* and 124-25 *infra.*)

The Master rewriting the limitation rests on inferences from the Project Act which no one discovered prior to the Master's draft report. It rests upon the Master's selection of legislative history, but the Master fails to disclose the two controlling facts:

(1) No member of Congress, even by remote inference, suggested that the Project Act created a "main-

stream" from Lake Mead to Mexico, with a separate basis for interstate water rights.

(2) Agreement has been universal that the Project Act is controlled by the Colorado River Compact in the unlikely event that any inconsistencies between the Project Act and the Compact might be discovered.

III. DESTRUCTION OF PRIORITIES BY A CONTRACTUAL ALLOCATION SCHEME

The shortage—or more accurately the disparity between the main stream supply and the claims against it which have been inflated by exempting the uses on the tributaries from the limitation accounting—is distributed by resort to a "contractual allocation scheme." This is deduced from the contracts which the Secretary has made for storage and delivery of water. The Master constructs a proration formula, undiscovered and undiscoverable from the Secretary's regulations or from any of the Secretary's contracts. California is to receive not 4,400,000 acre-feet, but 44/75 of an undetermined and undeterminable quantity. The numerator the Master finds in the one figure which appears in the limitation. The denominator is 7,500,000 acre-feet, but not found in the limitation nor (according to the Master) can it be taken from the Compact. It is derived from his interpretation of a tri-state compact which the Project Act authorized the states of Arizona, California, and Nevada to make, but which none ratified. Although the Master holds (correctly) that Congress neither imposed this apportionment on the states nor directed the Secretary to follow it, the Master concludes that the Secretary's contracts substantially effectuate that nuga-

tory tri-state compact. He strikes down as invalid, however, the Secretary's provisions in the Arizona and Nevada contracts which were placed there to make the accounting of these contracts conform to the Compact and limitation accounting; the Master's argument does not permit him to concede that the Colorado River Compact and the limitation accounting are compatible. The result he reaches, derived from this rejected tri-state compact, is even more unfavorable to California than that tri-state agreement would have been. (See pp. 224-25 *infra.*)

If the Master is wrong in rewriting the limitation to delete the incorporation of the Colorado River Compact, he cannot possibly find his "44/75" formula.

The converse is not necessarily true. Even if the Master could divorce the Compact from the limitation and substitute the newly invented "mainstream" for the Colorado River system, it does not follow, except by the discovery of "sovereign parity," that the shortage thus created ought to be prorated at all. We say that, subject to the quantitative limitation on California, shortages should be borne by application of the doctrine of equitable apportionment, including the principles of priority and protection of existing uses; section 8 of the Reclamation Act adopts those principles. (See pp. 147-52 *infra.*)

To reach the Master's proration result the Court must overrule its holding in *Arizona v. California,* 283 U.S. 423, 464 (1931) (expressly identified as such in the Court's opinion by Mr. Justice Brandeis), that the law of prior appropriation survived the enactment of the Project Act. The Court must override the express language of section 18 and section 14 of the Project

Act, and overrule *pro tanto* two decisions of this Court which have accorded section 8 of the Reclamation Act *interstate* effect. *Nebraska v. Wyoming,* 325 U.S. 589, 612-16 (1945); see *Wyoming v. Colorado,* 259 U.S. 419, 463-71 (1922). The Court must find that Congress delegated to the Secretary a power to make an interstate allocation of perpetual water rights, although members of Congress were virtually unanimous in their belief that Congress did not have that power to exercise by statute, much less to delegate to the Secretary of the Interior. (See *infra* pp. 146-47, 181-82, 186 note 1.)

If the Master is right that water supply will be abundant, the objective proposed by California presents no hazard to any existing project in any neighboring state, and it presents for a future project only the hazard that must be recognized and assumed by the sponsors of any new project anywhere in the West. The risk ought not to be cast upon projects which have become the basis of going economies, by the application of novel interpretations of the "law of the river" discovered 30 years too late.

IV. NONEXISTENCE OF THE MASTER'S CONTRACTUAL ALLOCATION SCHEME

The question of the validity of the Master's "contractual allocation scheme" is reached only if it is concluded (1) that the limitation must be rewritten to delete its incorporation of the Compact, and (2) that Congress validly delegated to the Secretary of the Interior the power to forever allocate water rights in the "mainstream," and (3) that he did so.

The "contractual allocation scheme" founders on the incontrovertible fact that no Secretary of the Interior

ever purported to make any such allocation. The contracts themselves contradict the existence of any such allocation. To find his allocation scheme, the Master not only rewrites the statutes, but he must also rewrite the contracts. Thus he excises from the contracts the clauses expressly reducing the Secretary's delivery obligations by reason of the contractees' uses above Lake Mead. (Rep. 237-47.) Even these excisions do not fit the contracts to the Procrustean bed. The very water delivery contracts relied upon by the Master to create the contractual allocation likewise expressly recognize the rights of New Mexico and Utah; the Arizona contract specifically recognizes "present perfected rights" —obviously as of 1944. These provisions must also be written out of the contracts to discover any correlation between the Master's "contractual allocation scheme" and the contracts as they were executed. (See pp. 201-03 *infra.*)

The Master assumes California agencies voluntarily accepted a "federal allocation" by entering contracts which were even harsher to California than the tri-state compact which California had refused to ratify.

Moreover, if any Secretary made any "allocation" to California, that allocation must be construed consistently with the limitation on California incorporating the Compact's systemwide concepts. So construed, the Secretary "allocated" to California 4,400,000 acre-feet per annum whenever the systemwide consumptive uses in the lower basin are 7,500,000 acre-feet per annum, and one half of any systemwide consumptive uses in excess of 7,500,000 acre-feet per annum, up to 962,000 acre-feet thereof.

In any event, and however the limitation is construed, the Secretarial "allocation" (if any) requires that shortages in "Article III(a) waters" shall be borne in inverse order of priority under the principles of priority of appropriation and equitable apportionment, thereby protecting California's existing projects. No contract purports to provide otherwise. (See pp. 211-31 *infra.*)

Very little could have been said in 1928, we think, in support of the Master's elaborate structure had it been proposed in Congress. Clearly any enthusiasm would have been limited to members of Congress from Arizona, who were in fact implacable in their opposition to the Project Act. Less can be said for it as an invention which bears the patent date of 1960.

V. WATER SUPPLY AND JUSTICIABILITY

The Master says that water supply cannot be determined within a margin of error which in fact is larger than the total quantity which Arizona in her Bill of Complaint claimed and described as unused.[6] If the Master is correct that the Colorado River Compact is (1) a ceiling on appropriations and (2) irrelevant, it is possible that water supply cannot be determined by anyone. If so, there is no justiciable controversy before the Court.

Much of what the Master says about the difficulties of determining water supply he ascribes to deficiencies in the science of hydrology and in the hydrologic data available. In fact, the data are better than those available to the Court in any prior case in which water supply was determined. Determination of water supply, we

[6]Rep. 104; Ariz. Complaint, par. XVII, p. 21.

believe, is jurisdictional. Moreover, without such a determination, a basic and compelling fact about the impact of the recommended decree is concealed. However "inappropriate" Congress' language may have been to achieve the result presumably intended, its intent with respect to specific projects was clear: It intended to make it possible to supply, in California, the All-American Canal, the Palo Verde Irrigation District, and The Metropolitan Water District of Southern California. This intent was recognized, affirmed, and asserted by both friend and foe of the Project Act. (See pp. 236-38 *infra.*)

That intent is not frustrated alone by supervening drought. We recognize fully that nature has already impaired the supply on which we relied. But the purpose intended by Congress could not have been achieved, if the Master reads it correctly, even if the full supply anticipated were available; the injury to California results from the Master's rewriting the applicable law and the water delivery contracts. In so doing, he relieves Arizona from the deductions which her pleadings conceded should be made from the quantities claimed under that state's contract with the Secretary, and awards Arizona substantially more water than those pleadings demanded.

The compelling inference from the facts of water supply, if they are developed, is that the Master has recommended a decision based on error. It is an error the consequences of which can only be described by the word "disaster."

We ask that the decree of this Court recognize that no limitation has been imposed on California restricting her to use less than 4,400,000 acre-feet per annum

of the waters apportioned to the lower basin states by Article III(a) of the Colorado River Compact from the main stream and the tributaries, plus one half of the excess or surplus waters unapportioned by that Compact. We ask that the appropriative priorities of our existing projects within that 4,400,000 acre-feet be protected, and that our rights in one half of the excess or surplus be recognized.

CONCLUSION

California does not ask that any water be required to run to the ocean unused. We do not ask to be relieved of any obligation which our state has fairly assumed. We ask a decision that will fully protect the rights and virtually all of the ultimate requirements of all existing projects in Arizona and Nevada competing with California for water from the main Colorado River.

ARGUMENT

PART ONE

INTRODUCTION TO THE ARGUMENT: EQUITABLE APPORTIONMENT AND PRIORITY OF APPROPRIATION AS THE FOUNDATION OF WATER RIGHTS

The Special Master's Report proposes, in one stroke, to abolish one hundred years of western water law in the "mainstream"[1] and to substitute in its stead a novel system of water rights. The system proposed by the Master is the antithesis of the law formerly applied to the "mainstream" and the law still to be applied to every other part of the Colorado River system in the lower basin.[2]

The law which would control the disposition of the controversy before the Court in the absence of the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act is not now in dispute. That controlling law is equitable apportionment and its primary ingredient, the principles of prior appropriation.[3]

California insists that those enactments recognize the continued vitality of those principles within the lower basin, except as California is expressly limited. The Master proposes to construe the Boulder Canyon Project Act to nullify unilaterally, without the assent of the states, equitable apportionment and the law of prior appropriation in the "mainstream" and to authorize the

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[1]Defined in the Report as Lake Mead and the main Colorado River below. (Rep. 173, 185.)

[2]The main Colorado River between Lee Ferry and Lake Mead and all lower basin tributaries.

[3]Rep. 152, 316, 325-26.

creation of a unique system of water rights by the Secretary of the Interior through the execution of water delivery contracts which forever fix the allocations of "mainstream" water among California, Arizona, and Nevada regardless of beneficial use, nonuse, or existence of a project to use it. We say that the contracts of themselves create no interstate apportionment.[4] They are intended to administer a system under which "beneficial use shall be the basis, the measure, and the limit of the right,"[5] whether asserted intrastate or interstate, and whether the right so administered was initiated by an appropriation under state law or initiated by a federal contract for the use of stored water. However initiated—by state permit or license to appropriate or by federal contract—no intrastate or interstate water right is created unless, in the exercise of due diligence, a project is built to put the water to beneficial use, in which event the right relates back to the date of its initiation.

The Master's extraordinary proposal nullifies Congress' express command in the Project Act. It ignores the century of experience upon which western water law has been based. It overrules this Court's holding set down by Mr. Justice Brandeis which has been undisturbed for a generation. *Arizona v. California,* 283 U.S. 423, 464 (1931). It conflicts with the legislative

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[4]In the alternative, we contend that if there were any contractual allocation scheme, the Master has misconstrued that scheme. See Argument *infra* pp. 195-231.

[5]The expression is from § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958), incorporated by reference in § 14 of the Boulder Canyon Project Act, 45 Stat. 1065, 43 U.S.C. § 617m (1958) (Rep. app. 394). Section 8 incorporates the relation-back principle and operates interstate. See Nebraska v. Wyoming, 325 U.S. 589, 612-14 (1945).

history of the Project Act and with the administrative, practical, and subsequent congressional construction of that act. It reverses the basis upon which development throughout the lower basin has proceeded for the last 30 years.

The extraordinary nature and the serious consequences of the Master's proposal to abolish the pre-existing law within the newly defined "mainstream" cannot be fully appreciated without considering the background and development of that law and its rationale.

1. *Principles of Western Water Law*

Western water law principles may be divided into two correlative and harmonious bodies of law: (a) The law of priority of appropriation applied internally by all of the western states[6] and adopted by the federal reclamation laws, with some modifications, and (b) equitable apportionment, the major ingredient of which is the law of prior appropriation, heretofore consistently applied by this Court in resolving western interstate water disputes.

2. *Principles of Priority of Appropriation*

The appropriative rights doctrine was conceived more than a century ago in response to these basic facts of life in western United States: Water is scarce. (See Rep. 16.) In these states, arable land and metropolitan centers are often widely separated from the water supply. Water must be brought to the land and to the people, often from great distances, by the construction of

[6]Modified riparian rights which still exist in California (Rep. 22) are quantitatively insignificant in this controversy.

elaborate diversion works, canals, and aqueducts.[7] Because existing streams are subject to erratic flows and floods,[8] regulation of stream flow by immense storage reservoirs is imperative.

Appropriative rights began in the mining camps of the Sierra Nevada in California.[9] At that time judges thought the choice of legal doctrines for the West was between what they assumed was the English common law of riparian rights and a new system based on priority of beneficial use. The new system was chosen, first in the mining camps, and later state by state throughout the West. The riparian doctrine,[10] developed in humid climates at a time when streams were important mainly as a means of transportation instead of

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[7]"Because of the topography and geography of the region, Colorado River water can feasibly and economically be utilized only by the construction of great projects consisting of dams, pumping facilities, desilting basins, canals and other works, the cost of which is enormous." (Rep. 133.)

[8]This is true not only of the Colorado River system (Rep. 20, 115, 117, 119-22), but of many other western streams, such as the Laramie, equitably apportioned by this Court in Wyoming v. Colorado, 259 U.S. 419, 486 (1922), the Cache la Poudre, analyzed in that case, *id.* at 475, and the North Platte, equitably apportioned by this Court in Nebraska v. Wyoming, 325 U.S. 589, 598 n.7 (1945). See comparisons of flow fluctuations of these streams and the Colorado River in plates 4, 5, and 6.

[9]Irwin v. Phillips, 5 Cal. 140 (1855); Conger v. Weaver, 6 Cal. 548 (1856).

[10]The riparian doctrine has three fundamental principles which are directly contrary to the law of appropriation. First, water may be used only by a riparian landowner, on riparian land, within the natural drainage basin of the stream from which it is taken. No similar restriction exists on appropriative rights, developed where export of water to site of use is a recognized necessity. Second, the riparian right is neither acquired by use nor lost by nonuse. In this respect it is the antithesis of the appropriative right. Third, the riparian right is correlative, with the consequence that a water user who had built a project 50 years ago and had used the water ever since would be forced to share, in abundance or scarcity, with the proprietor of a new project initiated tomorrow. This is likewise the antithesis of the appropriative doctrine that "first in time is first in right."

a resource essential for survival, failed utterly to meet the vastly different conditions in the arid West. The Master invites the Court to take a giant leap backward by reinstating the proration principle of the repudiated riparian doctrine and abrogating the priority principle of the appropriative doctrine.

Mr. Justice Stone, in an earlier suit between Arizona and California, aptly described the principles of appropriation:[1]

> "Under this doctrine, diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence. See Arizona v. California, supra [283 U.S. 423, 429 (1931)]; Kansas v. Colorado, 206 U.S. 46; Wyoming v. Colorado, 259 U.S. 419."

Three principles provide the cornerstones of the appropriative rights doctrine: (a) Beneficial use is "the basis, the measure, and the limit of the right,"[2] (b)

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[1]Arizona v. California, 298 U.S. 558, 565-66 (1936).

[2]Reclamation Act § 8, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958), incorporated in the Project Act by §§ 12 and 14 of the latter statute.

the earlier beneficial user is protected against a later user by the principle of first in time, prior in right, and (c) one who has properly initiated an appropriative right and who diligently pursues the construction of works to enable him to use the water, is entitled to a water right upon completion of his works with a priority dated back to his first initiation of the right for the full magnitude of the project he has built (the relation-back principle).

Thus the first fundamental is that a water right depends on beneficial use and is lost by nonuse. Where water is scarce, beneficial use must always be the basic criterion for a water right.

The second fundamental is the doctrine of priority: One who first initiates a project to put water to beneficial use and proceeds thereafter with due diligence has priority over later users. If there is a water shortage, that shortage is not shared equally by all persons with water rights on the same stream. Users cut back their use in inverse order of the priorities established by dates of initiation of the respective rights. The priority principle, rather than parity, has remained the basic element of western water law because it is the only principle, as experience has proved, which meets the needs of the West. There are several reasons for this.

In bringing land and water together, the investment of time and money—often great quantities of both[3]—

[3]The Master recognizes these facts (Rep. 133, 239), but fails to recognize that the water rights system he proposes dictates the failure of the very projects he realizes must be protected, unless the supply becomes very much greater than has been ex-

is required. The third fundamental, the relation-back principle, operating concomitantly with the priority principle, constitutes the only legal machinery yet devised which provides sufficient security to encourage, indeed to permit, the necessary investment. Under this doctrine the investor is protected against some risks, and other risks are calculable. He is relieved, under the priority doctrine and the relation-back principle, from yielding his place on the stream to a user who begins his use during the time the earlier appropriator has his project diligently under construction.[4] He is protected from cutbacks in his supply by the acts of other men. Furthermore, he is insulated to some extent from shortages due to natural diminution of supply. At the time he wishes to undertake construction of a project the risks of supply under the prior appropriation doctrine are calculable. Dependable supply in a stream can be determined within reasonable limits of accuracy. The investor can thus ascertain in advance, within those limits, by determining the dependable supply and existing appropria-

perienced in the last 50 years. (See *infra* pp. 255-56, 260-61.) Nevertheless, he considers water supply irrelevant (Rep. 99). If so, the Colorado River is the only river west of the 100th meridian on which projects and their water rights are immune to the relevance of this fact of life.

[4]*E.g.*, the city of Los Angeles first made surveys initiating the Colorado River Aqueduct in 1923 (Rep. 65); appropriations of water for the project were initiated by that city in 1924 (Calif. Exs. 419 and 419-A (Tr. 9,395)) and by the city of San Diego in 1926 (Calif. Exs. 436, 437, and 437-A (Tr. 9,395)). Metropolitan, as successor to the city of Los Angeles and in furtherance of the project, executed water delivery contracts with the Secretary of the Interior in 1930 (Ariz. Ex. 38, Tr. 251) and in 1931 (Ariz. Ex. 39, Tr. 252). Metropolitan's was the first water delivery contract executed by the Secretary of the Interior. The project, at all times diligently pursued, was completed in 1960—almost 40 years after it was initiated. (See Rep. 69 and appendix, pp. A25-36.)

tive rights on the stream, how much of the dependable supply is unappropriated and will be available to his project.[5] If parity (a basic ingredient of riparianism and the essence of the Master's formula allocation) is substituted for priority, no investor can evaluate the risks to which his project will be subject. Every user's water supply is always vulnerable to displacement or diminution by later users, the number of whom and the quantity of whose use are unknown and unknowable.[6]

The priority doctrine discourages building projects in excess of the reasonably dependable supply. Overbuilding creates disaster. When risks are calculable,

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[5]The Master recognizes that "[T]he cost of such projects is enormous, and they can be financed only if a relatively constant and dependable supply of water seems likely to be available once they are completed. Similarly, existing projects cannot be economically operated unless a dependable supply of water is available" (Rep. 239). He nevertheless rejects the hydrological evidence presented to the Court ("[It] simply does not permit a prediction of future Lower Basin supply with that refined degree of accuracy necessary to show whether existing California uses can be satisfied from the percentage of future supply apportioned to California. On the contrary, the mass of evidence which has been presented shows only that the science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question", Rep. 103). But he does not explain how Congress, necessarily relying upon hydrological studies, will be able to make that determination usefully, whereas the Court cannot. In fact, hydrological studies are constantly used as the criteria upon which "such projects" are financed and built. The Master likewise overlooks the fact that great projects are financed and built not only by Congress, but by state and local private enterprise using their own financing.

[6]See Yeo v. Tweedy, 34 N.M. 611, 620, 286 Pac. 970, 974 (1929): "The exercise of those rights which have been in abeyance will frequently destroy or impair existing improvements, and may so reduce the rights of all that none are longer of practical value, and that the whole district is reduced to a condition of nonproductiveness. The preventive for such unfortunate and uneconomic results is found in the recognition of the superior rights of prior appropriators."

projects for which the risks clearly exceed the possible return are usually not built. But if the risks are undefined and undefinable, marginal projects are built. By the parity principle, both the prudent and the profligate share in disaster, which destroys the usefulness of the resource for all.[7]

Today, after more than a century of experience, eight western states recognize and apply priority of appropriation as the sole and exclusive basis of water rights: New Mexico, Arizona, Nevada, Utah, Colorado, Wyoming, Montana, and Idaho. The populated areas of these eight states are the most arid in the United States. Six of the eight are states of the Colorado River basin. In nine other states, water laws are a combination of appropriation and riparian rights: Washington, Oregon, and California on the Pacific Coast, and a tier of states on the 100th meridian east of the continental divide: North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. The climate of these nine states, in terms of average annual precipitation, is not as dry as that of the eight strictly appropriation states. It is drier (except for the Pacific Coast north of San Francisco and some of the mountainous regions) than the United States to the east of the tier on the 100th meridian. East of the 100th meridian the riparian doctrine has prevailed

[7] "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years. Only when the water is actually applied does the soil respond." Wyoming v. Colorado, 259 U.S. 419, 476 (1922).

except as recently modified by statute.[8] The accompanying map (plate 1) illustrates the relationship between average annual precipitation and water law doctrines.

Courts early accorded recognition to the appropriation doctrine across state lines.[9] Mr. Justice Holmes said that appropriations must be effective across state

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[8]Today, mounting water use is bringing water shortages to regions of the United States long regarded as regions of water plenty. Under the impact of this experience, some of the traditionally riparian eastern states have already turned to the principles of appropriation. See Ziegler, *Statutory Regulation of Water Resources* in WATER RESOURCES AND THE LAW 89, 91-111 (1958), prepared by Legislative Research Center, University of Michigan Law School, for discussion of the statutes enacted in Mississippi (MISS. LAWS 1956, ch. 164), Iowa (IOWA LAWS 1957, ch. 229), and Florida (FLA. LAWS 1957, ch. 57-380). Other states are considering this change as well: *E.g.,* South Carolina, North Carolina, Arkansas, Wisconsin, and Michigan. See Fisher, *Western Experience and Eastern Appropriation Proposals* in THE CONSERVATION FOUNDATION, LAW OF WATER ALLOCATION IN THE EASTERN STATES 75, 90 (Haber & Bergen eds. 1958). It has also been suggested that the most satisfactory plan for the solution of water problems in Georgia would be the adoption of some form of the law of prior appropriation. INSTITUTE OF LAW AND GOVERNMENT OF THE SCHOOL OF LAW, UNIVERSITY OF GEORGIA, A STUDY OF THE RIPARIAN AND PRIOR APPROPRIATION DOCTRINES OF WATER LAW 106 (1955). The Model Water Use Act, prepared for the eastern states and approved by the National Conference of Commissioners on Uniform State Laws in August 1958 moves toward appropriation principles. The act provides both for loss of rights by nonuse (§ 306) and protection of existing uses (§ 303). By contrast, no state which has adopted the priority principle has abandoned it, nor has abandonment been seriously proposed.

[9]The first reported case involving that problem was Howell v. Johnson, 89 Fed. 556 (C.C.D. Mont. 1898). The Montana court there upheld the right of a downstream senior appropriator in Wyoming against the claim of an upstream junior appropriator in Montana. Five years later, in Willey v. Decker, 11 Wyo. 496, 73 Pac. 210 (1903), the Wyoming Supreme Court, in one of the most comprehensive reviews of the origins of appropriation in the western United States found in judicial decisions, concluded that imperative necessity, which gave birth to the doctrine, required its extraterritorial recognition.

lines because a state "cannot be presumed to be intent on suicide."[1]

3. *Federal Recognition of Appropriation Principles*

Congress recognized and adopted by statutes dating from 1866 the water laws of the western states.[2] The Desert Land Act of 1877 requires that the desert land entryman prove a valid appropriative right under state law, and absent proof of such a right, an entry cannot be permitted or a patent issued under the act.[3] Congressional adoption of the basic ingredients of appropriative rights is manifested in the Reclamation Act of 1902,[4] the foundation act upon which the entire complex of federal reclamation laws has been built, including the Boulder Canyon Project Act which is a supplement to the reclamation laws.[5] Section 8 of the 1902 act provides:[6]

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[1]Bean v. Morris, 221 U.S. 485, 487 (1911). See state and federal cases applying the law of appropriation across state lines collected in Wyoming v. Colorado, 259 U.S. 419, 470-71 (1922). See also Weiland v. Pioneer Irr. Co., 259 U.S. 498 (1922).

[2]*E.g.*, see United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 841-42 (S.D. Cal. 1958): "There is an almost unbroken line of statutes by which Congress has deferred to state laws concerning water. They . . . begin with the Act of July 26, 1866, and run through . . . the Colorado Storage Project Act of 1956." A line of 25 statutes is cited at 841 n.1. The texts of 36 such statutes are set out in appendix B to our rebuttal brief before the Special Master, dated June 30, 1959.

[3]Desert Land Act § 1, 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1958). Lands in Imperial and Palo Verde districts have been patented, both before and since the Project Act, on proof of appropriations of Colorado River water. (See appendix, pp. A5-6 and A10-11.)

[4]Act of June 17, 1902, ch. 1093, 32 Stat. 388, as amended (codified in scattered sections of 43 U.S.C.).

[5]Section 14 of the Project Act (Rep. app. 394) expressly so declares; § 12 of the same act defines "reclamation law" in terms of the 1902 act and acts amendatory thereof and supplemental thereto. (Rep. app. 392.)

[6]32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958).

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and [nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof]:[7] *Provided,* That the right to the use of water acquired under the provision of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."[1]

The rationale and purpose of the congressional recognition has been forcefully stated by this Court:[2]

"The rule generally recognized throughout the states . . . of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection . . . . The rule was evidenced not alone by legislation

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[7](Footnote and brackets ours.) The bracketed phrase indicates Congress' intent that § 8 should not affect the then pending case of Kansas v. Colorado, 185 U.S. 125 (1902). See Wyoming v. Colorado, 259 U.S. 419, 463 (1922).

[1]Section 8 was given interstate effect in Nebraska v. Wyoming, 325 U.S. 589, 612-15 (1945). See Wyoming v. Colorado, 259 U.S. 419, 463-71 (1922).

[2]California Ore. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154, 157 (1935). See also United States v. Gerlach Live Stock Co., 339 U.S. 725, 746 (1950); Wyoming v. Colorado, 259 U.S. 419, 459 (1922).

and judicial decision, but by local and customary law and usage as well.

". . . .

". . . . [I]t had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation . . . ."

4. *Equitable Apportionment Doctrine*

The law applied by this Court in interstate water disputes is known as "equitable apportionment." The word "equitable" in that phrase is a word of art developed in interstate water litigation. It is not a word of loosely defined content which requires the Court to dispense water rights with neither legal criteria nor guideposts. The Court has rightly rejected such a role and has defined the rules which it will apply in making an equitable apportionment of interstate waters. Between states which apply internally the law of prior appropriation, that law provides the basic ingredient of equitable apportionment. Mr. Justice Cardozo, in *Washington v. Oregon,* 297 U.S. 517 (1936), stated the essence of the inquiry in suits over water rights between appropriation states as follows (*id.* at 526):

"The question remains whether the Oregon irrigators as a result of all their acts are taking to themselves more than their equitable proportion of the waters of the river, priority of appropriation being the basis of division."

Although "priority of appropriation is the guiding

principle"[3] in an equitable apportionment suit, it is not the sole criterion:[4]

> "[A]ll the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

As the Master correctly observes (Rep. 326):

> "It is worthy of note that the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation. Indeed, the tendency has been to protect existing uses wherever possible."

A fortiori, water is never reserved for future uses when the supply is inadequate to meet the requirements of prior appropriation by existing projects. (Rep. 326-27, 331.)

Congress was repeatedly told during the debates on the third and fourth Swing-Johnson (Boulder Canyon Project) bills, both in the House and in the Senate, that the rule of water law in the arid West was the prior appropriation doctrine.[5] Congress also knew that the appropriation doctrine applied across state lines under the decision of this Court in *Wyoming v. Colorado,* 259

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[3]Nebraska v. Wyoming, 325 U.S. 589, 618 (1945), quoted at Rep. 326.

[4]Colorado v. Kansas, 320 U.S. 383, 394 (1943); quoted with approval, Nebraska v. Wyoming, *supra* note 3, at 618.

[5]*E.g.*, 68 CONG. REC. 2653-54 (1927) (Rep. Taylor of Colorado); *id.* at 3065 (Rep. Leatherwood of Utah); *id.* at 3273 (Rep. Lea of California); *id.* at 3294 (Rep. Winter of Wyoming); *id.* at 4291-92 (Sen. Johnson of California); *id.* at 4412 (Sen. Pittman) 69 CONG. REC. 9763-64 (1928) (Rep. Taylor); 70 CONG. REC. 233, 235-37 (1928) (Sen. Johnson); *id.* at 327 (Sen. Bratton of New Mexico); *id.* at 391-92 (Sen. Borah of Idaho); *id.* at 461 (Sen. Hayden of Arizona).

U.S. 419 (1922).[6] Section 8 of the Reclamation Act of 1902, conferring federal blessing upon the principles of prior appropriation, was likewise called to Congress' attention as an integral part of the Project Act.[7]

If Congress had intended to abrogate, change, or modify what it knew was the settled existing law, the inference is inescapable that it would have expressed itself clearly on that subject. That intention does not appear in the Project Act expressly and it cannot be fairly implied. On the contrary, the Project Act expressly preserves equitable apportionment and priority principles, except to the extent that those principles have been qualified by valid interstate agreement, and this Court has so held. *Arizona v. California,* 283 U.S. 423, 464 (1931); *United States v. Arizona,* 295 U.S. 174, 183 (1935). (See *infra* pp. 140-45.)

The foregoing principles have been qualified by two interstate agreements: (1) the Colorado River Compact, which makes an apportionment in perpetuity to each basin and thus supplants preexisting law in respect of those apportionments basin versus basin, and (2) the California Limitation Act and the first paragraph of

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[6] *E.g.,* 67 CONG. REC. 12623 (1926) (Sen. Johnson of California); 68 CONG. REC. 4522 (1927) (Sen. Kendrick of Wyoming); 69 CONG. REC. 10472, 10476-77 (1928) (Sen. Ashurst of Arizona); 70 CONG. REC. 163 (1928) (Sen. King of Utah); *id.* at 242 (memorandum by L. Ward Bannister inserted in *Congressional Record* by Sen. Phipps of Colorado); *id.* at 292 (Sen. Ashurst); *id.* at 391 (Sen. Hayden of Arizona); *id.* at 584 (memorandum by Delph E. Carpenter inserted in *Congressional Record* by Sen. Waterman of Colorado); *id.* at 1012 (Rep. Morrow of New Mexico).

[7] *E.g., Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess., pt. 3, at 116 (1927) (Rep. Swing); 68 CONG. REC. 4291 (1927) (Sen. Johnson); 70 CONG. REC. 291 (1928) (Sen. Ashurst). See *infra* pp. 148-50.

section 4(a) of the Project Act, which together constitute an intersovereign compact imposing a quantitative ceiling upon California's uses of waters of the Colorado River.[8] But within the framework established by the Colorado River Compact and by the quantitative ceiling of the limitation upon California, the principles of equitable apportionment and priority of appropriation still control the intrastate and interstate apportionment of the waters of the entire Colorado River system in the lower basin including the "mainstream."

We do not contend, as the Master suggests we contend, that the limitation creates any water rights in California. (See Rep. 231.) It is a limitation, not a grant. Our rights are based upon (1) preexisting appropriations, referred to as "rights which may now exist" in both the limitation and in Article III(a) of the Compact, and (2) principles of priority of appropriation and equitable apportionment adopted and applied in the federal water storage and delivery contracts (*infra* pp. 174-75). The limitation, like the Colorado River Compact, includes "all water necessary for the supply of any rights which may now exist" in explicit recognition of the preexisting rights.

Water delivery contracts executed pursuant to the Boulder Canyon Project Act, like water delivery contracts executed pursuant to other parts of the reclamation law, are not substitutes for interstate compacts.

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[8]"Rights which may now exist," the phrase used in both Article III(a) of the Colorado River Compact and the Limitation Act, refers to appropriative rights, unless we are to conclude that the words are meaningless; no other rights existed (except those for federal establishments and a few riparian landowners in California).

Water delivery contracts are essential working parts of the administration of reclamation projects in all of the 17 western states and are a familiar device in every such project. Water delivery contracts neither supplant nor modify equitable apportionment and priority principles.[9]

Rejecting both western experience and history, the Master concludes that Congress intended in the Project Act to destroy utterly every fundamental principle of western water law in the "mainstream" (saving only those portions of appropriative rights represented by uses thereunder prior to 1929) and to substitute in its place a system of water rights which, in every respect, is its antithesis: parity replaces priority, water rights are neither created by beneficial use nor lost by nonuse, relation back is abolished.

We shall examine the judicial decisions, the statutory language, the legislative history, and the administrative, practical, and congressional construction which confirm the continued vitality of these principles of western water law within the lower basin. Under those principles, there can be no doubt that California's rights for her existing projects are superior to the claims of Arizona and Nevada for new projects, as yet neither built nor authorized.

The starting point of our disagreement with the Master is his novel construction of the limitation on California, more harsh to California and more generous to Arizona than any decision for which Arizona contended in her pleadings in this case or any of its predecessors.

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[9]The purpose and effect of water delivery contracts are explained *infra* pp. 169-75.

PART TWO

THE INTERPRETATION OF THE LIMITATION ON CALIFORNIA, PROPOSED IN THE BOULDER CANYON PROJECT ACT AND ACCEPTED IN THE CALIFORNIA LIMITATION ACT, IS CONTROLLED BY THE MEANING OF THE COLORADO RIVER COMPACT EXPRESSLY INCORPORATED BY REFERENCE IN BOTH STATUTES

Statement of the Issue

The resolution of a pivotal issue in this case turns on the construction of a very few words which appear in almost identical form in two statutes: the Boulder Canyon Project Act, first paragraph of section 4(a),[1] and the California Limitation Act.[2] Those words, identified here by italics and brackets in their context in the Project Act, are as follows (Rep. app. 382):

> "California . . . shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the [1]

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[1] 45 Stat. 1058 (1928), 43 U.S.C. § 617c (1958) (Rep. app. 381-82).

[2] CALIF. STATS. 1929, ch. 16, p. 38 (Rep. app. No. 4).

waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any [2] *excess or surplus waters unapportioned by said compact,* said uses always to be subject to the terms of said compact."

California did agree in the California Limitation Act, repeating this language substantially *in haec verba.* (Rep. app. No. 4.)

The limitation expressly incorporates the Compact by reference. That incorporation poses two distinct questions of interpretation: (1) To what provisions of the Compact does each phrase refer? The intention of Congress and of the legislatures of California and the other basin states[3] determines the answer. (2) What is the meaning of the Compact provisions referenced in each phrase? The meaning of the Compact controls the answer.

To both questions, the Master's response is that the Compact is irrelevant (Rep. 138) and is not incorporated by reference (Rep. 173):

> "I have concluded that Congress intended, in limiting California to 4.4 million acre-feet of 'the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact,' simply to limit California's annual uses of water to 4.4 out of 7.5 million acre-feet. Con-

[3]Congress specified the limitation in the Project Act (first paragraph of § 4(a)); California adopted the limitation in the California Limitation Act, and six basin states (excepting Arizona) accepted the limitation as the basis for six-state ratification of the Compact either by enacting such ratification or by forbearing to repeal earlier ratification. (See Rep. 24-27.) The importance of this consensual character of the limitation is explained *infra* pp. 128-37.

gress referred to Article III(a) of the Compact solely as a shorthand way of saying '7,500,000 acre-feet per annum.' This inappropriate reference to the Compact has been the cause of seeming inconsistency in the Act and of much confusion in its interpretation. Reflection has led to the conviction that the statutory language does not accurately express the true congressional intention.

"Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries."

Phrase 1: The reference to Article III(a) of the Compact

Phrase [1] directs the reader to Article III(a) of the Compact, which provides:

"(a) There is hereby apportioned from the Colorado River System[4] in perpetuity to the Upper Basin and to the Lower Basin,[5] respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include

[4](Footnote ours.) "Colorado River System" as used in the Compact means "that portion of the Colorado River and its tributaries within the United States of America" (Art. II(a), Rep. app. 372).

[5](Footnote ours.) "Lower Basin" means "those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry" (Art. II(g), Rep. app. 372).

all water necessary for the supply of any rights which may now exist."

The Special Master correctly construes this "unmistakable language" (Rep. 143) of the Compact to refer to all Colorado River system waters, both from the main Colorado River and its tributaries, in the lower basin, and not just to "mainstream" waters in Lake Mead and below (Rep. 142-44, 173). It follows, therefore, that unless the plain language of phrase [1] is to be disregarded, it incorporates this meaning from the Compact.[6]

Phrase 2: The reference to "excess or surplus waters unapportioned" by the Compact

The Compact reference intended by phrase [2], a phrase which does not appear in the Compact, is not so clear. Of the component words in that phrase, "excess" never appears in the Compact, "surplus" only in Article III(c)[7] and "unapportioned" only in Article

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[6]California does not contend that the provisions of the Compact are operative, *ex proprio vigore,* to control the disposition of this case. California contends that the Project Act and the California Limitation Act adopt the Compact definitions as their own, and apply these definitions, as components of federal and state statutes, to the disposition of the case. The Master, for the most part, adopts California's interpretations of the Compact and rejects Arizona's, but declines to give any effect to the limitation's references to the Compact, howsoever construed.

[7]Article III(c) provides (Rep. app. 373):

"If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the *waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)* [of Article III]; and if *such surplus* shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)." (Emphasis and bracketed words added.)

III(f).[8] The question is whether Congress and the legislatures of California and of the other basin states intended by phrase [2], "excess or surplus waters unapportioned by said compact," to refer, *inter alia,* to the waters specified in Article III(b) of the Compact. (*Cf.* Rep. 168-69, 197.) Article III(b) provides (Rep. app. 373):

> "In addition to the apportionment in paragraph (a) [of Article III], the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum." (Bracketed words added.)

The Master agrees that Article III(b), like Article III(a), refers to all Colorado River system waters in the lower basin, not merely to waters from the "mainstream" (Rep. 147, 150). However, the Master asserts that if phrase [2] is read literally California cannot share in Article III(b) waters. (*E.g.,* Rep. 150-51, 168-69, 194-96.) The Master nevertheless concludes, by recourse to Senate debates, that Congress intended the "excess or surplus" accounting to begin when there is more water available for consumptive use than the 7.5 million acre-feet of "Article III(a) water." Congress did not intend to exclude California completely from the next million acre-feet (Rep. 194-200). We contend that a sound and literal reading of phrase [2], "excess or surplus waters unapportioned by said com-

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[8]Article III(f) provides (Rep. app. 374):

"Further equitable apportionment of the beneficial uses of the *waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c)* [of Article III] may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)." (Emphasis and bracketed words added.)

pact," also achieves that result and permits California to share in those III(b) waters. (*Infra* pp. 106-10.)

Significance of the Issue

Our difference with the Special Master over the meaning of the limitation may be stated in several ways:

In terms of statutory construction

In its simplest form, and yet the form which most precisely identifies the major legal issue, our difference with the Master can be reduced to an astonishingly simple question: *Do the words "Colorado River compact" and "said compact" in section 4(a) of the Project Act and in the Limitation Act mean the Colorado River Compact?* The Master concludes that they do not. Until the Master so held, there had never, in the last 30 years of Colorado River history and controversy, been the slightest suggestion that such was the case. Indeed, Arizona, even now, contends that Compact and Project Act should be harmonized by the view that Congress modified the Compact.[9]

If it is decided that "Colorado River compact" and "said compact" mean the Colorado River Compact, the construction of phrase [1], the "III(a) issue," is concluded in our favor by the Master's Report. (Rep. 142-44, 173; discussed *supra* pp. 71-72.)

In terms of the usefulness of the decision

This litigation was initiated by Complaint of Arizona to quiet an asserted title to water of the Colorado River system and for the express purpose of securing a dependable water supply for the proposed Central Arizona Project. (Rep. 30-31, 130-31.) Alternative diversion points on the main Colorado River were considered for

[9]See Ariz. Exceptions, pp. 7-8.

that project: Bridge or Marble Canyon above Lake Mead, or Parker Dam below Lake Mead. (*Supra* p. 7.) The decision that the limitation on California does not refer to the Colorado River Compact, or to Compact categories of water, but exclusively to waters from the "mainstream" (Lake Mead to the Mexican border) is the basis of the recommended decree which would leave all rights above Lake Mead unadjudicated. Unless Arizona chooses a diversion route from below Lake Mead, the decree has nothing to do with water for the Central Arizona Project. The Master leaves rights above Lake Mead to adjudication by future suit to which principles of equitable apportionment shall apply. (Rep. 316-21.)

In quantitative terms

As to the 7.5 million acre-feet referred to in phrase [1]:[1] Is California limited to 4.4 million acre-feet of the first 7.5 million acre-feet of annual consumptive use from the entire Colorado River system, main stream and tributaries, in the lower Colorado River basin (as we say), or to 4.4 million acre-feet of the first 7.5 million acre-feet of consumptive use from that segment of the Colorado River which the Master calls "mainstream," *i.e.,* from Lake Mead and below?

Conversely, as to the 3.1 million acre-feet (7.5 million minus 4.4 million) from which California is excluded: Must that quantity be claimed by the other four lower basin states (Arizona, Nevada, New Mexico, and Utah) from the entire Colorado River system in the lower basin (as we say), or may it be claimed in its entirety from the "mainstream," in competition with California's

[1]The Master agrees that the quantity referred to is 7.5 million acre-feet, but leaves to complicated exegesis the discovery of where the figure 7.5 comes from, if not from the Compact. The limitation does not use the figure.

4.4 million, by the two lower basin states having geographic access thereto (Arizona and Nevada), undiminished by their uses on the "tributaries," including the main stem from Lee Ferry to Lake Mead?

As to the "excess or surplus" referred to in phrase [2]: Is California limited to annual consumptive use of one half of "excess or surplus" over and above that 7,500,000 acre-feet of consumptive use from the entire Colorado River system, main stream and tributaries, in the lower basin (as we say), or to one half of "excess or surplus" over and above the first 7,500,000 acre-feet of consumptive use from the "mainstream"?

Conversely, as to the one half of "excess or surplus" from which California is excluded: Must that half be claimed by the other four lower basin states from the entire Colorado River system in the lower basin (as we say), or may it be claimed in its entirety from the "mainstream" by Arizona (and perhaps Nevada)?

The practical consequences of the resolution of this issue turn upon the Special Master's identification of the waters from which California is excluded. The Master holds that under the Project Act the claims against those waters from which we are excluded must be satisfied wholly from the "mainstream" and not, as we contend, from the Colorado River system (the main Colorado River and tributaries) within the lower basin as defined in the Colorado River Compact. The consequences are readily demonstrable:

None of the parties contend that there will not be sufficient water throughout the Colorado River *sys-*

tem in the lower basin to sustain permanently the consumptive use of at least 7.5 million acre-feet annually. Of this, the permanently dependable supply in the tributaries now supports about 2 million acre-feet per annum of consumptive use, and the permanently dependable supply in the Colorado River from Lee Ferry to the Mexican boundary can probably support a beneficial consumptive use of not less than 5.5 million acre-feet per annum.[2]

Therefore, if the emphasized words identified by the bracketed number [1] relate to Colorado River *system* water throughout the lower basin, the permanently dependable supply is adequate to sustain California's use of at least 4.4 million acre-feet per annum, as well as the consumptive use of 3.1 million acre-feet by the other lower basin states: Arizona, Nevada, New Mexico, and Utah.

Whenever *system* supply in the lower basin will support beneficial consumptive uses exceeding 7.5 million acre-feet per annum, there is "excess or surplus" which California may use in satisfaction of her appropriations to the limit of one half.

However, the Report's interpretation of the words identified by the bracketed number [1] limits the waters referred to therein to that segment of the Colorado River system which the Report labels "mainstream." This interpretation makes it impossible to satisfy permanently 7.5 million acre-feet of consumptive use from such waters because the permanently dependable supply of the "mainstream," so defined, available for consumptive use in the lower basin is sub-

[2]See *supra* pp. 20-21.

stantially less than 7.5 million.[3] This interpretation also creates the shortage which the Master prorates. (See Part Three *infra* pp. 138-94 and Part Four *infra* pp. 211-31.)

If some 2 million acre-feet of consumptive use which is now sustained by the permanently dependable supply of the tributaries in the lower basin is eliminated from the limitation accounting, as the Report would do, the dependable "mainstream" supply, considered alone, contains no "excess or surplus." This makes inoperative, for all practical purposes, the provision of section 4(a) which permits California to use up to one half of "excess or surplus waters unapportioned by said compact."

In terms of other issues

Are principles of equitable apportionment and priority of appropriation replaced by a "contractual allocation scheme" divesting interstate priorities (except for "present perfected rights") of "mainstream" users *inter*

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[3]"With the storage provided by Lake Mead, and barring a drought unprecedented in the recorded history of the River, the Lower Basin has, under the guarantee of the Compact, available for use at Hoover Dam a minimum of 7,500,000 acre-feet of water per year, less transit losses between Lee Ferry and the dam, evaporation loss from Lake Mead, and its share of the Mexican treaty obligation." (Rep. 144-45.) When minimum figures are substituted for the deductions specified by the Master and for similar losses below Hoover Dam which the Report properly characterizes as a further diminution of supply (Rep. 187), this is a "guarantee" under the Compact of less than 6 million acre-feet per year of consumptive use from the "mainstream." (See plates 7 and 8 *infra* and explanatory note preceding plate 7.)

To satisfy 7.5 million acre-feet of beneficial consumptive use from the "mainstream" in Arizona, Nevada, and California, there must be a supply (*i.e.* flow) of at least 10 million acre-feet of water annually in the "mainstream," because of requirements of the Mexican Water Treaty and of unavoidable losses. The supply which can actually be expected on a permanent basis does not exceed 8.7 million acre-feet of flow. See *supra* p. 41 note 4 and *infra* tables 7 and 8.

sese? Water rights from the main stream above Lake Mead and from the lower basin tributaries rest on equitable apportionment, and not on contracts to store and deliver from Lake Mead. (Rep. 316-21.) The limitation on California is the cornerstone of the Master's "contractual allocation scheme." Its essential premise is that the figure "7,500,000 acre-feet" which the Master agrees must be found in the limitation itself,[4] must be identified with 7,500,000 acre-feet from the "mainstream" and not the 7,500,000 acre-feet from the Colorado River system to which Article III(a) of the Compact refers.

The Master's "contractual allocation scheme" collapses if the 7,500,000 acre-feet referred to by the limitation is the 7,500,000 acre-feet from main stream and tributaries, to which he agrees Article III(a) of the Compact in fact refers (Rep. 142-44). (See Part Four *infra* pp. 206-11.)

In conceptual terms

Is the offer which Congress made to California in the Project Act, and which California accepted in its Limitation Act as the basis for six-state ratification of the Colorado River Compact, to be construed as a compact between these sovereigns in accordance with its plain and literal language, or is it to be construed solely as a federal statute and then its natural and literal meaning emasculated by reference to only the ambiguous part of the legislative history?

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[4] "Congress referred to Article III(a) of the Compact solely as a shorthand way of saying '7,500,000 acre-feet per annum.'" (Rep. 173.)

I. THE SPECIAL MASTER'S CONCLUSION THAT SECTION 4(a) CANNOT BE READ LITERALLY IS WRONG

The Master's rejection of the limitation's express reference to the Compact begins with his conclusion that "the words of Section 4(a) . . . *cannot* bear their literal meaning." (Rep. 170; emphasis added.) The results which the Master perceives in a literal reading "would fly in the face of what must have been the congressional intention" and "would make no practical sense whatsoever" (Rep. 172). It is only after the Master thereby renders useless the express language of the limitation that he turns to construction by inference in contradiction of its natural and literal meaning. (See Rep. 173.)

None of the Master's reasons for rejecting the precise terms of the limitation are sound.

A. There Is No Distinction Between Article III(a) as Used in the Compact and Article III(a) as Used in the Project Act

In his explanation of the meaning of the Colorado River Compact, the Special Master discovers a distinction—previously unperceived by all parties during this litigation or the prior controversy—between Article III(a) as used in the Project Act and Article III(a) as used in the Colorado River Compact. The Master's distinction, if we understand it, is this: The limitation on California speaks of the "*waters* apportioned to the lower basin States" by Article III(a) of the Compact. (Emphasis added.) This is Project Act III(a), which the Master describes as a "source of supply." But Compact III(a) is asserted to be not a source of supply but

a "limitation on appropriative rights." Therefore, the Master concludes, there is Article III(a) *water* only "in the Project Act sense" (a source of supply), but not "in the Compact sense" (a limitation on appropriative rights).[5]

The Master's supposed dichotomy is unreal.

Both the Compact and the limitation refer, identically, to a quantity of water necessary to supply 7.5 million acre-feet of consumptive use annually.[6] This identity follows from the use of the same language and

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[5]Rep. 149:

"As the foregoing discussion indicates, I regard Article III(a) and (b) as a limitation on appropriative rights and not as a source of supply. So far as the Compact is concerned, Lower Basin supply stems from Article III(c) and (d). There are, of course, other sources of supply, for example, Lower Basin tributary inflow, but these are not dealt with as supply items in the Compact. Thus when referring to the Compact, it is accurate to speak of III(c) and III(d) water, but it is inaccurate and indeed meaningless to speak of III(a) and III(b) water. For Compact purposes, Article III(a) and (b) can refer only to limits on appropriations, not to the supply of water itself.

"It is true that Congress in Section 4(a) of the Project Act, treated Article III(a) as a source of supply rather than as a limitation on appropriations. The Act speaks of 'the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact . . . .' Later in this Report I shall develop at some length the meaning of this language and the confusion it has produced in this litigation. Suffice it now to say that the congressional meaning is different from the Compact meaning. One may properly speak of III(a) water in the Project Act sense, but not in the Compact sense. Much of the confusion in this case may be traced to this difference between the two writings, for the parties speak of III(a) water without differentiating between the Compact and the Project Act."

The Master's statement that lower basin tributary inflows "are not dealt with as supply items in the Compact" conflicts with his correct conclusion that beneficial consumptive use from the tributary supply is accountable under Article III(a) and (b) of the Compact (Rep. 142-44).

[6]Since the limitation takes its meaning from the Compact, both refer to Colorado River system water.

the same concepts in both documents.[7] Article III(a) of the Compact provides that "there is hereby apportioned . . . the exclusive beneficial consumptive use of 7,500,000 acre-feet of *water* per annum . . . ." The Compact's Article III(a) apportionment includes "all *water* necessary for the supply of any rights which may now exist." The limitation on California includes in precisely identical words: "all *water* necessary for the supply of any rights which may now exist." The Master agrees that the term "beneficial consumptive use" in Article III(a) of the Compact and the term "aggregate annual consumptive use (diversions less returns to the river)" in the limitation both mean "diversions less returns to the stream" (Rep. 147-49, 185-87). (All emphasis added.)

Many other provisions of the Compact in addition to Article III(a) make clear the Compact's intention in Article III(a) to specify a *quantity of water* available for beneficial consumptive use. Article I states that a major purpose of the Compact is to provide for the "apportionment of the use of the *waters* of the Colorado River System . . . ." Article III(c) refers to the "*waters* which are surplus over and above the aggregate of the *quantities* specified in paragraphs (a) and (b)" of Article III. Article III(f) speaks of "the *waters* of the Colorado River System unapportioned by paragraphs (a), (b), and (c)" of Article III. Article

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[7] If the Master is correct that the Compact's apportionment in perpetuity is merely a "limitation on appropriative rights" (Rep. 149), then it is identical to the limitation on California's appropriative rights. See Rep. 231: "The first paragraph of Section 4(a) is a limitation on California, not a grant to her . . . ." *Compare* Rep. 139-41 re the purpose of the Compact *with* Rep. 165-66 re the purpose of the limitation on California.

VIII provides that all rights to system waters other than present perfected rights shall be satisfied solely from "the *water* apportioned to that Basin in which they are situate." (All emphasis added.) If the Master were correct, the Compact would be hopelessly self-contradictory. (*Cf.* Rep. 195-96.)

Not even the Special Master is able to apply consistently the supposed dichotomy. In his discussion of California's rights to "tributary" waters under equitable apportionment principles, the Master states (Rep. 316-17):

> "With respect to California, *Section 4(a) is concerned with consumption and not with supply* and therefore does not affect any rights of that state to demand that tributary water be permitted to flow into the mainstream." (Emphasis added.)

Furthermore, articles II(B)(5), (6), and (8) of the recommended decree speak of "*water* apportioned for consumptive use" (Rep. 348-49). Decree article II (B)(8) also speaks of releasing "apportioned but unused *water* . . . for consumptive use" (Rep. 349). Do these provisions refer to a "limitation on appropriative rights" or a "source of supply"? Earlier in his Report, the Master answers this question when he states that "the recommended decree apportions water in those terms," *i.e.*, "in terms of consumptive use (diversions from the mainstream less return flow thereto)." (Rep. 126.)

We agree with the Master that there is a vitally important distinction between "supply" (meaning the quantity of water flowing at a particular point, as in Compact Article III(d)), and "consumptive use" (meaning the quantity of water diverted less the quan-

tity returning to the stream system, as in Compact Article III(a)). About 8,700,000 acre-feet of "supply"—flow from Hoover Dam—is required to produce about 6,000,000 acre-feet of "use"—diversions less returns to the stream—below Hoover Dam, and hence this distinction between supply and use is essential to avoid total confusion. (See plate *7 infra.*) The Special Master, in a single paragraph, eliminates that confusion which has existed on this point for 30 years when he explains why Compact III(a) and III(d) cannot be correlative.[8] This distinction between supply and use, however, is wholly unrelated to the dichotomy created by the Special Master which, if uncorrected, will create even greater confusion for at least another generation for those seeking this evanescent distinction between Compact III(a) and Project Act III(a). Both mean the quantity of water necessary to sustain 7.5 million acre-feet of consumptive use per annum. Both refer to the same 7.5 million acre-feet of systemwide lower

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[8]Rep. 144:

"Lastly, Arizona argues that Article III(a) relates to the mainstream only because III(a) and III(d) are correlative, III(d) being III(a) multiplied by ten, and Article III(d) is clearly a mainstream measurement. This argument is unacceptable. Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. Since a substantial quantity of water is lost through reservoir evaporation and channel losses as it flows from Lee Ferry, the point where the III(d) obligation is measured, to the diversion points downstream from Hoover Dam, where most of the appropriations are made, 7,500,000 acre-feet of water at Lee Ferry will supply a considerably smaller amount of appropriations below Hoover Dam. Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantitative measurement of the flow of water at Lee Ferry."

basin consumptive use, from main stream *and* tributaries.

Thus, (1) the Project Act, (2) the Limitation Act, (3) the Compact, and (4) the Master's Report and recommended decree are all consistent and uniformly use the word "water" to refer to the water necessary to supply the consumptive uses in the quantities stated.

B. A Natural and Literal Reading of the Limitation's Reference to the Compact Does Not Produce the Irrational and Unfair Results Discovered by the Master

The Master asserts that a "literal interpretation" of section 4(a) "would make no practical sense whatsoever" (Rep. 172) because it would divest Utah's and New Mexico's lower basin uses, exclude the upper basin from surplus, and prohibit the use in California of waters which would otherwise go to waste. In each instance, the Master portrays a "literal" interpretation which is not truly literal but which would produce an irrational or unfair result; because of that result, he then rejects the "literal" interpretation.

The results which the Master perceives do not flow from a reasonable reading of the natural and literal language of the limitation.

1. *Utah and New Mexico Would Not Be Excluded From All Lower Basin Uses*

The Special Master asserts that section 4(a) of the Project Act, read literally, authorizes a tri-state compact among Arizona, California, and Nevada which would divide among these three states all of the Colorado River system waters in the lower basin; thus, Utah and New Mexico would be deprived of any lower basin system waters, including the lower basin tributary waters which are now being consumed in those states

and which were being consumed therein as of 1928. (Rep. 170-71.) The Master concludes that "the unlikelihood of such a congressional intention indicates that Section 4(a) should not be given its literal meaning." (Rep. 171.)[9]

New Mexico and Utah would not be and could not be excluded from the use of any water by any compact among Arizona, California, and Nevada.[1] Neither the authorization nor the ratification of any interstate compact could affect the rights of the states not parties to it. The difficulty which compels the Master to rewrite the limitation was dispelled by this Court in *Arizona v. California,* 283 U.S. 423, 462 (1931): "As Arizona has

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[9]This literal reading of § 4(a) by the Master conflicts with his "literal" construction of the limitation in the first paragraph. Since § 4(a) deals only with the "waters apportioned" by Article III(a) and "excess or surplus waters," the proposed tri-state compact in § 4(a) could dispose of *all* lower basin waters only if the Article III(b) waters are included in the "excess or surplus." The Master elsewhere frequently asserts that if the limitation is read literally California is excluded from Article III(b) waters which are not "excess or surplus." (Rep. 150, 168-69, 180 n.40, 194-95.) If so, would not the whole million acre-feet be available for appropriation by New Mexico and Utah as well as by Arizona and Nevada? This inconsistency demonstrates our contention that the Master strains the literal reading to achieve inequitable results and then rejects the express and specific reference in the limitation to the Compact in order to avoid the inequitable results created only by his strained reading.

[1]The Master rejects his own argument by construing Articles III(a) and III(b) of the Colorado River Compact as limitations on appropriative rights (Rep. 149). So also as to the reference to California in the first paragraph of § 4(a) (Rep. 231). If he is correct, then clauses (1) and (2) of the abortive tri-state compact set forth in the second paragraph of § 4(a) of the Project Act, which name Arizona and Nevada, can also be no more than a limitation on their appropriative rights. California was surely not expected to sign a tri-state compact which amounted to a limitation on her but a grant to her rivals. The tri-state compact thus could not dispose of New Mexico's and Utah's water rights. It could only be a reciprocally imposed limitation on the appropriations of each of the three parties as against the other two parties.

made no such [interstate] agreement, the [Boulder Canyon Project] Act leaves its legal rights unimpaired."

If compacting states could effectively abridge the rights of noncompacting states, the upper basin would not have been concerned over Arizona's refusal to ratify the Compact. Yet this concern clearly existed[2] and was, as the Master recognizes, the motivating force for the limitation on California.[3]

The Master points out that Senator (now Judge) Bratton of New Mexico was "one of the principal architects of Section 4(a)" of the Project Act. The Master considers it "preposterous" that section 4(a) would divest all of New Mexico's lower basin rights with the active support of Senator Bratton. (Rep. 175.)[4] The answer is simple: Senator Bratton must have believed—correctly—that clauses (1) and (2) of the tri-state compact to which New Mexico was not a party could not affect her rights. Otherwise clause (3), which insured Arizona the "exclusive beneficial consumptive use of the

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[2]Rep. 22, 139, 165. See, *e.g., Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. (1926) at 95-112 (testimony of S. G. Hopkins, Interstate Stream Commissioner for Wyoming), and 120, 135-219 (testimony of Delph E. Carpenter, Interstate Rivers Commissioner for Colorado); H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 2, at 4 (1927) (minority views of Mr. Leatherwood of Utah).

[3]Rep. 165: "The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, *leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings.*" (Emphasis added.)

[4]Senator Bratton announced that he was going to vote against the Hayden amendment to authorize this specific tri-state compact, even though it had been made permissive, not mandatory; he thought the states should be free to negotiate their own terms, without any suggestions from Congress. 70 CONG. REC. 470-71 (1928).

Gila River and its tributaries within the boundaries of said State,"[5] would also cut off existing New Mexico rights. Senator Bratton, as an upper basin Senator, must have recognized that the Colorado River Compact could not affect the rights of Arizona unless she ratified the Compact. Therefore, Senator Bratton, as a lower basin Senator, must surely have recognized that a tri-state compact could not affect the rights of New Mexico which would not ratify that compact. It is only the contrary assumption—that a group of states may deprive another state of water rights without its consent —that creates the Master's dilemma: Either Senator Bratton failed to comprehend the plain meaning of the language used, or he was wantonly neglectful of New Mexico's interests. The choices are equally preposterous.

Indeed, no one has ever suggested that the La Plata River Compact, a two-state compact dividing the waters of that Colorado River tributary, had any effect upon the rights of the other five states having an interest in the Colorado River.[6]

The tri-state compact, authorized by the second para-

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[5]Whatever else this language encompasses, it includes water which rises in Arizona Gila tributaries before these enter New Mexico. The San Francisco River is an example. Gila finding of fact 2, Rep. 336.

[6]The La Plata River Compact divided the flow between Colorado and New Mexico. This compact was negotiated in 1922 by Delph E. Carpenter of Colorado and Stephen B. Davis of New Mexico, both of whom were negotiators and signatories of the Colorado River Compact. The La Plata River Compact was signed at Santa Fe three days after the signing of the Colorado River Compact in that city; it was ratified by both states in 1923 and consented to by Congress in 1925 (43 Stat. 796 (1925)). The La Plata River Compact is reconfirmed and approved in article X of the Upper Colorado River Basin Compact (Ariz. Ex. 2 (Tr. 216)) consented to by Congress in 1949 (63 Stat. 31).

graph of section 4(a), would have been the most curious interstate compact ever negotiated. Although three states would have been signatories, it made an apportionment of water to only two of them—Arizona and Nevada. Furthermore, the failure to provide any water for any other state could not have been filled in by implication from the limitation on California, even assuming that the limitation could be converted to a grant. The limitation provision in the first paragraph of section 4(a) was required only in the event of Arizona's failure to ratify the Colorado River Compact. The tri-state compact was expressly conditioned (see clause (7)) on Arizona, California, and Nevada all ratifying the Colorado River Compact. It was *never* contemplated that the tri-state compact and the limitation on California would coexist.

However the language of the second paragraph is read, the acre-feet of the *limitation* specified in the first paragraph cannot be added to the acre-feet of the hypothetical *grant* specified in the second paragraph to Arizona and Nevada only. Consequently, if a tri-state compact had been entered into in the very words of section 4(a), second paragraph, and even if this gave 3.1 million acre-feet to Arizona and Nevada and one half of "excess or surplus" to Arizona, there would be a residue of 4.4 million acre-feet of III(a) water and one half of the "excess or surplus" available for use in California, New Mexico, and Utah. Since, as the Master points out, the first paragraph operates only as a limitation and not as a grant to California (Rep. 231), it cannot exclude New Mexico and Utah from sharing in this residue with California. The Master cannot have his argument both ways.

The conclusive effect which the Master attributes to the failure of the tri-state compact expressly to provide for New Mexico and Utah is incongruous in view of the quantity of water involved. The quantity of water necessary to supply the combined 1928 uses of New Mexico and Utah was insignificant. Their total annual consumptive use over the 1914-1945 period averaged less than 75,000 acre-feet.[7] In contrast, in deducing his "contractual allocation scheme," the Master treats as *de minimis* the inflow from the Bill Williams River (Rep. 184) involving more water than required for those combined New Mexico and Utah uses.[8]

Article 7(g) of the Arizona 1944 contract (Rep. app. 402) expressly recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned to the lower basin by the Compact and of the waters unapportioned by the Compact, and is expressly without prejudice to those rights. Although Arizona now contends that this provision of her contract is invalid (Rep. 201-02), the Master declares the contract to be valid and binding except for article 7(d) (Rep. 207, 237-47). Article 7(g) constitutes an important administrative construction by the Secretary as well as a practical construction by Arizona that the lower basin rights of New Mexico and Utah are relevant to, and unimpaired by, the Project Act. This construction is reinforced by the Secretary's report on the proposed

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[7]Ariz. Ex. 77 (Tr. 3,787), table S4, at 13, cols. 5 (for New Mexico) and 6 (for Utah).

[8]Average annual Bill Williams inflow of 75,000 acre-feet was reported to Congress. See Calif. Ex. 26 (Tr. 4,972), table 6; *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 508 (table 6) (1928). See Rep. 121 for historic inflow of Bill Williams River for 1914-1951 period, averaging 117,800 acre-feet per annum.

Central Arizona Project which he submitted to Congress in 1949. The Secretary, pursuant to interpretations then advanced by Arizona, deducted from Arizona's share of the Colorado River system waters 130,000 acre-feet for combined Utah and New Mexico lower basin uses, in accord with Arizona's contract.[1]

2. *Upper Basin Would Not Be Excluded From Surplus*

The Master asserts that section 4(a), read literally, authorizes a compact which would "prohibit" upper basin states from using any of the surplus waters in the Colorado River basin (Rep. 171). The Master asserts that it is unlikely, particularly in view of Article III(f) of the Compact, that Congress intended to authorize Arizona and California to divide these waters between themselves and to leave nothing for the upper basin beyond its Article III(a) apportionment (Rep. 172). The Master concludes, therefore, that the limitation cannot be read literally to refer to the Compact.

For all of the reasons noted above in connection with lower basin rights of New Mexico and Utah, the upper basin would not and could not be excluded from the use of any water by any compact among Arizona, California, and Nevada.

Furthermore, the quantity of water which the upper states must let pass Lee Ferry to Lake Mead is controlled, not by the tri-state compact (however construed), but by the Colorado River Compact. The tri-state compact provides that it "shall be subject in all particulars" to the Colorado River Compact (clause (6),

[1]See Ariz. Ex. 71 (Tr. 310), at 151.

Rep. app. 383) and that it will "take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada" (clause (7), Rep. app. 383). No upper state can consume water which has already reached Lake Mead.

Article 7(b) (Rep. app. 401) of the Arizona contract provides for delivery of surplus waters only "to the extent such water is available for use in Arizona" under the Compact and the Project Act. Articles 7(e) and 7(f) (Rep. app. 401-02) expressly preserve the upper basin's rights to surplus waters by a "further equitable apportionment" pursuant to Articles III(f) and III(g) of the Colorado River Compact. In his report on the Central Arizona Project, the Secretary, pursuant to Arizona's contentions, recognized the upper basin's rights to share in surplus.[2]

3. *California Would Not Be Excluded From Use of More Than 4.4 Million Acre-Feet Per Annum Until Basin Uses Total 16 Million Acre-Feet Per Annum*

The Master asserts that if the section 4(a) limitation is read literally, California would be prohibited from consuming Colorado River water in excess of 4.4 million acre-feet per annum until the beneficial consumptive uses throughout the Colorado River basin totaled 16 million acre-feet per annum, a figure which the Master puts at about twice the present total basinwide

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[2] *Ibid.* The report shows "total surplus to be allocated under the terms of art. III(f) of the Colorado River compact" to be 220,000 acre-feet per annum. Of this quantity, 55,000 acre-feet was earmarked for Arizona. Although the basis is not articulated in the report, it was evidently arrived at by dividing the surplus equally between the two basins (110,000 acre-feet to each); then, one half thereof (55,000 acre-feet) was "to be allocated to Arizona under Article III(f) of the compact."

consumptive use. (Rep. 172; see also Rep. 195-96.)

It is impossible to construe the Project Act, Limitation Act, or Compact to require California or any other state to allow water to go to waste if it is not used by others who have a prior or superior right thereto. Article III(e) of the Compact is explicit.[2a] The Master recognizes this principle in his proposed decree which permits a state to use water which will not be used in another state to which it is apportioned.[3] Thus, the Master himself refutes the faulty premise of this argument, that California may not use water which is apportioned for use elsewhere, but which is not now being used.

The problems which the Master poses need not exist. By a sensible reading, the "excess or surplus waters unapportioned by said compact" referenced in the limitation means all consumptive use from system water in the lower basin over and above 7.5 million acre-feet per annum of consumptive use.

C. Congress Did Not Exclude the Gila River System Waters From the Tri-State Compact Proposed in Section 4(a)

The Master asserts that clause (3) of the second paragraph of section 4(a) gives Arizona 2.8 million acre-feet from the main stream "in addition" to the ex-

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[2a]Article III(e) provides:

"The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses." Rep. app. 373-74.

[3]Decree II(B)(8) (Rep. 349-50); see Rep. 314 n.4.

clusive use of the Gila River within her boundaries (Rep. 179). The Master also asserts that the first paragraph of section 4(a) must be read correlatively with the second, so that the Gila could not have been included in the first paragraph. The conclusion is that the first paragraph cannot be read literally to incorporate the Compact's systemwide concept which would include the Gila.

The Master's premise is wrong.

Clause (1) of the tri-state compact stated in the second paragraph of section 4(a) does not state that Arizona's 2.8 million acre-feet comes from the main stream. Clause (3) does not say that Arizona is entitled to the exclusive use of the Gila "in addition" to her 2.8 million acre-foot apportionment. The words "in addition" nowhere appear in the second paragraph. The Master has converted the "and" introducing clause (3) into the words "in addition." There are seven numbered clauses in the second paragraph, each after the first being introduced by the word "and". If each introductory "and" in that paragraph were read as "in addition" or "plus," much of the language of the paragraph would not make sense.

Even if the word "and" could be read as "in addition," the naming of the Gila River system is not the equivalent of naming all of the lower basin tributary systems. The Master would have us read "Gila River" as another instance of congressional shorthand, this time a code meaning "Gila River, Bill Williams River, Virgin River, Muddy River, Little Colorado River,

Kanab Creek, Johnson Creek, etc."[4] This construction not only violates the *expressio unius* maxim; it imputes absurd draftsmanship to Congress. Other provisions of the act make it clear that at the times when Congress wanted to designate tributaries, it knew how to draft language appropriate to reach that result.[5]

Clause (6) of the proposed tri-state compact provides (Rep. app. 383):

> "[A]ll of the provisions of said tri-state compact shall be subject in all particulars to the provisions of the Colorado River compact . . . ."

The Article III(a) apportionment in the Compact extends to the Gila (Rep. 141-42), and inconsistencies, if any, in clauses (1) and (3) must give way.

In 1939 the Arizona Legislature passed an act to ratify a tri-state compact containing the provisions of the authorized tri-state compact recited in section 4(a) of the Project Act. However, it recited that *"in addition* to the water covered by paragraphs (b) and (c)

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[4]See Calif. Ex. 7307 (Tr. 22,162) which gives, tabulated from Arizona evidence, "Average Annual Virgin Flow of Lower Colorado River Basin Tributaries for the Period 1914 to 1945 as Such Tributaries Enter the Main Stream." The Gila averaged 1,403,600 acre-feet per annum, and all other lower basin tributary inflow averaged 1,493,900 acre-feet per annum, a total of 2,897,500 acre-feet per annum.

[5]The Project Act refers to "tributaries" in §§ 4(a) (second paragraph), 6, 13(b), 13(c) [three times], 13(d), and 15. In § 6 it directs the Federal Power Commission not to issue or approve permits or licenses "affecting the Colorado River or any of its tributaries, except the Gila," giving the clearest indication that when it wanted to designate all tributaries, it said so, and when it wanted to designate the Gila alone, it also said so.

The Master states that "certain sections of the Project Act apply to the Colorado River System" not just to the "mainstream." But he purports to explain that "in those sections Congress was dealing with problems which had system-wide application." (Rep. 173 n.32.) This "explanation" restates his conclusion that the problem dealt with in 4(a) does not have systemwide application.

hereof," Arizona should have exclusive use of the Gila within its boundaries.[6] (Emphasis added.) It also provided, very significantly, that it should be approved thereafter by Congress as well as by the states of California and Nevada.[7] The subsequent consent of Congress would not have been required if this were the same tri-state agreement to which Congress had already consented in advance in the second paragraph of section 4(a). Arizona must have recognized that adding "in addition" changed the meaning, as we now contend, and therefore required the subsequent consent of Congress. In 1941 a bill in the Arizona Legislature to ratify the proposed Project Act tri-state compact without amendment passed the Senate but failed in the House.[8] The 1941 bill by contrast did not require further consent by Congress, which had already consented to *this* tri-state compact in the second paragraph of section 4(a) of the Project Act.

The Master answers that if clause (3) merely assures to Arizona exclusive use of Gila waters within that state, clause (3) is redundant and useless because this result would follow even without clause (3). (Rep. 179 n.38.)[9] This is completely wrong for at least three reasons:

(1) The Master is wrong about the physical facts. He says (*ibid.*):

"California had no diversion works as of 1928

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[6]Calif. Ex. 1322 for iden. (Tr. 11,436) § 1, art. III(d), p. 5.
[7]*Id.* § 3, p. 7.
[8]Calif. Ex. 1323 for iden. (Tr. 11,436).
[9]The Master also asserts that the legislative history supports his interpretation that the Gila was allocated to Arizona in addition to the 2.8 million plus half of surplus. We discuss the legislative history *infra* pp. 110-24, particularly 120-21, 123-24.

capable of diverting Gila River water for use in that state nor were there any contemplated at that time. Indeed, California has not used Gila River water since 1928 . . . ."

It can be conclusively and irrefutably demonstrated from the Master's Report and the record that Imperial Irrigation District's headworks remained below the mouth of the Gila River from a date before 1907 to 1941 and were capable of diverting, and necessarily diverted, Gila River inflow for use in California. It was not until 1942, when the All-American Canal went into full operation, that all of Imperial's diversions were made at Imperial Dam above the mouth of the Gila.[1] Congress also had been fully informed during the Project Act hearings and debates that California had works capable of diverting the Gila River inflow.[2] As of 1928,

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[1]Compare the Master's accurate statement at 54-55 of the Report: "Water deliveries from the Colorado River to the Imperial Valley were first made at the turn of the century and, over the years, several diversion points in both the United States and Mexico were employed. In 1907 water was first diverted at Hanlon Heading into the Alamo Canal, which lay partly in Mexico and entered the United States near Mexicali. In 1918 a new diversion point, Rockwood Gate, went into operation upstream from Hanlon Heading and remained the primary diversion point until the All-American Canal was constructed. Construction of the canal was commenced in 1934. However, because of difficulties in the operation of Imperial Dam, which was dedicated in 1938 and which is the diversion point for the canal, service through the All-American Canal was delayed until 1940 and full service did not occur until February 1942. After this date no further deliveries were made through the Mexican works."

The mouth of the Gila is above both of Imperial's diversion points mentioned, Hanlon Heading (Calif. Ex. 121 (Tr. 7,004)) and Rockwood Gate (Calif. Ex. 120 (Tr. 6,991)).

[2]*E.g., Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 209-10 (1926) (Delph E. Carpenter); 70 CONG. REC. 335 (1928) (Sen. Phipps).

the Gila made substantial contributions to the main stream.[3]

(2) Even if the Master's facts were correct and history were rewritten, his conclusion does not follow that clause (3) as we construe it would be redundant. However construed, the allocations in clauses (1) and (2) would not assure the Gila uses to Arizona, as did clause (3).

(3) Finally, such language, even if redundant, would not be useless. Arizona's Senator Hayden, author of the language,[4] wanted to doubly assure his constituents of protection for the Gila since the Gila's inclusion in the Compact's systemwide allocation was the rock on which Arizona's Compact ratification had foundered,[5] as Senator Hayden explained to the Senate in debate with Senator Johnson.[6]

In denying our claim that Arizona's main stream rights are affected by the extent of her Gila uses, the Master relies upon the assertion that California now has no appropriative rights to Gila waters.[7] The Master misses the point. California has the same interest in the Gila as the upper basin has in lower basin tributaries although the upper basin cannot use or affect the lower

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[3]See Rep. 122. During the period 1903-1920, it contributed to the main stream a flow averaging in excess of 1,000,000 acre-feet annually. Ariz. Ex. 45 (Tr. 254), at 219, quoted in Calif. Exhibits, vol. 24.

[4]See Calif. Ex. 2014 (Tr. 11,173).

[5]See, *e.g.*, 70 CONG. REC. 335-36 (1928).

[6]70 CONG. REC. 467 (1928).

[7]Rep. 229-30.

basin tributary supply. (See Rep. 142-43.)[8] Tributary uses must be taken into account in determining the magnitude of surplus, hence the interbasin impact of the Mexican burden under Article III(c).[9] The Compact allocates benefits; hence, it is reasonable to include in the Compact interbasin accounting benefits from the lower basin tributaries. Similarly, it is reasonable to include in the limitation accounting Arizona's benefits from the Gila.

It is a well-established principle of water law that an upstream appropriator on the main stream can enjoin a junior appropriator from taking water from a downstream tributary, if that water is necessary to supply a main stream right further downstream which is

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[8]Senator Ashurst argued with Wyoming's Governor Emerson, a Colorado River Compact negotiator, that the Gila is of no interest to the upper basin. Governor Emerson told him: "I am not able to see your argument in regard to the Gila River—I think it is as much a part of the Colorado River system as our [Wyoming's] Green River." *Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 765 (1925).

[9]The Gila is above Mexico which is senior to all other rights on the river under the Mexican Water Treaty. (59 Stat. 1219 (1945); Ariz. Ex. 4 (Tr. 220).) The Mexican Treaty may be satisfied "from any and all sources" in the Colorado River system (Ariz. Ex. 4 (Tr. 220), art. 10), which obviously include the Gila. This does not mean that waters must be released from reservoirs on the Gila to flow to Mexico. In calculating the magnitude of Arizona's contribution to the Mexican burden the benefit she derives from the entire Colorado River system, including the tributaries, should be taken into account, but her contribution, thus calculated, should in fact be made from her share of the main stream, simply as a commonsense water conservation measure. Clause (4) of the tri-state compact set forth in the second paragraph of § 4(a), proposed by Arizona's Senator Hayden (Calif. Ex. 2014 (Tr. 11,173)), recognizes this principle. Clause (4) provides that Arizona would bear *one half* of the treaty burden, all from her share of the main stream, if the Gila should be released from that burden. The Master reduces this to 37⅓% (28/75). See *infra* pp. 223-25.

senior to both upstream rights.[10] Mexico, downstream from all United States uses, has the senior right by treaty to the waters of the Colorado River system. See Decree art. II(A) (Rep. 347).

II. THE LANGUAGE OF THE PROJECT ACT REQUIRES THE LIMITATION TO BE GIVEN ITS NATURAL AND LITERAL MEANING TO INCORPORATE THE COLORADO RIVER COMPACT

A. It Is Unreasonable To Reject the Project Act's Express and Specific Incorporation of the Colorado River Compact

A statute must be construed to produce a harmonious whole, to avoid conflicts between various provisions of the statute, and to give effect, if possible, to all provisions of the act.[1]

> "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."[2]

The Master asserts that Congress intended section 4(a) to relate solely to "mainstream" waters, that is, Lake Mead and the main Colorado River below Lake Mead within the United States, because these are the waters controlled by Hoover Dam (Rep. 173-74). Out of the entire statutory language the Master has found only two words in section 4(a) to seize upon in support of this thesis: The limitation on California is on our "aggregate annual consumptive use . . . of

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[10]LONG, IRRIGATION § 135 (2d ed. 1916); KINNEY, IRRIGATION § 649, at 1,139 (2d ed. 1912).

[1]*E.g.*, 2 SUTHERLAND, STATUTORY CONSTRUCTION 336-39, 342-43 (3d ed. Horack 1943).

[2]Cardozo, J., in Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 218 (1936).

water of and from the *Colorado River*."[2a] Those two emphasized words do not, as the Master asserts, point in the direction of relating the limitation solely to waters in Lake Mead and below. (See Rep. 174.) Those two words in section 4(a) do not refer to a segment of the Colorado River any more than do those same two words in section 19.[3]

When Congress intended to refer to "water stored" in Lake Mead, Congress said so expressly (sections 1, 5, and 8). If Congress had intended to restrict the limitation in section 4(a) to the waters controlled by Hoover Dam, Congress would also have said so expressly. In section 4(a), Congress did *not* say so expressly; on the contrary, it expressly incorporated the systemwide operation of the Compact.

The two phrases in the first paragraph of section 4(a)—[1] "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" and [2] "excess or surplus waters unapportioned by said compact"—naturally and literally refer to the Colorado River Compact. The "natural reading"[4] of the entire Project Act compels the conclusion

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[2a]California must physically take its share of Colorado River system water from the main Colorado River (which of course is fed by tributaries) because we have no access to any lower basin tributary systems.

[3]Section 19 (Rep. app. 395) authorizes supplemental compacts among the seven named Colorado River basin states for comprehensive development of "the Colorado River." Wyoming and New Mexico are included although the Colorado River main stream does not flow anywhere near these states.

[4]The Master rejects our contention that if Arizona effectively ratified the Compact in 1944 the limitation is no longer binding on California because "the *natural reading* of the language of the statute does not support [California's] contention." (Rep. 166; emphasis added.) We believe that we should have the benefits, if we are to have the detriments, of a natural reading of the statute.

that Congress meant what it said each of the 27 times it referred to the Colorado River Compact in the Project Act.[5] The Master's construction—23 of Congress' 27 references to the Compact mean Compact, but four do not[6]—must be rejected because there is no rational basis for any such distinction. As we have already pointed out (*supra* pp. 80-100), there is no reason why the limitation's reference to the Compact cannot be given its natural and literal meaning.

The Master's construction would create serious inconsistencies within the provisions of the Project Act itself. No one challenges that the numerous other references to the Compact in the Project Act—in the title and in sections 1, 4(a) (other than the four exceptions created by the Master), 6, 8, 12, 13, 18, and 19—refer to the Colorado River Compact. For example, section 4(a), first paragraph, and section 13(a), which refer to Article XI of the Compact (requiring its seven-state ratification), mean Article XI of the Compact. Section 4(a), second paragraph (clause (4)), which refers to Article III(c) of the Compact, means Article III(c) of the Compact. Section 6, which refers to Article VIII of the Compact, means Article VIII of the Compact. By excising the express and precise reference to the Compact in two phrases in the limitation, the Report has achieved the anomalous distinction of creating inconsistency by avoiding the natural and literal meaning

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[5]Title and §§ 1, 4(a) (both paragraphs), 6, 8, 12, 13, 18, and 19 (Rep. app. 379-95).

[6]The two Limitation Act phrases which the Master concludes do not refer to the Compact are substantially repeated in the second paragraph of § 4(a), clauses (1) and (2), respectively. These are the four places in the Project Act out of the 27 references to the Compact (14 times in § 4(a)) that Congress, according to the Master, said "compact" but did not mean Compact.

of the statute. The section 4(a) express reference to Article III(a) of the Compact must mean Article III(a) of the Compact just as surely as the express reference in section 13(a) gave congressional consent to the Colorado River Compact and not to some other document, and waived the provisions of Article XI and not of some other article.

In dealing with broad conceptual matters, Congress may have some difficulty in choosing the words to describe its intention.[7] But Congress encountered no such difficulty in referring to the "Colorado River compact," to "said compact," and to "paragraph (a) of Article III." Such a precisely measured term, like Article III(d) of the Compact, "presents no questions of interpretation" (Rep. 144).

Why did Congress in section 4(a) use the words "paragraph (a) of Article III of the Colorado River compact" and the words "said compact" if Congress did not intend to refer to the Compact? The Master neither asks that question nor gives an answer. His figure "7,500,000 acre-feet" cannot be discovered from the first paragraph of section 4(a) unless reference is made to Article III(a) of the Compact.

The Master cannot escape the plain import of Congress' chosen words. The Master has not and cannot establish that Congress used the words "Colorado River compact" and "said compact" as a private code with a special usage only in section 4(a) of the Project Act, once in the first paragraph and once in the second. Because the Master's construction does violence to the

[7]See Freund, *The Use of Indefinite Terms in Statutes*, 30 Yale L.J. 437-38 (1921), pointing out that Congress, by its choice of words, can control, to some extent, the precision or certainty intended in a statute.

words chosen by Congress, the Master's construction must be rejected.

If the Master is right that the limitation's express reference to the Compact does not mean the Compact, Congress did not merely use what the Master calls "inappropriate" language (Rep. 173); Congress was guilty of woefully bad and misleading draftsmanship. Congress wholly failed to understand express and unmistakable language of the Compact—that the lower basin apportionment is from the Colorado River system, expressly defined as the Colorado River and its tributaries —explained and reexplained through successive Congresses.

Even if it were clear that Congress erred so egregiously, the Master's conclusion does not follow. Congress provided for the possibility that it might have misread the Compact. Congress did so in section 8(a) of the Project Act:

> "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, *anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.*" (Emphasis added.)

What is "in this Act to the contrary notwithstand-

ing"? The closest scrutiny discloses nothing. But the possibility of something "to the contrary" was nevertheless provided for, and throughout the act are riveted provisions whose only purpose is to say: Should inconsistency between this act and the Compact be discovered, the Compact controls. The Limitation Act section concludes: "such uses always to be subject to the terms of said compact." The tri-state compact authorization concluded: "and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada."

The English language does not contain words clearer than those which Congress used, again and again, to say that the Compact is to control in the event of inconsistency.

In *Arizona v. California,* 292 U.S. 341 (1934), this Court, through Mr. Justice Brandeis, announced that the limitation on California means what it says (292 U.S. at 357):

> "Nor does Arizona show that Article III(b) of the Compact is relevant to an interpretation of § 4(a) of the Boulder Canyon Project Act upon which she bases her claim of right. It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under Article III(b). But the Act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the Compact. *The*

Act merely places limits on California's use of waters under Article III(a) and of surplus waters; and it is 'such' uses which are [quoting from section 4(a)] *'subject to the terms of said compact.'"* (Emphasis added.)

In short, the Limitation Act does incorporate the Compact by reference.[8]

B. Article III(b) Waters Are Included in the "Excess or Surplus" Available to California if the Project Act Is "Read Literally"

The Master says that if the phrase "excess or surplus waters unapportioned by said compact" is "read literally," California has no share in the uses specified in Article III(b) of the Compact (Rep. 168-69). He rejects this result (Rep. 194). Then, relying on the Senate debates (Rep. 194-200), he construes this phrase to mean "all consumptive use above the first 7.5 million acre-feet of mainstream water in the Lower Basin, in the United States, in one year." (Rep. 200.)

Although the Compact provisions referenced by this

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[8]Our offer of proof included extracts from Arizona's brief in the *Perpetuation of Testimony* case which demonstrate conclusively that the future suit for which Arizona sought the testimony to be perpetuated was a suit on California's undertaking in the Limitation Act. Calif. Ex. 7504 for iden., Tr. 22,760. In presenting the offer, California counsel called attention of the Master to the emphasized sentence from the opinion quoted in text:

"I believe, your Honor, that this can be fairly characterized as an alternative holding, Mr. Justice Brandeis' opinion, and if that is so, your Honor's Draft Report is asking the court sub silentio to overrule a prior decision of the Court."

The Master's response: "It may very well be." (Tr. 22,789.)

phrase are not precisely identified[9] (*supra* pp. 72-73), a literal reading of the limitation's reference to the Compact does not preclude California from the Article II(b) waters. The Compact, Project Act, and California Limi-

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[9]The Report, however, states or implies at least three contradictory "literal" meanings of phrase [2], under one of which California would share in III(b) waters:

(1) Article III(a), (b), and (c) waters are apportioned by the Compact; therefore, phrase [2] refers to all system waters in excess of those apportioned waters. See Rep. 194: "Thus by a *literal Compact reading,* the phrase ['excess or surplus waters unapportioned by said compact'] would mean System water in excess of the aggregate of the apportionments of Article III(a), (b) and (c)." (Emphasis and bracketed words added.) This literal meaning is derived from Article III(f) which refers to "waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c)" of Article III. *Cf.* Rep. 194.

(2) Article III(a) and (b) waters are apportioned by the Compact; therefore, phrase [2] refers to all system waters in excess of those apportioned waters. See Rep. 168: "Thus *read literally,* the phrase limiting California to one-half of any 'excess or surplus waters unapportioned by said compact' means that California may consume half of any water above that referred to in Article III(a) and (b)." (Emphasis added.) This "literal" reading is derived from Article III(c) which refers to the "waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III. *Cf.* Rep. 194.

(3) Article III(a) waters are apportioned by the Compact; therefore, phrase [2] refers to all lower basin system waters in excess of those apportioned waters. This definition results by necessary implication from the Master's statements at Rep. 170-71. The Master asserts that if the two paragraphs of § 4(a) are read together, Congress consented in advance to a tri-state compact which provided that out of the first 7.5 million acre-feet of consumptive use, 4.4 million is allocated to California, 2.8 million is allocated to Arizona, and 300,000 is allocated to Nevada; and any excess is divided half to California and half to Arizona. The Master then concludes (Rep. 171): "Thus, a *literal reading* of Section 4(a) would authorize Arizona, California and Nevada to enter into a compact for the division among themselves of *all* of the *Lower Basin system water,* including the water being used by New Mexico and Utah." (Emphasis added.) This conclusion cannot follow unless "excess or surplus" waters include all lower basin water above III(a) waters, including III(b) waters.

tation Act all treat Article III(b) waters as "excess . . . waters unapportioned" by the Compact, in which California may share.

The Master is unable to explain "whatever may account for [the] segregation [of Article III(b)] as a separate provision of the Compact" (Rep. 147). Arizona explained very well in her brief in *Arizona v. California,* 283 U.S. 423 (1931), the reason why Article III(b) uses a deliberate circumlocution to avoid the word "apportioned," and why Article III(b) appears at all, instead of a quantity of 8,500,000 acre-feet in Article III(a) for the lower basin:[1]

> "The difference in language between paragraphs (a) and (b) is plain, and the difference in meaning is clear. Paragraph (b) does not *apportion in perpetuity,* as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of 'surplus' waters, and surplus waters are defined, not as surplus over quantities 'apportioned,' but as surplus over quantities '*specified* in paragraphs (a) and (b).' Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. There-

[1]Calif. Ex. 2043 (Tr. 12,379), pp. 2-3.

after it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs (b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c)."[2]

This accords with the report of Delph Carpenter, Colorado River Commissioner of the State of Colorado,[3] which was printed in the *Congressional Record*[4] during the debates on the Project Act:[5]

"The repayment of the cost of the construction of necessary flood-control reservoirs for the protection of the lower river country, probably will result in a forced development in the lower basin. For this reason a permissible additional development in the lower basin to the extent of a beneficial consumptive use of one million acre-feet, was recognized in order that any further apportionment of surplus waters might be altogether avoided or at least delayed to a very remote period. *This right*

[2]Arizona's counsel were Clifton Mathews, now a Senior Circuit Judge of the Ninth Circuit Court of Appeals, and Dean Acheson, subsequently Secretary of State.

[3]Ariz. Ex. 46 (Tr. 255).

[4]70 CONG. REC. 577-86 (1928).

[5]Ariz. Ex. 46 (Tr. 255), reproduced in Calif. Exhibits, vol. 24, pp. A77, A82.

of additional development is not a final apportionment. This clause does not interfere with the apportionment to the upper basin or with the right of the States of the upper basin to ask for further apportionment by a subsequent commission." (Emphasis added.)

III. THE LEGISLATIVE HISTORY OF THE PROJECT ACT SUPPORTS THE NATURAL AND LITERAL MEANING OF THE LIMITATION'S INCORPORATION OF THE COLORADO RIVER COMPACT

Not one word in the legislative history affirmatively supports the Master's thesis that Congress intended to relate the limitation solely to "mainstream" waters in Lake Mead and below.

Some members of Congress correctly understood that "III(a) waters" in the Compact include the main stream and all tributaries; some apparently thought, at times, that only the Gila was excluded; some apparently thought, at times, that the "III(a) waters" were identified with the flow at Lee Ferry. But not one Senator or Representative departed from the Compact or identified the limitation, as the Master does, with the waters in Lake Mead and the main Colorado River below. No one in Congress, or anywhere else for over 30 years after, until the Master proposed this "novelty,"[6] ever so suggested.

The Master's segregation of the Colorado River at Lake Mead into two rivers is based solely on an inference spelled out in his Report: Hoover Dam controls

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[6]Tr. 22,762.

only "mainstream" water; it cannot control the "tributary" water, including the main stream between Lee Ferry and Lake Mead.[6a] Therefore, by inference, section 4(a) of the Project Act applies only to the "mainstream." (Rep. 173-74.) This inference cannot stand in the face of the limitation's express reference to the Compact, which applies to all Colorado River system waters in the lower basin. Moreover, this inference erroneously attributes legal significance to the location of Hoover Dam and Lake Mead. The objective of Congress at all times has been a comprehensive basin-wide plan of river development[7] which has gone forward since the completion of Hoover Dam in 1935.[8] Black

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[6a]The Master's hydrology and water law are wrong. Hoover Dam can affect uses from the main stream and tributaries above Lake Mead, by making natural flow previously appropriated below Lake Mead available for appropriation above Lake Mead to the extent that downstream appropriators are satisfied from flood flows conserved by the reservoir. Glen Canyon Dam, below all points of upper basin use, serves a similar purpose for upper basin users who are enabled to meet the Compact's delivery obligations from stored water in Glen Canyon reservoir, thus making additional natural flow above the reservoir available for use in the upper basin.

[7]This purpose is manifested in Project Act title and §§ 15, 16, and 19 (Rep. app. 379, 394-95). See S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 27 (1928), which is Calif. Ex. 203 (Tr. 7,715).

[8]Davis Dam, located 67 miles below Hoover Dam, was completed about 1950; it "implements regulation of releases at Hoover Dam into the seasonal pattern required by downstream irrigation and domestic users." (Rep. 33.) Parker Dam, 88 miles farther downstream, was completed about 1938; it "regulates the flow of the Bill Williams in excess of local uses in Arizona." (Rep. 33-34.) The Colorado River Storage Project Act of 1956 (70 Stat. 105, 43 U.S.C. §§ 620-620*o* (1958)), authorizes construction of four storage reservoirs in the upper basin including Glen Canyon Dam, which is almost equivalent to another Hoover Dam. Closure of Glen Canyon Dam is scheduled for 1962 (Tr. 21,351-52), and two other upper basin storage reservoirs (Navajo Dam and Flaming Gorge Dam) are under construction.

Canyon, Boulder Canyon, Bridge Canyon, and Glen Canyon were all proposed in Congress as possible sites for the first high dam, which would be authorized by the Project Act.[9] Congress authorized the Secretary to choose between Boulder Canyon and Black Canyon,[1] some 20 miles apart, as the location of Hoover Dam, narrowing the choice to these two sites, not for legal reasons, but for engineering and economic reasons. The dam had to be located at a place where it would provide adequate river regulation and flood and silt control. Yet the dam would have to be located close enough to major markets in southern California for power production to repay the cost of the dam.[2] Furthermore, projects to divert from the river between Lee Ferry and Lake Mead for use in both Arizona and California were under active consideration before and after 1928.[3] Hoover Dam's location could have no legal significance in connection with the limitation on California.

A. The Limitation's Incorporation of the Compact Is Purposeful and Rational

The Project Act manifests Congress' purpose to subjugate all system waters to the Compact and to protect

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[9]*E.g.*, J. G. Scrugham (Governor of Nevada, previously Nevada's Compact Commissioner, subsequently Senator from Nevada), as special adviser to the Secretary of the Interior, "Report on the Development of the Colorado River Basin" (Dec. 16, 1927), *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 469, 514, 517-20 (1928); Senator Pittman, 68 CONG. REC. 4406-10, 4412, 4414 (1927); Senator Johnson, 67 CONG. REC. 12625 (1926).

[1]Project Act § 1 (Rep. app. 379).

[2]S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 9-10 (1928) (Calif. Ex. 203 (Tr. 7,715)); H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1, at 6-8 (1928); F. E. Weymouth, *Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 474, 480-81 (1925), quoted at 68 CONG. REC. 4309, 4311 (1927), by Senator Oddie of Nevada.

[3]See *infra* pp. 124-27.

the upper basin apportionment thereunder.[4] The reasons were identical with those which the Master finds to support the "language of the Compact that subjugates both mainstream and tributaries to its rule." (Rep. 143.)

To achieve this purpose, the limitation on California was employed by Congress in the Project Act to help make a six-state compact acceptable to the upper basin if Arizona would not ratify. The Master correctly identifies the reason (Rep. 165):

> "Absent seven-state ratification of the Compact, the Upper Basin required protection against appropriations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against

[4]For example, see the following provisions of the Project Act (Rep. app. No. 3): The title states a basic purpose of the act to be "the approval of the Colorado River compact." Section 1 authorizes construction of works "subject to the terms of the Colorado River compact." Section 6 specifies, as part of the second priority, that Hoover Dam and Lake Mead be operated for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact." Sections 8(a) and 13(b) and (c) subject the United States and all water users to the Compact. Section 13(a) gives the constitutionally required consent of Congress to the Compact. Section 19 consents to negotiation of compacts "supplemental to and in conformity with the Colorado River compact."

See S. Rep. No. 592, 70th Cong., 1st Sess., pt. 1, at 14-16 (1928) (Calif. Ex. 203 (Tr. 7,715)); H.R. Rep. No. 918, 70th Cong., 1st Sess., pt. 1, at 13-15 (1928).

undue encroachment by the nonratifying state."

Using Compact terminology to solve this Compact problem is the most reasonable construction to give to the limitation. By this construction Congress could simply, quickly, and accurately determine that the limitation accompanying a six-state agreement would afford to the upper basin substantially the protection of a seven-state agreement.

Congress clearly intended the limitation to incorporate the Compact, whatever it may mean. This was the overriding intent of Congress regardless of any individual Senator's understanding or misunderstanding of the meaning of the Compact.[5] Congress must have understood the systemwide scope of the Compact.[6] Furthermore, from 1923 through 1928, the text of the Com-

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[5]For the standard of interpretation contemplated by Congress, see the discussion between Senator Bratton and Senator Pittman. (70 CONG. REC. 469-70 (1928), quoted *infra* pp. 122-23.)

[6]Section 13(a) of the Project Act, which gives the constitutionally required congressional consent to the Compact, must be read as though the language of the Compact is set forth therein *in haec verba.* The Constitution (art. I, § 10, cl. 3) requires congressional consent to an interstate compact so that Congress may protect the national interest by refusing to consent to a compact which is not in the best interests of the Nation. See Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1855); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 YALE L.J. 685, 694-95 (1925); ZIMMERMANN & WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 57 (1951); THURSBY, INTERSTATE COOPERATION 67-69 (1953). In order to do so, Congress must be presumed to know the terms of the Compact and to understand them.

pact was reported to Congress numerous times,[7] and its "unmistakable language" (Rep. 143) clearly reveals its systemwide application—to main stream and tributaries in the lower basin. (Rep. 142-44.) On numerous occasions during that period, the systemwide application of the Compact was authoritatively reported or explained to Congress.[8] Thus, there is no possibility that Congress did not mean Compact when it said Compact. There is no reason to reject the natural and literal meaning of Congress' words.

It is neither necessary nor sensible to read the limitation, particularly in view of its purpose, by ignoring its express reference to the Compact and by applying that limitation solely to the "mainstream," Lake Mead and below, a body of water which is completely foreign to any classification defined in or dealt with by the Com-

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[7]Rep. Hayden, Ariz., 63 CONG. REC. 472-73 (1922); H.R. 13480, 67th Cong., 4th Sess. § 1, inserted in the *Congressional Record* by Rep. Hayden, 64 CONG. REC. 2725-26 (1923); Herbert Hoover, H.R. Doc. No. 605, 67th Cong., 4th Sess. 8-12 (1923) (Ariz. Ex. 53 (Tr. 259)); Hoover, *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 38-41, 41-44, 47-50 (1924); Sen. Ashurst of Arizona, *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. 313-15 (1925); Delph E. Carpenter, *Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 315-18 (1925); H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 26-29 (1926); H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1, at 32-34 (1928); Sen. Bratton, New Mexico, 70 CONG. REC. 324-25 (1928); Carpenter report, quoted *id.* at 579-80.

[8]*E.g.,* Herbert Hoover, 64 CONG. REC. 2710-11 (1923) (answers to questions 4, 6, and 8 of questionnaire on Colorado River Compact (Ariz. Ex. 55 (Tr. 260)); Delph E. Carpenter, *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 208-10 (1926); Sen. Johnson, Calif., 70 CONG. REC. 466 (1928).

pact. The Master's construction[9] defeats the conceded purpose of the limitation to leave "a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the nonratifying states" (Rep. 165). (See *supra* pp. 113-14.) Bridge Canyon, above Lake Mead, was an alternative diversion point considered for Metropolitan Water District's Colorado River Aqueduct; such plans were known to Congress. (*Infra* pp. 124-27.) Under the Master's construction of the limitation, a Metropolitan diversion at Bridge Canyon (above the "mainstream") would provide water to California in addition to the quantities specified in the limitation. This would increase California's rights to lower basin waters by the amount of the Bridge Canyon diversion and decrease in like amount the quantity available to a nonratifying Arizona from the main Colorado River in the lower basin. The upper basin congressmen could not have intended that their protection under the limitation should depend upon the choice of diversion points for California projects.

Furthermore, the Master's reading would be egregiously unfair to California. Under the Master's recommended decree, Arizona, Nevada, New Mexico, and Utah uses on all lower basin tributaries are ignored. But under the Colorado River Compact, which the Master properly construes to include lower basin tributaries (Rep. 142-44), tributary uses in these four lower basin states diminish the rights which the lower division states

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[9]Rep. 173: "Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, *despite the fact* that Article III(a) of the Compact deals with the Colorado River *System*, which is defined in Article II(a) as including the entire mainstream and the tributaries." (First emphasis added.)

(Arizona, California, and Nevada) have under Article III(c) of the Compact to require states of the upper division (Colorado, Utah, New Mexico, and Wyoming) to supply water to satisfy the Mexican Treaty, because these uses on lower basin tributaries augment the quantities for which the lower basin is accountable in determining the obligation of the upper division states to deliver water in addition to that required by Article III(d).

In other words, in consequence of the Master's severing the Compact from the limitation, California loses the tributary issue twice: (1) In lower division (Arizona, California, and Nevada) versus upper division (Colorado, Wyoming, New Mexico, and Utah), tributaries are *included,* to California's disadvantage, by reducing the contribution to the Mexican burden which the lower basin may demand at Lee Ferry, thus increasing California's portion of the Mexican burden. (2) In *Arizona v. California,* tributary uses in Arizona and Nevada are *excluded,* again to California's disadvantage, in computing the quantity of the total claims of those two states which may be asserted against the "mainstream" in competition with California's share. It is unreasonable almost to the point of absurdity that any state would on the same day make two such bad and inconsistent bargains with respect to lower basin tributaries, one by enacting the Limitation Act, the other by ratifying the Compact. That is the result, however, of the "patentable novelty" which rewrites the words of one bargain—the Limitation Act.

If the Court decides not to construe the limitation consistently with the Compact, then it should construe the Compact consistently with the limitation.

B. Senator Phipps, Author of the Limitation and Chairman of the Reporting Committee, Made His Intention To Refer to the Compact Unmistakable

A principal reason given by the Master for reading the Colorado River Compact out of the limitation is that the importation of Compact concepts flies "in the face of every expression of intent made by any Senator who had anything to do with the legislation." (Rep. 180.) This assertion is completely wrong. The authoritative legislative history of the first paragraph of section 4(a) supports only the conclusion that the word "Compact" was inserted in phrases [1] and [2] of the limitation purposefully, intentionally, and deliberately.

Senator Phipps, chairman of the reporting committee, made this abundantly clear on the Senate floor when he perfected the language of the limitation which he had offered as an amendment to the act. At the time Senator Phipps offered his perfecting amendment, the limitation—phrase 1—referred simply to "the waters apportioned to the lower basin States by the Colorado River compact."[1] Senator Phipps made his intention unmistakable in offering his perfecting amendment:[2]

> "Referring to the amendment which is now before the Senate, *in order to remove any possible misunderstanding regarding the 4,400,000 acre-feet of water,* I desire to *perfect* the amendment by inserting on page 3, line 4,[3] after the word 'by' the words 'paragraph (a) of article 3 of,' so that it will show that that allocation of water refers directly to *the seven and one-half million*

[1]Calif. Ex. 2012 (Tr. 11,173), p. 3, lines 3-4.
[2]70 CONG. REC. 459 (1928), quoted in Calif. Ex. 2015 (Tr. 11,173), at 54.
[3](Footnote ours.) Calif. Ex. 2012 (Tr. 11,173), p. 3, line 4.

acre-feet of water that are mentioned in paragraph 3." (Emphasis added.)

Senator Phipps' perfecting amendment was accepted without objection.[4]

Before Senator Phipps perfected his amendment, misunderstanding concerning the precise provision of the Compact intended to be referenced might have been conceivable.[5] There can be no occasion whatever for misunderstanding after the amendment was perfected. It is incredible that Senator Phipps perfected his amendment to make precise reference to Article III(a) of the Compact if he did not intend to refer to the Compact at all. If the Master were right, Senator Phipps did not "perfect" his amendment, he hopelesly obscured its meaning by using a "shorthand" so esoteric that it defied translation for more than 30 years.[6]

It is inconceivable that Senator Phipps would have referred to the Compact "inappropriately." Senator Phipps was the chairman of the Senate Committee on Irrigation and Reclamation which held extensive hearings on the fourth Swing-Johnson bill[7] and reported

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[4]*Supra* note 2.

[5]Before perfection, the words "waters apportioned to the lower basin States by the Colorado River compact" might have been misunderstood to refer to the 75 million acre-feet of flow which Article III(d) requires to pass Lee Ferry every 10 years. *Cf.* Rep. 187-88.

[6]The Master says that "[T]his inappropriate reference to the Compact has been the cause of seeming inconsistency in the Act and of much confusion in its interpretation." (Rep. 173.)

[7]*Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. (1928). Senator Phipps had also been a member of that Senate committee during consideration of the second and third Swing-Johnson bills. See *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. (1924); *Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1925).

the bill favorably containing the first version of a proposed limitation to be exacted from California.[8] He was the author of several amendments (actually substitute texts) to section 4(a),[9] one of which became the first paragraph of that section.[1] Senator Phipps must have been thoroughly familiar with the provisions of the Compact and thus understood that the waters apportioned by Article III(a) of the Compact embraced both the main stream and the tributaries in the lower basin. He surely intended to define the limitation on California in those terms. For example, two days before he perfected his amendment, he and Senator Hayden engaged in the following colloquy upon the limitation provision (70 CONG. REC. 335):

> "Mr. HAYDEN. If the Senator thought there was force in that argument, I should think that he would have included in his amendment a provision eliminating the waters of the Gila River and its tributaries, as my amendment does.
>
> "Mr. PHIPPS. I do not consider it necessary because the bill itself, not only the present substitute measure but every other bill on the subject, ties this question up with the Colorado River compact.
>
> "Mr. HAYDEN. My amendment does that.
>
> "Mr. PHIPPS. Yes; that is true, but under estimates of engineers—one I happen to recall being made, I think by Mr. La Rue—notwithstanding all of the purposes to which water of the Gila may be put by the State of Arizona, at least 1,000,000 acre-feet will return to the main stream. Yet Arizona contends that that water is not available

[8]See Calif. Ex. 2001 (Tr. 11,173), p. 7, lines 4-12.
[9]Calif. Exs. 2004, 2009, 2012 (Tr. 11,173).
[1]Calif. Ex. 2012 (Tr. 11,173).

to California; whereas to-day and for years past at least some of the waters from the Gila River have come into the canal which is now supplying the Imperial Valley.

"It is not a definite fixed fact that with the enactment of this proposed legislation the all-American canal is going to be built within the period of seven years; as a matter of fact, it may not be built at all; we do not know as to that. *But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.*" (Emphasis added.)

To resolve any differences among conflicting expressions of intention by Senators, the specific statement by Senator Phipps, author of the first paragraph and of its perfecting amendment, and chairman of the reporting committee, must be taken as controlling.[2] If the Master is right, Senator Phipps did not understand his own amendment.

C. Confused, Conflicting, and Ambiguous Statements on the Floor of the Senate Cannot Overturn the Natural and Literal Incorporation of the Compact in the Limitation

If the Master is correct—that "Compact" does not mean Compact, and that "Colorado River" means "Lake Mead and below"—the English language is not adequate to achieve the evident purpose of the Project Act and the limitation on California. The fault in this

[2]Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95, 399-400 (1951); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942).

construction lies not with Congress nor with the words which Congress put in the statute. It lies in ignoring the persuasive legislative history, *supra,* and in yielding the natural and literal meaning of express and purposeful words to confused debate originating during a filibuster.[3]

The Master relies heavily upon Senator Pittman of Nevada (Rep. 176-77). However, the Master himself has elsewhere made clear why Senator Pittman's statements cannot be accepted as the basis for interpreting the limitation (Rep. 188-90, 193): Senator Pittman, as did Senator Hayden (Rep. 190-93), confused the Article III(a) apportionment with the Article III(d) flow at Lee Ferry. The Master has conclusively demonstrated that these two articles cannot be identified (Rep. 144, 187-88). If "all subsequent discussion in the Senate flowed in the same channel" (Rep. 190), this conceded confusion is not a persuasive substitute for the clear and literal meaning of the statute or its authoritative legislative history.

Senator Pittman, in debate with Senator Bratton over the tri-state compact set forth in the second paragraph of section 4(a), expressed his standard for interpreting specific language in a statute in light of a conflicting legislative history (70 CONG. REC. 470):

> "When Congress uses certain language, there may be a vast difference of opinion among Senators as to what the courts will construe it to mean; but when they use exact language which the Congress of the United States says they may use in an agree-

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[3]See Senator Hayden's description in 1949 of this filibuster in Ariz. Reply to Calif. Answer, app. 6, p. 95.

ment, then the Congress is supposed to know what the agreement means."

The Master also quotes Senator Johnson (Rep. 179 n.38) to the effect that under the tri-state compact set forth in section 4(a) Arizona would receive 2.8 million acre-feet "in addition to" the Gila. The worst that can be said is that Senator Johnson's statements during the debates in the press to secure passage in face of an Arizona filibuster (her second one) were not always consistent. He had earlier read to the Senate the definition of the Colorado River system from Article II(a) of the Compact, and Herbert Hoover's answer to question 4 propounded by Senator Hayden[4] which explained the reason for including all tributary systems in the Compact (70 CONG. REC. 466 (1928)). Senator Johnson then stated that he opposed the pending Hayden version of a tri-state compact amendment to section 4(a)[5] because it would amend the Compact by excluding the Gila *(ibid.)*. Senator Hayden denied this *(ibid.)* and explained that the purpose of his amendment was to assure Arizona the use of Gila River waters, free from any obligation to supply Mexico *(id.* at 467).

Senator Johnson accepted the tri-state compact provision as the second paragraph after it had been amended to make it permissive rather than mandatory so that it did not represent "the will or the demand or the request" of Congress (*id.* at 472). Thereupon, all efforts to clarify it ended.

Senator Hayden and Senator Ashurst voted against the bill (*id.* at 603); apparently, the Arizona Senators

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[4]Ariz. Ex. 55 (Tr. 260), text in Calif. Exhibits, vol. 24, pp. A31, A33. Mr. Hoover was chairman of the Colorado River Commission which negotiated the Compact.

[5]Calif. Ex. 2014 (Tr. 11,173) is the Hayden amendment.

were not convinced that the Project Act was as favorable to Arizona as the Master's Report would provide.

To summarize: The limitation, read naturally, makes an express reference to the Colorado River Compact. The weight of the legislative history accords with the literal meaning of the statute, and thus concludes any doubts as to the construction of the language.[6] Taken most strongly against us, however, the legislative history is ambiguous, conflicting, and uncertain, and therefore cannot be permitted to overturn the natural meaning of the language of the limitation.[7]

IV. TRUNCATION OF THE COLORADO RIVER AT LAKE MEAD IS NOT LOGICAL BECAUSE DIVERSIONS OF WATER FROM BRIDGE CANYON (ABOVE LAKE MEAD) HAVE BEEN PLANNED FOR USE IN BOTH ARIZONA AND CALIFORNIA BEFORE AND AFTER ENACTMENT OF THE PROJECT ACT

Prior to passage of the Project Act, Congress was told of plans to divert large quantities of Colorado River water at Bridge Canyon above Lake Mead for use in Arizona and in California.[1] Senator Cameron of Arizona advocated such a plan on the Senate floor during the debates on the third Swing-Johnson bill.[2] The Senator placed in the *Congressional Record* a map,

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[6]Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 390 (1951); United States v. Spelar, 338 U.S. 217, 219 (1949). See Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes,* 25 WASH. U.L.Q. 2, 21, 25-26 (1939).

[7]*Ex parte* Collett, 337 U.S. 55, 61 (1949); FCC v. Columbia Broadcasting Sys., 311 U.S. 132, 136-37 (1940).

[1]*E.g.,* 68 CONG. REC. 4429-30, 4444-46 (Cameron), 4516 (Phipps), 4521 (Kendrick, Pittman) (1927).

[2]68 CONG. REC. 4429-30, 4444-46 (1927).

illustrating the diversion at Bridge Canyon for use in Arizona and California.[3]

Since the passage of the Project Act, diversion points for the proposed Central Arizona Project at Bridge Canyon or Marble Canyon (above Lake Mead) have been studied as well as the diversion point at Parker Dam (Rep. 227).

The Thirteenth Annual Report of the Arizona Interstate Stream Commission to the Governor of Arizona (1960) states (p. 31):

> "The circulation of the Special Master's draft report on *Arizona v. California et al.* has given new impetus to plans for utilizing Colorado River water in Arizona. An integral part of Colorado River water utilization plans for Central Arizona is a route for diversion. The Stream Commission and the [United States] Geological Survey have undertaken a co-operative program to map the unsurveyed area which would be traversed by a proposed diversion route from Marble Canyon. With the mapping program nearing completion, detailed cost estimates can be made which will facilitate consideration of the relative desirability of this diversion route to central Arizona."

Marble Canyon, just above Bridge Canyon and below Lee Ferry, is another site on the Colorado River main stream above Lake Mead which the Special Master defines as a "tributary" outside the terms of his decree.

After passage of the Project Act, The Metropolitan Water District of Southern California investigated a large number of alternative routes for its Colorado River Aqueduct, finally reducing them to four. The

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[3]68 CONG. REC. 4431 (1927).

diversion points for these four routes were (1) Parker Dam, which was ultimately selected, (2) Boulder Canyon, (3) Bridge Canyon, above Lake Mead, and (4) the All-American Canal. The district's report on these four routes shows that the Bridge Canyon diversion was under serious consideration until late 1930.[4]

In the History and First Annual Report of the Metropolitan Water District, for the period ending June 30, 1938, Metropolitan reported that the most important point in consideration of a Bridge Canyon diversion was its cost of some $558,000,000. The decision was still not final (p. 84):

> "When the upper river shall have been completely developed and controlled and when the demand for power in the Southwest has been largely increased and the supply of cheap steam power has been exhausted, it may be desirable to construct a dam from 600 ft. to 900 ft. high at Bridge Canyon for the purpose of producing hydroelectric energy. When such a dam shall have been constructed and financed by some agency other than the Metropolitan Water District, it may be found feasible to make a gravity connection to it thus eliminating all

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[4]See The Metropolitan Water District of Southern California, *Summary of Preliminary Surveys, Designs and Estimates for the Metropolitan Water District Aqueduct and Terminal Storage Projects* (November 1930) and *Final Report of the Engineering Board of Review* (December 1930), a copy of which is tendered to this Court and to each of the other parties with the filing of this brief. The map, plate 2 *infra,* shows aqueduct routes from figure 64, p. 148, of this document. Appendix V, p. 155, explains reasons for rejecting the diversion from Bridge Canyon.

or part of the pumping necessary to bring the water to Los Angeles over a pumping route."

The proposed diversions for projects in both Arizona and California described above are illustrated on plate 2 *infra*.

In light of these facts, the theory of truncation of the Colorado River at Lake Mead is not now, and never was, a viable idea. Why, for example, would Congress, with full knowledge of tremendous diversions proposed at Bridge Canyon above Lake Mead for use in Arizona and California, have restricted the operation of Project Act sections 4(a) and 5 solely to Lake Mead and below? Why did not California divert water at Bridge Canyon (or at least make a more substantial effort to do so) if the consumptive use of this water diverted above Lake Mead would not be charged under the limitation? Why would Arizona press for a Central Arizona Project to divert at Bridge Canyon where her late priority project would have to compete with senior California projects when the water supply became scarce? (See Rep. 247.) At Parker, on the other hand, the Central Arizona Project would share in Arizona's pro rata allocation of "mainstream" waters independent of interstate priorities under the Master's decision.

There is only one answer to these questions: Congress did not truncate the Colorado River at Lake Mead.

V. THE CONSENSUAL NATURE OF THE LIMITATION, ESTABLISHED BY THE PROJECT ACT AND THE RECIPROCAL CALIFORNIA LIMITATION ACT UPON SIX-STATE RATIFICATION OF THE COMPACT, REQUIRES A NATURAL AND LITERAL READING OF THE LIMITATION TO INCORPORATE THE COLORADO RIVER COMPACT

The Master construes the limitation as if it were imposed by congressional fiat.[1] This is wrong, as the Master sometimes recognizes.[2]

The consensual nature of the limitation

The limitation is cast in the classic language of contract: The United States made an offer to California (first paragraph of section 4(a)) to "agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the passage of this Act . . . ." California accepted that offer by enacting the limitation and by her six-state ratification of the Compact. Five other basin states accepted the limitation as the predicate for six-state ratification of the Compact. Colorado, Nevada, New Mexico, and Wyoming forbore to repeal between December 21, 1928 (when the Project Act was enacted), and June 25, 1929 (when the Project Act became effective), their earlier six-state ratifications of the Compact. Utah, which had repealed her six-state ratification in 1927, ratified the Compact again as a six-state agreement shortly after California

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[1] *E.g.*, Rep. 165: "The reason that *Congress imposed this limitation* on California's consumptive use of mainstream water . . . is apparent from the statutory language itself." (Emphasis added.) See also Rep. 164, 165-66.

[2] See Rep. 182, 317.

enacted the Limitation Act. All six ratifying states expressly waived seven-state ratification required by Article XI of the Compact, as specified in sections 4(a) and 13(a) of the Project Act. Arizona did not ratify. The Compact, the Limitation Act, and the Project Act all became effective simultaneously upon presidential proclamation on June 25, 1929. (See Rep. 24-27.) This group of documents established a statutory compact between California and the United States for the benefit of the six other expressly named basin states.[3] An interstate agreement or compact has often been characterized by the Court as a contract[4] and as a treaty.[5]

Significance of consensual nature in problems of interpretation

The consensual nature of the limitation is important in construing the meaning of section 4(a) of the Project Act. No one has the option to accept or reject ordinary federal statutes. Section 4(a) of the Project Act is deliberately oriented in the opposite direction. The Project Act was an offer to the basin states to

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[3]The United States and a state may validly enter into agreements by means of reciprocal legislation. Stearns v. Minnesota, 179 U.S. 223, 248 (1900); Searight v. Stokes, 44 U.S. (3 How.) 151 (1845); Neil, Moore & Co. v. Ohio, 44 U.S. (3 How.) 720 (1845).

[4]Virginia v. West Virginia, 220 U.S. 1, 34 (1911); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823); see concurring opinion of Jackson, J., West Virginia *ex rel* Dyer v. Sims, 341 U.S. 22, 36 (1951); see ZIMMERMANN & WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 32 (1951).

[5]Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104, 105, 107 (1938); Arizona v. California, 292 U.S. 341, 359-60 (1934); Virginia v. Tennessee, 148 U.S. 503, 527 (1893); Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591, 635 (1846); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838); see ZIMMERMANN & WENDELL, *op. cit. supra* note 4, at 31-32.

enter into an agreement; by its very terms it did not become operative until the offer had been accepted by those states. Each state had to interpret the offer in order to decide whether to accept it; therefore the consensual nature of the limitation scheme reinforces the weight which must be given to the express language employed by Congress in the Project Act. "Shorthand" (Rep. 173) or cryptic meanings gleaned from selected portions of the Senate debates, which were not communicated to the states, must not be permitted to overturn this clear literal meaning. Great weight must also be given to the administrative, practical, and legislative construction of this agreement by the parties to it and by the other basin states which are its express beneficiaries.

The Master replies that the Project Act and the California Limitation Act cannot be characterized as offer and acceptance. Section 4(a) of the Project Act, he asserts, "is not an offer but a condition precedent to the effectiveness of the Project Act" (Rep. 181). There is no such distinction even under ordinary contract law; a promise which is also a condition is a frequent ingredient of a contract. But whatever label is put on the limitation, it is clearly consensual in nature.

The Master's transmutation of the controversy

The Master further replies that if the Project Act is interpreted as an offer, it does not follow that the limitation must be given its natural and literal meaning: "Thirty years of unabated controversy," says the Master, "give unchallenged testimony that the language is *not* plain on its face." (Rep. 182; emphasis in original.) Significantly, the Master fails to define that "controversy." There have been "thirty years of unabated

controversy" about the meaning of the Compact, but there has never been any doubt, until this Report created it, that the reference in section 4(a) to the "Colorado River compact" means the Colorado River Compact signed on November 24, 1922.

California and the other basin states made a bargain with each other and with Congress in 1929. California then assumed a calculable risk: What provisions of the Compact are incorporated into the Project Act? What do those provisions mean?[6]

California should not be charged with taking the risk that the language of section 4(a) would be rewritten 30 years later so that the words refer to a different river (the "mainstream") and to classifications of water entirely unrelated to the Compact to which its words unmistakably refer. The limitation's reference to the Compact was neither modified nor excised by section 2 of the California Limitation Act, as the Master implies (Rep. 181-82).[7]

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[6]If "Compact" means Compact, we assumed a negligible risk about the meaning of the phrase "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" in light of the Master's confirmation of the plain meaning of Article III(a) of the Compact. (See Rep. 142-44.) The Master refuses to consider the Compact in construing the limitation and thus would destroy the basis on which we calculated that risk.

[7]Section 2 of the Limitation Act (Rep. 181, app. 398) provides: "By this Act the State of California intends to comply with the conditions respecting limitation on the use of water specified in subdivision 2 of Section 4(a) of the said 'Boulder canyon project act' and this act shall be so construed." The Master's construction of the Limitation Act makes § 2 (which is not the substantive part of the statute) more significant than § 1 which enacts the limitation in Congress' words; if the Master's interpretation of § 4(a) of the Project Act and of § 2 of the Limitation Act were correct, § 1 enacting the limitation was utterly useless.

To bolster his conclusion that "Compact" does not mean Com-

Construction by the states concerned

The bargain between Congress and California is not only an agreement between those sovereigns; it is also by its own specific terms "an express covenant" for the benefit of the six other states of the basin. The understanding of those beneficiaries, although not controlling, is relevant in interpreting what that agreement means. An examination of the expressions of spokesmen for those states reveals that the beneficiaries, including Arizona, consistently understood the terms of the bargain (as did California) to refer to the Compact in accordance with the natural and literal meaning of the language used in the Project Act and in the Limitation Act.[8]

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pact, the Master asserts that § 2 of the Limitation Act suggests the California Legislature's awareness of *"this* ambiguity in the statutory language." (Rep. 182; emphasis added.) Whatever the Master may mean by "this ambiguity," the California Legislature certainly did not find any ambiguity in the limitation's incorporation of the Compact. The obvious purpose of § 2 was to remove any possible doubt that California intended to comply with the limitation.

[8]The supporting documents are too voluminous to be included easily within the text of this brief. We submit these bound within volume 25 of California Exhibits.

These documents were submitted to the Special Master as a part of California's Offer of Proof dated August 17, 1960, after the draft report had revealed that the basis of the decision was a contention never offered by anyone, hence never tried, that the cross reference to the Compact in § 4(a) was "inappropriate" (Rep. 173) and must be disregarded. California submitted the offer to prove that the administrative practical, and congressional construction of the Project Act and California Limitation Act for 30 years has uniformly been: "The Colorado River Compact controls the interpretation of the limitation on California set forth in the first paragraph of section 4(a) of the Project Act and in the Limitation Act as if the Compact had been fully recited therein." (Brief in Support of Calif. Offer of Proof dated Aug. 17, 1960, pp. I-1 and I-2.)

The Master rejected the offered documents on the ground that none of them, even assuming their competency, "establish any proposition that will affect the disposition of the issues in

For example, the official report of Arizona's Colorado River Commission,[1] published just after the enactment of the Project Act in December 1928, analyzed that act and concluded that section 4(a) of the act incorporated and was controlled by the Colorado River Compact and that the limitation adopted the Colorado River Compact's definitions and classifications of water from the Colorado River and its tributaries, including the Gila.[2] Arizona's published report on the meaning of section 4(a) preceded the California Legislature's enactment of the Limitation Act by over two months. Is it reasonable that California should have discerned that the limitation was devastatingly more severe to California than Arizona, reading its plain language, had said it was?

Through all the years that followed, in every available forum—in interstate conferences, before the Secretary, in Congress, and in successive trips to this Court[3]—Arizona always took the same view: "Com-

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this litigation" (Rep. 253). We believe that ruling was clearly wrong. In any event, these documents are clearly relevant and are judicially noticeable. See, *e.g.*, United States v. Louisiana, 363 U.S. 1 (1960); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

[1]The Colorado River Commission of Arizona was an official state body charged by statute with responsibility for matters concerning the Colorado River. Act of March 7, 1927, ARIZ. LAWS 1927, ch. 37, p. 84.

[2]Calif. Ex. 7501 for iden. (Tr. 22,760). The report was dated December 31, 1928.

[3]See, *e.g.*, the following exhibits submitted as part of California's offer of proof which the Special Master rejected (Rep. 253); Calif. Exs. 7503-7504, 7506-7508, 7510-7512, 7513-C, and 7514-B, all for iden. (Tr. 22,760). For a discussion of the significance of the foregoing exhibits, as well as an analysis of Arizona's representations before Congress, see our brief dated August 17, 1960, in support of our offer of proof, pp. III-18 through 33, III-36 through 38, III-42 through 44, III-48, III-108 through 109, III-111 through 114, III-118 through 120, and III-147 through 149.

pact" in section 4(a) means Colorado River Compact.

California's Colorado River Commission,[4] a counterpart of the Arizona Commission, published its official report in September 1930, likewise interpreting section 4(a) and the then recently enacted Limitation Act as incorporating the Colorado River Compact and adopting its definitions and classifications of water.[5] California has unwaveringly taken the same position at all times.

In this present suit New Mexico and Utah stoutly resisted joinder, even in lower basin capacities. It occurred neither to their counsel, to the late Special Master who recommended their joinder, nor to this Court that they are not even proper parties—let alone indispensable parties—to a "mainstream" controversy among Arizona, California, and Nevada.

Construction by federal administrators

The consistent and reiterated administrative construction of the limitation upon California was that the limitation incorporated the Colorado River Compact, including the Compact's definitions and classifications of water.[6] The Master denies that there was any administrative construction on the theory that the United States had refused to "take sides in the Arizona-California

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[4]The Colorado River Commission of California was an official state body charged by statute with the responsibility of Colorado River matters. Act of May 17, 1927, CALIF. STATS. 1927, ch. 596, p. 1030, § 2. Under § 5, p. 1031, the existence of the commission was to end in 1929, but it was extended two more years by CALIF. STATS. 1929, ch. 367, p. 691, § 2.

[5]Calif. Ex. 7502 for iden. (Tr. 22,760).

[6]See supporting materials collected in Calif. Offer of Proof and Brief in Support of Offer, dated Aug. 17, 1960, at III-53 through 130.

controversy." (Rep. 252.) We agree that federal administrators refused to take sides between Arizona and California on the "controversy" between them about what the Compact meant; but there was no uncertainty among the administrators about whether the Compact was incorporated into the Project Act and the Limitation Act. On that question the federal administrators did not refuse "to take sides."[7] There is and was only one view: "Compact" means Compact.

Congressional awareness and construction

Congress was aware of the consistent construction which the affected parties and the administrators had placed upon the limitation, that "Compact" means Com-

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[7]The federal administrators had very clearly defined the "controversy" upon which they were *not* taking sides, and it was *not* the "controversy" which the Master's decision has created. For example, on January 29, 1944, Clifford E. Fix, Assistant Chief Counsel, Bureau of Reclamation, submitted a memorandum to the Solictor of the Department of the Interior prior to the hearing before the Secretary on February 2, 1944, on the proposed Arizona water delivery contract. Mr. Fix stated in the course of that memorandum: "Despite all that has been said by both states over a period of more than twenty years, there is now only one issue. The sole issue is whether the 1,000,000 acre feet provided for the lower basin by Article III(b) of the compact is unapportioned.

"While Arizona claimed for years that the Gila River and its tributaries were not to be included in the apportionment to the lower basin, it now concedes that the Gila and its tributaries are included in the waters apportioned to the lower basin under Articles III(a) and III(b). It rests its entire case on two propositions: (1) California has limited itself to 4,400,000 acre feet of apportioned water, and (2) III(b) water is apportioned water." (Calif. Ex. 7604 for iden., Tr. 22,760, at 5.) Commissioner of Reclamation H. W. Bashore concurred with the conclusions of the Fix memorandum and forwarded it to the Secretary of the Interior, along with the proposed Arizona water delivery contract which he submitted, for approval. (Calif. Exs. 7605-7606, both for iden., Tr. 22,760.) It was this "controversy" which was the basis for the language of article 10 of the Arizona contract and it was this controversy which the Secretary refused to resolve, as Secretary Ickes made perfectly clear in a decision promulgated by him contemporaneously with the execution of the Arizona

pact, and that the controversy was limited to determining the Compact provisions referred to and their meaning.[8] This same construction stems from the conduct of Congress in subsequent legislation. The most significant example ocurred in 1945 when the Senate ratified the Mexican Treaty[1] on the basis of a literal interpretation of the Project Act and the Limitation Act as incorporating the Colorado River Compact. After extensive hearings,[2] the Senate Foreign Relations Committee reported the treaty favorably.[3] The committee report states that California's contracts call for 5,362,000 acre-feet per annum, which include 962,000 acre-feet of unallocated surplus. The Compact surplus was estimated to be about 2 million acre-feet, less the 1.5 (or 1.7) million acre-feet guaranteed to Mexico.[4] Thus, the committee asserted that any curtailment of deliveries to California would be caused

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contract in February 1944. (See Calif. Ex. 7607 for iden., Tr. 22,760, a memorandum the substance of which was published by the Secretary. (Calif. Ex. 1837 (Tr. 12,257).)

[8]See the following comments by affected states on the 1947 report by the Department of the Interior on development of the Colorado River basin: Calif. Exs. 7513-C for iden. (Tr. 22,760) at 15-16, 17-18 (Arizona); 7513-D for iden. (Tr. 22,760) at 55-56 (Colorado). Similar comments on the proposed Central Arizona Project are also pertinent: Calif. Exs. 7514-B for iden. (Tr. 22,760) at 10-11 (Arizona); 7514-E for iden. (Tr. 22,760) at 100 (New Mexico). For the administrators' view, see Ariz. Ex. 71 (Tr. 310, 3,513, 3,520-21), at 150-51, quoted in Calif. Ex. 7514-F for iden. (Tr. 22,760). For a discussion of these documents, see Calif. Offer of Proof and Brief in Support of Offer, pp. III-36, 38, 42, 45-46 (Aug. 17, 1960).

[1]45 Stat. 1219 (1945), Ariz. Ex. 4 (Tr. 220).

[2]*Hearings Before the Senate Committee on Foreign Relations on a Treaty with Mexico Relating to the Utilization of the Waters of Certain Rivers,* 79th Cong., 1st Sess. (1945).

[3]S. EXEC. REP. No. 2, 79th Cong., 1st Sess., pt. 1 (1945).

[4]The treaty guarantees 1.5 million acre-feet per annum to Mexico, subject to reduction under certain conditions or to increase to 1.7 million acre-feet when surplus waters are available. See Ariz. Ex. 4, *supra* note 1, § 10.

not by the treaty but by subjection of California's rights to the Compact which, in turn, subjects surplus waters to first call for any Mexican treaty (Article III(c)) and does not permit allocation of such surplus waters until after October 1, 1963 (Articles III(f) and III(g)).[5] The Committee Report clearly related California's 4.4 million acre-feet to Article III(a) of the Compact, not to 7.5 million acre-feet of "mainstream" water. California's exposure to the Mexican burden was related to the 962,000 acre-feet of Compact surplus recognized in the California contracts—computed on a basin-wide, not a "mainstream" basis. Thus, California's "firm" rights to 4.4 million acre-feet of "Article III(a) waters" would not be invaded.[6]

The limitation on California must be given its natural and literal meaning: "Compact" means Compact.

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[5]S. EXEC. REP. No. 2, *supra* note 3, at 6-7. The Master quotes testimony of a California witness before the Senate committee during hearings on the treaty expressing concern that performance of the treaty might invade California's 4.4 million acre-feet of III(a) water (Rep. 251). He neglects to quote, or even cite, the Senate committee report on the treaty, which reassured California that this could not happen.

[6]See Brief in Support of Calif. Offer of Proof dated Aug. 17, 1960, pp. III-131 through 141.

PART THREE

THE MASTER ERRED IN HOLDING THAT THE BOULDER CANYON PROJECT ACT AUTHORIZED THE SECRETARY OF THE INTERIOR TO IMPOSE A FEDERAL INTERSTATE APPORTIONMENT ON THE STATES WITHOUT THEIR CONSENT, BY A "CONTRACTUAL ALLOCATION SCHEME"

Statement of the Issue

The Master holds that the Project Act authorized the Secretary, by means of water storage and delivery contracts, to "impose a federal apportionment" (Rep. 154) of "mainstream" waters on the states of Arizona, California, and Nevada; and that he did so. California's component, he holds, is determined by the limitation contained in section 4(a) of the Project Act (discussed in Part Two of this brief). The components for Arizona and Nevada are derived from a contract with Arizona and a contract with Nevada, both executed in 1944, by which the Secretary intended to effectuate the tri-state compact authorized by the second paragraph of section 4(a) but never ratified by any state. The Master concludes that the Secretary, although not required by the act to follow that formula, substantially effectuated it. The primary characteristic of this "contractual allocation scheme," as inferred by the Master, is the abrogation, as among "mainstream" users, of the principles of equitable interstate apportionment (particularly the principles of priority and protection of existing uses), previously established by this Court, and the

substitution of interstate proration in ratios derived from his interpretation of the act and contracts.

The whole "contractual allocation scheme" envisioned by the Master is an ingenious design for a nonexistent apparatus. The water service contracts exist, but the act did not contemplate that they should effectuate an interstate allocation; they do not purport to have made one; they did not make one *sub silentio;* they do not purport to abrogate interstate priorities and substitute interstate proration in the event of shortage. The limitation on California's rights is controlled by the proper interpretation of the limitation on California (discussed in Part Two *supra*), not by the Secretary's contracts with Arizona and Nevada.

The Master's construction of the Project Act and of the water delivery contracts is contradicted by the decisions of this Court, by the language of the statute, its legislative history, the statutory pattern of which it is an integral part, and its congressional, administrative, and practical construction for more than 30 years.

I. THE HOLDING IN *ARIZONA v. CALIFORNIA*, 283 U.S. 423 (1931), CONCLUSIVELY DETERMINED THAT THE PROJECT ACT DID NOT ABROGATE THE PRINCIPLES OF PRIORITY OF APPROPRIATION AND EQUITABLE APPORTIONMENT

In Arizona's first Colorado River suit, *Arizona v. California,* 283 U.S. 423 (1931), this Court held that the Project Act did not displace, except as the states

might expressly compact thereunder, the principles of priority of appropriation and equitable apportionment in the "mainstream" or any other part of the Colorado River system in the lower basin. It is 30 years too late to overturn that decision. Development in the basin has gone forward in reliance upon it; Congress has accepted and reenacted it; the parties to the suit are foreclosed by it.[1]

In that decision, this Court did not leave the parties to speculate about its holding on this issue; the Court identified it precisely (283 U.S. at 464):

> "*As we hold* that the grant of authority to construct the dam and reservoir is a valid exercise of Congressional power, *that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries,* and that there is now no threat by Wilbur, or any of the defendant States, to do any act which will interfere with the enjoyment of any present or future appropriation, we have no occasion to consider other questions which have been argued. The bill is dismissed without prejudice to

[1]In the 1931 suit, Arizona sued the six other Colorado River basin states and Secretary of the Interior Wilbur. 283 U.S. at 449.

an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." (Emphasis added.)

The Court's language is unmistakable. The principle laid down—that nothing in the act purports to abridge the right of Arizona to appropriate waters of the Colorado River above or below the dam either in 1931 or in the future[2]—obviously applies to every state in the basin, and not merely to Arizona alone. The Court's construction of the Project Act does not hinge upon Arizona's unilateral action ratifying or failing to ratify the Colorado River Compact. Thus the Court made clear that the source of any modification in the states' rights to appropriate, control, or use the waters of the Colorado River in the lower basin was not the Project Act, but a valid interstate agreement. Section 18 of the

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[2]283 U.S. at 462-63. That the act did not interfere with prospective appropriations is underlined by the Court's statement that "the Act interposes no legal inhibitions" on the execution of Arizona's alleged plans "for the taking of additional water in Arizona pursuant to its laws." The Court pointed out that "Years must elapse before the project is completed. If by operations at the dam any *then* perfected right of Arizona, or of those claiming under it, should hereafter be interfered with, appropriate remedies will be available. Compare *Kansas* v. *Colorado,* 206 U.S. 46, 117." (First emphasis added.) 283 U.S. at 463.

Project Act was held to have specifically preserved those rights of the states, *inter sese*.[3]

It is equally clear that this Court held that the Project Act does not divest—except by agreement of a state—either the quantity or priority of appropriations which had already been validly made.[4]

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[3]"The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein 'shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified' by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired." 283 U.S. at 462.

Mr. Justice Brandeis' recognition that § 18 prohibits such an interpretation of the Project Act as the Master proposes comports with the recognition this Court has often given similar "savings clauses" as precluding supersedure or nullification of existing state law by federal legislation. See, *e.g.*, FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 252 & n.17 (1954) (§ 27 of the Federal Power Act) (Mr. Justice Douglas, joined by Justices Black and Minton, dissented on other grounds but agreed "that the Federal Power Act was not intended to interfere with water rights created by state law." 347 U.S. at 258); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (§ 8 of the Reclamation Act of 1902).

[4]283 U.S. at 460-61. See also Arizona v. California, 298 U.S. 558, 570 (1936), the *Judicial Apportionment* suit, in which the Court said: "[I]t is evident that the United States, by Congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, *to impound, and control the disposition of, the surplus water in the river not already appropriated*. The defendant states contend, and Arizona does not deny, that the natural dependable flow of the river is already overappropriated, and it does not appear that without storage of the impounded water any substantial amount of water would be available for appropriation.

"The decree sought has no relation to any present use of the water thus impounded which infringes rights which Arizona may assert subject to superior but *unexercised powers* of the United States." (Emphasis added.)

The Court's definition of the phrase "to appropriate water" makes clear that the Court understood the term and did not use it in any esoteric sense (283 U.S. at 459):

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."[5]

It is 30 years too late to consider the proposal implicit in the Master's Report that this Court's 1931 decision in *Arizona v. California* should be overruled.[6] Since that decision, development in the lower basin, including construction of Hoover Dam and of great agricultural and domestic projects in California, has gone forward. (See Rep. 32-33, 53-71.)

Congress likewise accepted and acted upon this Court's 1931 holding when it appropriated funds to

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[5] *Accord,* Arizona v. California, 298 U.S. 558, 565-66 (1936).

[6] The Master proposes to distinguish this Court's decision out of existence. (Rep. 158-60.) Neither Arizona's purported ratification of the Compact in 1944, nor the operation of the dam and reservoir anticipated by the Court in 1931, provides any basis for overturning this Court's construction of the Project Act. The meaning of Congress' words in 1928, as construed in 1931, has not changed by reason of the acts and conduct of third persons during the period 1931-1961. Indeed, the acts and conduct of Congress, of the administrators of the act, and of the states are consistent with the Court's construction of the Project Act in 1931, and wholly inconsistent with the Master's construction of the Project Act in 1960.

build Hoover Dam,[7] as well as in 1937, when Congress appropriated funds for the Gila Project in Arizona.[8]

Congress adopted substantially the language of section 18 of the Project Act, and therefore the construction of that language,[9] in section 14 of the Boulder Canyon Project Adjustment Act of 1940.[10]

The Court reaffirmed its view of the Project Act in the *Parker Dam* case, *United States v. Arizona,* 295 U.S. 174, 183 (1935):

> "Arizona owns the part of the river bed that is east of the thread of the stream . . . . Her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flow-

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[7]From 1930 through 1956, $282,693,055 was appropriated for construction and operation and maintenance of Hoover Dam and power plant. See BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, CUMULATIVE SUPPLEMENT TO BUREAU OF RECLAMATION APPROPRIATION ACTS AND ALLOTMENTS 210, 245-49 (1957).

[8]During the hearings on appropriations for the Gila Project, Commissioner of Reclamation Page transmitted to the House committee considering the measure (see *Hearings Before a Subcommittee of the House Committee on Appropriations on the Interior Department Bill for 1938,* 75th Cong., 1st Sess. 1675-81, 1807-63 (April 12, 20-21, 1937)), the opinion, dated April 14, 1937, of Acting Solicitor Kirgis. The Acting Solicitor quotes from the language of the 1931 decision upon which we rely and then concludes: "The decision of the Supreme Court seems to leave Arizona in a position to appropriate any unappropriated water of the Colorado River if it could put such water to beneficial use, and this without reference to authority given by Congress in the Boulder Canyon project act." Calif. Ex. 7754 for iden. (Tr. 22,760). Commissioner Page's transmittal of April 16, 1937, to the House Committee on Appropriations is Calif. Ex. 7756 for iden. (Tr. 22,760). The appropriation of funds for the Gila Project was made by the Act of Aug. 9, 1937, 50 Stat. 564, 595 (1937).

[9]"In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" Shapiro v. United States, 335 U.S. 1, 16 (1948), quoting with approval Hecht v. Malley, 265 U.S. 144, 153 (1924).

[10]54 Stat. 779, 43 U.S.C. § 618m (1958).

ing therein is unaffected by the [Colorado River] Compact or federal reclamation law."[1]

II. EVEN IF THE ISSUE WERE NOT CONCLUDED BY *ARIZONA v. CALIFORNIA, SUPRA,* THE PROJECT ACT DOES NOT ABROGATE, BUT PRESERVES, PRIORITY AND EQUITABLE APPORTIONMENT PRINCIPLES

Even if the construction of the Project Act were an original question (which it is not), it is abundantly clear that the Project Act both expressly and by necessary implication preserves priority and equitable apportionment principles within the lower basin except as modified by effective interstate agreement.

A. Project Act Sections 18, 14, 8, and 4 Preserve Priority and Equitable Apportionment Principles

Sections 18, 14, 8, and 4 plainly manifest Congress' intention to preserve existing western water law.[2]

1. *Section 18*

Section 18[3] requires compliance with state law intrastate and with the "federal common law"[4] of priority and equitable apportionment interstate,[4a] "except as

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[1]The Court had earlier defined federal reclamation law as the Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof and supplemental thereto, "including the Boulder Canyon Project Act." 295 U.S. at 180 n.2.

[2]*Accord,* Colorado River Storage Project Act § 7, 70 Stat. 109 (1956), 43 U.S.C. § 620f (1958).

[3]Section 18 of the Project Act provides:

"Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

[4]"Federal common law" is Mr. Justice Brandeis' phrase in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

[4a]As construed in Arizona v. California, 283 U.S. 423, 462, discussed *supra.*

modified by the Colorado River compact or other interstate agreement." That requirement is buttressed by section 14 of the act, making the act a supplement to the reclamation laws and subjecting it to the control of the reclamation laws "except as otherwise herein provided."[5] The provisions of section 18 read with section 14 unmistakably establish Congress' intention to incorporate section 8 of the 1902 act[6] and to make clear that nothing in the Project Act provides "otherwise."

Congress' intent to preserve existing law, plainly manifested by the language of section 18, is confirmed by the legislative history of that section. Section 18 became part of the Swing-Johnson bill on December 14, 1928.[7] Senator King, the author of section 18, was a staunch opponent of federal control of water rights. Typical of Senator King's view is his statement to the Senate eight days before section 18 became a part of the bill:[8]

> "If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento

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[5]Section 14 provides: "This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Section 12 defines "reclamation law."

[6]Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958), quoted *supra* p. 63, was given interstate effect in Nebraska v. Wyoming, 325 U.S. 589, 612-15 (1945).

[7]70 CONG. REC. 593.

[8]70 CONG. REC. 169 (Dec. 6, 1928). Senator King was addressing Senator Hayden who hastened to agree with Senator King. *Ibid.* This is not an isolated example of congressional intent. The same view of Congress' power was repeated many times during the debate on the Swing-Johnson bills by almost every member of Congress who had anything to do with the legislation. See *infra* pp. 179-80 note 8, 181-83, 186.

River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes."

The Master limits section 18 to an *intrastate* effect. (Rep. 217, 240.) His construction distorts the language of that section and renders the phrase "except as modified by the Colorado River compact or other interstate agreement" meaningless. Obviously, *intrastate* rights are not modified by the Colorado River Compact.[9] Nor do we know of any interstate compact ever negotiated, or even proposed, to effect an allocation of waters intrastate.

2. *Section 14*

Section 14 of the Project Act,[1] incorporating section 8 of the Reclamation Act of 1902, likewise compels recognition of prior appropriation and equitable apportionment principles. Congress' intent, evident from the language of section 14, is confirmed by the legis-

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[9]See Art. IV(c): "The provisions of this article [IV] shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water." Rep. app. 375. Only Article IV contains any provisions that might conceivably have intrastate effect.

[1]"This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided" (Rep. app. 394). Section 12 of the Project Act defines "reclamation law" as used in the Project Act as "that certain Act of Congress of the United States approved June 17, 1902 . . . ." (Rep. app. 392.)

lative history of that section. Congress in the Project Act did not intend, according to its coauthor, Representative Swing, "to create or to assert or to deal in or to dispose of water rights."[2] On the contrary, both Representative Swing,[3] the House author of the

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[2]Representative Swing, speaking on the third Swing-Johnson bill, said in *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 116 (1927):

"On the question of Arizona's rights in and to the water of the river, let me say that the Government is not undertaking to create or to assert or to deal in or to dispose of water rights. It proposes to go in and construct a dam and store water for reasons which have been set out, and then it turns the water loose. The Secretary's power, as given by this act is not to sell water. The act says 'The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water.' Whose water? It does not say. It might be a community like Imperial Valley that has already acquired a water right, and wants its water stored, or it may be someone who hereafter will acquire a water right, but that right will not be acquired under this bill; not from the United States Government. He will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use. There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State. As a matter of fact, the reclamation law is adopted by section 13 [§ 14 of the bill as enacted] of this bill, and section 8 of the reclamation act says that what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.

"If the water is used in Arizona, the water right must be acquired under the laws of Arizona; if in Nevada, under the laws of Nevada; if in California, under the laws of California." (Bracketed words added.)

[3]See note 2 *supra.*

bill, and Senator Johnson,[4] the Senate author, explained that the intent was to preserve beneficial use as the basis, the measure, and the limit of water rights, in accordance with section 8 of the Reclamation Act to which the Project Act by section 14 was made a supplement. The bill which both its authors assured Congress had nothing to do with creating water rights then contained the words of section 5 of the act[5] upon

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[4]On February 21, 1927, Senator Johnson, speaking on the third Swing-Johnson bill, said on the floor of the Senate (68 CONG. REC. 4291):

"I repeat to you that this is a reclamation measure, made so by section 13 [now 14] of the bill. Adverting, then, to section 8 of the reclamation law, let us see how much there is in this statement that is made about appropriating the water of Arizona and taking the property of that State.

"Section 8 of the reclamation act provides:

" 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.'

"So, first, our act is a reclamation act.

"Secondly, under the reclamation law we can no more affect the rights of Arizona in the waters that flow through Arizona than we could affect the title of any Arizona resident to any particular property. In passing, I may remark that it is entirely a misnomer to say that Arizona or any other State in the West, after all, has title to water. Under western law, the appropriator of water has a title to the use when the application is beneficially made of the water that he thus appropriates; but to talk of title of the State to water is entirely a misapprehension and misapplication of terms." (Bracketed words added.)

[5]*House:* H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 31 (Dec. 22, 1926); Calif. Ex. 2053 for iden. (Tr. 11,177) at 19. *Senate*: S. 3331, 69th Cong., 1st Sess. (1926); Calif. Ex. 2055 for iden. (Tr. 11,177) at 18, 19. For a brief discussion of § 5, see S. REP. No. 654, 69th Cong., 1st Sess., pt. 1, at 26-27 (April 19, 1926).

which the Master principally relies to reach the opposite conclusion.[6] It is apparent that, contrary to the Master, the authors of the bill did not construe the language of section 5 as providing "otherwise."

The Master's restriction of section 8 of the Reclamation Act of 1902, incorporated into the Project Act by section 14, to intrastate consequences is contrary to this Court's decisions applicable to the interpretation of the reclamation laws of which the Project Act is a part. Section 8 of the Reclamation Act of 1902 has been held unequivocally to apply to interstate rights in an interstate stream.[7]

Water rights in the "mainstream" or in any other part of the Colorado River system in the lower basin which are administered under the reclamation law are controlled by section 8 of the Reclamation Act of 1902; they are not created by water delivery contract. Contracts executed by the Secretary of the Interior pursuant to section 5 of the Project Act, like other reclamation contracts, are merely a step in the acquisition of water rights which come into being by diligence in putting the waters to beneficial use in accordance with the principles of priority of appropriation and equitable apportionment.

This proposition has been conclusively established

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[6]Rep. 151-53; see discussion *infra* pp. 168-91.

[7]Nebraska v. Wyoming, 325 U.S. 589, 612-15 (1945). See Wyoming v. Colorado, 259 U.S. 419, 463-71 (1922).

by this Court's decisions in *Ickes v. Fox*[8] and *Nebraska v. Wyoming*,[9] involving several varieties of reclamation

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[8]300 U.S. 82 (1937). In that case the Court declared:

"Although the government diverted, stored and distributed the water, the contention of petitioner [Secretary of the Interior] that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Id.* at 94-95.

In a later installment of the same litigation, the Court of Appeals for the District of Columbia stated the basis of the Supreme Court's decision:

"Reading the Reclamation Act in the light of the decision in Ickes v. Fox, we find the situation in this case to be as follows: The water-rights of appellants are not determined by contract but by beneficial use. The Secretary of the Interior in operating the project is in the position of a carrier of water to all entrymen in the Reclamation project. He is not obligated to furnish any more water than is available. Under the Reclamation Act he is not authorized to furnish any water at all except for beneficial use. He must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington. He has no concern in disputes between the various entrymen which concern their respective priorities, other than as a stakeholder. He can only make such charges to reimburse the Reclamation Fund for the construction of the project as are provided in the Reclamation Act itself." Fox v. Ickes, 137 F.2d 30, 33 (D.C. Cir. 1943), *cert. denied*, 320 U.S. 792 (1943).

[9]The rule announced in Ickes v. Fox was followed in Nebraska v. Wyoming, 325 U.S. 589, 614 (1945), in which Mr. Justice Douglas quoted the language of Ickes v. Fox set out in note 8 *supra* and added:

"The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. . . . Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'"

contracts identical to those utilized by the Secretary of the Interior to administer "mainstream" waters under the Project Act.[10]

Administrators of the Project Act have consistently construed the act as a supplement to the reclamation law. Every water delivery contract executed recites that it is executed pursuant to the Reclamation Act of 1902.[1] The United States has executed just about every species of contract recognized under the Reclamation Act of 1902 and acts supplementary and amendatory thereto with users of "mainstream" waters. These include "water right applications" both before and after enactment of the Project Act, which on approval by the

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[10]Ickes v. Fox, note 8 *supra*, involved a reclamation contract with a water users association and water right applications by individual water users on the Yakima Project on the Yakima River in Washington. 300 U.S. at 88-90. Nebraska v. Wyoming, note 9 *supra*, involved reclamation contracts under the North Platte Project with "landowners or irrigation districts" on the North Platte River in Nebraska and Wyoming, as well as Warren Act contracts. 325 U.S. at 594-95.

[1]See Rep. app. 399, 409, 419, 423. All but a few of the main stream water delivery contracts in evidence are tabulated in appendix F, vol. 2, Calif. Findings and Conclusions. Not included in that tabulation are (1) the sample water right applications for the Yuma Project in Arizona and California discussed *infra* note 2; (2) early contracts (superseded in the early 1950's) between the Secretary of the Interior and the organizations representing the users in the North Gila Valley in Arizona (Ariz. Ex. 91 (Tr. 356) dated Sept. 24, 1918, superseded by Ariz. Ex. 95 (Tr. 360) dated May 12, 1953) and in the Yuma Valley in Arizona (U.S. Ex. 19-T (Tr. 15,518) dated May 31, 1906, superseded by Ariz. Ex. 92 (Tr. 357) dated June 15, 1951); and (3) the contract, executed since the trial concluded, between the Secretary of the Interior and the City of Yuma, Arizona (Calif. Ex. 7611 for iden. (Tr. 22,760)).

Secretary become contracts with individual water users,[2] standard water delivery contracts with irrigation districts or water user associations (also before and after enactment of the Project Act),[3] Warren Act contracts,[4] and "special use" contracts.[5] Arizona's Warren Act contracts recite that they are made under the Reclamation Act of 1902 and its supplements, expressly including the Project Act and the Warren Act.[6] The Arizona "special use" contracts similarly recite the Reclamation Act of 1902, with special reference to the Project Act, the "special use" statute of February 25, 1920,[7] and the individual project authorization statutes.

The Special Master holds that all contracts for diversion and use of "mainstream" waters which have been executed by the United States meet the requirements of section 5 of the Project Act, with one minor exception not relevant here.[8] These include contracts described above which were executed pursuant to the reclamation laws *prior to* enactment of the Project Act.

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[2]Ariz. Ex. 168 (Tr. 2,262) (Yuma Project, Arizona, sample water right application dated 1917); Calif. Exs. 378, 379, 380 (Tr. 8,852) (Yuma Project, California, sample water right applications dated 1917, 1910, 1948, respectively).

[3]*E.g.*, U.S. Ex. 19-T (Tr. 15,518) and Ariz. Ex. 92 (Tr. 357) (Yuma County Water Users' Association); Ariz. Ex. 93 (Tr. 359) (Wellton-Mohawk Irrigation and Drainage District). See note 1 *supra*, item (2).

[4]Seventeen Arizona Warren Act contracts are in evidence as part of Ariz. Ex. 165 (Tr. 2,247), 16 of which are tabulated in Ariz. Ex. 163 (Tr. 2,223).

[5]Eleven Arizona "special use" contracts are included in Ariz. Ex. 165, and are tabulated in Ariz. Ex. 163, note 4 *supra*.

[6]36 Stat. 925 (1911), 43 U.S.C. §§ 523-25 (1958).

[7]41 Stat. 451, 43 U.S.C. § 521 (1958).

[8]Rep. 205-21. The Master holds invalid a contract dated June 12, 1945, between the United States and the Arizona Edison Company for a term extending to December 31, 1970, because it is not for "permanent service" required by § 5 of the Project Act. (Rep. 220-21.)

One of the water right contracts to which the Master refers (Rep. 212 n.75) is California Exhibit 379 (Tr. 8,852), a 1910 water right application contract with one Adolph Kunz on the Reservation Division of the Yuma Project located in California. It is like the water right applications with reclamation project water users on the Salt River Project in the Gila River basin,[9] and indeed, all over the West. It is in evidence as representative of a great many identical contracts with other users on the Reservation Division.[10]

Clearly Mr. Kunz, by this contract in 1910, did not become either beneficiary or victim of a Secretarial allocation consisting of a pro rata share in waters available to three states from the future Hoover Dam. It would seem equally clear that the water right Mr. Kunz acquired in 1910 is the same water right which Mr. Kunz (his heirs, devisees, or assigns) has today.

The Reservation Division of the Yuma Project on which Mr. Kunz secured a water right in 1910 was recognized in California's Seven-Party Priority Agreement, in the Secretary of the Interior's General Regulations, and in the water delivery contract with each California defendant agency written since the Project Act was passed, as having a second priority, junior only to Palo Verde Irrigation District's first priority.[11] No contract other than standard reclamation law water delivery applications with individual water users, some executed before and some since the Project Act, has ever been negotiated for the Bard Irrigation District, the non-Indian portion of the Reservation Division of the Yuma

[9] *E.g.*, U.S. Exs. 30 and 31 (Tr. 15,537 and 16,146).
[10] Calif. Ex. 381 (Tr. 8,855); Tr. 8,853-55 (Steenbergen).
[11] See, *e.g.*, Palo Verde contract, Rep. app. 425.

Project.[12] If there is a "contractual allocation scheme," Mr. Kunz's contract is one of the components of the scheme. But the authorization for such a scheme did not become law until 19 years after the Kunz contract.

Similarly, on the Arizona side of the river in the Yuma area, standard reclamation contracts were the only contracts controlling deliveries to the users on the Valley Division of the Yuma Project and in the North Gila Valley, adjacent to the Yuma Project, until the early 1950's.

In 1906, the Secretary of the Interior executed a water delivery contract with the Yuma County Water Users' Association[1] which remained in effect until 1951, when the same parties executed a supplemental contract under which present deliveries are made.[2] The 1951 contract, while it states that it is made pursuant to the Reclamation Act of 1902 as amended and supplemented, does not expressly state that it is made pursuant to the Boulder Canyon Project Act.[3] However, section 12(a) provides that water deliveries thereunder will be subject to the Colorado River Compact and the Project Act. Likewise, in 1918, the Secretary of the Interior executed a contract with the North Gila Valley Irrigation District providing for the continued delivery of water to the North Gila Valley, even though the area had not been officially included within the Yuma Project area by the Secretary of the Interior.[4] It was not until 1953 that a supplemental water delivery contract was executed between the same parties.[5] The 1953 contract

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[12]Tr. 8,819-20 (Steenbergen); Calif. Ex. 50 (Tr. 6,898).
[1]U.S. Ex. 19-T (Tr. 15,518).
[2]Ariz. Ex. 92 (Tr. 357).
[3]*Id.* at art. 1.
[4]Ariz. Ex. 91 (Tr. 356).
[5]Ariz. Ex. 95 (Tr. 360).

states that it is made pursuant to the Reclamation Act of 1902 as amended and supplemented, specifically citing the Boulder Canyon Project Act.[6]

The 1953 contract with the North Gila Valley Irrigation District calls for the delivery of sufficient stored water from Lake Mead, "including all other waters diverted for use within the District from the Colorado River," as may be ordered by the district and reasonably required, subject, in part, to "the express understanding and agreement that such rights, if any, as the District or the landowners within the District may have heretofore acquired to the use of water from the Colorado River, are unimpaired by this contract."[7] The 1951 contract with the Yuma County Water Users' Association calls for the delivery of sufficient stored water in Lake Mead, "including all other water diverted for use within the division from the Colorado River *System*" (emphasis added) as may be ordered by the district and reasonably required, subject, in part, to "the express understanding and agreement that such rights, if any, as the Association or the landowners within the division may have heretofore acquired to the use of water from the Colorado River are unimpaired by this contract."[8] The only right that any user in either area had is a right which arose prior to the enactment of the Project Act by virtue of beneficial use pursuant to an appropriation under Arizona law. The Project Act did not unilaterally transform any early right, with priority applicable interstate and protected under the doctrine of equitable apportionment, into a pro rata share of a contractual allocation never

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[6] *Id.* art. 1.
[7] *Id.* arts. 5 and 5(d).
[8] Ariz. Ex. 92 (Tr. 357), arts. 12(a) and 12(a)(4).

fully accomplished, under the Master's thesis, until 1944 when the Secretary executed the contract with the State of Arizona. Further, it is obvious that the Secretary of the Interior did not consider it necessary to execute new contracts with the users in the North Gila Valley and the Yuma Valley pursuant to the broad powers which the Special Master finds Congress delegated to the Secretary under section 5. Obviously, the Secretary concluded that the earlier reclamation contracts satisfied the mandate of section 5, if any contract at all were necessary, just as the Master considers that water right application contracts with users in the Bard District in California meet the Project Act requirement.

If there is a contractual allocation scheme, it never came to fruition, if at all, until 1944 when the Arizona water delivery contract was executed. Yet the 1906 and 1918 contracts must have been components of a Secretarial scheme of some variety prior to 1944, since they coexisted with the California contracts. What was the contractual allocation scheme during that 15-year period? If those contracts were part of any allocation, their execution preceded by 23 and 11 years, respectively, the enactment of the purported authorization for such a scheme.

Unless the wide variety of water delivery contracts described at Rep. 205-14 serves a different function on the Colorado River system than this Court has held they serve on the Yakima River in Washington and the North Platte River in Nebraska and Wyoming,[9] water rights thereunder are controlled by section 8

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[9]See pp. 151-52 notes 8 & 10 *supra* for discussion of Ickes v. Fox, 300 U.S. 82 (1937), and Nebraska v. Wyoming, 325 U.S. 589 (1945).

of the Reclamation Act of 1902, whether the contract is for delivery of "mainstream" water or for waters of the Gila River system.

3. *Sections 8(a) and (b) and 4(a), First Paragraph*

This Court's previous construction of Project Act sections 14 and 18[10] is likewise consistent with the provisions of sections 8(a) and (b) and 4(a), first paragraph. Thus, section 8(a) and (b) expressly applies to "all users and appropriators of water stored" behind Hoover Dam. If the Project Act abrogated appropriations (other than "present perfected rights," a term not used in section 8(a) and (b)), the word "appropriators" is not only misused, it is misleading. No purpose other than an interstate purpose could conceivably be served by section 8(a) and (b). The first paragraph of section 4(a) defining the terms of the limitation upon California specifies that there must be included all water needed to supply "any rights which may now exist." Those rights must refer to interstate rights under equitable apportionment principles, including priority of appropriation, since no other basis for interstate rights was then recognized in the lower basin.

B. Legislative History and Administrative and Practical Construction of the Project Act Confirm Preservation of Priority and Equitable Apportionment Principles

Congress did not leave its intent to be derived by implication. But if Congress had omitted sections 14 and 18 of the Project Act and if it were necessary to ascertain Congress' intent by inferences drawn from other provisions of the statute, from its legislative his-

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[10]Arizona v. California, 283 U.S. 423 (1931), and United States v. Arizona, 295 U.S. 174, 183 (1935), discussed pp. 140-45 *supra*.

tory, from its administrative and practical construction, and from the pattern of similar legislation, the inferences which could properly be drawn from those sources sustain one conclusion only: The Project Act preserved priority of appropriation and equitable apportionment in the "mainstream" and in every other part of the Colorado River system in the lower basin.

1. *Legislative History*

As we have seen (*supra* pp. 146-50), Congress was repeatedly informed during the debates on the third and fourth Swing-Johnson bills, both in the House and in the Senate: (1) that the prior appropriation doctrine was universally adopted throughout the arid West; (2) that the appropriation doctrine applied across state lines under the decision of this Court in *Wyoming v. Colorado;* and (3) that section 8 of the Reclamation Act of 1902, incorporated in the Project Act by reference, conferred federal approval upon the principles of prior appropriation.

If Congress intended to abrogate, change, or modify what it knew was the settled existing law, the inference is inescapable that it would have expressed itself clearly on that subject. Congress did express itself clearly. Congress, on three occasions in the Project Act, expressly authorized modification of these principles—not by congressional or administrative fiat—but by authorizing or approving effective interstate agreement: (1) Congress authorized and approved the Colorado River Compact, modifying the law of equitable apportionment basin versus basin (section 13 and section 4(a), first paragraph); (2) Congress specified the terms of the limitation which California was to

impose upon herself, stating the maximum quantitative use to which California was entitled, thus *pro tanto* qualifying the operation of equitable apportionment (section 4(a), first paragraph); (3) Congress authorized a tri-state compact among Arizona, California, and Nevada which, if it had been ratified and become effective, would have affected equitable apportionment by compact apportionment to Arizona and Nevada (section 4(a), second paragraph), but this compact was not ratified by any state.[1] Since Congress expressed itself clearly on the precise subject, the inference is clear that the omission to abrogate, to alter, or to limit equitable apportionment and priority of appropriation other than as specified is deliberate and purposeful: Congress intended to preserve unchanged that which it did not expressly qualify.

The administrative, practical, and congressional construction of the statute confirms the analysis of the language, purpose, and legislative history that the Project Act does not nullify priority and equitable apportionment.[2]

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[1]Of course, under the general authorization of § 19, any of the Colorado River basin states could have entered into subsidiary compacts supplemental to the Colorado River Compact which might have modified the principle of equitable apportionment, but no such compact has ever been executed in the lower basin (Rep. 29).

[2]All of the materials herein cited relating to administrative, congressional, and practical construction are either received in evidence or judicially noticeable. *E.g.,* United States v. Louisiana, 363 U.S. 1 (1960). The exhibits marked for identification which are discussed below are the materials which we submitted to the Special Master in an offer of proof rejected by the Report (pp. 248-53). In addition to the materials set forth *infra,* see administrative construction of § 14 of the Project Act, *supra* pp. 152-58.

2. Subsequent Congressional Construction

During the hearings on the first appropriation bill for the construction of Hoover Dam, Senator Hayden argued:[3]

> "What will happen is that the waters of the Colorado River will be impounded in the Boulder Canyon Reservoir and made available for use; large quantities of water will be taken out of the Colorado River into the great all-American canal; over 1,000,000 acre-feet will be further taken out of the river by a pumping plant, and taken over into the coastal plain of California in the vicinity of Los Angeles; they will be put to beneficial use; and, *once having acquired a prior right to its use, no other State can obtain the use of those waters.*" (Emphasis added.)

Senator Hayden made similar assertions during the Senate debates in opposing that appropriation bill.[4] Senator Hayden later inserted in the *Congressional Record* the text of a letter from Chairman Charles B. Ward of the Colorado River Commission of Arizona to Colonel William J. Donovan, commenting on the failure of the 1929 tri-state negotiations:[5]

"We knew that if a tri-State compact was not

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[3] *Hearings on H.R. 12902 Before the Subcommittee of the Senate Committee on Appropriations,* 71st Cong., 2d Sess. 171 (1930), quoted in Calif. Ex. 1808 (Tr. 12,240).

[4] 72 CONG. REC. 11775-76 (1930).

[5] *Id.* at 11,803, 11,804. The Commission was an official body in Arizona, charged by statute of its state with responsibility for Colorado River system matters, including negotiations with other states and the federal government and the issuance of reports and bulletins. ARIZ. LAWS 1927, ch. 37, pp. 84, 86, 87. Charles B. Ward is identified in Calif. Ex. 1351 for iden. (Tr. 11,436) as its chairman as of Aug. 1, 1929.

Colonel Donovan was the federal representative in the tri-state negotiations referred to by Mr. Ward.

made with California, that California would have the right of prior appropriation against our State as to the waters allocated to the lower basin, and with her wealth, power, and influence Arizona would soon find that the Colorado River water would be of no benefit to her."

Congress subsequently appropriated the funds to begin construction of Hoover Dam.[6]

In 1940, Congress enacted section 14 of the Boulder Canyon Project Adjustment Act[7] in almost the identical language of section 18 of the Project Act. This section in the Project Act was the basis of the Court's explicit holding in *Arizona v. California,* 283 U.S. 423, 462 (1931), that appropriation is not abrogated by the Project Act, except as the states agree. Its adoption, nine years after this decision, constitutes congressional acceptance of the judicial interpretation.

3. *Administrative and Practical Construction*

On July 31, 1930, the Acting Secretary of the Interior informed the attorneys for the Palo Verde Irrigation District in California that Hoover Dam storage would not interfere with the prior rights to the use of the river, for which no contract would be required.[8]

The battle waged in 1937 by the six states which had ratified the Colorado River Compact against the request for appropriations for the Gila Project (diverting main stream waters at Imperial Dam) in Arizona produced further administrative affirmations of the priority doctrine. An interoffice memorandum dated April 9, 1937, to Commissioner of Reclamation Page from

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[6]Act of July 3, 1930, 46 Stat. 877-78.
[7]54 Stat. 779, 43 U.S.C. § 618m (1958).
[8]Calif. Ex. 351 (Tr. 9,929).

counsel for the Reclamation Bureau points out that this new project must be subject to prior rights of earlier contractors.[9]

> "Contracts have heretofore been made for the sale of water in California in accordance with the compact rights of California, and the sale of water for use on the Gila project in Arizona must be subject to the rights of such California contractors, as well as to the rights of any other contractors in the six States for a water supply from the Colorado River under the compact."

On April 14, 1937, Acting Solicitor of the Interior Kirgis delivered to the Commissioner an opinion that under this Court's 1931 decision Arizona was free to appropriate any unappropriated water of the Colorado River it could put to beneficial use, independent of the Project Act.[1] On April 16, 1937, Commissioner Page communicated the same principle to Ward Bannister of Colorado who had protested the sale of Lake Mead water to the Gila Project without Arizona's ratifying the Compact. Commissioner Page again stated that prior rights of earlier contractors in California and elsewhere in the basin would be respected.[2] On the same date, Commissioner Page transmitted these last two documents[3] to the House Committee on Ap-

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[9]Calif. Ex. 7753 for iden. (Tr. 22,760).

[1]Calif. Ex. 7754 for iden. (Tr. 22,760), discussed *supra* p. 144 note 8.

[2]Calif. Ex. 7755 for iden. (Tr. 22,760): "Contracts have been made for the sale of water in California in accordance with the compact rights of California, and the sale of water for use on the Gila project in Arizona must be subject to the rights of such California contractors as well as to the rights of any other contractors in the six states for a water supply from the Colorado River under the compact."

[3]Calif. Exs. 7754 and 7755, both for iden., *supra* notes 1 & 2.

propriations which was considering the appropriations for the Gila Project.[4] President Roosevelt, on June 21, 1937, approved a finding of feasibility for the Gila Project[5] in which it was again pointed out that sales of water to Gila Project users were subjected to prior contracts made under the Project Act and to superior treaty rights.[6] In August 1937, funds were appropriated for the Gila Project.[7]

Arizona's conduct of her Colorado River matters is consistent only with the construction of the Project Act that preexisting western water law was preserved by that act. Arizona did not secure a water delivery contract with the Secretary until 1944. At all times, however, users in Arizona, both with and without contracts, have ordered and received "mainstream" water for consumptive use.[8] In 1935, Arizona sued the six other Colorado River basin states for "a judicial apportionment among the states in the Colorado River basin of the *unappropriated water of the river* . . . ."

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[4]Calif. Ex. 7756 for iden. (Tr. 22,760).

[5]Ariz. Ex. 60 (Tr. 269), at 126.

[6]*Id.* at 123: "In all sales of water rights [for the Gila Project] it will be necessary to prescribe that the water supply of the project is subject to the Colorado River compact, and to the Boulder Canyon Project Act and to the sales of water under the compact and said act and to the treaty which it is anticipated will be made with Mexico fixing that country's rights in the flow of the Colorado River."

[7]Act of Aug. 9, 1937, ch. 570, 50 Stat. 595.

[8]On plate 3 *infra* we present a schematic diagram of "mainstream" users in Arizona and California, both with and without water delivery contracts. This diagram illustrates that "mainstream" waters have been diverted for use in Arizona without contracts, both in the past and presently. For example: The city of Yuma, whose water rights stem from an 1893 appropriation, did not obtain a water delivery contract with the Secretary of the Interior until 1960, after this trial had ended. The South Gila Valley in the Gila Project, Arizona, is irrigated in part by private pumping without contracts.

Arizona v. California, 298 U.S. 558, 560 (1936) (emphasis added). Arizona had no water delivery contract when she brought that suit, and she did not name the Secretary of the Interior as a defendant.[9]

On February 26, 1948, the State of Nevada, as provided by statute,[10] submitted its comments on the Secretary of the Interior's report on the Central Arizona Project. These comments are a practical construction of the Project Act that, absent a lower basin compact, priority controls intrabasin rights, even though this construction operates against Nevada's interests.[11]

4. *Statutory Scheme of the Reclamation Law*

The Boulder Canyon Project Act must be construed not only as a part of the reclamation laws (*supra* pp.

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[9]Arizona alleged "that to apply the doctrine of appropriation as the law governing an equitable apportionment of the waters of said river among the plaintiff and the defendants, and particularly between Arizona and California, under the facts alleged in this Bill of Complaint, would be inequitable and result in an unjust enrichment of the State of California at the expense of her co-defendants and of Arizona and of the Treasury of the United States." Ariz. Complaint, Calif. Ex. 7506 for iden. (Tr. 22,760), p. 35.

Arizona's pleadings are incomprehensible if she then construed the Project Act as nullifying equitable apportionment and priority of appropriation. Neither is such a possibility suggested by the Court's opinion.

[10]Flood Control Act of 1944, § 1, 58 Stat. 887, 33 U.S.C. § 701-1 (1958).

[11]Nevada's comments appear in H.R. Doc. No. 136, 81st Cong., 1st Sess. (1949), reproduced as Calif. Ex. 7514-D for iden. (Tr. 22,760). Point 12 of the Nevada comments (*id.* at 99) states: "The proposed allocation of 300,000 acre-feet plus a share of surplus water to Nevada in the Colorado River is of great value to this State. That interest is imperiled by lack of the tri-State compact authorized between Arizona, California, and Nevada. *Without the tri-State compact Nevada must rely upon State laws for the water, and our rights are junior to those of California.*" (Emphasis added.)

145-58), but also *in pari materia* with the other federal statutes dealing with water rights in the arid West. Federal statutes have regularly and without exception recognized state law as governing western water rights.[12] Our construction of the Project Act accords with this pattern of federal legislation.[1] The Master's construction would create one inexplicable exception.

III. THE MASTER MISCONSTRUES AND MISAPPLIES SECTIONS 5 AND 8(b) OF THE PROJECT ACT

We agree with the Master that the Project Act "clearly reserves to the United States broad powers over the water impounded in Lake Mead and delegates this power to the Secretary of the Interior, as agent of the United States" (Rep. 152). This authority is manifested by Project Act provisions in section 1 (authorizing the Secretary to "construct, operate, and maintain" Hoover Dam for the purposes, among others, of improving navigation, river regulation, and the storage and delivery of water (Rep. app. 379)), section 5 (authorizing the Secretary, under such general regulations as he may prescribe, to contract for the storage and the delivery of stored water, and providing that no person shall have or be entitled to have the use of stored water except by such contract (Rep. app. 384-85)), and section 8(b) (subjecting any bi- or tri-state compact

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[12]The Court in United States v. Fallbrook Pub. Util. Dist., 165 Fed. Supp. 806, 841 & n.1 (S.D. Cal. 1958), cites an "almost unbroken line" of 25 federal statutes in which "Congress has deferred to state laws concerning water." The texts of 36 such statutes are set out in appendix B to our rebuttal brief before the Special Master, dated June 30, 1959.

[1]See United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 396 (1934), quoted with approval in United States v. Arizona, 295 U.S. 174, 191 (1935).

among Arizona, California, and Nevada, dividing the benefits, including power, from the use of water, to prior contracts made by the Secretary (Rep. app. 389-90)). Those provisions were designed, as the Master recognizes, for the purpose of permitting the Secretary to construct the dam and reservoir and to administer its functions thereafter.[2] The Master assumes, however, that while this was the "basic purpose," a subsidiary purpose was the interstate allocation of water (Rep. 152-54). We disagree that Congress had any such subsidiary purpose or that any such subsidiary purpose necessarily follows from the basic purpose.

Water delivery contracts were never intended to be substitutes for an interstate compact. Absent an interstate compact, the law of equitable apportionment and priority of appropriation, left undisturbed by the Project Act within the framework of the Colorado River Compact and the Limitation Act, controlled the interstate disposition of waters of the Colorado River and its tributaries.[3]

The purpose of water delivery contracts was to provide the Secretary with effective authority to administer the orderly storage and delivery of water, to obtain revenues as part of the financing of the construction and operation of Hoover Dam and reservoir, and to assist Congress' purpose to protect the upper basin's Compact apportionment.

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[2]Rep. 183: "The Project Act was concerned primarily with the construction and operation of Hoover Dam, and most of its provisions relate to this basic purpose."

[3]The Master's assumption that, absent interstate compact, waters stored in Lake Mead must be forever wasted or allocated by water delivery contracts rests upon his unsupportable conclusion that Congress abrogated equitable apportionment and priority principles in the "mainstream." Rep. 153, 252.

A. Section 5 of the Project Act Is Not a Source of Authority for the Interstate Allocation of "Mainstream" Waters

The first paragraph of section 5 of the Project Act is the focal point of the Master's inferences that Congress authorized the Secretary to impose a "federal apportionment" on the "mainstream" users. It provides (Rep. app. 384-85):

> "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir [Lake Mead] and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made*

as herein stated." (Emphasis and bracketed words added.)

The Master asserts that Congress added the last sentence "to make its intention abundantly clear" that the Project Act is "the source of authority for the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead." (Rep. 151.) The Secretary's water delivery contracts must be the basis for the allocation of all "mainstream" water because, using the Master's apothegm, "no contract, no water." (Rep. 153.)

The Master misconstrues the statutory scheme.

1. *The Statutory Scheme of the Project Act*

First, that emphasized sentence from section 5 expressly provides that a water delivery contract is required, not for the use of *all* "mainstream" waters, but only for "water stored as aforesaid."[4] Stored waters are the waters made available for consumptive use by the regulation provided by Hoover Dam.[5] Holders of pre-

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[4]The first sentence of § 5 authorizes the Secretary to contract "for the storage of water in said reservoir and for the delivery thereof" (Rep. app. 384). Section 1 authorizes the Secretary to construct, operate, and maintain Hoover Dam and Lake Mead, *inter alia*, to provide "for storage and for the delivery of the stored waters" (Rep. app. 379).

[5]See Calif. Ex. 351 (Tr. 9,929), letter dated July 31, 1930, from the Acting Secretary to attorneys for Palo Verde Irrigation District, which construes stored water as water in excess of that which could have been used under prior rights from "unregulated flow" (p. 2); Tr. 10,070-71 (Conkling), defining "stored water," by custom and usage, as "water that has been retained in a reservoir out of its normal occurrences for later use"; Gila Valley Irr. Dist. v. United States, 118 F.2d 507, 508-09 (9th Cir. 1941). The federal Salt River Project, Arizona, gives a clear example of the distinction between rights in stored water and preexisting rights in natural flow transiting through a reservoir. Tr. 2,164-67 (McMullin). *Cf.* Nebraska v. Wyoming, 325 U.S. 589, 631 (1945).

existing rights in natural flow available for consumptive use without Hoover Dam regulation do not need water delivery contracts.[6]

The Court held in Arizona's third suit (*Arizona v. California,* 298 U.S. 558, 570 (1936)):

> "[I]t is evident that the United States, by congressional legislation and by act of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, *the surplus water in the river not already appropriated.* The defendant states contend, and Arizona does not deny, that the natural dependable flow of the river is already over-appropriated, and it does not appear that without the storage of the impounded water any substantial amount of water would be available for appropriation."[7] (Emphasis added.)

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[6]The Master occasionally states that Congress delegated to the Secretary the authority to allocate within his discretion the water "unappropriated" as of June 25, 1929. Rep. 153; see also Rep. 203: "[N]o *new* water right without a contract" (emphasis added). The Master's "contractual allocation scheme," however, divides *all* "mainstream" water available for consumptive use in any year (*e.g.,* Rep. 305-06).

[7]Earlier, the Court noted, based on Arizona's Bill of Complaint, that "3,600,000 acre feet are diverted annually below Lees [*sic*] Ferry from the river and its tributaries other than the Gila." (298 U.S. at 562 n.2.)

This construction accords with the administrative practice. Each of the California water delivery contracts, substantially *in haec verba,* calls for the delivery "from storage available in [Lake Mead] . . . so much water as may be necessary to supply the District a total quantity, *including all other waters diverted for use of the District from the Colorado River*" in the amounts and with the priorities thereafter specified.[8] The Secretary's contracts with Arizona projects, executed pursuant to the 1944 contract with the state,[9] contain substantially identical provisions,[10] as does Nevada's 1944

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[8]Palo Verde Irrigation District contract art. (6) (Rep. app. 424); Imperial Irrigation District contract art. 17 (Ariz. Ex. 34 (Tr. 249)); Coachella Valley County Water District contract art. 17 (Ariz. Ex. 36 (Tr. 250)); Metropolitan Water District amended contract art. 6 (Ariz. Ex. 39 (Tr. 252)) [*cf.* first contract of Metropolitan Water District art. 6 (Ariz. Ex. 38 (Tr. 251)) that the United States will deliver a specified quantity, "provided, that such amount is without prejudice to any additional rights which the District may have or acquire in or to the waters of the Colorado River, or to the power of the parties to contract hereafter with reference thereto"]; City of San Diego contract art. 7 (Ariz. Ex. 40 (Tr. 242)), which has been merged with Metropolitan Water District's contract (Ariz. Ex. 41 (Tr. 253)).

[9]Art. 7(*l*) of the Arizona contract provides that deliveries of water thereunder shall be made for use in Arizona to persons or agencies "as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona." (Rep. app. 403.)

[10]See, *e.g.,* Yuma County Water Users' Ass'n contract art. 12(a): "including all other water diverted for use within the division from the Colorado River *System*" (emphasis added), (Ariz. Ex. 92 (Tr. 357)); Wellton-Mohawk Irr. & Drainage Dist. contract art. 4 (Ariz. Ex. 93 (Tr. 359)); Unit B Irr. & Drainage Dist. contract art. 5, containing the same reference to the Colorado River *system* as Ariz. Ex. 92 quoted *supra* this note (Ariz. Ex. 94 (Tr. 359A)); North Gila Valley Irr. Dist. contract art. 5 (Ariz. Ex. 95 (Tr. 360)); Yuma Mesa Irr. & Drainage Dist. contract art. 4 (Ariz. Ex. 96 (Tr. 361)); and City of Yuma contract art. 6(a), containing the same reference to the Colorado River *system* as Ariz. Ex. 92 quoted *supra* this note (Calif. Ex. 7611 for iden. (Tr. 22,760)).

contract.[11] The emphasized language recognizes the preexisting natural flow rights of each agency contracting with the Secretary. The Secretary agrees to deliver sufficient stored water to each agency so that the aggregate of the natural flow and stored water diverted for the use of that agency will equal a specified quantity.[11a]

This construction was established by an administrative determination made by the Secretary of the Interior on July 31, 1930, about one year after the Project Act became effective, during the negotiations for the California water delivery contracts. In response to an inquiry from the Palo Verde Irrigation District's attorneys, the Acting Secretary stated (Calif. Ex. 351 (Tr. 9,929) at 2):

> "If no stored water is required by the Palo Verde Irrigation District, no contract between that district and the United States will be required.

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[11]Ariz. Ex. 44 (Tr. 254), art. 4 (Rep. app. 420): "including all other waters diverted for use within the State of Nevada from the Colorado River *system*" (emphasis added).

[11a]See Nebraska v. Wyoming, 325 U.S. 589, 631 (1945): "[The Warren Act contracts] do not provide that the United States will furnish water in such amounts as may from time to time be available. The United States agrees to deliver water which will, *with all the water to which the land is entitled by appropriation or otherwise,* aggregate a stated amount." (Emphasis added.) The Court's footnote to this last sentence quotes the following language from one of the contracts: "Thus the contract with the Gering Irrigation District provides: 'The United States will impound, and store water in the Pathfinder Reservoir, or elsewhere and release the same into the North Platte River at such times and in sufficient quantities to deliver, and does hereby agree to deliver at the Wyoming-Nebraska State line for the use of said District an amount of water which will, *with all the water the lands of the District may be entitled to by reason of any appropriations and all water not otherwise appropriated, including drainage and seepage waters developed by the United States,* aggregate a flow of water as follows . . . .' " (325 U.S. 631 n.17; emphasis added.)

Those possessed of prior rights to the unregulated flow of the river will be privileged to continue the enjoyment of those rights without interference by storage in the Boulder Canyon reservoir."

Second, the water delivery contracts aid in the administration of the dam and reservoir because they regulate the delivery of "stored waters." Section 5 does not say that a water delivery contract is the source of a water right. Rather it says that a person without a contract has no right to use "stored waters." The Master relies upon the requirement "no contract, no water" (Rep. 153).[12] This requirement, applicable only

[12]The prohibitory phrasing of the contract requirement is not peculiar to the Project Act. Similar phraseology is employed in other parts of the reclamation law dealing with water delivery contracts. See, *e.g.*, § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 43 U.S.C. § 423e (1958):

"No water shall be delivered upon the completion of any new project . . . *until a contract* or contracts . . . *shall have been made* . . . providing for payment . . . of the cost of constructing, operating, and maintaining the works . . . ." (Emphasis added.)

The Reclamation Project Act of 1939, § 9(d), 53 Stat. 1195-96, as amended, 43 U.S.C. § 485h(d) (1958), similarly provides:

"No water may be delivered for irrigation of lands in connection with any new project . . . *until an organization . . . has entered into a repayment contract* with the United States . . . ." (Emphasis added.)

Congress' use of prohibitory language similar to that of § 5 in setting out contract requirements under the basic reclamation laws both before and after the Project Act demonstrates that Congress did not intend in § 5 to carve out a unique exception to the Secretary of the Interior's customary contractual authority under the basic reclamation laws. It is also significant that contracts under both of the acts referred to above were considered by this Court in the two most recent decisions involving the relationship of reclamation contracts and water rights as affected by § 8 of the Reclamation Act of 1902.

The mandate of § 46 of the Omnibus Adjustment Act was in effect in 1935 when the Secretary executed the contract with the Casper-Alcova Irrigation District on the North Platte River which this Court gave detailed consideration in Nebraska v. Wyoming, 325 U.S. 589, 633 (1945). (See Wyo. Ex. 3, contained in the Court's files of Nebraska v. Wyoming, No. 5

to stored water, does not prove who is entitled to a contract. But, even if "stored water" is all water in the river below Hoover Dam, holders of "present perfected rights," at least, are entitled to a contract. (See section 6 of the Project Act, Rep. app. 387.)

A water delivery contract serves the same function as a permit or a license to appropriate water under state law; these administrative devices are used in each western state to regulate and to administer the acquisition of rights to the waters subject to appropriation. No person may appropriate such water except by permit and license. However, the water right is created and preserved by exercising due diligence in putting water to beneficial use, not by a piece of paper, whatever it is called—permit, license, or contract.[13] Under the recla-

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Original, October Term 1960.) The Court's application of § 8 to the reclamation contracts involved on the interstate North Platte River is discussed *supra* p. 151 note 9.

Similarly, § 9(d) contracts executed under the Reclamation Project Act of 1939 were at issue recently in Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958). The Special Master recognizes that under those decisions "water rights and priorities as between a reclamation project and other users *within the same state* are governed by state law" (emphasis added), citing to that portion of the *Ivanhoe* decision where § 8 is discussed (Rep. 218). While *Ivanhoe* was concerned solely with intrastate matters, the Court's discussion of § 8 does not limit that section to intrastate effect. Indeed, the Court's discussion should be interpreted consistently with the previous decision in Nebraska v. Wyoming, *supra,* where § 8 was expressly applied interstate. See also Wyoming v. Colorado, 259 U.S. 419, 463-71 (1922).

[13]In 1929, § 1c of the California Water Commission Act was almost a paraphrase of § 5 of the Project Act. It provided: "No right to appropriate or use water subject to [appropriation] shall be initiated or acquired . . . except upon compliance with the provisions of this act." (CALIF. STATS. 1923, ch. 87, § 1, p. 162.) The California Supreme Court held that the California law in this posture was designed "merely to regulate and administer" the appropriation of water. The permit was "not the right itself." Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 525, 526, 279 Pac. 128, 129, 130 (1929).

In Wyoming v. Colorado, this Court recognized that permits to appropriate are not the source of water rights because "the amount of the appropriation turns on what is actually done under the permit." 259 U.S. 419, 489 (1922).

mation act, to which the Project Act is expressly made a supplement (sections 12 and 14 (Rep. app. 392, 394)), a federal water storage and delivery contract is not a patent or grant of a water right.[14]

Third, the contracts provide charges for the delivery of "stored water" to obtain revenues to pay for the dam.[1] (Project Act sections 4(b) and 5 (Rep. app. 383-84).)

Fourth, the contracts subject all rights acquired in "stored waters" to the Colorado River Compact (Project Act sections 1, 8(a), and 13(b) and (c) (Rep. app. 379, 389, 393)).

2. Legislative History of Section 5

In early 1926, Secretary of the Interior Work submitted the department's views on the third Swing-Johnson bill to the Senate and House committees considering those measures.[2] At that time the bill contained no language authorizing the Secretary to execute water delivery contracts for the use of the stored water to be made available by the proposed dam.[3] Secretary Work recommended that the stored water be administered by means of water delivery contracts under the reclamation laws:[4]

"The water so impounded should be sold to cities

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[14]Ickes v. Fox, 300 U.S. 82 (1937). See *supra* p. 151 note 8.

[1]See Ariz. contract (Ariz. Ex. 32 (Tr. 248) art. 9 (Rep. app. 404); Nev. contract (Ariz. Ex. 43 (Tr. 253)) arts. 9-10 (Rep. app. 412-13); Metropolitan contract (Ariz. Ex. 38 (Tr. 251)) arts. 10-11; San Diego contract (Ariz. Ex. 40 (Tr. 252)) arts. 11-12, merged with Metropolitan (Ariz. Ex. 41 (Tr. 253)).

[2]*Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 5-9 (1926).

[3]*Id.* at 1-5.

[4]*Id.* at 6.

requiring it for domestic purposes and other municipal uses and to irrigation districts, like that of the Imperial Valley, desiring a complete or supplemental water supply under the provisions of the Warren Act, payment to be made for a definite volume of water each year.

". . . .

"In the sale of water to irrigation districts and municipalities the provisions of the reclamation act and of the Warren Act would apply.

"Such an adjustment of burdens and benefits should stimulate irrigation development because of the generous terms on which water will be supplied and at the same time result in a considerable revenue from the water furnished for irrigation, domestic, and industrial uses."

Secretary Work's recommendation that the stored water should be administered under customary reclamation contracts in order to recoup project costs (the traditional function of water delivery contracts under the reclamation laws) resulted in the addition to H.R. 6251 of the section 5 language authorizing the Secretary to make contracts to provide revenue to cover construction, operation, and maintenance costs of the project.[5] Subsequently, at the insistence of upper basin representatives, the committee added the last sentence of the first paragraph of section 5 so as to *require* contracts for the use of stored water. (See pp. 177-80 *infra.*)

When the fourth Swing-Johnson bill was introduced

[5]See committee print of H.R. 6251, *id.* at 10-14, described by Representative Swing as substantially conforming to Secretary Work's recommendations. *Id.* at 9-10.

in December 1927, then containing the language added at upper basin insistence to the first paragraph of section 5,[6] Secretary Work submitted a further report on this bill. In his report of January 4, 1928, to Chairman Smith of the House committee, he reasserted that stored water should be sold for domestic, municipal, and irrigation purposes "under the provisions of the Warren Act."[7]

In his report of January 21, 1928, to Chairman Phipps of the Senate committee, Secretary Work similarly reaffirmed that "water will be sold under the provisions of the reclamation law either for a complete or supplemental water supply."[8]

Congress clearly must have shared the view that contracts authorized by section 5 would be patterned after ordinary reclamation contracts. The Secretary's reports, which were printed in the committee hearings[9] and reported to the Senate and House by the respective committees,[1] were not disputed on this point.

The legislative history of the last sentence of the first paragraph of section 5 (which the Master never mentions) is conclusive. It was not the Secretary of the Interior or any other representative of the United States, or any representative of any lower basin state who proposed to add that sentence (repeated for con-

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[6]H.R. 5773 and S. 728, 70th Cong., 1st Sess., reproduced as Calif. Exs. 200 and 201, Tr. 7,712.

[7]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. 7 (1928).

[8]S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 30 (1928). (Calif. Ex. 203 (Tr. 7,715)).

[9]See notes 2 and 7 *supra*.

[1]H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1, at 28-30 (1928); S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 30-31 (1928); H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 20-24 (1926).

venience in the margin[2]). That sentence was initiated as an *upper basin* amendment to the third Swing-Johnson bill.[3] Its purpose was explained by Delph Carpenter, upper basin spokesman,[4] as follows:[5]

> "[Mr. Carpenter.] That amendment[6] is proposed by the upper States for the fundamental reason I assigned at the outset of my statement today, which is that we insist that no use occur by reason of this structure which may later be said to be independent of the compact and be asserted as adverse to the upper States.
>
> ". . . .
>
> "'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any person in the State of Arizona attempt to take any water out of the

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[2]"No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract as herein stated."

[3]Calif. Ex. 1801 (Tr. 12,234) (committee print of the third Swing-Johnson bill showing source of proposed amendments), pp. 1, 7.

[4]By 1926, it had become apparent that Arizona probably would not ratify the Colorado River Compact, and upper basin representatives joined together to prepare a series of amendments to the proposed Swing-Johnson bill which would provide the maximum possible protection for the upper basin's apportionment against a nonratifying Arizona. These proposed amendments were presented to the House committee through Mr. Carpenter (Colorado's Compact negotiator), who acted as the authoritative spokesman for the upper basin interest, with the admonition that "we" must oppose this bill unless these amendments are adopted. *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 82, 120 (1926).

[5]*Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 161, 163 (1926) (reproduced as Calif. Ex. 1802 (Tr. 12,236)).

[6](Footnote ours.) The last sentence of the first paragraph of § 5 of the Project Act.

stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water.

". . . .

"The thought of this amendment is that any water stored in this reservoir under the terms of the compact, when released from storage shall be burdened by the compact wherever it goes. As far as water is concerned, existing claims of the lower States[7] are protected by the compact. Water must pass through this reservoir to take care of the present existing lower claims.

"As to future development from the main river, we insist that water stored in this structure by the United States be stored and released upon the express condition that the persons who receive the water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California."* (Emphasis added.)[8]

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[7](Footnote ours.) As to the "existing claims of the lower States," see discussion *supra* pp. 169-73 re rights in natural flow.

[8]If there could be any doubt about what Mr. Carpenter intended by this language, it is dispelled by his strongly held and unalterable view, expressed to the same committee during these hearings, that the federal government could not and should

"Mr. Swing. And also they shall make a fair contribution to the burden of returning this money to the Treasury of the United States.

"Mr. Carpenter. Yes; that goes without saying. Anybody benefiting from this reservoir should help pay."

The same views were expressed by Mr. Swing, the House author of the bill.[9]

At the same time the last sentence was added to the first paragraph of section 5, correlative provisions in sections 1, 8(a), and 13(b) and (c) were also added to the Project Act at the insistence of the upper basin representatives for the same purpose, namely, to subject appropriators, the United States, and all claiming under it to the Colorado River Compact.[1] Section 8(a) expressly requires that "contractees" shall "observe and be subject to and controlled by" the Colorado River Compact in the operation of the reservoir and the storage and delivery of water therefrom, "anything in this Act to the contrary notwithstanding, and all . . . contracts shall so provide." The manifest purpose of these provisions is to protect the upper basin's Compact ap-

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not be permitted to impose any federal apportionment. *Hearings on H.R. 6251 and H.R. 9826, supra* p. 178 note 4, at 148-55. Mr. Carpenter's views on this subject were shared by all members of Congress who had anything to do with the Project Act (*infra* pp. 181-83, 186).

[9]*Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 116 (1927); *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 57 (1928) (reproduced in Calif. Ex. 1804 (Tr. 12,237), at 3-4).

[1]See Calif. Ex. 1801 (Tr. 12,234), §§ 1 (pp. 1-2), 8(c) (p. 12, now 8(a), and 12(b) and (c) now 13(b) and (c) (pp. 15-16).

portionment by impressing the provisions of the Compact upon every contract.[2]

Delph Carpenter's statement that section 5 "has nothing to do with the interstate relations between Arizona and California" reflects one of the major areas of legislative agreement expressed throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) by proponents and opponents of the measure alike: Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished. A list of representative citations is set forth in the margin.[3]

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[2]See S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 14-16 (1928) (Calif. Ex. 203 (Tr. 7,715)); H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1, at 13-15 (1928).

[3]*E.g.*, 70 CONG. REC. 169 (1928) (Senators King and Hayden); *id.* at 244, 245 (Senator Phipps); *id.* at 390-92 (Senator Borah); S. REP. No. 592, 70th Cong., 1st Sess., pt. 2 (minority views of Senator Ashurst), at 9 (1928), quoted in 69 CONG. REC. 6286 (1928). See also *infra* p. 186 note 1.

In January 1928, the Secretary of the Interior submitted to the Senate and the House Committees on Irrigation and Reclamation the report of Hon. James R. Garfield, former Secretary of the Interior; Prof. William F. Durand, Stanford University; Hon. James G. Scrugham, former Governor of Nevada [and Nevada's Compact Commissioner]; and Hon. Frank C. Emerson, Governor of Wyoming [and Wyoming's Compact Commissioner]; they were special advisers to the Secretary of the Interior on the Colorado River basin project. One of the questions propounded by the Secretary to his special advisers was:

"Whether the Federal Government has power to allocate the unappropriated waters of the Colorado River to the basin States, thus rendering a compact between the States unnecessary." *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. 363 (1928); *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. 469 (1928).

The answer submitted in the report of Mr. Emerson is typical of the advisers' opinions:

Senator Bratton, upon whom the Master relies in his construction of the California limitation,[4] stated the current and universally held view of Congress in 1928 during the final Senate debates on the Project Act (70 CONG. REC. 330-31 (1928)):

> "There are only two ways known to me through which title to water of an interstate stream, either for purposes of irrigation or development of power, may be adjudicated. One is by a compact or agreement—the method sought to be followed in this case—and the other is by a decree rendered in a suit instituted originally in the Supreme Court of the United States."

3. *Senators Quoted by the Special Master*

The Master wholly ignores the foregoing legislative history of section 5 and the repeated statements by all who took part in the consideration of the Swing-Johnson bills that Congress had no power to allocate the waters of an interstate stream. In contrast to this authoritative, unassailable legislative history, the Master relies primarily upon some excerpts from the remarks of Senators Pittman, Hayden, Walsh, and Johnson.

"Answer. No; except by determination of the Supreme Court of the United States in litigation properly presented. While the Federal Government would have the right to fully regulate, if necessary, the water of the Colorado River for interstate and foreign commerce, the right does not rest in the Government to allocate the water of the river between the States except as such allocation might be in aid of navigation. Each State is sovereign over that portion of the Colorado River contained within its boundaries and the allocation of water between the States themselves can only be accomplished by compact between them with the approval of the United States."

Senate hearings, *supra*, at 365; House hearings, *supra*, at 525.

[4]Rep. 175 n.34: "In 1933 Senator Bratton was appointed to the Court of Appeals for the Tenth Circuit and, in 1953, he became Chief Judge."

during the final debates on the fourth Swing-Johnson bill (Rep. 154-58). Those remarks, when placed in the context in which they were spoken, do not sustain the Master's position.

a. Senator Hayden

Senator Hayden, upon whom the Master relies, was the most vigorous opponent of the Project Act in Congress; he fought every Swing-Johnson bill and he voted against the fourth Swing-Johnson bill,[5] the only such bill to come to a vote. He repeatedly denied that Congress had any power to allocate the waters of the Colorado River.[6] The Special Master's implication to the contrary[7] is based on a statement of Senator Hayden taken completely out of context. The Master quotes (Rep. 155) the following statement of Senator Hayden (70 CONG. REC. 169 (1928)):

> "The only thing required in this bill is contained in *the amendment that I have offered,* that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in rela-

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[5] 70 CONG. REC. 603 (1928).

[6] *E.g., Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 75-76 (1927); 70 CONG. REC. 70 (1928). See also *Hearings on H.R. 12902 Before the Subcommittee of the Senate Committee on Appropriations,* 71st Cong., 2d Sess. 170-72 (1930) (reproduced as Calif. Ex. 1808 (Tr. 12,240)).

[7] Rep. 155: "Senator Hayden of Arizona who, like Senator Pittman, was one of those most interested in the Project Act, emphasized a number of times that the bill provided a basis for the apportionment of water among Arizona, California and Nevada regardless of state law and interstate priorities, but that it would not affect intrastate water rights." Senator Hayden voted against the bill, 70 CONG. REC. 603 (1928).

tive order of priority may be determined by the State courts."[8] (Emphasis added.)

The amendment referred to by Senator Hayden is described by the Master as "the basis for a substitute amendment by Senator Phipps of Colorado which, in turn, was enacted as the first paragraph of Section 4(a) of the Project Act" (Rep. 155).

The amendment referred to by Senator Hayden[9] is printed a few pages earlier in the *Congressional Record* at the point where it was offered that same day by the Senator (70 CONG. REC. 162 (1928)). The Master fails to describe that amendment, which was a substitute text to section 4(a). The first paragraph required, as a condition precedent to the effectiveness of the act, that seven states ratify the Compact and that California, in her act of ratification, enact a specified limitation. The second paragraph specified the terms of a *mandatory* tri-state compact among Arizona, California, and Nevada, by which, in effect, California's ratification of the prescribed tri-state compact would also be a condition precedent to the effectiveness of the

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[8]The Master's footnote 23 to this quotation identifies "similar statements" by Senator Hayden at 70 CONG. REC. 163 (1928), which apparently refers to this statement:

"The State of Arizona is, therefore, interested in the apportionment of the waters of the lower basin. That is what *the amendment which I have offered* proposes to do." (Emphasis added.) The amendment referred to (Calif. Ex. 2011 (Tr. 11,173)) is set forth at 70 CONG. REC. 162. This quotation is also taken out of context, for the reasons stated about the quotation set forth in text, discussed above.

[9]Calif. Ex. 2011 (Tr. 11,173).

Project Act.[10] It was for this reason that Senator Hayden described "the amendment that I have offered" as *requiring* "that there shall be apportioned to each State its share of the water." Senator Hayden stated only that the *mandatory* tri-state compact would make an apportionment. (See *infra* p. 186.)

The Master has seized upon a possible ambiguity (in the debate over the mandatory formula, subsequently abandoned) which Senator Hayden immediately clarified (70 CONG. REC. 169 (1928)):

> "Mr. Hayden. . . . The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.
>
> "Mr. King. If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana,

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[10] *Id.* at 2-4. During the 1930 hearings on the first appropriation bill for Hoover Dam Senator Hayden said: "Congress of the United States does not possess the power to divide the waters of rivers among States. That is a result which could only be accomplished by the States through compacts." He concluded that without a tri-state compact priority of appropriation would control the interstate allocation of interstate waters and that "once having acquired a prior right to its use, no other State can obtain the use of those waters" to be used by the All-American Canal and the aqueduct to the vicinity of Los Angeles. *Hearings on H.R. 12902 Before a Subcommittee of the Senate Committee on Appropriations*, 71st Cong., 2d Sess. 170-71 (1930), quoted in text at 161 *supra*.

On the Senate floor Senator Hayden reported that "constitutional lawyers in this body said that it was impossible for the Congress of the United States to divide the waters of rivers." 72 CONG. REC. 11170 (1930).

and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes.[11]

"Mr. Hayden. *The amendment that I have offered contemplates no such possibility.*" (Emphasis added.)

The Master quotes the ambiguity and omits the clarification.

Furthermore, that amendment was subsequently withdrawn (70 CONG. REC. 382 (1928)), and a new one specifying only the terms of a mandatory tri-state compact was later offered by Senator Hayden (*id.* at 387-88). The new Hayden amendment was not accepted into the bill until the tri-state compact provision was made permissive only, and not mandatory. (70 CONG. REC. 469 (1928); see Rep. 162-63.)

b. Senator Pittman

Senator Pittman, like Senator Hayden, was firmly convinced that Congress did not have the power to allocate the waters of the Colorado River.[1] Senator Pittman's remarks quoted by the Master (Rep. 155)[2]

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[11] (Footnote ours.) Senator King is the author of § 18 of the Project Act which preserves priority and equitable apportionment principles. See discussion *supra* pp. 146-47.

[1] *E.g.*, 70 CONG. REC. 386, 468 (1928).

[2] 70 CONG. REC. 471 (1928): "Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition

are also taken out of context. Senator Pittman was debating with Senator Bratton the advisability of Congress' specifying in the second paragraph of section 4(a) the terms of a tri-state compact to which Congress would consent in advance of state ratification. Senator Bratton objected that the provision operated to hamper and restrict state sovereignty, even after it had been perfected at the suggestion of Senator Pittman to be permissive rather than mandatory. (See 70 CONG. REC. 469-70 (1928).) Senator Pittman made clear that his intent in authorizing the tri-state compact in advance was merely to prevent unnecessary delay in securing later congressional consent to a tri-state agreement (70 CONG. REC. 471-72 (1928)). Senator Johnson accepted the amendment only after receiving Senator Pittman's assurance that it was not "the will or the demand or the request" of Congress (70 CONG. REC. 472 (1928)).

c. Senators Walsh and Johnson

The confused colloquy between Senators Walsh and Johnson (Rep. 156-58) does not, as the Master erroneously states, "[make] clear that Congress intended that the Secretary of the Interior, in the exercise of the discretion vested in him by Section 5, could, by means of water delivery contracts, effectuate an interstate allocation, in default of allocation by the states themselves" (Rep. 156). Senator Walsh inquired whether the Secretary would be required to supply water to the city of Los Angeles because of the city's appropriation

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on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason."

mentioned earlier by Senator Johnson (70 CONG. REC. 167), and Senator Johnson answered, "I rather think so" (Rep. 156). After the two Senators proceeded at cross-purposes for a while,[3] Senator Walsh asked whether the Secretary could "utterly ignore those appropriations" to which Senator Johnson replied, "Possibly so." Senator Walsh obviously did not feel that his problem had been clarified since he concluded, "That is what I am curious to find out about." (Rep. 158.) It is clear that neither Senator was talking about rights which could have been satisfied from natural flow without Hoover Dam regulation.

Furthermore, at the time of the Walsh-Johnson colloquy, section 18, which expressly preserves priority and equitable apportionment principles (*supra* pp. 145-47) was not yet part of the Swing-Johnson bill. Section 18, which was accepted in the bill by Senator Johnson a week later (70 CONG. REC. 593), resolves all doubts. Senator Johnson had also announced earlier that under Project Act section 14 (then 13), water rights would be acquired and controlled by section 8 of the Reclamation Act which was incorporated in the Project Act by reference (*supra* pp. 148-50).

B. Section 8(b) Does Not Sustain the Master's Interpretation of Section 5

The Special Master suggests that section 8(b) of the Project Act (Rep. app. 389-90) supports his conclusion that Congress empowered the Secretary to impose upon

[3]Senator Walsh was inquiring about the rights of an appropriator as against the Government to the use of stored waters conserved by the dam. Senator Johnson was explaining the Secretary's right and obligation under § 4(b) to contract with financially responsible agencies to underwrite payment for the dam.

Arizona, California, and Nevada a federal apportionment of "mainstream" water by the execution of contracts to store and deliver waters impounded by Lake Mead (Rep. 151). The suggestion is based upon misinterpretations of both section 5 and section 8(b).

Section 8(b) provides that the United States and those claiming under it shall be "subject to and controlled by" the terms of a two- or three-state compact, between or among Arizona, California, and Nevada "for the *equitable division of the benefits, including power,* arising from the use of water accruing to said States" if that agreement were reached by the states and confirmed by Congress before January 1, 1929; the proviso to section 8(b) provides that if such an agreement were reached and confirmed by Congress after January 1, 1929, that compact would be "subject to"[4] prior water and power contracts executed by the Secretary pursuant to section 5.

The Master's conclusion is based on two assumptions: (1) Congress delegated to the Secretary the power to allocate such water by water delivery contracts authorized in section 5, and (2) the compact contemplated by section 8(b) was an interstate compact for the allocation of water. Neither assumption can be sustained.

Section 5, as we have seen, was not a delegation of power to the Secretary to make interstate allocations of water by water delivery contracts; section 8(b) must be read in this context. The very language of section

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[4] *Cf.* the language of § 8(a) that the United States shall be "subject to *and controlled by*" the Colorado River Compact (emphasis added) and the language in 8(b) preceding the proviso quoted above.

8(b), authorizing a compact between two or among three states for the "equitable division of the benefits, including power, arising from the use of water," is strikingly different from the language of the second paragraph of section 4(a) and section 19 which authorized interstate compacts for the apportionment of water.[5]

The manifest intent of Congress in enacting section 8(b) was to prevent the states, by compact, from distributing "benefits" among themselves in a way which might impair revenue contracts required to pay for the dam and reservoir—principally the power contracts authorized by sections 5(a), (b), and (c) to meet the requirements of section 4(b). California and Nevada wanted Hoover Dam power, Arizona did not. If two states wished allocations of Hoover Dam power, and the third did not, the two might agree upon the division between them. The section 8(b) compact among two or three states would have related to power or the price of water. This is the construction which Secretary of the Interior Wilbur appears to have placed upon section 8(b) in 1930.[6]

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[5]Thus § 4(a) refers in unmistakable language to a compact apportioning the specified quantity of water "for exclusive beneficial use in perpetuity," and § 19 refers specifically to the "storage, diversion, and use of the waters of said river." See also the language of the act authorizing the negotiation of the Colorado River Compact in which Congress stated that the subject matter was to provide "for an equitable division and apportionment among the States of the water supply of the Colorado River and of the streams tributary thereto . . . ." 42 Stat. 171 (1921) (Ariz. Ex. 6 (Tr. 221)).

[6]This administrative construction is evidenced by an exchange of correspondence between Secretary Wilbur and Governor John C. Phillips of Arizona. On May 9, 1930, Secretary Wilbur wrote a letter to Governor Phillips in which he repeated Arizona's objection to the "Boulder Dam contracts" and in which he replied

If proponents of section 8(b)[7] had attributed to the proviso of that section the interpretation which the Master derives, its legislative history would have been marked by hot debates about the inclusion of this language of section 8(b). In fact, the record on section 8(b) is singularized by relative silence.[8]

C. The Congressional Plan Is Wholly Contrary to That Deduced by the Special Master

The legislative history of the Project Act contradicts the Master's conclusion that Congress intended that act to be the source of authority for allocation of "main-

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to that published objection. Secretary Wilbur said (Calif. Ex. 1835 (Tr. 12,256)):

"[Arizona interposes] an objection that the Boulder Dam contracts . . . have been concluded by the Secretary prior to the conclusion of negotiations between California and Arizona, which negotiations your Commission thinks might have resulted in a compact covering power questions as well as water. At any rate, I assume that that is why section 8(b) of the Project Act is quoted.

". . . .

". . . . The construction of this great work . . . is necessarily at a standstill until the Secretary signs the required power contracts, for, under the Act, no appropriations could be made before that time. I have now signed such contracts and made it possible for this work to proceed. But before doing so, not only did this Department wait until the states had had an opportunity under section 8(b) to compact on or before January 1, 1929, as the law allows, but I delayed my action until April 28, 1930, or thirteen months, after taking office, in the earnest hope that the states would be able to work out their problems. . . . Nevertheless, I did not accept that failure of the states to come together as being final, nor did I, by proceeding immediately with the power contracts, as I might have done, foreclose them from agreeing on the power question."

The letter also deals with Governor Phillips' objection to the Secretary's price—but not the quantity—of water delivered to Metropolitan.

[7]Section 8(b) was a Nevada proposal. See Calif. Ex. 1801 (Tr. 12,234), at 11-12 (then § 8(d); *Hearings on H.R. 6251 and H.R. 9826, supra* p. 178 note 4, at 183.

[8]See, *e.g.*, *Hearings on H.R. 6251 and H.R. 9826, supra* p. 178 note 4, at 201-05; 69 CONG. REC. 9984 (1928) (House).

stream" water. Contrary to the Master's assertions,[1] the legislative history of the Project Act is almost unintelligible except on the premise that the legislators considered that they could *not* provide, in the Project Act, the authority for the federal allocation of impounded water among the states.

The Project Act must be construed in the light of the power which Congress intended to exercise.[2] Congress' repeated disclaimer of the existence of any power in it to allocate the waters of an interstate stream establishes beyond doubt that Congress did not intend to provide authority for a federal allocation of the waters of the Colorado River system.[3]

Moreover, the Project Act should be construed consistently with the legal atmosphere prevailing during the period in which that act was debated and passed. During that time this Court had made clear that Congress could constitutionally delegate power to an administrator only if adequate standards guiding the administrator were supplied in the statute;[4] such standards are wholly absent from the Project Act as it is interpreted by the Master. Neither the terms of a nonexistent compact under section 8(b) nor the nugatory compact envisioned

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[1]"The congressional debates are almost unintelligible except on the premise that the legislators considered that they were providing, in the Project Act itself, the authority for the allocation of impounded water among the states." (Rep. 154.) The Master has confused administration of the dam and reservoir with the creation and dispensing of water rights.

[2]*Cf.* Helvering v. Griffiths, 318 U.S. 371 (1943).

[3]It is unnecessary for the purpose of ascertaining Congress' intent in 1928 to reach the constitutional question because Congress very clearly did not purport to exercise that power even if it could have done so.

[4]J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

by section 4(a), second paragraph, can supply standards to the Secretary; sections 14 and 18 are limited by the Master, incorrectly, to their intrastate effect (Rep. 217-18) and sections 8(a) and 13(b) and (c) are limited, correctly, to interbasin effect. By his construction of these sections, the Master has wholly eliminated standards controlling the Secretary's interstate allocation of water. The delegation to the Secretary would be invalid even under the most generous view taken as to the constitutional limits on legislative delegations of power. The Project Act, as we construe it, preserving equitable apportionment and priority principles, provides adequate standards to guide the Secretary sufficiently to satisfy the constitutional requirements laid down by this Court during that earlier era.[5]

It is entirely unreasonable to infer that Congress intended water allocations by these alternatives:

(1) Interstate compacts, approved by legislatures of the states, and consented to by Congress; or

(2) Secretarial allocations by contracts, not even required to be reported to the states or to Congress, which might be written with (a) individual water users, (b) public or private projects, or (c) with states.

The Master's conclusion is completely refuted by the manner in which Congress exacted the limitation on California's water rights. If the Master were correct about the authority Congress purportedly delegated to the Secretary, Congress would have imposed the limitation on California without the consent of any

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[5]*E.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

state simply by directing the Secretary to observe that limitation in his water delivery contracts. Likewise, Congress would have imposed the Colorado River Compact simply and directly upon all Colorado River system waters without ratification by any state. Congress did not do so, and the legislative history does not reveal any serious suggestion by any congressman or by any state that Congress should or could do so. Rather, Congress employed a consensual plan under which the limitation was imposed and the Compact made effective, not solely by Congress, but with the concurrence of six states including California's enactment of the California Limitation Act (*supra* pp. 128-37).

PART FOUR

THE SECRETARY'S WATER DELIVERY CONTRACTS DO NOT ESTABLISH ANY FRACTIONAL "CONTRACTUAL ALLOCATION SCHEME"

The Master concludes (1) that Congress intended to authorize the Secretary to make an interstate allocation of "mainstream" water, and (2) that successive Secretaries of the Interior made that allocation by imposing upon Arizona, California, and Nevada substantially the terms of a tri-state compact which each of those states refused to ratify.[1]

I. THE MASTER'S REASONING REFUTES ITSELF: CALIFORNIA AGENCIES CANNOT BE ASSUMED TO HAVE ACCEPTED A "FEDERAL APPORTIONMENT" MORE ADVERSE TO CALIFORNIA THAN THE TRI-STATE COMPACT THAT CONGRESS REFUSED TO REQUIRE AND THAT CALIFORNIA REFUSED TO RATIFY

The "contractual allocation scheme" (Rep. 233) perceived by the Master allocates to California less water than she would have received if the tri-state compact authorized by the second paragraph of section 4(a) had been ratified: California does not get an apportionment in perpetuity of 4.4 million acre-feet of the first 7.5 million acre-feet of "Article III(a) water."

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[1]The Master asserts that the Secretary deliberately followed the terms of the tri-state compact authorized in § 4(a) of the Project Act in making the interstate allocation attributed to him by the Master, although no such compact has ever been agreed to. (Rep. 163, 222-24.) If the tri-state compact had been ratified, the Secretary's contracts were required to conform to it by the terms of § 5 (Rep. app. 384-85). In the absence of ratification, there was no such direction (Rep. 162-63).

but merely a fractional interest—44/75 of "mainstream" water;[2] California does not bear one half of the Mexican burden,[3] but 44/75 (58⅔ per cent) of that burden. It is incredible that the California agencies voluntarily entered into water delivery contracts which effectuated an apportionment to them upon terms far less favorable than the terms of the tri-state compact to which they were opposed.[4]

II. THE GENERAL REGULATIONS PROMULGATED BY THE SECRETARY OF THE INTERIOR PURSUANT TO THE PROJECT ACT REFUTE THE INFERENCE THAT THE SECRETARY CREATED ANY "CONTRACTUAL ALLOCATION SCHEME"

If the Secretary of the Interior had intended to create an interstate allocation "scheme" of this importance, one would expect to find at least the major elements of that scheme on paper, in one place, formally promulgated. No such writing exists. The General Regulations written by the Secretary contradict any inference that the Secretary created any "contractual allocation scheme" to apportion "mainstream" waters.

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[2]The Master assumes that if the tri-state compact authorized by the second paragraph of § 4(a) had been ratified, California would have been granted, on a parity with Arizona and Nevada, her apportionment coextensive with the limitation specified in the first paragraph of § 4(a), even though he denies that the first paragraph of that section can be interpreted as a grant (Rep. 231). The second paragraph of § 4(a) unmistakably specifies the apportionments in perpetuity to Arizona and Nevada (no apportionment was made to any other state) from the first 7.5 million acre-feet of "Article III(a) water" in terms of acre-feet, not in ratios or fractions.

[3]See clause (4) of the second paragraph of § 4(a) (Rep. app. 383).

[4]No one has suggested that the California agencies, during the period 1930-1934 when the contracts were executed, entered into those contracts involuntarily.

Section 5 of the Project Act authorizes the Secretary of the Interior to prescribe general regulations governing the writing of two different kinds of contracts: (1) The first paragraph refers to regulations in respect of contracts for the storage of water in the reservoir and delivery thereof, at such points as may be agreed upon, for irrigation and domestic use; and (2) the third paragraph refers to regulations in respect of contracts for the storage and delivery of water for generation of electrical energy and delivery thereof at the switchboard to stated contractees. Congress carefully distinguished the two categories of contracts and carefully distinguished the kinds of regulations which the Secretary was authorized to prescribe for each. The authorization to promulgate general regulations in respect of the first category is permissive;[5] the second category is mandatory (Rep. app. 385):

> "General and uniform regulations *shall* be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy . . . ." (Emphasis added.)

Contracts for the sale and distribution of power make interstate allocations; accordingly, Congress provided specific directions to the Secretary of the Interior relating to the order of preference for power applicants,[6]

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[5]The first paragraph of § 5 provides that the Secretary "is hereby authorized, under such general regulations as he *may* prescribe, to contract for the storage of water . . . and for the delivery thereof . . . for irrigation and domestic uses . . . ." (Emphasis added. Rep. app. 384.)

[6]Section 5(c) provides, in part (Rep. app. 386) that preference among applicants "for the use of water . . . necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard . . . shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants."

and the factors expressly to be taken into account in entering into such contractual allocations.[7]

The Secretary is authorized to allocate power interstate, but only for 50 years, subject to certain rights of renewal on terms fixed by Congress (section 5(a) and (b), Rep. app. 385).

The regulations which the Secretary promulgated reflect exactly the statutory distinction between the Secretary's specific authority to make an interstate allocation of the use of falling water for power generation and his lack of authority to make an interstate allocation of water for consumptive use.

The Secretary promulgated General Regulations governing the storage and delivery of water for consumptive use April 23, 1930,[8] and for the use of water for generation of power two days later.[9]

The power regulations make a detailed allocation among Arizona, Nevada, and the California power contractors, reserving 36 per cent of the energy for Arizona and Nevada, which they may commence to take at any time within 50 years, but which California's contractors must take, or pay for even if not taken,

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[7]The unlettered paragraph following § 5(c) (Rep. app. 386-87) thus provides that "no application of a State . . . for an allocation of water for power purposes or of electrical energy shall be denied . . . on the ground that the bond issue of such State . . . necessary to enable the applicant to utilize such water and appurtenant works . . . necessary for the generation and distribution of . . . energy . . . has not been authorized or marketed, until after a reasonable time . . . has been given to such applicant to have such bond issue authorized and marketed."

[8]Sp. M. Ex. 4 for iden. (Tr. 255) at A485.

[9]*Id.* at A237.

meanwhile. Metropolitan Water District is allocated 36 per cent of the firm energy to be used only for pumping water through its aqueduct.[1]

But the water regulations, under which Metropolitan Water District was to (and does) receive the water to be pumped through its aqueduct, make no interstate allocation whatever. They are completely silent on the subject.[2]

The only other water regulations which have ever been promulgated under the Project Act were those of Secretary Wilbur, dated February 7, 1933[3] (withdrawn by Secretary Ickes later that same year),[4] authorizing a contract with Arizona. These do not make an interstate allocation. To the contrary, article 10(c) of that proposed contract was authorized by the regulations to provide:[5]

> "[T]his contract is without prejudice to relative claims of priorities as between the State of Arizona and other contractors with the United States,

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[1] *Ibid.* The power regulations were amended from time to time in 1930 and 1931, but the interstate allocation of power was unaffected.

[2] The water regulations were amended in 1931 to incorporate the Seven-Party Agreement. See Calif. Ex. 1811 (Tr. 12,244), quoted in Sp. M. Ex. 4 for iden. (Tr. 255) at A487. It is significant that this amendment did make one interstate provision, and one only: The Secretary reserved the authority, if he should allow Metropolitan, the City of Los Angeles, and the City and/or County of San Diego to accumulate unused water to its credit in the reservoir, "to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between [those California agencies] . . . and such users resulting therefrom." *Id.* § 6 ("Sec. 8" and "Sec. 9"), at A488-89; see Rep. 102 n.23. He has not done so.

[3] Ariz. Ex. 28 (Tr. 244).

[4] Ariz. Ex. 29 (Tr. 244).

[5] *Supra* note 3, at 276.

and shall not otherwise impair any contract heretofore authorized by said regulations."

Article 10(c) cited the regulation of April 23, 1930, amended September 28, 1931, which incorporates the Seven-Party Agreement pursuant to which the California contracts had been made.[6]

It is clear from section 5 of the act that Congress never intended to authorize the Secretary to make an interstate allocation of "mainstream" water,[7] but even if it were assumed, *arguendo,* that Congress did have that intention, it is nevertheless plain that the water delivery contracts executed by successive Secretaries of the Interior do not create the "contractual allocation scheme" (Rep. 233) deduced by the Master.

III. NONE OF THE ELEMENTS OF THE MASTER'S CONTRACTUAL ALLOCATION SCHEME ARE FOUND IN THE WATER DELIVERY CONTRACTS THEMSELVES

Read severally or together, forward or backward, these contracts do not contain, either expressly or by implication, the ingredients of the "contractual allocation scheme" the Master describes. Moreover, the contracts, as they were written, do not purport to effectuate the apportionment which the Master finds by his construction of section 4(a) of the Project Act.

The Master deduces the "contractual allocation scheme" from the limitation upon California and from two water delivery contracts: one of the two contracts executed with the State of Nevada and one with the

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[6]*Supra* note 2.
[7]See Part Three *supra* pp. 140-94, especially 168-82.

State of Arizona, striking out, however, certain of the provisions of those contracts, and reading the contracts, as thus redrawn, against section 4(a) of the Project Act as he construes that section (Rep. 222-27). In fact, however, the "mainstream" picture is far more complex: Users in Arizona and California have received "mainstream" waters under a myriad of water delivery contracts and water right applications, founded upon the entire reclamation law; others have received "mainstream" waters without a contract of any kind. (*Infra* plate 3; *supra* pp. 152-58.) Water rights have been founded upon such diverse bases as appropriations (*e.g.*, appendix, pp. A4-5, A10, A13-14, A28-29) and federal reservations (see Rep. 254-66). The Master recognizes that there is no water delivery contract with the State of California; rather, the Secretary contracted with a number of agencies within the state (Rep. 207-08).

These diverse rights and obligations originated over a period of several decades from 1910 to 1960 in unrelated transactions with parties who were strangers to one another. The *ex post facto* rearrangement of all of those rights and obligations into one comprehensive interstate structure based solely on Secretarial contracts executed pursuant to the Project Act is inconsistent, not only with their terms, but with each step which brought them into existence.

A. The Delivery Contracts Do Not Purport To Apportion to Any State the Quantities Specified by the Master

None of the contracts as they were written oblige the Secretary to deliver to any state the quantities (much less the fractions) recited by the Master.

The Arizona contract did not require the Secretary to deliver 2.8 million acre-feet; it required the Secretary

to deliver up to 2.8 million acre-feet, but that figure, under the express terms of the contract, could never have been reached because it is explicitly subject to deductions for certain losses, for uses by Arizona above Lake Mead that diminish the flow into Lake Mead, and for uses in recognition of rights of New Mexico and Utah.[8] The 50 per cent of "excess or surplus" is likewise subject to reduction, not only in favor of Nevada, but also in favor of Utah and New Mexico.[9]

The two Nevada contracts specify that the Secretary will deliver, not .3 million acre-feet, but that quantity of water which together with "all other waters diverted for use within the State of Nevada from the Colorado River system" would equal .3 million acre-feet. No provision is made in the Nevada contract for delivery to her of any water over and above the .3 million acre-foot ceiling.[10]

The Master recognizes that these deductions in the Nevada and Arizona contracts destroy the assumed correlation between the "contractual allocation scheme" and

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[8]Ariz. contract art. 7(b), (d), and (g); Rep. app. 401, 402. The Master invalidates article 7(d) (Rep. 237-47). In the Central Arizona Project report, the quantity of the deduction required under article 7(g) for uses in New Mexico and Utah was stated, under interpretations then advanced by Arizona, as 130,000 acre-feet annually. Ariz. Ex. 71 (Tr. 310, 3,513, 3,520-21), at 150-51.

[9]Ariz. contract art. 7(b), 7(g), Rep. app. 401, 402.

[10]The first water delivery contract with Nevada was executed March 30, 1942, calling for delivery of "so much water as may be necessary to supply the State a total quantity not to exceed" 100,000 acre-feet per annum. (Nev. contract art. 5(a), Rep. app. 410.) The second Nevada contract, executed in 1944, amended the prior contract by increasing the ceiling from .1 to .3 million acre-feet, including "all other waters diverted for use within the State of Nevada from the Colorado River system." (Nev. contract art. 4, Rep. app. 420, amending art. 5(a) of the 1942 contract.)

the contracts as they were written; he attempts to avoid the difficulty by invalidating some of the offending provisions (Rep. 237, 241, 246-47). We agree with the United States that those provisions are clearly valid.[11]

The California contracts, considered severally or together, do not require the Secretary to deliver to California 4.4 million acre-feet of consumptive use and one half of any excess or surplus waters from the "mainstream." On the contrary, the California contracts provide for the delivery to specified California projects of the aggregate quantity of water sufficient to satisfy 5,362,000 acre-feet of consumptive use annually (see Rep. 208, 222, 223-24); that quantity also includes water sufficient to supply Indians, who neither have nor need contracts (Rep. 312 n.3a), and non-Indians, on the Reservation Division of the Yuma Project in California, who hold only individual water right applications (plate 3 *infra* note 7); it does not include water for the other federal reservations in California.

It is apparent that these contracts as they were written cannot "fix" the "proportions" 4.4, 2.8, and .3 which the Master uses in creating his proposed "contractual allocation scheme," because the Secretary did not fix those quantities in the contracts.

Moreover, as the Master recognizes, the California contracts do not call for the delivery of half of surplus (Rep. 223).[12]

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[11]See U.S. Exception II.

[12]The Master attempts to avoid this difficulty by implying a reservation of one half of surplus for California from a reservation in Arizona's contract for the benefit of Nevada (Rep. 223). The Master thus attributes to the Secretary of the Interior a bizarre method of making an allocation to California, 14 years after he executed the California contracts.

B. The Circumstances Surrounding the Execution of the Water Delivery Contracts Belie the Existence of a "Contractual Allocation Scheme"

The first water delivery contract executed by the Secretary pursuant to the Project Act was the Secretary's contract with Metropolitan Water District calling for delivery to the district of 1,050,000 acre-feet per annum of beneficial consumptive use. Shortly before the execution of that contract, Secretary of the Interior Wilbur expressly disclaimed any intention to deal with the allocation of lower basin waters,[1] a position continuously maintained by Secretary Wilbur and by subsequent Secretaries of the Interior.[2]

If, despite the Secretary's disclaimer, there was a contractual allocation scheme in existence in 1930, what was it? Was California irrevocably allocated 1,050,000 acre-feet of consumptive use? Was California irrevocably allocated 1.05/7.5 of "mainstream" water exclusive of federal reservations? For whom was the "unallocated" water reserved?

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[1]See, *e.g.*, Calif. Ex. 7553 for iden. (Tr. 22,760).

[2]See, *e.g.*, Calif. Exs. 7601, 7602, 7604, 7605, 7606, 7607, 7608, 7859, 7509, all for iden. (Tr. 22,760), and Calif. Ex. 1837 (Tr. 12,257), *infra* p. 211 note 5. Upon every opportunity, successive Secretaries of the Interior have disclaimed intention to make any interstate allocations; thus, in 1952, Secretary of the Interior Chapman made clear that no allocation should be inferred from his creating the Master Schedule (the document which translates delivery obligations into actual deliveries of water from Imperial Dam, serving projects in both California and Arizona). In his contract with Imperial Irrigation District, providing for the preparation of that schedule, the Secretary declared: "The preparation and approval of a Master Schedule by the Bureau of Reclamation or the Secretary shall not constitute an administrative determination, finding or recommendation as to the water to which any agency is entitled." (Ariz. Ex. 37 (Tr. 250), at 100.)

In 1933, Secretary Wilbur promulgated regulations (Ariz. Ex. 28 (Tr. 244)) authorizing a water contract with Arizona, which said nothing about excess or surplus. Was this a Secretarial allocation? Secretary Ickes revoked the regulations. (Ariz. Ex. 29 (Tr. 244).) What was the Secretarial allocation then?

By 1934, contracts had been executed with California users recognizing rights in California projects for the delivery of water for 5,362,000 acre-feet of consumptive use annually. The contracts themselves, however, do not add up to 5,362,000 acre-feet. That figure includes the rights of the Yuma Project recognized as entitled to a second California priority, but no contract for the project has ever been written. What Secretarial allocation scheme could then be perceived?

In 1942, when the Secretary executed his first water delivery contract with Nevada calling for delivery of up to 100,000 acre-feet of diversions, did the Secretary forever fix the proportion in which Nevada could share "mainstream" water? In 1944, when the Secretary executed a supplementary water delivery contract with Nevada, allocating no part of the excess or surplus water to Nevada, did the Secretary forever allocate, by reservation, 50 per cent of the surplus waters to Arizona? If so, how did Nevada get back 4 per cent when Arizona's water delivery contract was executed later in that year?

If successive Secretaries of the Interior created the "contractual allocation scheme" attributed to the Secretary by the Master, is it not extraordinary that the existence of that scheme utterly escaped the attention of this

Court in three prior cases and in deciding the joinder motion in this case, of the states of Arizona,[3] Nevada, California, New Mexico, and Utah, of the United States, and of Congress[3a] during more than 30 years of continuous exegesis of the documents upon which this theory rests?

IV. CALIFORNIA'S RIGHTS UNDER THE SECRETARY'S CONTRACTUAL ALLOCATION, IF HE MADE ONE, ARE CONTROLLED BY THE PROPER INTERPRETATION OF THE LIMITATION ACT, TO WHICH THE CONTRACTS ARE NECESSARILY SUBJECT

If it were assumed that the Secretary of the Interior made an "allocation" to California by the execution of a series of water delivery contracts with public

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[3]The existence of this scheme surely eluded Arizona when in January 1944 she filed a statement with the Secretary of the Interior in support of her (then proposed) water delivery contract, stating: "Arizona does not view this contract as a substitute for the Tri-State Compact between Arizona, California and Nevada, authorized in the Boulder Canyon Project Act." Calif. Ex. 7511 for iden. (Tr. 22,760) at 29.

[3a]See, *e.g., Hearings on H.R. 5434 Before the Committee on Irrigation and Reclamation,* 79th Cong., 2d Sess. (1946), Calif. Ex. 7760 for iden. In those hearings on reauthorization for the Gila Project, Charles A. Carson, representing Arizona, made very clear that Arizona did not interpret her water delivery contract as an allocation to Arizona of 2.8 million acre-feet of "mainstream" water. Mr. Carson told the committee:

"We have been talking also of the 2,800,000 acre-feet of water to be delivered to Arizona by this contract. That is not the exact amount; it is subject to reductions by virtue of the use in those portions of Utah and New Mexico which are in the lower basin, and by some other matters . . . ." (*Id.* at 402.)

Among the "other matters" which constituted deductions from that 2,800,000 acre-foot delivery obligation were Arizona's uses on the Gila River system (*id.* at 422, 433). Arizona's then position was that uses on the Gila up to 1,000,000 acre-feet were identified with Article III(b) of the Colorado River Compact; uses on the Gila in excess of 1,000,000 acre-feet were deductions from the 2,800,000 acre-feet deliverable from the main stream (*id.* at 421, 422, 443, 444, 519).

agencies in this state, the Secretary must have intended to allocate to California as much water as she could use within the limitation imposed by the first paragraph of section 4(a) of the Project Act and the reciprocal California Limitation Act (see Rep. 313). If that "allocation" were made, it was made consistently with the construction universally (until 1960) attributed to the limitation. The definitions of the Colorado River Compact are incorporated in the limitation. As we have seen (Part Two *supra* pp. 69-137), that limitation permits a consumptive use in California of (1) 4,400,000 acre-feet per annum whenever the total consumptive use from the Colorado River system (main stream and tributaries) in the lower basin is 7,500,000 acre-feet per annum, and (2) one half of the total consumptive use of such waters in excess of 7,500,000 acre-feet per annum, not to exceed 962,000 acre-feet per annum.

The Secretary must have recognized what every member of Congress who addressed himself to the problem had recognized from the first moment that the possibility of a self-limitation on California was suggested in the United States Senate: California's right would be practically coextensive with California's limitation. This arises from the great geographical fact of life, that California's lands can be served by gravity canals, whereas large expansion of irrigation use in Arizona requires 1,000-foot pump lifts comparable to the proposed Central Arizona Project, or great tunnels through mountain ranges. Only large domestic and industrial water projects can be made self-financing for out-of-basin use, and the only such project is one for southern California population centers.

This is what the Secretary did: On November 5, 1930, the Secretary requested from the State of California and its Colorado River water users a recommendation as to the division of Colorado River waters in California.[4] Pursuant to this request, on August 18, 1931, the defendant public agencies of the state entered into the Seven-Party Agreement[5] which the Division of Water Resources of the State of California recommended to the Secretary as a uniform schedule of priorities to be included in all water delivery contracts with users in California.[6] On September 28, 1931, the Secretary promulgated amended General Regulations, incorporating in article 6 thereof the recommended schedule of priorities from article I of the Seven-Party Agreement.[7] Thereafter, between 1931-1934, the Secretary entered into water delivery contracts with the California public agencies in accordance with the General Regulations so promulgated and the Seven-Party Agreement. (See Rep. 28; Rep. app. 424-28.) These water delivery contracts, in accordance with the regulations, recognized rights in California to 5,362,000 acre-feet per annum for consumptive use (Rep. 207-08), including the second priority right of the Reservation Division of the Yuma Project which has no contract except individual water right applications executed before and after 1929. (Rep. 212.)

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[4]Calif. Ex. 1810 (Tr. 12,244), text in Sp. M. Ex. 4 for iden. (Tr. 255), app. 1002, p. A477.

[5]Ariz. Ex. 27 (Tr. 242), the effect of which is tabulated in the appendix, p. A3.

[6]Calif. Ex. 1811 (Tr. 12,244), art. 6, text in Sp. M. Ex. 4 for iden. (Tr. 255), pp. A487-89.

[7]*Ibid.*

Thus, by October 15, 1934, when the last California water delivery contract had been executed,[8] if not earlier,[9] the Secretary—had he been authorized to allocate interstate rights to the consumptive use of "mainstream" water by water delivery contracts—had allocated to California (1) the consumptive use of 4,400,000 acre-feet per annum of "mainstream" water in any year that systemwide consumptive use in the lower basin totaled 7,500,000 acre-feet,[1] and (2) one half of the quantity of consumptive use throughout the system in the lower basin in excess of that 7,500,000 acre-feet per annum, but not to exceed 962,000 acre-feet per annum. That allocation to California is consistent with the provisions of the limitation upon California expressly incorporating the systemwide scope of the Colorado River Compact and, therefore, consistent with the requirement of section 5 of the Project Act that water delivery contracts should "conform to paragraph (a) of section 4 of this Act" (Rep. app. 385).

Section 5 of the Project Act expressly requires that such contracts shall be "for permanent service" (Rep. app. 385; see Rep. 238-40). Therefore, after the Secretary made that "allocation" to California, he could not derogate his own grant by allocating part of the water,

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[8]Ariz. Ex. 37 (Tr. 250); Rep. 28.

[9]On February 7, 1933, the Secretary promulgated regulations with the copy of a proposed water delivery contract with Arizona appended (Ariz. Ex. 28 (Tr. 244)), but these were withdrawn less than five months later (Ariz. Ex. 29 (Tr. 244)) without any contract having been executed thereunder.

[1]The issue of how shortages are to be borne under a Secretarial allocation if there is less than 7,500,000 acre-feet per annum of consumptive use is treated *infra* pp. 211-31.

committed to California in 1930-1934, to Nevada in 1942 and 1944,[2] and to Arizona in 1944.[3]

The Secretary clearly indicated his intention not to impair prior "allocations" of water to California. The Arizona contract expressly recognizes the rights of the United States and California "to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California," providing the aggregate of all deliveries and uses in California do not exceed the ceiling upon California's uses imposed by the limitation.[4] Moreover, article 10 of the Arizona contract (Rep. app. 405) provides expressly that all provisions of the contract are without prejudice to contentions of other states and water users, *inter alia,* about "(1) the intent, effect, meaning, and interpretation of said [Colorado River] compact and said [Project] act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III(a) of the Colorado River Compact; (3) what part, if any, is within Article III(b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system." The controversy which the Secretary thus disclaimed intent to resolve was the controversy about what the Colorado River Compact meant; all interested

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[2]Ariz. Exs. 43 (Tr. 253) and 44 (Tr. 254); Rep. app. Nos. 6, 7.

[3]Ariz. Ex. 32 (Tr. 248); Rep. app. No. 5.

[4]*Id.* art. 7(h), Rep. app. 402.

parties then agreed that the Compact was incorporated into section 4(a) of the Project Act.[5]

V. SHORTAGES IN "ARTICLE III(a) WATERS"* ARE BORNE INTERSTATE UNDER PRIORITY AND EQUITABLE APPORTIONMENT PRINCIPLES; THE CONTRACTS DO NOT PURPORT TO SUBSTITUTE PRORATION

The Special Master concludes that his "contractual allocation scheme . . . requires each state to share the burden of the shortage ratably" (Rep. 233). If there is a "contractual allocation scheme," we deny that it controls this issue, or, if it does, that it adopts any principles other than those of priority and equitable apportionment.

A. Priority and Equitable Apportionment Principles Control the Burden of Bearing Shortages, Interstate, in "Article III(a) Waters"*

If there is a "contractual allocation scheme," it is completely silent on whether priority or proration controls the interstate burden of bearing shortages, with

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[5]See, *e.g.*, the Secretary of the Interior's announcement on the signing of the Arizona contract: "Bureau [of Reclamation] representatives under my instructions have taken the position through the negotiations [of the Arizona contracts] that any contract proposed should not commit the Department as to any controversial issue regarding the amounts of water available to Arizona, or to any compact state, under the compact and the act." Calif. Ex. 1837 (Tr. 12,257), p. 4. See also Calif. Exs. 7601, 7602, 7604, 7605, 7606, all for iden. (Tr. 22,760), interdepartmental correspondence and memoranda, specifying unmistakably that the "controversial" issue was the dispute over the meaning of the Colorado River Compact provisions which were incorporated into the Project Act. Calif. Ex. 7607 for iden. is a memorandum issued by Secretary of the Interior Ickes, February 9, 1944, reiterating the department's position explicated in Calif. Exs. 7601, 7602, 7604, 7605, 7606, all for iden. (Tr. 22,760).

*"Article III(a) waters" is used for convenience instead of the phrase "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact."

two significant exceptions: (1) the Secretary expressly provided proration of any "excess or surplus waters" (California is limited to one half thereof, up to 962,000 acre-feet per annum; Arizona is "allocated" one half thereof, subject to a reduction of one twenty-fifth (four per cent) for Nevada); (2) the California contracts accord to Metropolitan Water District (including the merged rights of Los Angeles and San Diego) the right "so far as the rights of the [California] allottees . . . are concerned" to accumulate water up to a stated quantity in the reservoir by reason of reducing diversions by the district, subject to two provisions, the second of which is "that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District . . . and such users resulting therefrom."[1] No such arrangement was included in the Arizona contract.[2]

The Master correctly states that "the requirement of permanent service in section 5 seems to have been intended to instruct the Secretary to contract for water deliveries in such a way as to assure users, as far as is physically possible, of a stable supply of water" (Rep. 239). The physical and climatic conditions in the Colo-

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[1]See Rep. app. 426-27, art. 6, §§ 8-9, of Palo Verde Irrigation District contract, which is included in the Secretary's regulations and in all of the California contracts. (See Rep. 28 n.96.)

[2]See Calif. Ex. 1838 (Tr. 12,261), an opinion by Solicitor Margold of the Department of the Interior (approved by the Assistant Secretary) published in 1934 (54 L.D. 593), which concludes that a similar storage provision in a contemplated Arizona water delivery contract "is violative of the Boulder Canyon Project Act and the Colorado River Compact, and that the Secretary is without authority to approve its inclusion in the contract" (p. 6).

rado River basin compel this conclusion (Rep. 238-39). These are the very factors which engendered and spread the appropriation doctrine throughout the arid West (Part One *supra* pp. 54-64). The same considerations must have motivated the Secretary of the Interior in administering a body of law of which the Project Act is one "supplement," and in which the dominant statutory direction since 1902 had been that "beneficial use shall be the basis, the measure, and the limit of the right."[3]

The only proper inference is that the Secretary did not intend to modify the existing law (principles of priority and equitable apportionment) to control the interstate burden of any shortages except when his contracts expressly so provided.[4] Thus, under the "contractual allocation scheme," the burdens of any shortages in the "Article III(a) waters" are borne under those settled principles of western water law.

Finally, it should be noted that priority principles can readily be made a part of any "contractual allocation scheme." This is demonstrated by the Master's scheme in which "priority of 'present perfected rights' regard-

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[3]Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958), discussed *supra* pp. 62-66, 150-52.

[4]The Master applies the correct principle of construction in construing that part of article 7(d) of the Arizona contract providing for reduction of the delivery obligation for evaporation, reservoir and river losses, stating: "As I construe this provision, questions of allocation of losses are expressly left undetermined by the contract; such determination is to be made on the basis of the Compact and Project Act, without reference to other terms of the contract" (Rep. 206). We would apply the same principle to allocation of shortages, adding that the determination is to be made by reference to principles of appropriation, the existing law.

less of state lines" controls the allocation of water "in the extremely improbable event that releases [from Lake Mead] do not satisfy the rights perfected in any of the states [of Arizona, California, and Nevada] as of the effective date of the Act" (Rep. 312).

There are a number of alternative procedures available to the Court to make the requisite determinations of whatever interstate priorities are recognized by this Court which would not unduly delay or complicate the resolution of this controversy:

(1) The Court may adopt the machinery proposed by the Special Master for determination of "present perfected rights." The Master's proposed decree establishes the machinery to determine "present perfected rights" in Arizona, California, and Nevada (Decree art. VI (Rep. 359)) under the decision proposed by the Special Master (Decree art. II(B)(5) and (6) (Rep. 348-49)). This same machinery can be retained and expanded, if necessary, to determine the relevant priorities.

(2) The Court may refer the matter to a Special Master to make those determinations from the record with authority to supplement the record as may be necessary or desirable and report his findings and conclusions to the Court.

(3) The Court may make those determinations from the record. (See *infra* tables 1, 2, and 3.)

B. The Master's Conclusion That Shortages in "Article III(a) Waters" Are Borne Pro Rata Is Based Upon Inferences Improperly Drawn From Erroneous Constructions of the Controlling Documents

The Master's conclusion that shortages in "Article III(a) waters" from the "mainstream" are borne pro rata according to the "contractual allocation scheme" is reached solely upon the basis of a series of inferences improperly drawn from erroneous interpretations of the Colorado River Compact, the Boulder Canyon Project Act, and the water delivery contracts.[5] The Master does not find any express provision to that effect in any of these documents, and there are none. These documents neither abolish priorities nor authorize the creation of an antithetical federal system of water rights. The Master's conclusion to the contrary is based upon erroneous inferences drawn from the following six assumed factors (Rep. 232-37):

1. Proration of "excess or surplus" by the "contractual allocation scheme."

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[5]Even the Master's scheme must permit the operation of priority principles to a limited extent beyond "present perfected rights." The Master provides (correctly) that water apportioned to but unused in one state may be released for consumptive use in other states (Rep. 314, Decree art. II(B)(8) (Rep. 349-50)). For example, what law other than priority and equitable apportionment is to control competing claims of Arizona and California to water apportioned to, but unused in, Nevada? The contracts do not even purport to deal with these waters.

The Master also resorts, by necessity, to the priority principle when he says that California is entitled by contract to "4.4 million acre-feet of the *first* 7.5 million acre-feet of consumptive use of water from the mainstream in one year." (Rep. 222. Emphasis added.) He refers, of course, to the first 7.5 million acre-feet, the rights to which are prior to any rights in "excess or surplus," and not to the chronologically first 7.5 million acre-feet used after January 1 of each year. The Master demonstrates that even if there were no principle of priority, it would be necessary to create one.

2. "Present perfected rights" provision in section 6 of the Project Act.

3. Approval of the Colorado River Compact by the Project Act.

4. The tri-state compact set forth in the second paragraph of section 4(a) of the Project Act.

5. The principle of "sovereign parity."

6. Administrative construction.

In each instance the Master misconstrues the documents involved, and he draws the wrong inferences from them.

1. *Proration of "Excess or Surplus" by the "Contractual Allocation Scheme"*

In support of his argument for parity in the "Article III(a) waters," the Master relies upon the proration of "excess or surplus" required by his contractual allocation. The Master says that there is nothing in the Project Act, with the exception of the "present perfected rights" provision in section 6,[6] or in the water delivery contracts, "which suggests that a similar parity as between the states does not prevail if there is less than 7.5 million acre-feet of consumptive use to be apportioned among them." (Rep. 234.)

The Project Act does not establish parity since it merely requires California's rights in "excess or surplus" to be *limited* to one half; it is not a source of right. (Rep. 231.) Suppose there were 2 million acre-feet of surplus, and Arizona had prior appropriations therein of 1.5 million acre-feet. The limitation would not be operative, and Arizona would receive 1.5 million acre-feet; priority would rule both sides of the river. The "excess

[6]We deal with the Master's treatment of this provision *infra* pp. 217-21.

or surplus" limitation on California has the *effect* of proration only because it happens that California's rights in "excess or surplus" would, but for the limitation, exceed one half thereof. The words of the limitation are *"not more than* one-half of any excess or surplus waters." (Emphasis added.)

But if there were a "contractual allocation scheme" which requires proration of "excess or surplus," the contrasting silence in the statute and all its legislative history about how shortages in the "Article III(a) waters" would be borne permits only the inference that proration was not intended therein and that priority under equitable apportionment principles was either left undisturbed or adopted by the Secretary. The Master weighs silence on the wrong side of the scale.

2. *"Present Perfected Rights" Provision in Section 6 of the Project Act*

The Master asserts that section 6 of the Project Act[7] requires the Secretary of the Interior, in event of shortage, to supply "present perfected rights" as against all other rights, and to protect these rights in order of priority. He defines "present perfected rights" as the quantity of water put to use prior to June 25, 1929, and the quantity impliedly reserved by the United States for federal reservations prior to that date (Rep. 306-12). The Master concludes that if Congress had intended priority to otherwise govern interstate rights, Congress would have said so, and that Congress did not say so.

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[7]Section 6 provides in pertinent part (Rep. app. 387): "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power."

(Rep. 234-35.) This is exactly the opposite type of inference which the Master asks the Court to draw from the proration of "excess or surplus" and the silence about bearing shortages in "Article III(a) waters." (*Supra* pp. 216-17.)

The Master overlooks the essential fact that "present perfected rights" are not the creation either of the Colorado River Compact or of section 6 of the Project Act. They are preexisting rights under equitable apportionment and appropriation principles, recognized in both Compact and Project Act.[8]

The Master has converted the shield which Article VIII of the Compact and section 6 of the Project Act intended to create for existing projects and going economies into a sword which he would use for their destruction. The statutory inference he draws from section 6 is contradicted expressly by three provisions:

The first is section 18 of the Project Act which preserves the rights of the states with respect to "the appropriation, control, and use of waters within their borders,

[8]The Master suggests (Rep. 234) that "it is quite possible that a right 'perfected' as of June 25, 1929, and thus protected by section 6 is junior in priority to a right recognized under state law but not 'perfected' as of that date. In such a case, section 6 would reverse the order of state priorities." Nothing in the record suggests this possibility. Only eight projects diverted from the river in 1929: Palo Verde Irrigation District (Rep. 58-59), Imperial Irrigation District (Rep. 53-54), and Yuma Project, Reservation Division (Calif. Finding 3G:103(13), pp. III-46 and 47), all in California, and Colorado River Indian Reservation (Calif. Finding 14B:108, p. XIV-19), the North and South Gila Valley area (Calif. Finding 14E:105, pp. XIV-44 and 45), Yuma Project, Valley Division (Calif. Finding 14C:106, p. XIV-28), Yuma Auxiliary Project (Calif. Finding 14D:104, p. XIV-36), and the City of Yuma (Calif. Findings 14A:101-02, pp. XIV-3 and 4), all in Arizona. No appropriator senior to them, but with a right unperfected in 1929, has perfected a right since then. The projects now using water are identified at Rep. 127-28.

except as modified by the Colorado River compact or other interstate agreement." (Rep. app. 395.) This section, which was the basis of the Court's holding in *Arizona v. California,* 283 U.S. 423 (1931), is discussed *supra* pp. 140-45. The second is section 14 of the Project Act which incorporates section 8 of the Reclamation Act (*supra* pp. 147-50). The third is the language which Congress prescribed for the California Limitation Act. The quantities specified within California's limitation include "all water necessary for the supply of any rights which may now exist." (Rep. app. 398.) This describes recognition, not the destruction, of existing rights.

But even if the Master's construction of the "present perfected rights" provision in section 6 were correct, his conclusion that all other priorities are divested does not follow. The *upper basin* spokesmen put this in section 6.[9] They disclaimed all intent to affect rights of Arizona and California *inter sese.* (*Supra* pp. 177-81.) Even if "present perfected rights" by the mandate of section 6 are senior to all other rights in the "mainstream," described by the Master as "rights that might be recognized . . . under state law but that do not qualify as perfected rights" (Rep. 161), it does not follow that those other rights, *inter sese,* are not governed by priority principles. At the very least, sections 14 and 18 of the Project Act preserve those priorities.

In combination, the Master's narrow definition of "present perfected rights" and his destruction of all interstate priorities other than those of "present perfected rights" would be as detrimental to Arizona, in many

[9] *Hearings on H.R. 6251 and H.R. 9826 Before House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 113, 116, 166-67 (1926).

respects, as to California. If the Master is correct, the city of Yuma was a trespasser on the river until it received a contract in 1960. Most users in the South Gila Valley are trespassers today. (Rep. 53, 213.) Unless the noncontract users in the South Gila Valley secure a contract or go out of existence earlier, Arizona would be in contempt of the Special Master's recommended decree from the moment of its entry by this Court.

Finally, it should be noted that article 7(*l*) of Arizona's 1944 contract expressly provides that "present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract" (Rep. app. 403). This contract obviously speaks as of its effective date in 1944.

Arizona's 1944 contract further provides: "No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona."[10] Although uses by Arizona main stream projects (except for the Valley Division of the Yuma Project) have expanded over their uses as of June 25, 1929,[1] no Arizona project has

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[10]Art. 9, Rep. app. 404. The balance of article 9 provides: "A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot."

[1]See Ariz. Ex. 77-B (Tr. 3,992), table A-1, p. 43, areas A-7-C, A-8-C, A-9-C; Ariz. Ex. 190 (Tr. 3,686), table 1.

been required to make any payment for the use of main stream water.[2]

The Master's proposal to rewrite the law is based on inference and conjecture, and is not supported by a single word which anyone uttered about the Compact and its treatment of "present perfected rights," or section 6 of the Project Act and its treatment.

3. *Approval of the Colorado River Compact by the Project Act*

The Master points out that the Project Act approved the Colorado River Compact which he says "provides the background for the enactment of the Project Act" (Rep. 235), and the Compact, he asserts, treats the upper and lower basins on a parity with priority of appropriation not an operative factor. The Master relies upon Article III(c) which requires the two basins to bear equally the burden of any deficiency to meet the Mexican Treaty obligation if the waters surplus to the Article III(a) and (b) allocations are insufficient to supply Mexico. *Ibid.*

Article III(c) and (d) makes clear that the Compact does not put the two basins on a parity.[3] Article III(c) requires Mexico to be supplied first from the systemwide surplus over the Article III(a) and (b) allocations. Thus, the rights to the use of III(c) waters

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[2]Calif. Ex. 2718 is a U.S. Bureau of Reclamation tabulation of revenues received from storage of water (Tr. 17,220, 17,234-35). Only Nevada and Metropolitan Water District have paid for any water delivered.

[3]See Ariz. Exceptions, p. 2 n.1: "[W]e certainly disagree with the Special Master's statement that 'the Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water . . .' (Rep. 235)."

are junior to and not on a parity with those specified by Article III(a) and (b).

Article III(d), which provides that the upper division states may not deplete the Lee Ferry flow below 75 million acre-feet in any consecutive ten years, establishes a senior main stream right in favor of the lower basin, and is described by the Master as "the guarantee of the Compact" (Rep. 144). Article III(d) was apparently inserted in the Compact in recognition of the more rapid and substantial development below Lee Ferry. Thus, Article III(d) itself represents an application of the priority principle.

If the express incorporation of the Compact can be read out of section 4(a) and the limitation on California, a faulty inference from the Compact surely cannot be read back in to destroy the priority principle established under western water law for the past century. If the Compact provides any background for enactment of the Project Act, it is a background of a systemwide accounting which is included in Article III(c) as well as in Article III(a).

4. *The Tri-State Compact Set Forth in the Second Paragraph of Section 4(a) of the Project Act*

The Master writes (Rep. 235-36):

> "As I have pointed out, the second paragraph of Section 4(a) gives advance approval to a compact among Arizona, California and Nevada containing an allocation of water which was substantially effectuated by the contractual allocation established by the Secretary. Under this proposed compact, each state's apportionment would be of equal quality, precisely like the inter-basin apportion-

ment in the Colorado River Compact. Surely Congress did not intend that such an interstate compact would give California superior priorities to water because of the earlier dates of her uses."

Mere inspection of the proposed tri-state compact discloses the fallacy. The compact would have allocated 2,800,000 acre-feet to Arizona, 300,000 to Nevada, but would have made no allocation whatever to California or to any other lower basin state. California's rights in all or part of the 4.4 million acre-feet of the III(a) apportionment remaining must be filled in from the first paragraph prescribing the terms of the limitation. Concerning the first paragraph, the Master accurately writes (Rep. 231):

"The first paragraph of Section 4(a) is a limitation on California, not a grant to her, and hence cannot be a source of her rights to water as against the other Lower Basin states."

The source of all of California's rights—described in the first paragraph of section 4(a) as including "all water necessary for the supply of any rights which may now exist"—was the only source of rights which any of the states had prior to the Project Act: appropriation and equitable apportionment. These are rights to which priority universally attaches. There can be no implication of intent to deprive California of priorities by a proposed compact which very conspicuously made no allocation to California "of equal quality" or otherwise.

The Master also errs when he ascribes to the Secretary an intent to effectuate this compact. The proration formula which the Special Master would infer from section 4(a) is expressly negated by clause (4) of the

proposed tri-state compact in the second paragraph of section 4(a). That clause provides in part (Rep. 383):

> "[I]f, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin . . . ."

If the tri-state compact had become effective, clause (4) would have required shortages in the "Article III(a) waters" to be borne in the following proportions:

Arizona	50%
California	50%
Nevada	0%

According to the pro rata allocation of the "Article III(a) waters" which the Master finds is suggested in section 4(a), these shortages are met:

Arizona	37%	(28/75)
California	59%	(44/75)
Nevada	4%	(3/75)

The Master's conclusion fails because it puts everybody on the wrong side of the controversy:

Senator Hayden of Arizona, author[4] and advocate[5] of the proposed tri-state compact, included clause (4) which increased Arizona's share of the Mexican Treaty by 13 per cent (50 minus 37).

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[4]Calif. Ex. 2014 (Tr. 11,173).
[5]*E.g.*, 70 CONG. REC. 459-68 (1928).

Senator Johnson of California opposed the proposed tri-state compact[6] which decreased California's share of the Mexican burden by 9 per cent (59 minus 50) and put it on Arizona.

Senator Pittman of Nevada was, at best, lukewarm toward the proposed tri-state compact[7] which relieved his state of its entire share of any Mexican Treaty burden and put it on Arizona.

Under the rule in Bratton's case suggested by the Special Master—that the New Mexico Senator is conclusively presumed to be on New Mexico's side (Rep. 175)—this could not be so.

The conclusion compelled by clause (4) of the proposed tri-state compact is that priority of appropriation would control unless a proration scheme such as that suggested in clause (4) were adopted.

5. *The Principle of Sovereign Parity*

The Master asserts (Rep. 236):

> "In short, Congress contemplated inequality in the quantities allocated to each of the states, but parity in their rank. Interstate priorities were rejected. The principle of sovereign parity was established."

"Sovereign parity" is an appealing phrase with many echoes in interstate litigation. It has never, however, been applied as the Special Master proposes. The relevant cases indicate what we take to be a basic truism: States, like men, are equal before the law; the Court

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[6] *E.g., id.* at 466-67.
[7] *E.g., id.* at 469.

has made clear that this does not mean that either states or men are entitled to equal quantities of water. No one has previously suggested that it means equal priorities in unequal quantities of water.

Allocation of the water supply of an interstate stream is made on the basis of "equitable apportionment." A cardinal principle of equitable apportionment is "equality of right." "Equality of right" refers not to an equal division of the water but to the equal level or plane on which all the states stand, in point of power and right, under the constitutional system.[8] The consequence of this principle is the application, between litigant states, of the principles and rules of law which the states apply in common to the determination of water rights within their borders. (See Part One *supra* pp. 64-65.) In the lower Colorado River basin, priority of appropriation is the exclusive basis of water rights in Arizona, Nevada, New Mexico, and Utah, and so far as material to this litigation, in California. (See Rep. 22.)

This principle, which results from the sovereign character of the parties in litigation, also results from the sovereign character of the parties to an agreement—or to a proposed agreement.

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[8]What was there said [in Kansas v. Colorado, 206 U.S. 46] about 'equality of right' refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system." Wyoming v. Colorado, 259 U.S. 419, 465 (1922). In Wyoming v. Colorado, out of an available supply determined to be 288,000 acre-feet per annum after satisfaction of prior Colorado rights of 22,250 acre-feet, Wyoming received 272,500 acre-feet (94%) on the basis of her priorities. *Id.* at 490, 496.

6. *Administrative Construction*

The Special Master argues that administrative construction of the Project Act disproves the applicability of priority principles to the use of Lake Mead water, for two reasons: (1) The contracts incorporate the pro rata system of apportionment proposed, he asserts, in section 4(a) of the Project Act. (2) The Secretary has never compiled an interstate priority list nor gathered the data necessary to make such a list. (Rep. 236-37.)

The first reason is wrong. The second is irrelevant.

There are only two proration provisions in section 4(a): Not even the Master's contractual allocation scheme incorporates the express proration of the Mexican Treaty burden between Arizona and California as specified in clause (4) of the proposed tri-state compact. The Master does incorporate what he finds to be a proration of "excess or surplus" suggested by section 4(a). From this, we can infer only the intention to preserve and not to modify interstate priorities in "Article III(a) waters." (*Supra* pp. 212-13, 216-18.) There has never been a shortage, or a threatened shortage, of water to meet the consumptive uses from the main stream in the lower basin. (Rep. 161.) Therefore, it has never been necessary, to date, for the Secretary to establish any rule (priority or proration) to govern the distribution of water in case of shortage. Arizona's contract, article 10, disclaims any effect on interstate priorities—odd, if the "scheme" displaced them.

The Secretary has secured an intrastate priority schedule for California[9] because of the California Limi-

[9]Ariz. Ex. 27 (Tr. 242), the Seven-Party Agreement, article I of which is incorporated in General Regulations of the Secretary, Calif. Ex. 1811 (Tr. 12,244), art 6.

tation Act which restricts the quantity of water available to satisfy the very substantial California rights. Thus an intrastate priority conflict arose almost immediately in California. On the other hand, there has been more than sufficient water to supply requirements of other basin states; and, therefore, a shortage within Arizona and Nevada has been unlikely and an intrastate priority schedule has not been made. Yet the Special Master agrees that the intrastate distribution of water in each of these states is governed by intrastate priorities (see Rep. 216-17).

Similarly, the Secretary has never compiled a list of "present perfected rights" and their relative priorities. Yet, the Special Master asserts that the statute expressly commands their satisfaction and the preservation of their priorities. (Rep. 306-12, 349, Decree art. II(B)(6).) The Master's recommended decree provides machinery for the determination of "present perfected rights" and their priorities. (Rep. 359, Decree art. VI.)

We have set forth (pp. 162-65 *supra*) sustained administrative materials which establish that priority principles as incorporated in equitable apportionment have not been nullified by the Project Act or by the contracts.

C. The Master's Proration Scheme Would Provide an Illogical and Impractical Dual System of Water Rights in the Lower Basin

The Master recommends that the use of water from the "mainstream" is to be governed by a proration formula. (Rep. 233-37.) Rights to the use of water

found flowing in any other part of the Colorado River system within the lower basin (including the main stream between Lee Ferry and Lake Mead) are still governed by the doctrine of equitable apportionment. (Rep. 320-21, 323, 325.) Strangely, however, the equitable apportionment doctrine is also found to apply between competing rights on the "mainstream" and rights on the "tributaries." (Rep. 316-17.) The Special Master invalidates the deduction clauses in the Arizona and the Nevada water delivery contracts which are designed to protect the Lake Mead supply against undue depletions of the Lake Mead supply by those states. Instead, the Master suggests (Rep. 247):

> "[V]oiding these provisions does not . . . leave California helpless to protect her interests. . . . California will be able to protect herself against undue depletions on the tributaries and the mainstream above Lake Mead by compact, or, if the necessity arises, by suit."

Suppose that Arizona constructs a Central Arizona Project, diverting water from Bridge or Marble canyons on the newly defined "tributary," the main stream above Lake Mead. (See Rep. 227-28.) California is invited to sue. The suit would be based on equitable apportionment, and the decree would recognize California's priorities. A decree in that suit, if it prevailed, would enjoin the diversion, and water would be released into Lake Mead.

> "Once this tributary water commingles with the mainstream water it is governed by the Project Act and the Secretary's water delivery contracts

and may be consumed only according to the interstate apportionment created by them." (Rep. 317.)

First: The effect thereof is to allocate to California only 44/75 of the water supply which our water right makes available for use. The Master has created an anomalous creature hitherto unknown to water law: a water right which can be fully vindicated against junior users but which is shorn of 31/75 of any water made available thereby.

Second: The Secretary must allocate 28/75 of that water to Arizona users below Hoover Dam. If the rights of Arizona users below Hoover Dam were junior to the rights of the enjoined Arizona users above Lake Mead, this allocation would be a violation of state law which the Master finds prohibited by section 18 of the Project Act (Rep. 240-41) as enforced by a provision in the Master's recommended decree (Rep. 350, Decree art. II(C)(1)). Yet it is partially on the basis of a supposed similar violation of section 18 of the Project Act that the Master voids the deduction clauses in the Arizona and Nevada contracts (Rep. 240-41). Thus, the Master has invalidated, without good reason (see *supra* pp. 201-03) the contract provision designed to protect the Lake Mead supply and has substituted therefor an unworkable scheme of overlapping priority and proration.

Third: The 3/75 of such water would be available to Nevada users from Lake Mead and below even though some of these uses would be junior to the enjoined use. This would be contrary to the very priority under equitable apportionment principles which required the release of these waters.

Such a dual system of water rights is completely unknown in the law of the West. The Master's dual system of water rights *requires* that priority, both interstate and intrastate, be violated.

Neither the Project Act nor any contractual allocation scheme established thereunder can reasonably be construed to impose this illogical and unworkable dual system of water rights on any part of the Colorado River system in the lower basin.

PART FIVE

THE DEPENDABLE WATER SUPPLY CAN AND MUST BE DETERMINED

The Water Supply Issue and Its Significance

The Report generates, but fails to articulate, this paradox:

1. Absent the Colorado River Compact, there could be no justiciable controversy among Arizona, California, and Nevada; indeed, not even a harsh word. The historic flow of the Colorado River at Lee Ferry, the dividing point between the upper and lower basins, as reported by the Master,[1] is in excess of that required to supply all of the demands of Arizona and Nevada for all of the projects now in existence plus all of the demands for new projects which those states have identified, plus a full supply for California's Metropolitan Water District and all California priorities senior to it,[2] plus the Mexican Water Treaty

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[1]The Master reports historic Lee Ferry flows in three tables, at Rep. 109, 117, and 146. The table at Rep. 109, giving aggregates by decades, 1898-1958, shows that the flow for the most recent 10-year period, ending in 1958, averaged 11.66 million acre-feet per year; 20 years, 11.9 million; 30 years, 11.85 million; 40 years, 12.73 million; 50 years, 13.50 million; and 60 years, 13.66 million.

[2]If California were to receive enough water to give the Metropolitan Water District a full supply, California would receive 5.062 million acre-feet of consumptive use, disregarding minor quantities for federal reservations in California sustained by the Master (*supra p.* 15). Under the Master's formula, in such event, Arizona would receive enough to sustain 3.462 million, and Nevada 300,000, a total of 8.824 million (as between Arizona and Nevada, the apportionment would vary somewhat, depending upon whether the Secretary contracts with Nevada for 4% of surplus, but the total for the two states in any event would be 3.762 million if California received 5.062 million, and the sum total of 8.824 million would be unchanged). This requires a flow at Lee Ferry of about 2,500,000 acre-feet more than the uses sustained (see plate 7 *infra* and accompanying table) or more than 11.3 million acre-feet, to supply Mexican Treaty deliveries and losses.

requirements, and all transit losses projected for the future.[3] If there is now a justiciable controversy in the lower basin, it is only because some present recognition must be given to the Colorado River Compact's apportionment to the upper basin, not yet fully utilized. But the Master says that the Compact apportionment of 7.5 million acre-feet of consumptive use is only a "ceiling on the quantity of water which may be appropriated" (Rep. 140), which may or may not ever be reached[4] (Rep. 111-13), and is irrelevant (Rep. 138). If so, the conclusion ought to follow that the case is not now justiciable. The Master holds otherwise (Rep. 129-35).[5]

2. On the other hand, a comparison of the water supply at Lee Ferry for the last 30, 40, 50, or even 60 years (Rep. 109) with the rate of upper basin depletions which will be occasioned by projects now under construction, plus projects which Congress has authorized or instructed the Secretary of the Interior to prepare for submission to Congress,[6] shows that the residue which will be available after these depletions will not support on a permanent basis the consumptive use of more than 6 million acre-feet per annum of main stream water in Arizona, California, and Nevada after satisfying the first lien of the Mexican Water Treaty

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[3]Treaty delivery plus net transit losses below Lee Ferry projected by Arizona and California, based on existing and authorized storage capacity, are 2.350 and 2.525 million acre-feet, respectively. See plates 7 and 8 and accompanying table *infra*.

[4]Rep. 115: "Existing California uses are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed."

[5]Rep. 132-33: "[D]espite a present unsatisfied demand for water in the Lower Basin, it is impossible to develop further uses of the water because of the cloud on its legal availability."

[6]Pp. 252-53 *infra*.

and nature's toll of unavoidable losses.[7] Of this, California's share under the Master's formula would be 3,520,000 acre-feet[8] compared with constructed capacity of 5,362,000 acre-feet, and actual uses at the close of trial of 4,586,392 acre-feet,[1] now substantially greater.[2] The survival of one or more of California's existing projects, if the Special Master's formula is approved, will depend either upon nature's generosity in furnishing a water supply in the next half century greater than that of the last half century, or on Congress' reversal of its stated policy[3] of putting to use in the upper basin the water which the Compact apportions to that basin in perpetuity.

The conclusion ought to follow that the Report's formula for division of the supply among Arizona, California, and Nevada does violence to the meaning of the documents which together constitute the law of the river. The Master declines to so test his formula, saying that (1) the dependable water supply cannot be determined (Rep. 102-25), and (2) he will not receive evidence on the anticipated growth rate of upper basin depletions (Rep. 112 n.41). We respond to these assertions *infra* pp. 251-61.

Manifestly, the Compact is the factor which tips the scales between these opposite conclusions. But the Master holds the Compact to be irrelevant (Rep. 138).

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[7]The calculation is shown on the explanatory note and table preceding plate 7 and illustrated on plates 7 and 8.

[8]Calculated by the Master at Rep. 311.

[1]Rep. 128, corrected to reflect n.73.

[2]See appendix, pp. A35-36.

[3]Pp. 252-53 *infra*.

I. THE DEPENDABLE WATER SUPPLY MUST BE DETERMINED TO ESTABLISH THE EXISTENCE OF A JUSTICIABLE CONTROVERSY*

This Court has stated the classic test of a justiciable controversy over water rights:

> "[W]here there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction." *Nebraska v. Wyoming,* 325 U.S. 589, 610 (1945).

The controversy which the parties brought to this Court, and the controversy which the Court referred to the Special Master, was a controversy created by conflicting claims to the *dependable* water supply. Its precipitating cause, as the Master accurately reports (Rep. 130-31), was the need to determine whether there will be a "dependable water supply" (Rep. 130) for the proposed Central Arizona Project.

This controversy he declines to resolve.

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*We shall use "justiciable" and "justiciability" to refer both to the constitutional requirement of a case or controversy necessary to invoke the judicial power, and to the requirement in the original jurisdiction that the case must be of serious magnitude, proved by clear and convincing evidence. Cases are cited at Rep. 130, 319-20.

II. THE DEPENDABLE WATER SUPPLY MUST BE DETERMINED TO COMPARE THE RESULT PROPOSED BY THE DECREE WITH THE RESULT INTENDED BY CONGRESS IN 1928

The Master writes (Rep. 101):

> "Obviously the relevant factor in determining Congressional intention is the supply of mainstream water which Congress thought would be available at the time it enacted the Project Act, not the supply which will in fact be available after 1960."

A water supply study—translating flow to consumptive use—is essential to discover the legislative intent and purpose in 1928. One compelling example will illustrate why this is so.

Here is what Senator Hayden ("one of those most interested in the Project Act," Rep. 155) said on December 12, 1928 (70 CONG. REC. 464):

> "The Senator [Shortridge of California] thoroughly understands, I hope, that under the set-up[4] to which the senior Senator from California [Johnson] has so often referred, there will be available at Boulder Dam on the average about nine and one-half million acre-feet of water. There are varying estimates, but they all arrive at about that conclusion.
>
> "The bill itself provides that a million acre-feet

[4] (Footnote ours.) The "set-up" seems to be the fourth Swing-Johnson bill as it was then pending before the Senate, Calif. Ex. 2010 (Tr. 11,173).

may be used in the vicinity of Los Angeles, and some three and one-half million acre-feet through the all-American canal to irrigate the Imperial Valley. Then there is another half million acre-feet which may be used in the vicinity of Yuma and the Paloverde [*sic*] Valley, leaving about 4,000,000 acre-feet of water unused, and which can not go anywhere else except to Mexico, unless the State of Arizona undertakes this very plan of development which the Senator from California seems to indicate is impossible of accomplishment."

The 9,500,000 acre-feet of supply at the site of Hoover Dam, of which Senator Hayden spoke, is very close to the determinations of flow at Hoover Dam by expert witnesses whose testimony the Special Master rejects. Our figure was 9,650,000.[1]

Senator Hayden's arithmetic would allow 5 million acre-feet for California, 4 million for Arizona, Nevada, and Mexico, and 500,000 acre-feet for losses. It is reasonably clear that he was talking about gross diversions, not diversions less returns to the river.[2] But his supply figure is significant, and he said that it

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[1]Plate 7 and accompanying table:

Inflow to lower basin at Lee Ferry	8,700,000 acre-feet
Net gain, Lee Ferry to Hoover Dam	950,000 acre-feet
Available at Hoover Dam	9,650,000 acre-feet

[2]Senator Hayden treated the 2,800,000 acre-feet which the proposed tri-state compact would have specified for Arizona as gross diversions, equivalent to 1,852,000 acre-feet of consumptive use (diversions less 948,000 acre-feet of return flow usable in

would provide water for the All-American Canal, the Palo Verde Irrigation District, the Yuma area (presumably in California), and a million acre-feet for "the vicinity of Los Angeles." This congressional purpose the Master would frustrate.

This is a compelling reason to reject any proposal to rewrite the statute to deprive "the vicinity of Los Angeles" of a water supply 30 years after Metropolitan has built works to use the waters which Senator Hayden said (overstating the form but not the substance) were provided for Metropolitan in the bill.

This also, we think, refutes the Master's categorical statement that "the estimates of supply in 1928 were uniformly and substantially larger than even the most

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Mexico). "In other words, if Arizona were given the privilege of diverting 2,800,000 acre-feet of water from the Colorado River at Parker, and applying it to the lands in the lower Gila Valley, the return flow would be sufficient to take care of all the legitimate demands of Mexico." 70 CONG. REC. 463 (1928). "I have specified in the amendment which I have offered that the State of Arizona lays no claim to that return flow. *We do not ask to have any credit for it* after it arrives in the main stream of the Colorado River. It will be surplus and unappropriated waters which Arizona can not use, and that water, and that alone, will be sufficient to supply any demand for water to meet the existing uses in Mexico." *Id.* at 464. (Emphasis added.)

If rewriting a statute based on a confused legislative history were in order, the place to start, in § 4(a) of the Project Act, is its definition of consumptive use. It is not defined at all in the second paragraph, on which the Master relies for his "contractual allocation scheme."

A "contractual allocation scheme" based on 4.4, 2.8, and .3 million acre-feet for the three states, plus one half of excess or surplus for Arizona and California, all in terms of diversions and not consumptive use, would produce a result far more favorable to California than that which the Master has devised. Of California projects, only Palo Verde and the Reservation Division of the Yuma Project have significant return flow. All Arizona main stream projects have substantial return flow, as Senator Hayden indicated.

optimistic estimates made today."[3] (Rep. 101-02.) The failure to present the appropriate data conceals what is, if the Master is correct, one of this century's most astonishing paradoxes.

For six years California fought for and Arizona fought against the Boulder Canyon Project Act. Every Arizona spokesman in Congress opposed it. The act passed, and Arizona came to this Court alleging its unfairness to her (*Arizona v. California,* 283 U.S. 423, 449-50 (1931)). Yet that act generated an "allocation scheme" under which most of the water which the Boulder Canyon Project makes available for use, over and above the natural flow rights satisfied before Hoover Dam was built, goes to Arizona. (*Infra* plate 9.)

If the Master is right, every California man and every Arizona man in Congress was on the wrong side in

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[3]The most authoritative report relating to water supply before Congress when the Project Act was passed is that of the board of engineers appointed by the Secretary of the Interior with approval of the President, under authority of a joint resolution of May 29, 1928 (45 Stat. 1011), transmitted to Congress by the Secretary on December 3, 1928. That report, after concluding that prior water supply estimates were too optimistic, stated this conclusion: "It is estimated that the present flow [at Black Canyon, site of Hoover Dam] is depleted by water taken for irrigation in the upper basin by approximately 2,750,000 acre-feet, which amount, if added to the above estimated average flow, would increase it to about 15,000,000 acre-feet." An undepleted or virgin flow of 15,000,000 acre-feet at Black Canyon is the equivalent of about 14,000,000 acre-feet at Lee Ferry because the net gain between the two points is almost 1,000,000 acre-feet per annum (*supra* p. 237 note 1). While other estimates, including that reported by Senator Hayden, were higher (pp. 236-37 *supra*), none is as authoritative an answer to the question: What information did Congress have about water supply when it enacted the Boulder Canyon Project Act? The report is Calif. Ex. 202 (Tr. 7,714), found in Sp. M. Ex. 4 for iden. (Tr. 255), WILBUR & ELY, HOOVER DAM DOCUMENTS (H.R. Doc. No. 717, 80th Cong., 2d Sess. A187 (1948)). Quotation is from p. A200.

1928, and the states remained on the wrong side through three suits in this Court.

The paradox is apparent, however, only when the subject matter of the suit—dependable water supply—is recognized as determinable.

III. THE PREMISES UPON WHICH THE MASTER DECIDES THAT DEPENDABLE WATER SUPPLY IS UNDETERMINABLE ARE IN ERROR, BUT IF CORRECT WOULD MAKE THE CONTROVERSY NONJUSTICIABLE

The controversy is not justiciable if the premises of the Special Master are correct. Those premises, all contrary to the premises of the controversy pleaded and tried, may be quickly identified:

(1) The Colorado River Compact is irrelevant to the controversy[4] (Rep. 138). It is merely a "limitation on appropriative rights" in each basin rather than an apportionment in perpetuity[5] (Rep. 140, 149), and there is nothing to show that upper basin depletion will exceed 4.8 million acre-feet (Rep. 111-12).

(2) Any danger of impairment of existing California uses, under the formula allocation devised by

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[4]Contrast Ariz. Complaint par. XXII, pp. 25-26, and Prayer, pp. 30-31, identifying Compact issues at the heart of the controversy. *Accord,* U.S. Petition of Intervention, par. XXXII, p. 28.

[5]Contrast Ariz. Exception 1, pp. 3-4, disagreeing with this conclusion of the Master.

U.S. Brief in Support of Motion To Intervene, filed Dec. 31, 1952, pp. 28-29:

"Severally, the States of the Upper Basin of the Colorado River have apportioned among themselves the 7,500,000 acre-feet of water annually allotted to that Basin by the Colorado River Compact. Development of that Basin is going forward premised upon that apportionment."

the Master, is nonexistent "unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed."[6] (Rep. 115.)

(3) The "margin of error" within which it is possible to make a useful prediction of future main stream water supply is greater than 1,800,000 acre-feet per year (Rep. 104), a margin greater than the 1,700,000 acre-feet of water alleged by Arizona to be unused and to which she sought to quiet title.[7]

The controversy is justiciable only if the Master's premises are wrong.

IV. THE MASTER OVERSTATES THE DIFFICULTY OF DETERMINING WATER SUPPLY

A. Necessity and Feasibility

The determinations of the dependable supply in this case were closely corroborated by a distinguished group of experts on both sides.[8] Determinations were in close

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[6]Contrast: "The contending parties assert conflicting claims to the right to use certain quantities of Colorado River System water. These claims are mutually exclusive. As to each quantity of water involved a recognition of the Arizona claim requires a denial of the California claim and vice versa." Ariz. Statement in Support of Motion To File Bill of Complaint, bound with Complaint, p. 3.

[7]"Arizona is not now presently using all of the aforesaid 3,800,000 acre-feet of water to which it is entitled annually. In excess of 1,700,000 acre-feet out of the said 3,800,000 acre-feet is not being presently used and consumed in Arizona . . . ." Ariz. Complaint, par. XVII(b), p. 21.

[8]The hydrologists who testified on this subject were John R. Riter, Chief Development Engineer, U.S. Bureau of Reclamation (former Chief Hydrologist) (Tr. 21,261), Raymond A. Hill, consulting engineer (Tr. 21,726-31), Thomas M. Stetson, con-

agreement. The range of projections is 5.85 to 6.3 million acre-feet[9] (ignoring, as we must, any assumption as to contributions by the upper division under Article III(c) of the Compact in satisfaction of the Mexican burden (Rep. 145)). Experts used standard techniques understood by all hydrologists and used in planning all great projects. They are supported in their projection of the releases from Hoover Dam by a study published by the Bureau of Reclamation in 1960, after the close of the trial.[10] If the Reclamation Bureau's projection is correct, the Master's formula would reduce the Metropolitan Water District's supply to 538,000 acre-feet per annum by 1975.[11]

The Master discards all determinations. He does not make one of his own. It is entirely possible to make this essential determination. The Court has done so itself from far less satisfactory hydrological records.[12] It can do so here. As an alternative, it can refer the problem to the Master with instructions to take the testimony of experts of his or the Court's own choosing in a supplemental reference. See the motion we made to the Master for this purpose. (Appendix, p. A39.)

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sulting engineer (Tr. 10,471-73), for California; and John R. Erickson, consulting engineer (Tr. 18,002-05), for Arizona. Luna B. Leopold, Chief Hydraulic Engineer, U.S. Geological Survey (Tr. 21,421) testified on the application of laws of probability to stream flows. There is no more distinguished group in their field.

[9]*Infra* p. 245.

[10]Bureau of Reclamation, Region 4, U.S. Dep't of the Interior, Financial and Power Rate Analysis, Colorado River Storage Project and Participating Projects (September 1960). Discussed *infra* pp. 259-61.

[11]*Infra* p. 260 and table 6 *infra*.

[12]Nebraska v. Wyoming, 325 U.S. 589 (1945); Wyoming v. Colorado, 259 U.S. 419 (1922). See plates 4, 5, and 6 *infra*.

B. What Is Meant by "Dependable Supply" or "Safe Annual Yield"

The dependable supply or safe annual yield is *not* the minimum flow, *not* the "average" flow. It is the "whole universe," the entire body of water found to have existed during a period of time long enough to include drouths as well as floods, regulated to the maximum extent made possible by the use of storage reservoirs to commute the highly variable annual flows into the maximum annual evenly regulated discharge, less unavoidable losses.

C. The Magnitude of the Dependable Supply

1. *Controlling Factors*

The calculation of the safe annual yield or dependable supply available from the main stream for division among Arizona, California, and Nevada involves three questions: (1) How much will be received at Lee Ferry? (2) How much will this supply be augmented by inflow below Lee Ferry? (3) How much of it is unavailable for consumptive use in the United States because of the Mexican Treaty requirements and unavoidable losses? The residue is dependable supply.

There is no real hydrologic issue. The experts agree on all hydrologic factors within a few percentage points. See plates 7 and 8 and accompanying table comparing the expert witnesses' calculations in determining dependable supply.

2. *Techniques of Determining Water Supply*

The techniques employed by the experts testifying for Arizona and California were standard ones, used con-

tinuously by hydrologists in the calculation of the dependable supply which is essential before any large project is constructed.[1]

Essentially, the method is this: Assuming that all of the reservoirs now in existence and authorized[2] had been in existence at the beginning of any selected period of time, it is mathematically possible to calculate how much of the variable flow that occurred during this period could be converted by this storage into an *equal annual release,* and what the uncontrollable excess or "spills" of floods would be. The process is not, as the Master

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[1]The technique is spelled out in detail in Calif. Findings, part V, which cross-reference the exhibits and testimony. Annexed to this brief are a schematic drawing, plate 7, which illustrates it, and a bar chart, plate 8, which compares the figures arrived at by the experts for each stage of the calculation. See the explanatory note preceding plate 7.

[2]The water supply studies in evidence deducted from the Lee Ferry inflow so much of the upper basin's apportionment as the upper basin can physically use by means of existing and authorized regulatory storage, plus (in some of the studies) assumed additional upper basin storage, while at the same time complying with Article III(d) of the Compact.

[3]Additional storage constructed anywhere in the Colorado River basin will add little, if any, to the usable water supply. There will be no significant gain in regulation by further increasing capacity because increased capacity will be largely offset by a corresponding increase in evaporation. W. B. Langbein, "Water Yield and Reservoir Storage in the United States," U.S. Geological Survey Open File Report, June 1958, pp. 8-9. This is Calif. Ex. 3007 (Tr. 21,469), adopted as the testimony of Dr. Luna B. Leopold, Chief Hydraulic Engineer, U.S.G.S. (Tr. 21,468-69.)

The largest reservoir under construction is Glen Canyon, located on the main stream about 16 miles upstream from Lee Ferry. All storage capacity existing or authorized for construction in the upper basin at the time of trial would provide the equivalent of 25,000,000 acre-feet of storage capacity effective at Lee Ferry. Tr. 11,721-22 (Stetson).

seems to think, one of averaging (Rep. 107-08). It involves a year-by-year analysis of the optimum drawdown and replenishment of each reservoir on the river, in conjunction with one another.[2a] There are several mathematical methods, but all produce about the same results in dealing with the same basic statistics, all gathered and published by federal agencies. Deductions must be made for reservoir losses, transit losses, and water to supply the Mexican Treaty deliveries (including excess arrivals in Mexico because of regulatory problems). The residue is the dependable supply.

3. *Conclusions of the Experts*

The experts were in close agreement as to the permanently dependable supply which will be available to the lower basin. The best that the lower basin could expect, even if the water supply were as abundant as it was during the most favorable period that ended with the date of trial, and even if all reservoirs in both basins were operated with optimum efficiency, would be in the range of 5.85[3] to 6.3 million acre-feet per year.[4]

[2a]The Secretary of the Interior must coordinate all reservoirs in the Colorado River basin controlling the storage and release of water under the command of the Colorado River Storage Project Act § 7, 70 Stat. 109 (1956), 43 U.S.C. § 620f (1958).

[3]Calif. Ex. 2216-A (Tr. 11,825); Tr. 21,836 (Stetson). The Master refers to the "future Lower Basin mainstream supply" as being 6.175 million (Rep. 110). He has overlooked the witness' reduction to 5.85 by a 5% safety factor. Tr. 11,818-19, 12,141-42 (Stetson).

[4]See table accompanying plates 7 and 8. The only study which indicated a dependable supply greater than 6.3 million acre-feet was that of Arizona witness Erickson based on legal assumptions supplied by Arizona counsel, never clearly explained, but the result of which would have required the upper division states to supply an average of 1,280,000 acre-feet per annum at Lee

D. The Master's Rejection of the Experts' Determinations of Dependable Supply

The Master rejects these determinations on two grounds: (1) "Lower Basin supply is affected by Upper Basin uses . . . no one can say with certainty what increase may occur in Upper Basin uses or at what time" (Rep. 110), and (2) "the science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question" (Rep. 103).

E. The Effect To Be Given the Colorado River Compact

The controlling reason for the Master's conclusion that the lower basin's dependable supply cannot be determined is his revolutionary interpretation of Article III(a) of the Compact. These are the critical words:

> "There is hereby apportioned . . . in perpetuity . . . the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum . . . ."

What effect shall be given to this apportionment in answering the ultimate question which precipitated this suit: Is there a dependable supply for the proposed Central Arizona Project?

Ferry in controlled releases expressly for purposes of the Mexican Treaty (in addition to the Compact Article III(d) requirement). By this device and increasing existing and authorized upper basin effective storage to the equivalent of 35 million acre-feet at Lee Ferry the lower basin supply was inflated to 7.4 million acre-feet, at the expense of the upper basin. See Tr. 18,090-90A, 18,097 (Erickson); Ariz. Ex. 366 (Tr. 18,097). The instructions of Arizona counsel are incorporated in footnotes in Ariz. Ex. 353 (Tr. 18,097). Arizona counsel later disclaimed these assumptions. (Tr. 21,839-42.) The Master rejects any assumption in the studies of "the extent of the delivery obligation imposed on the states of the Upper Division under Article III(c) of the Colorado River Compact." (Rep. 112.)

Three approaches to this problem appear in the record:

(1) Treat the upper basin's apportionment of 7.5 million acre-feet of consumptive use as a present withdrawal of that quantity from the lower basin's dependable supply, giving it somewhat the effect that the Master gives to a "reserved water right" for federal reservations (Rep. 310). This is the approach used in the Secretary's report to Congress on the Central Arizona Project,[1] and in the United States Petition of Intervention in this case,[2] in demonstrating the existence of a justiciable controversy in the lower basin. If applied literally, the residual Lee Ferry flow would be depleted down to approximately the "guarantee of the Compact" (Rep. 144), 75,000,000 acre-feet each 10 years, stated in Article III(d). (See p. 249 *infra.*)

(2) Treat the upper basin apportionment as if now in use, but only up to the quantity which could be made available for upper basin use (i) by the storage reservoirs now in existence or which Congress has authorized for construction, while (ii) honoring the obligation imposed by Article III(d). This was the method which provided the figures 6.5 and 6.8 million acre-feet of upper basin depletions referred to in the Report at page 111.

(3) Treat the upper basin's apportionment as related to a ceiling on appropriations as the Master does (Rep.

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[1]Ariz. Exs. 70 (Tr. 308) and 71 (Tr. 310, 3,513, 3,520-21), pp. 150-51; cited at Rep. 30-31, 130.

[2]*Supra* p. 240 note 5.

111, 140-42),[3] that is, the upper basin apportionment makes no reservation at all against the lower basin, but the quantity available to the upper basin is the residue left after the lower basin reaches the ceiling on appropriations imposed upon it by Article III(a) and (b), subject, apparently, to two provisos: (i) the III(d) obligation must be honored (Rep. 144), (ii) the III(a) "ceiling" on each basin is otherwise on a parity, so that if there is not water enough to sustain appropriations up to that ceiling in each basin, the two basins must prorate (Rep. 236).

The Master concedes that the Compact has something to do with lower basin water supply (Rep. 138) but rejects the relevance of both Compact and water supply. What he says about the Compact is misleading:

> "With the storage provided by Lake Mead, and barring a drought unprecedented in the recorded history of the River, the Lower Basin has, under the guarantee of the Compact, available for use at Hoover Dam a minimum of 7,500,000 acre-feet of

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[3]This requires a word of caution. The Report treats Article III(a) as "a ceiling on the quantity of water which may be appropriated" (Rep. 140), as establishing "limits" (Rep. 142), but this cannot mean that the *upper* basin apportionment is equated with a ceiling on *upper* basin appropriations. If that is meant, the apportionment to a basin is not an asset to it, but a liability.

The Master ignores the Colorado River Storage Project Act which treats the Colorado River Compact as an apportionment in perpetuity to the upper basin. See pp. 252-53 *infra*.

water per year, less transit losses between Lee Ferry and the dam, evaporation loss from Lake Mead, and its share of the Mexican treaty obligation." (Rep. 144-45.)

This statement fails to disclose how "7,500,000 acre-feet of water per year" translates to the denominator of the decree, "diversions less returns to the stream." The following tabulation does so on the basis of the only figures in the Report:

"Guarantee under the Compact		7,500,000"
Less:		
Evaporation loss from Lake Mead (average from Rep. 124)	751,000	
Evaporation loss from Lake Mohave (average from Rep. 125)	153,800	
Evaporation loss from Lake Havasu (*ibid.*)	140,200	
Channel loss between Hoover Dam and international boundary (average 1946-1951, Rep. 125)	971,700	
Lower basin share of the Mexican Treaty obligation (unstated, but at least)	750,000	
		2,766,700
Available for decreed allocation		4,733,300

The losses are larger than those associated with 7,-500,000 acre-feet of flow; tributary inflow and regulatory loss to Mexico are not included; channel and reservoir losses are to some extent duplicating. Nevertheless, the figures make obvious that when the Master associates the "margin of error" in determining water supply with the margin between 7,667,700 and 5,850,000 acre-feet of consumptive use for three states from the "mainstream" (Rep. 104) he does so without regard to what he calls "the guarantee of the Compact." (Rep. 144.)

F. Consequences of the Master's Concept of Article III(a) of the Compact as a "Ceiling" on Appropriations Instead of an Apportionment in Perpetuity

1. *The Legal Problem*

The Master's concept of Article III(a) is the reverse of the pleaded positions of all of the parties which were before the Court when it denied California's motion to join the four upper division states as necessary parties. In the absence of those states, this proposed rewriting of the plain language of the Compact is not a dependable foundation for the determination of this lower basin controversy. Those states would argue that the purpose of the Compact, as stated by the Master (Rep. 22-27, 138-41), would be served only by an apportionment in perpetuity to the upper basin; it certainly could not be served at all by a limitation on appropriations in the *upper* basin; and it could not be adequately served by imposing a limitation on *lower* basin appropriations (including the tributaries (Rep. 140-42)) which left no assurances that the residue not so appropriated would suffice for future upper basin use.

If, however, the Master is right, there is no justiciable controversy. The upper basin has not approached its ceiling (Rep. 111), and the lower basin is only now approaching its ceiling. There is now unused upper basin water, not yet appropriated in the upper basin and which perhaps may never be appropriated there, available for the Central Arizona Project to appropriate without impinging on *lower* basin claims of any party.[4]

[4]The vice of the Master's decision even on this assumption is that it places the risk of error in calculating availability of unused upper basin water on existing facilities and existing economies in California. If there is conviction behind any assumption

2. *The Factual Problem if the Compact Is Treated Merely as a "Ceiling" on Appropriations*

Is the Master right in believing that upper basin depletions will not increase above 4.8 million acre-feet per annum (Rep. 112), that there is nothing to indicate that they will expand to "anywhere near 6,500,000 acre-feet"? (Rep. 111.) The issue was not tried.

In the draft report circulated to the parties on May 5, 1960, the Master stated: "I have become convinced that it is impossible to make an estimate of future supply in the Lower Basin within useful limits of accuracy" (p. 103). The difficulties then appeared to be with the engineering evidence. On June 10, 1960, we moved that the Master appoint an expert or experts to assist in making a determination. (See Calif. comments on draft report, pp. 62-63.) He denied our motion. During oral argument in New York City in August 1960, the Master made clear his view which appears in the Report—that the major uncertainty stems from a conviction that "there is nothing to indicate that the Upper Basin depletions, which have never exceeded 2,200,000 acre-feet per annum measured at Lee Ferry, will expand to anywhere near 6,500,000 acre-feet."[5]

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which makes unused water available, fairness requires that the risk of error inherent in the assumption should be assumed by those who can evaluate the risk of prospective shortage in planning new projects.

[5]The figure 6,500,000 acre-feet is from our evidence. It is our estimate of the quantity which the upper basin can physically utilize with presently constructed and authorized regulatory storage reservoirs consistently with the upper division delivery obligation under Article III(d) of the Colorado River Compact to supply 75,000,000 acre-feet of flow each 10 years. The Master erroneously asserts that "the witnesses assumed this amount of depletion on instruction of counsel" (Rep. 111). See Tr. 11,729-30, 12,138.

The Master denies (Rep. 112) our offer to prove that these depletions will rise to 6.19 million acre-feet by 1990 (Calif. motion to reopen trial to take evidence re upper basin depletion of Colorado River at Lee Ferry, filed August 31, 1960, at appendix, p. A59), wiping out Metropolitan's supply under his formula.

In fact, project plans are in being for enough projects in the upper basin to use far more than its maximum apportionment.[6]

In 1956, Congress enacted the Colorado River Storage Project Act for the purpose declared in section 1 of "making it possible for the states of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively . . . ." 70 Stat. 105 (1956), 43 U.S.C. § 620 (1958). Three of the Storage Project's major reservoirs are nearing completion.[1]

Section 2 of that act (70 Stat. 106 (1956), 43 U.S.C. § 620a) provides that the Secretary shall give a number of named participating reclamation projects "priority to completion," such projects being the first beneficiaries of the water and power made available by the reservoirs authorized by section 1.

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[6]H.R. Doc. No. 419, 80th Cong., 1st Sess. 3 (July 1947) (second pagination series). Portions of H.R. Doc. No. 419 are Ariz. Ex. 64 (Tr. 290).

[1]*Cf.* Rep. 112. Glen Canyon Dam, Flaming Gorge Dam, and Navajo Dam are scheduled for closure by 1962 and will then commence withholding of water which otherwise would flow to the lower basin.

Section 3 of the act[2] expressly declares that it is not the intention of Congress to limit such comprehensive development as will provide for the consumptive use of all of the water apportioned to the upper basin.

A bill passed the Senate on March 28, 1961, after the Master filed his Report, which will increase upper basin depletions by about 360,000 acre-feet,[3] and others are pending for early action.

G. Hydrologic Factors

With respect to the "science of hydrology" (Rep. 103), the Master's criticisms relate to three topics: (a) general criticisms, (b) the period selected for analysis, and (c) difficulties of reservoir operation. These are discussed briefly below, in the light of a subsequent Bureau of Reclamation report, dated September 1960, which was not available to the Master or ourselves at the time of oral argument.

1. *The Master's General Criticism of the Science of Hydrology*

The Master's general comments on the imperfections of the science of hydrology (Rep. 105-10), if justified,

[2]"It is not the intention of Congress, in authorizing only those projects designated in section 1 of this act [43 U.S.C. § 620], and in authorizing priority in planning only those additional projects designated in section 2 [43 U.S.C. § 620a] of this act, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use by States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the Congress of additional projects under the allocations in the compacts as additional needs are indicated." (70 Stat. 107 (1956), 43 U.S.C. § 620b (1958).)

[3]S. 107, 87th Cong., 1st Sess. (1961), authorizing construction of the San Juan Chama-Navajo Project, New Mexico.

would just about make it impossible to plan any project anywhere. Whatever the merit of the criticisms, the weight to be given to them is in the *reduction,* not the increase, of the experts' projection of the dependable supply.

The Master treats of only two serious problems: selection of the proper climatological period, and the difficulty of operating reservoirs to store water over many years.

2. *Period Selected*

The significance of the selection of the period of 1909-1956 was that this was the *wettest* period ending with the latest year of record then available.[4] If there is no water for new projects based on the water supply of that period, *a fortiori* there is no water available for new projects if any other period ending in 1956 is used. A strong argument can be made for using the 1930-1956 period, which produced an average annual virgin flow some 2,000,000 acre-feet less than that of the 1909-1956 period. In 1945 in *Nebraska v. Wyoming,* 325 U.S. 589, 620-21, this Court said:

> "In recommending his apportionment the Special Master did not rest on the long-time average flow of the river. We have discussed the drought which has persisted in this river basin since 1930. No one knows whether it has run its course or whether it represents a new norm. There is no reliable basis for prediction. But a controversy exists; and the decree which is entered must deal with condi-

[4]See Rep. 118 for a comparison of average undepleted or "virgin" flows for four periods ending in 1956. By "virgin" flow is meant the flow which would have existed in a particular year if there had been no man-made depletions at all above that point. *e.g.,* Lee Ferry.

tions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions. But the decree which is fashioned must be based, as the Special Master recognized, on the dependable flow. . . . On this record we cannot say that the dependable flow is greater than the average condition which has prevailed since 1930."[5]

We think the Court may judicially notice from United States Geological Survey records that the "drought" has intensified and continued since 1958,[6] the last year for which the historic flow at Lee Ferry is shown in the Report (Rep. 117). The safe annual yield, if calculated today, would be less than that calculated at the time of trial. A period of drouth, once recorded, sets the upper limit of the dependable supply. No later succession of wet years can erase that limitation. But an extension, or a future succession, of dry years may establish a more severe limitation.

There is never any assurance that the future will repeat the past, but it is utter folly to assume that the

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[5]Dr. Luna B. Leopold, Chief Hydraulic Engineer, U.S. Geological Survey, testified: "One must consider the nature of the problem that he is faced with in trying to choose whether you are going to pay more attention to the upper rather than to the lower limit" of probabilities of water supply. (Tr. 21,453.) This Court has consistently manifested a keen awareness of the hazards of speculative optimism, suggested by the Master's reaction to Dr. Leopold's testimony: "I might feel differently if I were going to feed a population of birds or differently if I were going to feed a population of humans." (Tr. 21,454.) See also Wyoming v. Colorado, 259 U.S. 419, 475-76 (1922).

[6]Following are the records of historic flows at Lee Ferry released by the Geological Survey for the two years subsequent to those covered by the Master's table at Rep. 117:

Water Year	Acre-Feet	Source
1959	6,756,000	U.S.G.S., WSP No. 1633, at 330
1960	9,200,000	U.S.G.S., Provisional Records

future water supply will be *greater* than that shown by past records. Each time this Court has made a determination of water supply it has done so based on past records. This Court has consistently recognized that water supply must be determined and that it must be determined conservatively. *Nebraska v. Wyoming,* 325 U.S. 589, 620-21 (1945); *Colorado v. Kansas,* 320 U.S. 383, 396-97 (1943); *Washington v. Oregon,* 297 U.S. 517, 520 (1936); *Wyoming v. Colorado,* 259 U.S. 419, 471 (1922). The Boulder Canyon Project was reported to Congress as feasible upon that same hypothesis.[7]

The records available in this case are far better, both in length of record and accuracy,[8] than those which the Court employed in *Nebraska v. Wyoming* and *Wyoming v. Colorado, supra.* (See plates 4, 5, and 6 which graphically compare the length of stream flow record

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[7]See p. 239 note 3 *supra* (Sibert Board Report), p. A200.

[8]S. Doc. No. 79, 86th Cong., 2d Sess. 69-70 (1960), presents this appraisal by the Federal Power Commission of the historical records:

"A gaging station at Lees Ferry has been maintained by the U.S. Geological Survey (USGS) since the summer of 1921. According to the published USGS Water Supply papers, the recorded flows at Lees Ferry, for the water years 1922 through 1958, are excellent."

As to earlier water years, the same document quotes an appraisal by a USGS engineer:

" 'The stream flow records of Colorado River at Lee's Ferry, Arizona have probably been given more critical examination than those on any other river in the United States, both by the Geological Survey and by other agencies. While the estimated or computed records are not to be considered as good as the gaging station records, the runoff figures published in W.S.P. 1313 for such periods are probably as good as any that can be derived from existing data. It is doubtful that, on an annual basis, any gross errors have been introduced; those errors that are inevitable are undoubtedly of a compensating nature.' " *Id.* at 77-78.

on the Colorado with the records employed in the two earlier cases.) There is no conflict in the evidence in this case with respect to the hydrologic data. All parties used substantially identical data.

3. *The Difficulty of Operating Reservoirs*

The Master says "it is unrealistic to take the average yearly inflow into Lake Mead for a 30- or 50-year period and assume that this, less evaporation losses, will in fact be the actual yearly supply released from Lake Mead" (Rep. 108). Again, "It might be that over a short period of less than ten years Hoover Dam could be operated flexibly enough to translate the total inflow into an average yearly release. But it is most unlikely that it can be done over a longer period" (*id.*).

If this is so, then it becomes important to examine the flow the Master reports for the critical decade 1931-1940.[9] During this period the total historical flow at Lee Ferry was only 101,510,200 acre-feet (Rep. 146). The inflow between Lee Ferry and Hoover Dam in these 10 years was approximately 8,670,000 acre-feet (Rep. 123), making a total inflow of 110,180,200 acre-feet, offset by reservoir losses aggregating approximately 7,510,000 acre-feet (Rep. 124),[10] which reduced the quantity available—the "whole universe"—to about 102,670,200 acre-feet. This could have been regulated, at best, to an average annual discharge of only 10.27 million acre-feet from Hoover Dam. This was at a

[9]This happens to be the same critical period which the Court examined in Nebraska v. Wyoming, 325 U.S. 589 (1945).

[10]The table at Rep. 124 commences with 1935. The average evaporation for the whole period shown, 1935-1950, which included years of very low reservoir content during the filling period (1935-1941), as well as years when content was high, was 751,000 acre-feet per annum.

time when upper basin depletions averaged less than 1,680,780 acre-feet.[11] If upper basin depletions should increase only to the level which will be attained by existing and presently authorized projects, 3,840,000 acre-feet per annum (Rep. 115), an increase of 2.16 million, the residual regulated release from Hoover Dam in a dry decade like 1931-1940 would be diminished to an average of 8.11 million acre-feet per annum.[12]

The treaty requirements and net losses below Hoover Dam, based on California's evidence, projected for the future (table 6), are about 2.525 million acre-feet.[13] Subtracting these from the average Hoover Dam release last shown (8.11 million acre-feet), the residue available for consumptive use—the dependable supply—would be less than 5.6 million acre-feet per annum for Arizona, California, and Nevada.

Hence, we emphasize heavily: The water supply studies were designed to show, and did show, only the

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[11]Determined, as the Master determines them (Rep. 111 n.40), "by comparing the historic flow with the virgin flow figures at Lee Ferry" in his tables at Rep. 117, 118.

[12]The period of 1931-1940 was not, unfortunately, an isolated phenomenon. The eight years 1953-1960 were the driest eight years in sequence in the 65-year period of record.

The 8-year total of measured runoff for the Colorado River at Lee Ferry for water years 1953-1960 was 79,285,000 acre-feet. (1953-1958, Rep. 117; 1959, U.S.G.S. Water Supply Paper 1633; 1960, U.S.G.S. Provisional Records.) The previous 8-year low was 1933-1940 with a measured runoff of 79,836,400 acre-feet (Rep. 117).

The U.S. Weather Bureau forecasts 8,000,000 acre-feet of runoff for water year 1961. U.S. WEATHER BUREAU, WATER SUPPLY FORECASTS FOR WESTERN UNITED STATES, vol. 13, No. 5 (May 1, 1961), p. 12. Adding this amount to the 8-year measured flow would result in a new 9-year low of about 87,285,000 acre-feet. The previous low for 9 consecutive years was 94,428,600 acre-feet, for 1931-1939.

[13]See p. 260 *infra*.

maximum dependable future water supply which could be made available by theoretically perfect reservoir operation. It was about 6 million acre-feet. No actual operation of the reservoir could make that much water available, for reasons the Master recognizes. (Rep. 108-09.)

4. *Bureau of Reclamation Studies, After the Close of Trial*

The latest Bureau of Reclamation study, published after the trial,[1] confirms that calculation of anticipated inflow at Lee Ferry from the upper basin is not only feasible, but is absolutely essential in determining releases from Lake Mead. We think it is judicially noticeable, and we are tendering a copy to this Court and to each of the other parties. This publication is a preview of what the Master anticipates, a determination of the total amount of water to be released by the Secretary from Lake Mead and from the several reservoirs "in his reasoned discretion" (Rep. 305).

Tables 4 and 5 in the appendix *infra* are the relevant portions of tables 5 and 7 of the 1960 Bureau report. They show the total water to be released at Hoover Dam. Sustained releases projected by the Bureau will be 9,800,000 acre-feet per annum under 1975 conditions (table 4 *infra*). They would be 8,500,000 acre-feet per annum under anticipated 2020 conditions

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[1]Bureau of Reclamation, Regional Office, Region 4, U.S. Dep't of the Interior, Financial and Power Rate Analysis, Colorado River Storage Project and Participating Projects (September 1960).

(table 5 *infra*).[2] In both cases there would be additional releases or "spill" in some years shown in column 19. The spill must be disregarded in determining usable water supply for consumptive use. The only utility of spill is generation of nonfirm energy. Spill occurs only during the wet years when the reservoirs are full, and the report shows no spill at all from Lake Mead during the 29-year drouth period following the year corresponding to 1930.

The Bureau's projection is the latest and most authoritative statement of how the Bureau of Reclamation intends to operate the river. The water supply available for allocation to the three states, each state's allocation, and the quantity available for Metropolitan within California's allocation can all be calculated with some precision.[3] By 1975, there will be only 538,000 acre-feet available to Metropolitan (60 per cent of its use in 1960) and its whole supply will be extinguished by the year 2006.

Details of the calculation are shown in table 6 *infra*.

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[2]By comparison, the California projection of average annual regulated Hoover Dam releases, upon which the dependable supply of 5.85 million acre-feet was based, was 8.7 million (*infra* plate 7). In December 1957, the Secretary of the Interior estimated that downstream demands for water released from Lake Mead would be 8,903,000 acre-feet in 1970, with allowance only for existing lower basin projects. S. Doc. No. 77, 85th Cong., 2d Sess. 9 (1958).

[3]For Metropolitan to receive any water at all, there must first be satisfied about 3.9 million acre-feet of senior California priorities recognized by the decree; 3.85 million acre-feet established in the Seven-Party Agreement, plus about 40,000 acre-feet of Indian priorities added by the Master. The 3.9 million acre-feet is 44/75 of 6.65 million acre-feet.

The sole fact upon which there is room for difference of opinion is the date when complete utilization will occur. We think that the Bureau's study underestimates the rate of upper basin development. We offered to establish that the upper basin depletion would expand at such a rate that Metropolitan would lose its entire supply not later than 1990. The Master denies our motion for opportunity to do so (Rep. 112 n.41). But even if the Bureau's projection of upper basin depletions were correct, there is only a 16-year difference between the two estimated dates of doomsday for Metropolitan.

V. THE PROPOSED ALLOCATION, TESTED BY THE REALITIES OF THE WATER SUPPLY, IS INCONSISTENT AND INEQUITABLE

If water were permanently abundant, the terms of a formula to allocate its use would be inconsequential. But tested against the realities of the water supply, the Master's proration formula is internally inconsistent and produces wholly inequitable results. This comes from his ignoring his own characterization of "present perfected rights" as rights in natural flow not dependent upon the existence of storage (Rep. 308), and allocating shortages in stored water as though the contrary were true (Rep. 306).

This operation of the Master's formula is described below and illustrated on plate 9 *infra*.

A. Rights in Natural Flow Not Dependent on Storage

Arizona and Nevada concede that prior to June 25, 1929, the natural or unregulated flow of the main stream of the Colorado River sustained a total of at least 3,150,000 acre-feet of beneficial consumptive use annually in California, Arizona, and Nevada. Of that total, Arizona and Nevada concede that appropriators in California beneficially consumed at least 2,900,000 acre-feet annually[4] (about 92 per cent of the total), and Arizona consumed about 250,000 acre-feet annually (or about 8 per cent of the total).[5] Any uses by Nevada from the main stream prior to 1929 were insignificant.

The foregoing figures represent the minimum of the rights California had established in natural flow, unaided by storage. We assert that our valid appropria-

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[4]See, *e.g.*, Ariz. Reply to Defendants' Answer, par. 28(b), p. 26, in which Arizona conceded to California 2,902,000 acre-feet of such uses (reckoned by depletion); Nev. Comments on the Special Master's Draft Report, p. 24, which conceded to California for non-Indian projects 2,944,560 acre-feet of such uses. The addition of estimated Indian uses and uses on other federal reservations in California of the unregulated flow of the Colorado River before June 25, 1929, brings the total uses in California from that flow to much more than 2,900,000 acre-feet of beneficial consumptive use annually.

[5]See, *e.g.*, Nev. Comments on the Special Master's Draft Report, p. 24, acknowledging about 188,000 acre-feet of non-Indian uses in Arizona prior to June 25, 1929. To that figure has been added the estimate of actual Indian uses as of that date to reach the rounded total of 250,000 acre-feet annually. Moreover, par. 4(b), pp. 13-14, of Ariz. Reply to Defendants' Answer asserts that 73,000 acres of Arizona lands were served by water diverted from the main stream of the Colorado River as of November 24, 1922. At 3.5 acre-feet per acre of beneficial consumptive use, this would amount to about 255,500 acre-feet, or a rounded total of 250,000 acre-feet.

tive rights as of June 25, 1929, were very much larger, even if limited to those capable of being satisfied from regulated flow without Hoover Dam storage. (*Supra* Statement of the Case, p. 12 note 5.)

But the lesser quantities of California uses of natural flow conceded by our opponents will make our point.

B. Allocation of the Benefits of Storage

If, after construction of Hoover Dam, a sufficient supply from the main stream were available to satisfy 6,000,000 acre-feet of consumptive use annually (an increase over the unregulated flow of 2,850,000 acre-feet),[6] California, under the Master's "contractual allocation scheme" would receive an additional 600,000 acre-feet from the regulation provided by Hoover Dam.[7] Arizona and Nevada would share the remaining 2,250,000 acre-feet of "new" water made available by regulation.[8]

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[6]The dependable main stream supply permanently available for consumptive use in the lower basin of 6,000,000 acre-feet per annum (*supra* p. 245) provides this increase of 2,850,000 acre-feet of water over and above the 3,150,000 acre-feet in use by June 25, 1929.

[7]44/75 of 6,000,000 equals approximately 3,500,000 acre-feet (rounded to the nearest 100,000 acre-feet), which is 600,000 acre-feet more than the 2,900,000 acre-feet which Arizona and Nevada concede was in use in California by June 25, 1929.

[8]31/75 (28/75 for Arizona and 3/75 for Nevada) of 6,000,000 equals approximately 2,500,000 acre-feet, which is 2,250,000 acre-feet more than the 250,000 acre-feet in use in both of these states by June 25, 1929.

If releases from Hoover Dam were sufficient to sustain 7,500,000 acre-feet of consumptive use annually (an increase of 4,350,000 acre-feet over that assumed to be available from the unregulated supply), California would receive only 1,500,000 acre-feet of consumptive use from the supply made available by regulation provided by Hoover Dam,[9] and Arizona and Nevada would receive 2,850,000 acre-feet of such "new" waters.[10]

In other words, if total "mainstream" consumptive use were 6,000,000 acre-feet, California would be allocated 22 per cent, and Arizona and Nevada 78 per cent[11] of the new water made available by Hoover Dam. If total "mainstream" consumptive use should be 7,500,000 acre-feet, the respective shares of the new water are 34 per cent for California and 66 per cent for Arizona and Nevada.[12]

The comparisons stated above are summarized in the following table and are shown graphically on plate 9 *infra*.

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[9]44/75 of 7,500,000 equals 4,400,000 acre-feet, which is 1,500,000 acre-feet more than the 2,900,000 acre-feet in use in California by June 25, 1929.

[10]31/75 (*supra* note 8) of 7,500,000 acre-feet equals 3,100,000 acre-feet, which is 2,850,000 acre-feet more than the 250,000 acre-feet in use in both states by June 25, 1929.

[11]See *infra* p. 265, table A.

[12]See *infra* p. 265, table B.

Allocations of Benefits of Storage Resulting From the Master's Formula

A. If the supply will sustain only 6 million acre-feet of consumptive use:

State	Allocation	Use of natural flow	Incremental use of new water	Percentage of total incremental use of new water
Arizona	2,240,000	250,000	1,990,000	69.8
California	3,520,000	2,900,000	620,000	21.8
Nevada	240,000	0	240,000	8.4
Total	6,000,000	3,150,000	2,850,000	100

B. If the supply will sustain 7.5 million acre-feet of consumptive use:

State	Allocation	Use of natural flow	Incremental use of new water	Percentage of total incremental use of new water
Arizona	2,800,000	250,000	2,550,000	58.6
California	4,400,000	2,900,000	1,500,000	34.5
Nevada	300,000	0	300,000	6.9
Total	7,500,000	3,150,000	4,350,000	100

C. Allocation of the Burden of Shortages

But *shortages,* if the supply will not sustain consumptive use of 7.5 million acre-feet, are allocated as follows:

Allocation of Shortages in Stored Water, Contrasted With Allocation of Benefits of Storage, Resulting From Master's Formula

State	Percentage of shortage borne	Contrasting percentage of allocation of new water: If supply is 6 million	Contrasting percentage of allocation of new water: If supply is 7.5 million
Arizona	37⅓ (28/75)	69.8	58.6
California	58⅔ (44/75)	21.8	34.5
Nevada	4 (3/75)	8.4	6.9
Total	100	100	100

In summary, the Master's formula awards the lion's share of the new water (66 to 78 per cent) to Arizona and Nevada and 22 to 34 per cent to California, while burdening California with 58-2/3 per cent of any shortage below 7.5 million (unless the total supply falls below 3,150,000 acre-feet, far below any possibility suggested by anyone).

If this is the law, and always was, the question naturally arises why Arizona opposed passage of the Boulder Canyon Project Act, containing the provisions which the Master reads as dictating this result, and why Arizona, in three previous trips to this Court, has attacked the Project Act.

The Master's formula, applied to the realities of the water supply, produces a result so palpably illogical as to demonstrate that there is something wrong with its whole structure, its premises as well as its conclusion.

VI. THE PROPOSED ALLOCATION, TESTED BY THE REALITIES OF THE WATER SUPPLY, WOULD DESTROY THE WATER RIGHTS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, AND SHOULD BE REJECTED ON EQUITABLE GROUNDS

The burden of the Master's formula falls with particular weight on Metropolitan Water District. In consequence of the internal California priorities which the Master recognizes (Rep. 201, 256 n.4; Decree arts. II(C)(1), III(B), Rep. 350, 353), this district receives no water at all if the supply available for Arizona, Cali-

fornia, and Nevada is insufficient to sustain at least 6.65 million acre-feet of consumptive use.[1]

No testimony or calculation in the record, with one exception, supports an estimate of dependable supply as great as 6.65 million acre-feet. The sole exception was based on a hypothesis by Arizona counsel as to the upper division's obligations under Article III(c) of the Compact, later disowned by Arizona counsel.[2]

Even if the Project Act is construed to have created a "contractual allocation scheme," inferentially displacing priorities by proration, *sub silentio,* there is nothing to indicate that it also, *sub silentio,* abrogated the other great element of the law of equitable apportionment, *i.e.,* the protection of existing uses, and directed the disregard of existing uses in favor of new ones. Every element of equity weighs against such a result, particularly with respect to Metropolitan Water District, for reasons uniquely applicable to it.

Metropolitan Water District alone, of those who have contracted with the Secretary for the storage and delivery of water, was required to, and did, agree to underwrite a portion of the cost of Hoover Dam as a consideration for getting its water contract. Its water and power contracts were orginally made under section 4(b) of the act,[3] as well as under section 5. Under the terms of the Boulder Canyon Project Adjustment

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[1]See p. 260 note 3 *supra.*

[2]*Supra* p. 245 note 4.

[3]Section 4(b) of the Project Act provides, with respect to Hoover Dam (Rep. app. 383-84):

"(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or

Act,[4] it was required to, and did, agree to pay for 35 per cent of the firm energy to be generated at Hoover Dam, to be used only to pump project water through its aqueduct, whether the power is used or not.[5] It paid the United States $5,886,263 in fulfillment of its obligation to pay for unused energy.[6] The Secretary's findings under that act[7] show that payments by Metro-

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contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act."

[4]54 Stat. 774 (1940), as amended, 43 U.S.C. §§ 618-618*o* (1958).

[5]Calif. Ex. 415 (Tr. 9,395), art. 14, quoted in Sp. M. Ex. 2 for iden. (Tr. 212) at 333; *id.* art. 7(c)(1), at 325, as amended by Calif. Ex. 416 (Tr. 9,395), art. 5, quoted in Sp. M. Ex. 2 for iden., *supra*, at 352; see also Calif. Ex. 417 (Tr. 9,395), arts. 9(a) and 14(a), quoted in Sp. M. Ex. 2 for iden. (Tr. 212) at 861, 865.

[6]Tr. 9,669 (McKinlay); Calif. Ex. 482 (Tr. 9,395), col. 4. Since 1940, the increase in costs of steam-generated power has made it possible for the Secretary to resell unused Metropolitan power at its contract rates, crediting the proceeds to the district's obligation. As long as this situation prevails, it is not expected that losses of this type will recur.

[7]See the Secretary of the Interior's Third Annual Report of Operations Under the Boulder Canyon Project Adjustment Act (1945), table facing p. 30. Total anticipated revenues from firm energy sales are $229,359,882 (column 7), of which Metropolitan is obligated to pay about 35% (see contracts cited note 5 *supra*), or about $80,000,000. Anticipated revenues of $7,569,220 (column 9) from charges for stored water are all derived from Metropolitan. Thus Metropolitan's scheduled share of the $251,000,000 cost of Hoover Dam (column 10) is about $88 million.

politan over a 50-year period are expected to provide about $8,000,000 for stored water and about $80,000,000 for power to be used to pump that water. These revenues amount to over a third of those relied upon by the Secretary to meet the revenue requirements of the act. Only Metropolitan and the State of Nevada, of all water contractors, have been required to pay for the use of stored waters; in contrast, not a dime has been paid by Arizona or any Arizona user for stored water.[8]

The Master may or may not be right in saying that some section 5 water delivery contracts, notably Arizona's, "are not contracts in the ordinary sense" and that the "Secretary is bound by those terms, as are the contractees, not because of the legal chemistry of offer, acceptance and consideration, but because they are part of the statutory scheme provided for in the Boulder Canyon Project Act" (Rep. 207). But the Master is demonstrably wrong as to Metropolitan Water District's contract. The Metropolitan water contract and its concomitant power contract were made under section 4(b) as well as section 5, and the two are certainly contracts in the ordinary sense, containing all of the elements of offer, acceptance, and consideration—$88 million of it (as demonstrated in the preceding paragraph).

In reliance on that contract, Metropolitan Water District has spent approximately $400 million of its own

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[8]Calif. Ex. 2718 in part in evidence and in part for iden. (Tr. 17,234-35); U.S. Dep't of Interior, Bureau of Reclamation, Determination of Energy Rates Effective June 1, 1960, schedule 1.

money to build the Colorado River Aqueduct Project.[1] In addition, San Diego County Water Authority, as of November 30, 1956, had expended about $43,300,000 for the San Diego Aqueduct, and its unpaid obligation to the United States therefor was about $56,770,000. In 1960, the third barrel of the San Diego Aqueduct was completed at a cost of $55,000,000, of which Metropolitan will pay $20,000,000 and the Authority will pay $35,000,000.[1a] Further, Metropolitan Water District contributed over $7,000,000 to the United States for the construction of Parker Dam[2] to impound Havasu Lake as a diversion point. One of the proposed Central Arizona Project routes would make similar use without cost of the lake thus created.

The interpretations of the Project Act and Compact relied upon by Metropolitan in making these investments under its Government contracts were substantially the same interpretations as were then asserted by Arizona—and asserted as the reason why Arizona rejected the Compact and sought to enjoin construction of the dam whose benefits are now awarded her and taken from Metropolitan Water District.[3]

Congress has enacted at least four important pieces of legislation implementing Metropolitan's Colorado River Aqueduct Project and clearly must have been

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[1]See 22 MWD ANN. REP. (1960), table 6, at 11, "Grand Total $212,356,138"; table 14, at 27, grand total $172,842,930; *id.*, estimated cost of the northerly 36.3 miles of First San Diego Aqueduct (2 barrels) $15,479,449. These items total $400,678,517.

[1a]See appendix, pp. A33 and A34.

[2]See Metropolitan Finding MWD:114, p. MWD-26; Calif. Ex. 477 (Tr. 9,395), at 4.

[3]Calif. Exs. 1340 (Tr. 11,548), at 2-4; 1342 (Tr. 11,553); and 2042 (Tr. 12,375).

aware that the district's water contracts were the foundation of that project.[4] They have also been called to this Court's attention in Arizona's prior suits here.[5]

It would come with particular irony if Metropolitan Water District, the integrity of whose obligation assures repayment of a third of the Government's investment in Hoover Dam, should see its aqueduct rendered useless in order to provide Arizona with water—water which would not be available at all if Hoover Dam did not exist, for an aqueduct in the state which did its utmost, in Congress and in this Court, to prevent construction of that same dam.

This result is not equitable. The principle involved need not be catalogued with nicety as estoppel, or preclusion, or timeliness, or by another name. Such labels are not important. *Cf. Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958).

Perhaps the best name for the principle invoked is just "fair play."

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[4]By the Act of June 18, 1932, 47 Stat. 324, Congress granted the district a right of way for the aqueduct across the public lands. Calif. Ex. 450 (Tr. 9,395). Section 2 of the Act of Aug. 30, 1935, 49 Stat. 1039, authorized the construction of Parker Dam and "validated and ratified . . . all contracts and agreements . . . executed in connection therewith." Calif. Ex. 472 (Tr. 9,395). The acts of April 15, 1948 (62 Stat. 171), Calif. Ex. 500 for iden. (Tr. 9,395), and Oct. 11, 1951 (65 Stat. 404), Calif. Ex. 502 (Tr. 9,395), authorized the first and second barrels of the San Diego Aqueduct.

[5]Arizona v. California, 298 U.S. 558, 564 (1936); United States v. Arizona, 295 U.S. 174, 181, 186-87 (1935); Arizona v. California, 283 U.S. 423, 450 (1931).

The principle is recognized by the Master, its application refused. The principle is that which the Master himself applies on the upper Gila (Rep. 326):

> "It is worthy of note that the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation. Indeed, the tendency has been to protect existing uses wherever possible. See *Washington v. Oregon,* 297 U.S. 517 (1936); *Kansas v. Colorado,* 206 U.S. 46 (1907)."

A fortiori, this salutary rule should apply where, as here, the use which would be destroyed is that of a long-established and senior use vis-a-vis Arizona's "paper filing," her 1944 water contract.[6]

No decree of this or any other court has ever worked such destruction. We believe this very fact is a compelling reason to believe there is legal error in the decision which would produce it. Even the Master conceded from the bench during argument in New York City in 1960 the relevance of water supply in this sense:

> "I suppose it is true that if a particular determination would lead to a genuine disaster, I suppose we would agree that that would be a good reason for reexamining it to see whether perhaps we did fumble somewheres en route and perhaps the Court ought to so fashion its decree so that disaster should be avoided." (Tr. 22,976.)
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> ". . . .

[6]Rep. 307-08. The Master ascribes to the Project Act the intent to reject all priorities of "paper filings." The term is appropriate to describe Arizona's 1944 contract, but not the water rights of projects in existence or under construction which had become the foundation of a going economy.

"I naturally am very deeply concerned about any set of facts or arguments which suggest the possibility that the spigots on the Metropolitan Aqueduct will have to be turned shut, and if I believed any such thing I would have strained every legal document to try to prevent that because I adhere to the notion that it is true that some of the authors you quoted the other day—that such projects should not be turned off because some interesting legal conception is valid and it has some property significance along the lines you argued this morning.

"I have not heretofore persuaded myself that such was the fact. Nothing I have heard suggests that such is the fact and nothing persuades me that such is likely to be the fact within the unforeseeable future, not to say foreseeable future." (Tr. 23,-092-93.)[7]

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[7]Plate 10 *infra* shows graphically the flow at Lee Ferry required to fulfill the Master's assurance that his formula will not occasion shortage to Metropolitan. Shortly stated:

1. A Lee Ferry flow of at least 11.174 million acre-feet is needed to furnish Metropolitan a full supply. Losses below Lee Ferry included in this calculation are the lowest projected in the evidence, in association with reservoir capacity existing and authorized.

2. A Lee Ferry virgin flow of 13.724 million acre-feet is needed to furnish Metropolitan a full supply and to sustain only the 2.55 million acre-feet of upper basin depletions which will exist by 1963. This is *greater* than the average virgin flow for the period 1930-1956, which was only 13.085 million. Calif. Exs. 2202, 2202A (Tr. 11,713A).

3. A Lee Ferry virgin flow of 15.015 million acre-feet is needed to furnish Metropolitan a full supply and to sustain only the 3.841 million acre-feet of upper basin depletions which will exist by 1970. This is only 165,000 acre-feet less than the average annual virgin flow for the whole period of flow in evidence at the trial, 1896-1956. (*Id.*)

4. A Lee Ferry virgin flow of 18.67 million acre-feet is needed to furnish Metropolitan a full supply and to sustain

In the New York City argument he also declared his certainty that "neither in my lifetime, nor in your lifetime, nor the lifetime of your children and great-grandchildren will there be an inadequate supply of water" for the Metropolitan Aqueduct "or its contemplated expansion." (Tr. 23,084.) Under the formula devised by the Master, realization of that prophecy requires 8,824,000 acre-feet per annum[8] of consumptive use from the "mainstream" (ignoring California Indian uses), and a flow of substantially more than 11,000,000 acre-feet at Lee Ferry to include satisfaction of the Mexican Treaty burden and unavoidable evaporation and transit losses.[9] (See appendix, pp. A44-46.)

The Master now modifies this assurance, saying that consumptive use of 7,667,770 acre-feet per year[10] from

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depletions in the amount of the upper basin's full apportionment of 7.5 million acre-feet. This is impossible. It is nearly a million acre-feet in excess of the virgin flow for the *wettest* period of record, 1909-1929. (*Id.*)

[8]For Metropolitan Water District to receive a full supply of 1,212,000 acre-feet, junior as this district is to 3,850,000 acre-feet of senior priorities, California would have to receive 5,062,000 acre-feet. As this is 662,000 in excess of 4.4 million, the Master's formula would accord Arizona and Nevada 662,000 acre-feet in excess of 3.1 million, or 3,762,000.

[9]*Supra* p. 273 note 7.

[10]The Master's figure of 7,667,770 acre-feet should be 7,872,784 acre-feet. He tabulates California's existing uses at 4,483,885 acre-feet per annum. (Rep. 128.) Footnote 73, on the cited page, reveals that in 1957 Metropolitan Water District's uses had increased by more than 100,000 acre-feet, making the proper total 4,586,392 acre-feet. The computation of the "mainstream" consumptive use required to provide 4,586,392 acre-feet for California under the Master's formula is derived by working the formula backward:

Three states		California		Arizona		Nevada
7,500,000	(44/75)	4,400,000	(28/75)	2,800,000	(3/75)	300,000
372,784	(1/2)	186,392	(1/2)	186,392		0
Total 7,872,784		4,586,392		2,986,392		300,000

what he calls the "mainstream" would satisfy all of California's "existing uses," approximately 4.6 million acre-feet per annum in 1957, under his formula. (Rep. 104.) This would curtail Metropolitan Water District to about two thirds of what it is now using; the event will not wait upon the arrival of our great-grandchildren.

The Report says (Rep. 102):

> "[California] contends that application of the apportionment formula recommended in this Report to this supply of water would *seriously curtail existing uses of mainstream water in California and might eliminate all diversions by the Metropolitan Water District,* which serves Los Angeles and other cities on the Southern California coastal plain.
>
> *"While legally irrelevant, such a result, if at all probable, would arouse the greatest apprehension.* However, the record in this case gives no indication that the 'chaotic disaster' which California fears will, or is likely to, materialize. *Her dire predictions appear to be unfounded."* (Emphasis added.)

The last sentence contradicts everything the Master states about justiciability (Rep. 129-35), and in the same breath, the Master rejects all scientific evidence and refuses to receive any evidence at all on the anticipated rate of depletion in the upper basin, which together are the bases of what are not only "dire predictions," but inescapable certainties.[1]

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[1]See table 6 *infra.*

In these circumstances, disagreement as to the rate of expansion of upstream depletion is immaterial. If the Master's decree is adopted, only the date of the Colorado River Aqueduct's extinction is uncertain.

This problem is not capable of solution, as the Master suggests it may be, by hopes for changes in "supply conditions" (*i.e.*, more rain?) or for advances in "conservation or even production of water" (Rep. 114). If such risks are to be taken, let them be borne by the new project which asserts such hopes. As an alternative, the Master suggests in a footnote (Rep. 103 n.25) that a substantial reduction can be made in the amount of water needed to satisfy existing California uses, such as by reducing the runoff to the Salton Sea. This question was vigorously litigated for several weeks. Arizona did not even submit proposed findings on the subject, possibly because it developed that (1) the runoff to the Salton Sea is essential to prevent accumulation of salts in Imperial Valley lands,[2] (2) the farm efficiency (*i.e.*, the ratio of the quantity of water consumed by crops to the quantity diverted) of Imperial Irrigation District is among the highest of all reclamation projects in the lower basin,[3] (3) the farm efficiency which Arizona would require of Imperial is 75 per cent, whereas the Central Arizona Project would yield only 52 per cent.[4] It is surprising to find the issue revived (it was not mentioned in the Master's draft report nor in any comments on it), and so casually disposed of,

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[2]See summary in Calif. Finding 4C:106, pp. IV-21 and IV-22, particularly note 5.

[3]Calif. Exs. 5106-5109 (Tr. 20,768-69); Calif. Ex. 5110 for iden. (Tr. 20,769); Calif. Exs. 5111-5113 for iden. (Tr. 20,774); Calif. Finding 4C:106, pp. IV-21 through 24.

[4]Calif. Ex. 3047 (Tr. 19,860).

via a footnote, to California's disadvantage. If water is to be saved by improved efficiencies, let it first be done on the Arizona "mainstream" projects (Rep. 127). The diversion per acre is higher than it is for Imperial Irrigation District,[14] and the Master is unable to ascertain any figure for return flow from those Arizona projects which will enable him to compute their consumptive use (Rep. 126-27).

VII. CALIFORNIA DOES NOT ASK THAT UNUSED UPPER BASIN WATER WASTE TO THE SEA, BUT THAT THE RISK OF ITS ULTIMATE WITHDRAWAL FALL UPON THE PROJECTS HEREAFTER CONSTRUCTED TO USE IT

California does not ask that any water be required to run to the Gulf of California unused. Rather, we ask that the priorities of the three existing projects in California, and of all existing and authorized projects in Arizona and Nevada, be recognized in the dependable supply, and that the risk of ultimate loss of the water supply in excess of that which is permanently dependable, that is to say, the excess which the lower basin may use only until the upper basin uses its Compact apportionment, be borne by projects which may be authorized in the future. By this we mean, primarily, the proposed Central Arizona Project. If the water supply is as abundant as the Special Master seems to believe, this presents no hazard to that proposed project. If he is wrong, the hazard should not fall upon the projects long since built and the going economy which they sustain.

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[14]Calif. Ex. 5106 (Tr. 20,768).

The Master obviously is not persuaded that we are correct about the realities of the water supply. There has been a failure of communication on a subject which is at the heart of the controversy. We believe that this case should not be decided until the Court has had the benefit of the best and most precise information available as to how its decree will affect 7,000,000 people who now depend on Colorado River water from projects, the newest of which has been in operation 20 years. To that end, we suggest to this Court the course of action we proposed by motion to the Master:[5] That the Court appoint, or cause to be appointed, its own experts to examine and report expeditiously on the permanent water supply available from the main stream in the Colorado River basin. Our motion to the Special Master for that purpose is incorporated in the appendix at page A39. We now renew that motion before the Court.

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[5]See Calif. Comments, Suggestions, and Motions re Draft Report, submitted June 10, 1960, pp. 62-63.

PART SIX

MISCELLANEOUS MATTERS

1. *The Colorado River Indian Reservation Boundary*

Because of the theory that he adopts as to the measure of water rights for Indian reservations, with which we disagree, (*infra* pp. 283-84), the Special Master finds it necessary to determine the location of a disputed portion of the western boundary of the Colorado River Indian Reservation, located in Arizona and California on the main stream of the Colorado River below Lake Mead. (Rep. 255-57, 274-78.)

The Master's characterization of the boundary dispute as "minor" (Rep. 6 n. 12) accurately describes its posture in this water rights controversy. It is, however, definitely of the first magnitude if it is in any way to be a binding adjudication of land titles or political jurisdiction. Indeed, it is a major lawsuit in itself, involving substantial private and sovereign interests.[1]

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[1]The dispute involves some 2,280 acres of rich agricultural land located within the service area of the Palo Verde Irrigation District. The lands are presently assessed by the district pursuant to California law, some of them since 1927, and are irrigated through the district's facilities and those of the present non-Indian occupants and claimants of the land. See Calif. Finding 18D:113, p. XVIII-38. A major point of controversy centers on alleged avulsive changes in the course of the Colorado River in the reach of the river where it forms the boundary between Arizona and California. Similar difficult issues on other rivers have occupied the attention of this Court in a number of major interstate boundary disputes. See, *e.g.*, Kansas v. Missouri, 322 U.S. 213 (1944); Arkansas v. Tennessee, 246 U.S. 158 (1918); Indiana v. Kentucky, 136 U.S. 479 (1890).

The Master states his reasons for adjudicating the magnitude and priorities of the federal claims for "mainstream" Indian reservations as follows:

> "Since the Secretary cannot know how to operate Hoover Dam and the mainstream works below unless the controversy between the United States and the States of Arizona and California is resolved, since failure to adjudicate it will leave non-Indian users in doubt as to the water available for their use, and since this controversy has been properly presented in this case, it is appropriate to adjudicate it here." (Rep. 256-57.)

California contends that it is unnecessary to make a determination of the Colorado River Indian Reservation boundary dispute in order to achieve the stated objectives, and that an unqualified determination[2] of this dispute will unfairly prejudice the rights of the present non-Indian occupants of the disputed area who are not before the Court. Postponing determination of the boundary dispute does not materially affect the priority of the water right to which the lands are entitled. Palo Verde Irrigation District has the senior priority under the Seven-Party Agreement among the California defendants (Rep. app. 425), and the Master awards the disputed area an Indian priority dating from 1876 (Rep. 273). Consequently, since the disputed lands

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[2]If the Court decides that a determination of the magnitude and priority of the Indian water rights for the disputed area will be useful, the determination could be made expressly contingent on the United States subsequently establishing title to the disputed lands in appropriate proceedings. The Master makes such a conditional determination in his treatment of certain lands involved in the Fort Mohave Indian Reservation boundary dispute. (Finding 14, Rep. 281-82; conclusion 6, Rep. 283.) A similar ruling on the Colorado River Indian Reservation dispute would be even more appropriate.

hold one of the earliest priorities on the river, regardless of the location of the boundary, neither the Secretary nor non-Indian users can be uncertain as to the rank of priority to which the lands are entitled.[3]

The Special Master asserts that his findings will be binding on the parties, but that "in the hearings and in this Report, [he] did not inquire into or determine the right of any occupant, whoever he might be, to the possession of lands within the questioned areas" (Rep. 278). We interpret this statement as indicating that the Special Master does not purport to adjudicate land titles in the disputed areas, in accordance with his unequivocal assurances to this effect during the hearings.[4]

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[3]For example, the Report awards substantial quantities of water to the United States for the Lake Mead recreational area (Rep. 295) and the Havasu Lake and Imperial wildlife refuges which lie along the river boundary between states (Rep. 298-300). It does not, however, specify exactly how much of each of these areas lies in each state, even though these federal uses are to be charged against the allocation of the state where they are made (Rep. 312-13). Apparently, the Master does not consider that this unresolved matter will create uncertainty for either the Secretary or water users.

[4]On the Fort Mohave Indian Reservation boundary dispute, tried in conjunction with the dispute on the Colorado River Indian Reservation, the Master declared (Tr. 20,371): "It is not my function to pass on titles. It is only to determine how much water the Indian reservation is entitled to, and there is a margin of error there that you are entitled to pursue." Similarly, with reference to the Colorado River Indian Reservation dispute, the Master asserted that "manifestly we are not going to determine legal title to that [disputed area] in this lawsuit." (Tr. 20,289.)

The Special Master had previously taken note of California's objection that he had no jurisdiction to determine land titles and that California was representing its citizens as *parens patriae* solely with respect to water rights, not land titles. (Tr. 19,998-20,000.) With reference to the status of the party states as representatives of their water users, the Special Master has declined to adjudicate intrastate priorities of water users not actually before the Court. (See, *e.g.*, Rep. 218, 255, 256 n.4, 332.)

However, it is unfair to prejudice any of the parties in future litigation over land titles or political jurisdiction by approving findings on a tangential issue never pleaded by the United States,[5] and made relevant solely by virtue of the new ground broken by the Master in the field of Indian water rights. The United States should not be permitted, as an incident to its claims for water for the Indian reservations in the lower basin in this water rights litigation, to obtain an unqualified adjudication of jurisdiction and title to valuable lands. Consequently, if the Master's theory of the measure of Indian water rights is adopted, we ask that the Court include the following disclaimer in the decree as article VIII(D) (Rep. 360) to provide that it shall not affect:

> "(D) Any right, claim, or interest in land, or jurisdiction with respect to land, by any person, natural, corporate, or political, whether or not a party to this cause."

As to the merits of the Master's interpretation of the Executive Order of May 15, 1876 (Rep. 270-71), we agree that it established a boundary which changes as the course of the Colorado River changes, but disagree that it fixed the west bank of the Colorado River, rather than the center of the river, as the western boundary of the reservation. The lands comprising the west half of the bed of the navigable Colorado River were not part of the public domain subject to reservation in 1876, since title had previously vested in California on its admission as a state in 1850. See *United States v. Arizona,* 295 U.S. 174, 183 (1935); *United States v. Utah,* 283 U.S. 64 (1931).

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[5]See Calif. Finding 18D:119, p. XVIII-45.

Consequently, it is unreasonable to construe the order as purporting to reserve lands which were not in federal ownership. If the order is construed as making the center of the river the boundary, the withdrawal is reasonably confined to the federal lands comprising the east half of the bed of the river (then part of the Arizona territory), and the objective of providing a water boundary for that part of the reservation in Arizona[6] is just as fully achieved. In any event, it is clear that the order could not affect the title of the State of California to the west half of the bed of the Colorado River. See *Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981 (1914), *rev'd on other grounds*, 243 U.S. 415 (1917).

Secondly, as to the Master's conclusion that the so-called Olive Lake and Ninth Avenue cutoffs effected avulsive changes in the course of the Colorado River in those areas (Rep. 273, 278), we think it clearly erroneous. The meager evidence adduced by the United States upon which the Master bases his conclusion[7] falls far short of satisfying the difficult burden of proof on a party alleging an avulsion in a water boundary.[8]

2. *Federal Rights for Indian Reservations and Other Federal Lands*

We emphatically disagree with the Special Master's determinations with respect to (1) the basis upon which water rights for Indian reservations and other federal lands in the lower basin are predicated, (2) the

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[6]See Rep. 270, Finding 4.

[7]Rep. 271-72. Compare Calif. Findings 18D:122-25, pp. XVIII-48 through 51.

[8]See Calif. Conclusion 18D:208, p. XVIII-52, and cases cited.

quantities impliedly reserved for those reservations, and (3) the priorities accorded to them.

We recognize that the United States may, in setting aside public lands for Indian reservations, similarly reserve waters upon those public lands, either expressly or by implication, for the reasonable future needs of the Indians who are to inhabit those reservations. The United States did not expressly reserve water for the "mainstream" reservations involved in this dispute. Our disagreement is with the Master's findings of *implied* reservations (Rep. 259-60) in the face of substantial evidence to the contrary, and (assuming water was impliedly reserved) his determination that the reasonable needs of the Indians are measured by the irrigable acreage on each reservation (Rep. 262).[9]

However, since the quantities of water for such reservations in California are relatively small, and because none of the parties seem to have excepted to the Special Master's decision that all federal uses in Arizona and Nevada are chargeable to those states out of water from which California uses are excluded by the limitation on California (Rep. 247), we do not brief these questions.

3. *The Inappropriateness of Injunctive Relief*

Except for the controversy between Arizona and New Mexico over Gila River system waters, this suit is declaratory in nature. Therefore, the Special Master errs in casting the provisions of Articles II and III of his

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[9]See our comments on the Special Master's draft report pp. 45-53 (June 10, 1960). We briefed the question of Indian water rigths before the Special Master. See Calif. Opening Brief, vol. 1, pp. 188-95, April 1, 1959; Calif. Response to U.S. Opening Brief, pp. 112-27, June 11, 1959.

recommended decree concerning the "mainstream", in terms of injunctive relief against any party.

There can be no wrongful conduct by the California defendants inasmuch as the United States, under the Master's decree, controls the Colorado River from Lake Mead to the international boundary. Projects to divert Colorado River water for use in Arizona and Nevada will be constructed by the United States or under its authority, on or across federal lands. The California defendants could not interfere with such construction. Water to supply those projects will be delivered by the Secretary of the Interior who alone can effectively prevent any interference with such deliveries by any California defendant.[1]

Finally, no party has expressed any intention to violate any provision of the decree which may be entered by this Court. The California defendants expressly declare that they will not knowingly violate any provision of the decree of this Court.

In *Wyoming v. Colorado,* 298 U.S. 573 (1936), this Court refused to grant injunctive relief under circumstances which might otherwise justify issuance of an injunction in a suit among nonsovereign litigants. This Court held that certain diversions in Colorado "contravene the decree" which had been entered in an

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[1]Arizona also excepts to the injunctive provisions in articles III(B), (C), and (D) of the recommended decree (Rep. 353-54). Arizona argues that these provisions attempt to transfer to the State of Arizona the duties imposed upon the Secretary of the Interior by the Project Act and his water delivery contracts. Arizona also argues that her authority to prevent interference with the diversions, and uses referred to, is in serious doubt. See Ariz. Motion for Adoption, With Exceptions, of the Master's Report, Exception 35, p. 23. These reasons are equally applicable to the California defendants, and we therefore join in Ariz. Exception 35 for the reasons therein stated.

earlier decision (259 U.S. 496 (1922)) and "infringe Wyoming's rights under it." (298 U.S. at 579.) The Court then stated (*ibid*):

> "They [the unlawful diversions in Colorado] were being practiced when the present suit was begun and for a time thereafter, but when the motion to dismiss was overruled they were discontinued pending further action by us. Counsel for Colorado now assure us in their brief that the State does not propose to permit a resumption of these diversions if we hold, as we now do, that they contravene the decree. Because of this assurance, which we accept, there is no present need for granting an injunction in respect of these diversions."

Since injunctive relief was not given in the circumstances described above in *Wyoming v. Colorado, a fortiori,* no injunctive relief should be granted in *Arizona v. California* concerning lower basin waters other than the Gila River system.

Finally, article III of the recommended decree runs not only against the State of California but also against the defendant agencies in this state, unfairly subjecting those agencies to an injunction which does not apply to their counterparts in Arizona and Nevada. There is no basis for such inequitable discrimination.[2] If

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[2]During the trial of this cause, Arizona was able to secure information from the California defendant agencies by discovery procedures and to put such information in evidence without difficulty because these agencies had been joined as parties by Arizona when she brought this suit. (*E.g.*, Order Requiring Imperial Irrigation District to Permit Inspection and Copying or Photographing Records, entered May 17, 1957.) However, California had no effective means of securing information from similar agencies in Arizona which were not parties to this suit.

injunctive relief is to be granted against California by this Court's decree, it should run only against the State of California, not its public agencies.

4. *The Retention of Jurisdiction for Future "Mainstream"—"Tributary" Controversies*

The Special Master holds that the doctrine of equitable apportionment still controls the rights of "mainstream" users against users in other states of waters from lower basin "tributaries" including users from the main Colorado River between Lee Ferry and Lake Mead (Rep. 316-18.) "California," assures the Master, "will be able to protect herself against undue depletions on tributaries and the mainstream above Lake Mead by compact, or, if the necessity arises, by suit." (Rep. 247.)

The Special Master provides in article IX of his recommended decree that (Rep. 360):

> "IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

In any lower basin suit involving the waters controlled by Hoover Dam, the United States is an indispensable party. *Arizona v. California,* 298 U.S. 558 (1936). The present suit is possible only because the

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Furthermore, it was more difficult for California to lay a sufficient foundation for admission of this material into evidence. (*E.g.,* Tr. 3,108-09, 3,424-31; Calif. Ex. 18 for iden. (Tr. 3,428).) This inequity ought not to be perpetuated by this decree.

United States voluntarily intervened. (See Rep. 2 n. 5a.)

The Master holds that no justiciable interstate controversy presently exists between "mainstream" users and "tributary" users. (Rep. 318-21.) However, he does not specifically provide in article IX of his recommended decree that jurisdiction is retained to adjudicate such controversies if, as, and when they become justiciable.

California should not be placed at the mercy of the decision of the United States to intervene or not to intervene if a new suit should be necessary by California against Arizona. For example, the main Colorado River above Lake Mead within the lower basin includes alternative points of diversion (Rep. 227-28) for the Central Arizona Project, which, Arizona alleged, was the precipitating cause of this litigation (Ariz. Bill of Complaint, par. XX; Rep. 30-31, 130-31). This stretch of the river, however, is outside the terms of the recommended decree (Recommended Decree, art. I(B) and (F); art. VIII(B)) and is left to adjudication in future litigation (Rep. 247, 316-21).

If the Master's truncation of the river system is sustained, we suggest that the decree expressly declare what was probably intended by the language of article IX of the recommended decree, by adding the following language: "including, but not limited to, any interstate proceeding to adjudicate the right of states diverting from the 'mainstream' as against states diverting from the main Colorado River between Lee Ferry and Lake Mead and from all lower basin tributaries."

5. *The Inclusion of Underground Water Uses*

Article I(A) of the Master's recommended decree (Rep. 345) provides that for the purposes of the decree:

> "(A) 'Consumptive use' means diversions from the *stream* less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation." (Emphasis added.)

The apportionments made by the recommended decree are in terms of consumptive use (*e.g.*, Rep. 347-50, Decree art. II(B)).

The term "stream" in article I(A) of the recommended decree is too limiting a concept to effectuate the evident purpose.

In dealing with New Mexico uses from the Gila River system, the Report and the recommended decree recognize the relationship between surface water and underground water.[3] This same relationship applies to the main stream.[4] There are projects located along the "mainstream" which presently pump and consume substantial quantities of ground water interconnected with the "mainstream" water.[5] Certainly all water taken and consumed, whether extracted from above or below the ground, should be charged against whatever rights the state in which such water is consumed may have under the decree.

In order to avoid any ambiguity, therefore, we suggest inclusion of the following parenthetical phrase af-

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[3]Rep. 338, findings 12-14; Rep. 354-58, art. IV.

[4]See, *e.g.*, Tr. 11,859-64 (Marliave), Tr. 19,170-72 (Turner), for a description of the interconnection of the surface flow of the Colorado River and underground water in the Yuma, Arizona, area.

[5]See, *e.g.*, Tr. 2,209, 2,382 (Steenbergen); Ariz. Exs. 76 (Tr. 318), table 2, and 79 (Tr. 327), at 6, re ground water pumping in the South Gila Valley.

ter the word "stream" in article I(A): "(including all related underground water)".[6]

6. *Holders of Natural Flow Rights Are Entitled to Water Delivery Contracts*

Article II(C)(1) of the recommended decree requires the Secretary to respect state law in the release of water. It does not, however, require the Secretary to issue a contract to holders of natural flow rights pre-existing the enactment of the Project Act.

We hope, of course, to persuade the Court that the applicable law is contained in the ruling by the Secretary of the Interior in 1930 which was the law relied on when the contracts were written:

> "Those possessed of prior rights to the unregulated flow of the river will be privileged to continue the enjoyment of those rights without interference by storage in the Boulder Canyon reservoir." (Calif. Ex. 351, Tr. 9,929.)

There are riparian rights in California, inconsequential in amount, but which may be senior to the appropriative rights recognized in the existing California water delivery contracts. As minimum protection for water users who have relied on the Secretary's decision construing section 5 of the Project Act as applicable only to stored water, the Secretary should be required to issue contracts to the holders of such rights. Such contracts would in no way increase any state's apportionment.

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[6] A similar suggestion was made by Nevada. See Nev. Comments on Draft Report, p. 18; transcript of decree conference, Aug. 19, 1960, pp. 11-12.

Accordingly, article II(B)(7)(Rep. 349) should be amended by the addition of the following two sentences:

"The Secretary of the Interior shall issue a contract to any water user in any state, certified by the official or agency in that state responsible for administration of water rights, to have a water right which entitles the water user to use water, which certification shall include all data specified in Article VI. The contract shall entitle the contractee to use water to the extent available under the state's apportionment in accordance with the priority date and quantity of the right certified."

CONCLUSION

The decree which California seeks is fair and equitable, and conforms to every limitation which California has agreed to. That decree would confirm California's existing rights to the annual consumptive use of 4,400,000 acre-feet from the first 7,500,000 acre-feet of annual consumptive use from the Colorado River main stream and tributaries in the lower basin. It would recognize California's rights in one half of excess or surplus annually available over and above that first 7,500,000 acre-feet. It would recognize interstate priorities and principles of equitable apportionment in apportioning the burden of any shortages within the first 7,500,000 acre-feet. It would fully protect all existing main stream projects in Arizona and Nevada, to the full extent of their ultimate development. Only California projects would receive less than their full requirements.

If the Master's optimism about the quantities of water to be available is justified, such a decree would permit expansion of lower basin uses by construction of new projects in Arizona and Nevada. We do not oppose any such projects, if the risk of miscalculation of the water supply rests (as it does in every state of the arid West) on the new ventures, rather than on the existing projects built on the basis of decisions not now reversible and by investments not now recoverable.

For these reasons the California defendants believe and urge that their exceptions which they have jointly made to the Report of the Special Master should be approved by this Court, and that the decree to be entered in this case should be in conformity with those exceptions and the views presented in this brief.

May 22, 1961.

Respectfully submitted,

[Signatures follow on next page.]

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APPENDIX

Description and Development of the California Projects

Motion To Reopen the Trial for the Taking of Evidence re Depletion of the Colorado River at Lee Ferry by the Upper Basin

and

Statement in Support of Motion Submitted by the California Defendants to the Special Master, August 31, 1960

Tables 1-6

Plates 1-11

DESCRIPTION AND DEVELOPMENT OF THE CALIFORNIA PROJECTS

The Master's Report fails to describe adequately the three California projects which depend upon Colorado River water. Those three projects are:

(1) The Palo Verde Irrigation District (described at Rep. 58-60).

(2) The All-American Canal Project (described at Rep. 36-38) which serves the Yuma Project (Reservation Division) in California (described at Rep. 60-61), the Imperial Irrigation District (described at Rep. 53-55), and the Coachella Valley County Water District (described at Rep. 55-58).

(3) The Metropolitan Water District of Southern California, whose Colorado River Aqueduct serves the cities and districts in the southern California coastal basin (described at Rep. 61-71).

The following description of the California projects and their development demonstrates that these projects have been before Congress continuously from 40 to 75 years and have grown with the full knowledge and, indeed, with the assistance of Congress.

1. The Seven-Party Agreement

On August 18, 1931, pursuant to a request from the

Secretary of the Interior,[1] the defendants, other than the State of California, executed an agreement referred to as the "Seven-Party Agreement," fixing the relative rights and priorities of those defendants in the water available for use in California under the Colorado River Compact and the California Limitation Act.[2] The Division of Water Resources of this state recommended this agreement to the Secretary which was promulgated in general regulations.[3] Article I of the Seven-Party Agreement is incorporated *in haec verba* in every water delivery contract executed with these defendant agencies.[4] That agreement provides in effect the following rights and priorities:

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[1]Calif. Ex. 1810 (Tr. 12,244).

[2]Ariz. Ex. 27 (Tr. 242).

[3]Calif. Ex. 1811 (Tr. 12,244).

[4]*E.g.*, Palo Verde contract art. 6 (Rep. app. 424-29).

Priority No.[5]	Agency and description	Annual quantity in acre-feet (beneficial consumptive use)
1	Palo Verde Irrigation District—104,500 acres in and adjoining existing district	
2	Yuma Project (California division)—not exceeding 25,000 acres.....[6]	
3	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal.....	3,850,000
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa....	
4	Metropolitan Water District and/or City of Los Angeles.....	550,000
5	(a) Metropolitan Water District and/or City of Los Angeles.....	550,000
	(b) City and/or County of San Diego	112,000
6	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal.....	300,000
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa....	
		5,362,000
7	Agricultural use in the Colorado River Basin in California, as designated in Map 23000, U.S. Bureau of Reclamation	All remaining water available for use in California

[5]Priority No. 1 is served by Palo Verde Irrigation District; Nos. 2, 3, 6, and 7 by the All-American Canal; and Nos. 4 and 5 by Metropolitan Water District, in which the Los Angeles and San Diego rights have been consolidated.

[6]No contract has ever been executed with any district within this project pursuant to this agreement. See plate 3 *infra*.

2. Palo Verde Irrigation District, California[7]

Existing project

Palo Verde Irrigation District is located on the west bank of the Colorado River, about 212 miles below Hoover Dam.[1] The diversion works, irrigation distribution system, and protective works of the district consist of the Palo Verde Diversion Dam, 280 miles of canals, 120 miles of drains, 34 miles of levees, and an estimated 450 miles of private ditches.[2] The district contains within its boundaries about 121,000 acres. There are presently more than 72,000 net acres of land in cultivation in the valley proper and approximately 2,000 acres farmed on the lower mesa.[3]

Historical background, development, and water rights

The earliest reported settlement was in 1856 by Thomas H. Blythe who, in the early 1870's, acquired approximately 40,000 acres of "swamp and overflow" land.[4]

The first appropriation of water was made by Blythe who, in 1877, posted and filed for 190,000 miner's inches, or 3,800 c.f.s., to irrigate a projected service area of 186,000 acres in the valley and on the lower mesa.[5] From 1877 to 1883, Blythe constructed a gravity diversion intake (at the site of the present diversion dam) and also constructed 3½ miles of main canals.[6]

During the period from 1877 to 1925, additional no-

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[7]For detailed description of this project and its development, see Calif. Findings and Conclusions, vol. 3.

[1]Calif. Ex. 319 (Tr. 8,550).

[2]Tr. 8,709-10, 8,750 (Tabor).

[3]Tr. 8,549, 8,715 (Tabor); Calif. Ex. 319 (Tr. 8,550); Tr. 20,725 (Shipley).

[4]See Ariz. Ex. 45 (Tr. 254), p. 56.

[5]Tr. 8,720-21 (Tabor); Calif. Ex. 327 (Tr. 8,574).

[6]*Supra* note 4; Tr. 8,674 (Seeley); Calif. Ex. 330 (Tr. 8,579).

tices of appropriation were posted and recorded by Blythe and his associates and successors in interest. The largest was for 300,000 miner's inches (or 6,000 cubic feet per second); another claim was to serve a maximum gross service area of 285,000 acres.[7]

From 1908 to 1925, canals of sufficient capacity to serve approximately all of the lands in the valley proper were constructed.[8] In 1925, the system consisted of the "Blythe Intake," approximately 181 miles of canals, and 34 miles of levees.[9] In addition, the landowners had constructed approximately 185 miles of private canals.[1]

In 1925, the Palo Verde Irrigation District acquired the system, including the intake structure, canals, drains, spillways, levees, rights of way, and all rights existing under the appropriations made by Blythe and his successors in interest.[2]

Within areas in the Palo Verde Irrigation District,[3] 116 patents have been issued for lands entered and patented under the Desert Land Act.[4] These patents were issued on the basis of an express determination, required by the Desert Land Act,[5] of a valid appropriative

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[7]See Calif. Ex. 67 (Tr. 8,611); Tr. 8,721 (Tabor).

[8]Tr. 8,673-74, 8,684 (Seeley); see Ariz. Ex. 45, *supra* note 4, at 57-58.

[9]See Ariz. Ex. 45, *supra* note 4, at 57.

[1]Calif. Ex. 365 (Tr. 8,774).

[2]Calif. Ex. 67 (Tr. 8,611); Tr. 8,598, 8,603; Calif. Ex. 344 (Tr. 8,603); Calif. Ex. 345 (Tr. 8,604).

[3]Described in Calif. Ex. 4091 (Tr. 22,223), as shown on map, Calif. Ex. 319 (Tr. 8,550).

[4]Tr. 22,230 (Keil). Desert Land Act § 1, 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1958) (text in Calif. Ex. 4000 for iden. (Tr. 20,857) at I-2).

[5]Validity of Desert Land Applications and Entries in Arizona Dependent on Percolating Water for Reclamation, 62 I.D. 49 (1955), text in Calif. Ex. 4000 for iden. (Tr. 20,857), item III-A; Ruby E. Huffman, 64 I.D. 57 (1957), text in Calif. Ex. 4000 for iden., item III-C.

right in Colorac River system water acquired pursuant to state law.[6] The district (and its predecessors) has been expressly approved by the General Land Office as the source of water supply for desert land entries.[7]

On February 7, 1933, the district entered into a water delivery contract with the Secretary of the Interior for the delivery of water at or near the "Blythe Intake" for the beneficial consumptive use of waters of the Colorado River on the 120,500 acres of the district's service area,[8] in accord with the Seven-Party Agreement (*supra* p. A3). In 1938, the district filed an application with the State of California to appropriate water of the Colorado River in the quantities set forth in the Seven-Party Water Agreement; the application was filed to supplement Palo Verde's then existing rights and without waiving such rights or claims thereto.[9] Thereafter a permit was issued.[10]

Diversion dam

In 1955, a new diversion dam contract was signed between the United States and the district,[1] and the structure was built. This new diversion dam is of sufficient capacity to divert water for the irrigation of the 120,500 acres in the service area of the Palo Verde Irrigation District.[2]

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[6]*E.g.*, Calif. Exs. 4041, 4042, 4043, 4044 (Tr. 20,917), which are illustrative patents and proof files for entries made in the district.

[7]Calif. Ex. 4055 (Tr. 20,929).

[8]Ariz. Ex. 33 (Tr. 249).

[9]Calif. Ex. 346 (Tr. 8,606), at 7.

[10]*Id.* at 13-16.

[1]Calif. Ex. 361 (Tr. 8,749).

[2]*Ibid.*; Tr. 8,707 (Tabor).

Investment

From 1908 to 1955, the estimated overall cost of construction of project works was in excess of $31,000,000.[3]

Water requirements

For its full development permitted under the Seven-Party Agreement, Palo Verde Irrigation District would reasonably require beneficial consumptive use of approximately 420,000 acre-feet per annum of Colorado River waters for irrigation, domestic, and incidental uses on a net irrigable area of 105,000 acres in the State of California.[4] Maximum historic consumptive use in evidence

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[3]Calif. Exs. 361 (Tr. 8,749) and 365 (Tr. 8,774); Tr. 8,773 (Tabor).

[4]The quantity of 420,000 acre-feet per annum is calculated as follows: The Seven-Party Agreement (Ariz. Ex. 27, Tr. 242) accords Palo Verde Irrigation District a first priority for 104,500 acres (gross) in Palo Verde Valley, equivalent to a net irrigable area of 89,000 acres. Tr. 8,772 (Tabor). The reasonable consumptive use rate of 4.0 acre-feet per net irrigated acre is calculated as the average annual rate for the last five years of record, 1951-1955, obtained from Calif. Ex. 356 (Tr. 8,729) by dividing the total consumptive use (including incidental uses) by the net cultivated acreage. The first priority would thus require 356,000 acre-feet. The Seven-Party Agreement also accords Palo Verde Irrigation District a share in the third and sixth priorities for 16,000 acres (net) on the Palo Verde Mesa on a parity with Imperial Irrigation District and Coachella Valley County Water District. At the same consumptive use rate of 4.0 acre-feet per net irrigated acre, this priority would require 64,000 acre-feet.

was 296,000 acre-feet for approximately 74,000 acres in 1957.[5]

3. The All-American Canal Project

Districts served

The All-American Canal diverts at Imperial Dam, 303 miles below Hoover Dam and 22 miles above the upper Mexican boundary.[1] It transports water into the Imperial Valley for the Imperial Irrigation District and into Coachella Valley for the Coachella Valley County Water District.[2] Water is delivered en route to the Reservation Division of the Yuma Reclamation Project in California, the Valley Division of the Yuma Reclamation Project in Arizona, and to Mexico.[3]

The fertile lands within the Salton basin and the Reservation Division are completely dependent upon irrigation, the area being one of the hottest, most arid regions in the United States.[4] Supplied with water, however, the valley lands produce large quantities of varied crops on

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[5]Total beneficial consumptive use during the year 1955 of 284,320 acre-feet as shown on Calif. Ex. 356, note 4 *supra*, divided by the net cultivated acreage during that year of 70,338 acres (*ibid.*) results in a rate of approximately 4.0 acre-feet. The maximum acreage irrigated was 74,000 acres. Tr. 8,772 (Tabor). This acreage is multiplied by the calculated rate of 4.0 because 1955 is the most recent year for which evidence of beneficial consumptive use within Palo Verde Irrigation District was presented.

[1]Ariz. Ex. 1000 (Tr. 211), p. 22; Calif. Ex. 213 (Tr. 7,788).

[2]Calif. Ex. 214 (Tr. 7,792). For a more detailed description of these projects and their development, see Calif. Findings and Conclusions, vol. 3.

[3]See Ariz. Ex. 1000, note 1 *supra;* Tr. 8,817-18 (Steenbergen); Calif. Ex. 50 (Tr. 6,898); Ariz. Ex. 109 (Tr. 409); Tr. 7,852 (Dowd); Calif. Ex. 233 (Tr. 7,848).

[4]Tr. 6,472, 6,475 (Dowd); Calif. Ex. 49 (Tr. 7,259); Calif. Ex. 247 (Tr. 8,009-10).

a year around basis,[5] and are among the most productive agricultural lands in the United States, in terms of value of production per acre.[6] Imperial Valley is the nation's principal source of a number of winter vegetables,[7] and Coachella Valley is the nation's principal producer of several high value specialty crops.[8]

Historical background

The bringing of water from the Colorado River to irrigate the valley lands was first proposed in the 1850's,[9] and the approval of such a project was given by an act passed by the California Legislature in 1859.[1] Development of Imperial Valley commenced with surveys and plans started in 1892 by the Colorado River Irrigation Company to divert water from the Colorado River at a point which was later the site of Laguna Dam.[2] It followed in general the present route of the All-American Canal except for a portion entering Mexico in order to skirt sand dunes.[3] Congress in 1893 granted a right of way to the company for the canal across lands adjacent to the river in the Yuma Indian Reservation on condition that the company serve lands within the reservation.[4]

The canal route actually chosen headed on the river at Hanlon, a short distance above the international boundary in California, below the confluence of the Gila River and below the point of any diversion for the Yuma

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[5]Tr. 632 (Akin); Calif. Ex. 266 (Tr. 8,086-87).
[6]Calif. Ex. 265 (Tr. 8,086-87), Calif. Ex. 249 (Tr. 8,019).
[7]Calif. Ex. 250 (Tr. 8,019-20). See note 5 *supra*.
[8]Tr. 8,473-78 (Weeks); Calif. Ex. 317 (Tr. 8,475-76).
[9]Tr. 6,508-09 (Dowd).
[1]Calif. Ex. 51 (Tr. 7,096).
[2]Calif. Ex. 58 (Tr. 6,585), p. 13; Tr. 6,896 (Dowd).
[3]Tr. 6,900, 6,919 (Dowd).
[4]Calif. Ex. 60 (Tr. 6,598, 7,107).

Indian Reservation.[5] The canal as constructed (Alamo Canal) traversed Mexican territory for some 55 miles and then reentered the United States, utilizing for much of the distance an old overflow channel of the Colorado River (the Alamo).[6] This canal and its extensions continued in service until 1942.[7]

Appropriations

Formal appropriations of water under the laws of California for irrigation and power development, each of which was in the amount of 10,000 cubic feet per second of the flow of the Colorado River, were made by the predecessors of Imperial Irrigation District in the period 1893-1899 and succeeding years.[8] These appropriations were subsequently supplemented by permits issued by the State of California to the Imperial and Coachella districts.[9] The area described in these appropriations is that now within the service area of the All-American Canal.

Desert Land Act Patents in Imperial

Within the Imperial Unit of Imperial Irrigation District[1] 2,467 patents have been issued for lands entered and patented under the Desert Land Act.[2] These pat-

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[5]Tr. 6,915-18 (Dowd).

[6]Tr. 6,988-89 (Dowd); Calif. Ex. 121 (Tr. 7,004); Ariz. Ex. 45 (Tr. 254); Calif. Ex. 185 (Tr. 7,647).

[7]Tr. 6,915, 6,918 (Dowd).

[8]Calif. Ex. 66A (Tr. 7,877).

[9]Calif. Ex. 106 (Tr. 7,175).

[1]Described in Calif. Ex. 4092 (Tr. 22,223) as shown on map, Calif. Ex. 212 (Tr. 7,783).

[2]Tr. 22,249 (Keil). Desert Land Act § 1, 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1958) (text in Calif. Ex. 4000 for iden. (Tr. 20,857) at I-2).

ents were issued on the basis of an express determination as required by the Desert Land Act,[3] of a valid appropriative right in Colorado River system water acquired pursuant to state law.[4] Imperial Irrigation District, as well as its predecessors, has been expressly approved by the General Land Office as the source of water supply for desert land entries.[5] The published decisions of the Department of the Interior have approved desert land entries within the boundaries of the district.[6]

Diversions for Imperial Valley

Irrigation commenced in Imperial Valley in June 1901,[7] and has been maintained continuously since that date.[8] The original wooden headgate was replaced in 1906 by a permanent headgate, Hanlon Heading, with a capacity of 10,000 cubic feet per second.[9]

The Corps of Engineers informed the California Development Company predecessor of Imperial Irrigation District, in 1903 that the War Department would not interfere with its operations,[1] and beginning in 1910 is-

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[3]See *supra* p. A5 note 5.

[4]Calif. Exs. 4011 and 4012 (Tr. 20,884), 4013 and 4014 (Tr. 20,888), 4015 and 4016 (Tr. 20,888), and 4017 and 4018 (Tr. 20,889), which are illustrative patents and proof files for entries made in the district.

[5]Calif. Ex. 4022 (Tr. 20,895).

[6]Herbert C. Oakley, 34 L.D. 383 (1906); Theodore A. Iasigi, 39 L.D. 285 (1910); Virgil Patterson, 40 L.D. 264 (1911); Margaret T. White, 42 L.D. 569 (1913); Hart v. Cox, 42 L.D. 592 (1913), *rev'd on other grounds*, Cox v. Hart, 260 U.S. 427 (1922); Christopher C. Gingery, 45 L.D. 50 (1916); Margaret S. Whitman (on rehearing), 45 L.D. 599 (1917); Charles Edmund Bemis, 48 L.D. 605 (1922); Hazel, Assignee of Patterson, 53 I.D. 644 (1932); George B. Willoughby, 60 I.D. 363 (1949); Bill Fults, 61 I.D. 437 (1954).

[7]Tr. 7,312-15 (Dowd).

[8]Tr. 6,918, 7,202 (Dowd).

[9]Tr. 7,200-02, 7,229 (Dowd).

[1]Tr. 7,366-67 (Mr. Horton); Calif. Ex. 143 (Tr. 7,381).

sued permits under section 10 of the Rivers and Harbors Act of 1899[1a] authorizing the construction of temporary weirs across the Colorado River for the diversion of waters into the valley.[2]

During this same period, there were several federal investigations of the use of Colorado River water to irrigate this area. From 1901-1903, a joint investigation and report was made by the Department of State, the Attorney General of the United States, the Department of the Interior, the International Boundary Commission, and the Army Engineers of the War Department.[3] It was concluded that diversions for Imperial Valley did not interfere with navigation on the river,[4] and the consulting engineer for the United States Geological Survey, Department of the Interior, reported that it would be a "public calamity" to interfere with this development whereby "1,000,000 acres or more of land may be redeemed by this river by irrigation."[5] The United

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[1a]30 Stat. 1121, 33 U.S.C. § 403 (1958).

[2]Calif. Ex. 157 (Tr. 7,476).

[3]Calif. Ex. 141 (Tr. 7,364).

[4]*Id.* at 72-73. After reviewing the physical conditions on the river, the report concludes in part (p. 73): "It seems to me a matter of great doubt, in view of these facts, whether under such circumstances, a court could be induced to restrain this company in its operations, unless it was in the interest of some governmental navigation, which might require extraordinary means to an unusual end or unless some serious effort should be made in navigation by parties able and earnest and having real traffic to be handled. . . .

". . . . The Imperial Company has, in part, accomplished, and is expected ultimately to complete, the reclamation of several hundred thousand acres of land, as before stated. It will therefore become a question of policy with the Government whether it should strive to withhold the water altogether or acquiesce by inaction in this company's operations so long as the same are reasonable and not practically injurious to the use of the river for general purposes or inimical to Federal Control."

[5]*Id.* at 41, 56-57, 58.

States Reclamation Service had also conducted investigations, summarized in its 1904-1905 report.[6]

Congress also acted to protect the valley. In 1907, President Roosevelt sent a message to Congress on the subject,[7] as did President Taft in 1910[8] and 1912.[9] Funds were appropriated in 1910 to aid in the work to control the river.[10]

Diversions for Reservation Division

In 1904, Congress authorized the Secretary of the Interior to reclaim lands within the Yuma Indian Reservation "in like manner as though the same were a part of the public domain."[1] In 1905, acting under the Reclamation Act, the federal government made an appropriation of Colorado River waters pursuant to California law for the project and began construction of Laguna

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[6]Calif. Ex. 140 (Tr. 7,330).

[7]Calif. Ex. 147 (Tr. 7,408).

[8]Calif. Ex. 150 (Tr. 7,428).

[9]Calif. Ex. 152 (Tr. 7,439).

[10]Calif. Ex. 151 (Tr. 7,432). See Tr. 7,003-04 (Dowd). See also Tr. 7,007 (Dowd).

[1]U.S. Ex. 1103 for iden. (§ 25 of the Act of April 21, 1904, 33 Stat. 224, Tr. 13,738). Ten years earlier, Congress had ratified an agreement between the United States and the Yuma Indians whereby the Indians relinquished to the United States all their rights, title, claim, and interest in the original Yuma Indian Reservation, created by an executive order of January 8, 1884 (U.S. Ex. 1101, Tr. 13,737), in return for the right of each of the Indians to select five-acre allotments. With respect to lands not so allotted, the Secretary of the Interior was directed to sell at public auction those which were irrigable, while those lands not susceptible of irrigation were to revert to the public domain. (U.S. Ex. 1102 for iden., § 17 of the Act of Aug. 15, 1894, 28 Stat. 332, Tr. 13,737.) The 1904 legislation reserved and allotted five acres of irrigable land for each Indian belonging to the reservation, the remaining irrigable lands directed to be disposed of to settlers under the provisions of the Reclamation Act.

Dam as a diversion structure.[2] Water was delivered to the Reservation Division from Laguna Dam starting in 1910 and continuously thereafter until completion of Imperial Dam and the All-American Canal.[3]

The 1905 flood

In 1905, river floods broke into the Alamo Canal in Mexico and the entire flow of the Colorado River for a period of approximately two years ran from Lower California into Imperial Valley, threatening the whole valley with destruction, inundating a substantial part of the reclaimed lands, filling the lowest portion of Salton Sink, and creating what is now known as the Salton Sea.[4] The break was successfully repaired in 1907 by a series of man-made dikes and levees.[5] In 1910, Congress appropriated $1,000,000 for the construction of levees to protect the valley.[6]

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[2]On May 10, 1904, the Secretary of the Interior had authorized the Reservation Division as part of the Yuma Project and the construction of Laguna Dam. Ariz. Ex. 164 (Tr. 2,237). On July 8, 1905, J. B. Lippincott, acting for the United States under the provisions of the Reclamation Act of June 17, 1902, posted a notice of appropriation of 6,000 cubic feet per second of the unappropriated waters of the Colorado River at the California side of the proposed Laguna Dam site, the water to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon the lands of the Yuma Valley adjacent to the Colorado River, below the point of diversion situated in San Diego County, California, Calif. Exs. 386 (Tr. 9,949) and 13 (Tr. 7,391). Work on Laguna Dam was begun on July 19, 1905. Tr. 8,833 (Steenbergen).

[3]Approximately 600 acres were irrigated in the vicinity of Bard in 1910 and about 2,500 acres cleared for cultivation. Tr. 8,834 (Steenbergen); Calif. Ex. 374 (Tr. 8,838), p. 3. The irrigated acreage on the project increased regularly, reaching a high of 12,729 acres in 1926, and thereafter fluctuating annually. Calif. Exs. 375 (Tr. 8,841) and 372 (Tr. 8,835), maps 5-8.

[4]Tr. 7,396-404 (Dowd); Calif. Ex. 148 (Tr. 7,415).

[5]Tr. 7,397 (Dowd); Ariz. Ex. 45 (Tr. 254), p. 8.

[6]Calif. Ex. 151 (Tr. 7,432).

Organization of Imperial Irrigation District

The defendant Imperial Irrigation District, a public agency of the State of California, organized in 1911,[7] succeeded in 1916 to all of the water rights and other property above mentioned.[8] It is now one of the world's largest irrigation districts.

All-American Canal Board

In 1918, the district entered into a contract with the Secretary of the Interior providing for surveys and plans for an all-American canal to Imperial Valley, to divert at Laguna Dam (the "Potholes"), as proposed by the 1893 plans and surveys,[1] and surveys by the United States Reclamation Service in 1904[2] and by the Imperial Irrigation District in 1913.[3] The Secretary appointed a Board of Engineers which made a favorable report, July 22, 1919.[4] The plans and route proposed were substantially the same as those of the present All-American Canal to Imperial and Coachella valleys,[5] except for the All-American's higher point of diversion at Imperial Dam.

Laguna Dam contract

On October 23, 1918, the district acquired by contract with the United States the right to utilize Laguna Dam as a diversion dam, and agreed to construct an all-

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[7]Tr. 7,474 (Dowd).

[8]Calif. Ex. 158 (CALIF. STATS. 1915, ch. 172, authorizing Imperial Irrigation District to acquire irrigation system of California Development Co., Tr. 7,483); Tr. 7,485 (Dowd).

[1]Calif. Ex. 184 (Tr. 7,641).

[2]Calif. Ex. 140 (Tr. 7,330).

[3]Calif. Ex. 155 (Tr. 7,460).

[4]See Calif. Ex. 185 (Tr. 7,647).

[5]Tr. 7,641-43 (Dowd).

American canal from that point into Imperial Valley.[6] For the right to use the Laguna Dam, this district agreed to pay, and has paid the United States—including a small portion later paid by Coachella Valley County Water District and San Diego—the sum of $1,600,000.[7]

Kinkaid Act and "Fall-Davis Report"

In 1920, Congress enacted the "Kinkaid Act" (Act of May 18, 1920, 41 Stat. 600), providing for an investigation by the Secretary of the Interior of lower Colorado River problems.[8] The Secretary submitted a report, "Problems of Imperial Valley and Vicinity," known as the "Fall-Davis Report," to Congress in February 1922.[9] This report recommended that the United States construct a high storage dam, at or near Boulder Canyon on the lower Colorado River, and an all-American canal from Laguna Dam to the Imperial Valley.[10]

Works in existence at date of Boulder Canyon Project Act

As of June 25, 1929 (prior to construction of the All-American Canal), diversion works and a main canal had been constructed with a capacity adequate for the irrigation of 745,000 net irrigable acres of land in Imperial Valley.[1] As of 1932 there were 600,000 acres under canal.[2] The long term natural flow of the Colorado River above the mouth of the Gila River was sufficient to reasonably satisfy the district's diversion requirements

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[6]See note 1 *supra.*

[7]See note 1 *supra,* at 5; Tr. 7,641 (Dowd).

[8]Sp. M. Ex. 4 for iden. (Tr. 255), p. A7.

[9]See Ariz. Ex. 45 (Tr. 254), S. Doc. No. 142, 67th Cong., 2d Sess. (1922).

[10]*Id.* at 10, 21.

[1]Calif. Ex. 285 (Tr. 8,220); Tr. 8,219-20 (Dowd); see Ariz. Ex. 34 (Tr. 249), p. 83.

[2]Tr. 7,564 (Dowd).

to the extent of 4,000,000 acre-feet per annum without regulation by a storage dam.[3] Constructed canals and laterals in the Reservation Division as of 1929 were capable of supporting 15,700 gross acres.[4]

Imperial repayment contract: 1932 and 1952

On December 1, 1932, Imperial Irrigation District and the United States entered into a contract,[5] under provisions of the Boulder Canyon Project Act, for the construction by the Bureau of Reclamation of the All-American Canal, including a new diversion dam, Imperial Dam, located a few miles upstream from Laguna Dam, providing operation and maintenance of these works by the district, and repayment of the cost thereof to the United States; and for delivery of water to the district from Imperial Dam. The contract also provides that Imperial Irrigation District include within its boundaries certain designated lands in the mesa areas of Imperial Valley so that Government and private lands

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[3]Calif. Ex. 291 (Tr. 8,263).

[4]Tr. 8,838-39 (Steenbergen). Construction of Laguna Dam, the original diversion facility for the Reservation Division, was begun on July 19, 1905, and was completed March 20, 1909. The work on the Yuma Main Canal from Laguna Dam was initiated in 1909 and was completed in 1912. Tr. 2,257-58 (Steenbergen); Calif. Ex. 374 (Tr. 8,838), pp. 16-22. Work was commenced on the division's distribution system in the fall of 1909, and by 1910 it was completed to a point known as Indian Heading, in the vicinity of Bard. Tr. 8,833-34 (Steenbergen). Construction continued regularly on the entire distribution system until the end of 1915, when it was substantially complete. Tr. 8,835-37 (Steenbergen); Calif. Exs. 372 (Tr. 8,835), maps 1-4; and 374 (Tr. 8,838), pp. 12-24, 27, 32, 37-38.

By 1929, there were approximately 84 miles of canals and laterals on the division, 13½ miles of drains, and 17 miles of levees. Tr. 8,838-39 (Steenbergen). The present distribution system is substantially the same as that existing in 1929, except that some of the canals and levees have been relocated and about 10 additional miles of drains have been constructed. Tr. 8,839-40 (Steenbergen).

[5]See Ariz. Ex. 34, note 1 *supra*.

there located would be served by the canal as contemplated by the district's appropriative rights.[6] Capacity to serve these lands was built into the canal and the district obligated to pay the cost thereof.[7] On March 4, 1952, the district entered into a contract supplementing that of December 1, 1932.[8]

Coachella and San Diego repayment contracts

Defendants City of San Diego and Coachella Valley County Water District (organized as a public agency of the State of California in 1918) entered into contracts in 1933[9] and 1934,[1] respectively, with the United States for capacity in, and repayment based on capacities of, a proportionate part of the cost of the canal and dam and for delivery of water at Imperial Dam.

Construction of the All-American Canal

Construction of the All-American Canal commenced in 1934, and construction of Imperial Dam began in 1936. Water was first delivered through the All-American Canal to defendant Imperial Irrigation District, October 1940.[2] All of the district's water supply has been received through the All-American Canal since February 14, 1942.[3] Up to that time, headworks of Imperial Irri-

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[6]*Id.* at 83, 84.

[7]*Id.* at 67-68.

[8]Ariz. Ex. 37 (Tr. 250).

[9]See Ariz. Ex. 40 (Tr. 252).

[1]See Ariz. Ex. 36 (Tr. 250).

[2]Tr. 7,776 (Dowd); Sp. M. Ex. 4 for iden. (Tr. 255), p. 124.

[3]Tr. 7,783-84 (Dowd).

gation District were located *below* the confluence of the Gila River with the Colorado, and Imperial diverted Gila River water for use in California when it was available.[4] Water was first delivered through the All-American Canal to Coachella Valley County Water District in 1947.[5] San Diego has never received service therefrom, but receives its water through the Colorado River Aqueduct.[1]

Areas

The areas which could be irrigated from the All-American Canal are greatly in excess of the areas for which water will be available under the Seven-Party Agreement.[2]

Cost

The cost of the All-American Canal, including Imperial Dam, for which the defendants Imperial Irrigation District and Coachella Valley County Water District are obligated to the United States, under repayment contracts, is $38,500,000.[3] This is borne by them, in general, in proportion to the capacities of the sections of the works serving them.[4] In addition, the defendant Coachella Valley County Water District is obligated to the United States in the additional amount of not to exceed $13,500,000, the cost of its distribution system and other

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[4]Rep. 54-55; Calif. Exs. 121 (Tr. 7,004) and 119 (Tr. 6,980). See *supra* p. 97 note 1.

[5]Tr. 7,788-89 (Dowd).

[1]Tr. 9,700-04 (Beermann).

[2]See *infra* pp. A23-24.

[3]See Ariz. Ex. 34 (Tr. 249), p. 68.

[4]See Ariz. Ex. 36 (Tr. 250), pp. 166-68.

works.[5] San Diego's share of the cost is about $500,000.[6] Capacity for the Yuma Project is charged to the Imperial and Coachella districts, per the terms of the 1932 contract.

Since 1934, Congress has repeatedly appropriated money for the construction of Imperial Dam, the All-American Canal, and the distribution system.[7]

Total investments

The total investment of Imperial Irrigation District, and its municipalities, in works dependent upon the waters of the Colorado River system (including that district's obligations with respect to the All-American Canal) is not less than $62,000,000.[8] These works include more than 1,800 miles of main canals and laterals,[9] nearly 1,400 miles of drainage canals in Imperial Valley,[1] some 130 miles of main canals, and 75 miles of protective river levees in Mexico. In addition, the district has invested $50,000,000 in its power system.[2] The investment of Coachella Valley County Water District incurred in firm contract obligations, totals approximately $27,000,000.[3] The total investment of the United States, the district, its predecessors, and landowners, in all its

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[5]Calif. Ex. 311 (Tr. 8,419).

[6]Tr. 9,702 (Beermann).

[7]Over the period 1934-1956, those appropriations totaled $67,815,276. See BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, APPROPRIATION ACTS AND ALLOTMENTS 210, 242-44 (1957).

[8]Tr. 7,838, 7,850 (Dowd).

[9]Tr. 8,035 (Dowd).

[1]Tr. 7,915 (Dowd).

[2]Tr. 7,034-35, 7,838, 8,034 (Dowd).

[3]Tr. 8,480 (Weeks).

works, is not less than $80,000,000. As of 1956, both Indian and non-Indian water users[4] on the Reservation Division had paid to the Bureau of Reclamation an accumulated total of $920,000, leaving only $62,000 remaining to be paid on the original repayment obligation to the United States.[5]

Value of agricultural production

The value of the agricultural production of the lands within Imperial Irrigation District amounted to $136,000,000 in 1952, and to about $29,000,000 within the

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[4]The Bard Irrigation District represents the non-Indian lands in the division. The district has no contract with the Secretary, has no legal powers over project operations, and acts solely as an advisory group to the Bureau of Reclamation, although a contract has been proposed between the Secretary of the Interior and the district to transfer the operation and maintenance of all works in the division to the district. Tr. 8,859-60 (Steenbergen); Calif. Ex. 385 for iden. (Tr. 8,860). The Bureau of Indian Affairs supervises Indian lands in the division. Both Indian and non-Indian lands receive equal treatment in the delivery of water. Tr. 8,819-20A (Steenbergen).

[5]Tr. 8,858-59 (Steenbergen); Calif. Exs. 383 for iden. (Tr. 8,858) and 384 for iden. (Tr. 8,858).

The non-Indian section of the Reservation Division was opened to settlement in January 1910, by a public notice, issued pursuant to the Reclamation Act of 1902, which authorized the acceptance of homestead entries and water right applications. Tr. 8,850 (Steenbergen); Calif. Ex. 377 (Tr. 8,847). The Bureau of Reclamation has approved numerous "water right applications" for lands in the non-Indian section of the project, which in effect establish a water delivery agreement between the individual water users and the United States (Tr. 8,851-54 (Steenbergen)); Calif. Exs. 378-380 (Tr. 8,852), although there is no common water delivery agreement between the water users and the Secretary of the Interior, as is the case with other California water user organizations. When the obligation to repay the apportioned construction cost of the federal diversion and distribution facilities has been satisfied, the water user receives a certificate of full payment and release of lien. Calif. Ex. 382 (Tr. 8,856). Repayment obligations for the Indian lands are handled by the Bureau of Indian Affairs. Tr. 8,820 (Steenbergen).

Coachella Valley County Water District.[6] The total economy of both areas, as well as that within the Reservation Division, is dependent upon the water supply from the Colorado River system through the All-American Canal. All of the cities and towns in Imperial Valley are dependent upon the All-American Canal for their water supply.[7]

Water requirements

a. Yuma Project, Reservation Division, California

For its full development, the Yuma Project, Reservation Division, California, reasonably requires the beneficial consumptive use of approximately 70,500 acre-feet per annum of waters of the Colorado River for irrigation, domestic, and incidental uses on a net irrigable area of 20,100 acres in the State of California.[1] Maximum

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[6]See Calif. Exs. 265 (Tr. 8,086-87) and 317 (Tr. 8,475-76), table 5.

[7]Tr. 6,476 (Dowd).

[1]The quantity of 70,500 acre-feet is calculated as follows: The gross acreage is 28,000 (Tr. 8,824 (Steenbergen)), reduced by the Seven-Party Agreement (Ariz. Ex. 27 (Tr. 242)) to 25,000. Of this, the irrigable area constitutes 20,110 acres (rounded to 20,100), consisting of 14,610 acres under distribution system in the Reservation Division (Tr. 8,824 (Steenbergen)), plus 5,500 acres in the west end of the reservation and in the so-called "island area" (Tr. 8,826 (Steenbergen)), jurisdiction over which is in dispute between Arizona and California, which can be served by the extension of the present distribution system. Tr. 8,825-27 (Steenbergen). The reasonable consumptive use rate of 3.5 acre-feet per net irrigated acre is computed as the average annual rate for the most recent years of record, 1954-1956, obtained from Calif. Ex. 376 (table: Reservation Division, computed annual consumptive use, Tr. 8,842) by dividing the total consumptive use (including incidental uses) by the net cultivated acreage. The result, 3.53, is rounded to 3.5 This rate is multiplied by the net irrigable area of 20,100 acres to obtain the reasonable beneficial consumptive use requirement for the project of 70,500 acre-feet.

historic beneficial consumptive use in evidence was 44,-500 acre-feet in 1926 on approximately 12,700 acres.[2]

b. Imperial Irrigation District and Coachella Valley County Water District, California: Combined requirements

Imperial Irrigation District and Coachella Valley County Water District are cumulatively restricted by the first six priorities of the Seven-Party Agreement, which makes no allocation between them, to the beneficial consumptive use of 4,150,000 acre-feet per annum, minus the senior allocations therein made to Palo Verde Irrigation District and the Reservation Division of the Yuma Project (which are stated in that agreement in terms of acreage, not acre-feet). The effect of these deductions converted to acre-feet of water (*supra* pp. A7 and A22) is to leave a residue of 3,659,500 acre-feet

[2]Rate of beneficial consumptive use for 1929 (3.5 acre-feet) was taken from Calif. Ex. 376 (Tr. 8,842) by dividing total consumptive use by irrigated acreage, and this rate was applied to the acreage irrigated in 1926 (12,729 acres), the year of maximum acreage as shown in Calif. Ex. 375 (Tr. 8,841). No rate is in evidence for the year 1926, and 1929 is the nearest year to 1926 for which there is evidence of a rate.

per annum[3] for beneficial consumptive use by the Imperial Irrigation District and Coachella Valley County Water District for its full development permitted by the Seven-Party Agreement (300,000 acre-feet is junior under the Seven-Party Agreement to the priorities of The Metropolitan Water District of Southern California). The net irrigable area capable of irrigation by 3,659,500 acre-feet of beneficial consumptive use is 661,000 acres.[4] This area is less than the sum of the

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[3]The quantity of 3,659,500 acre-feet per annum is calculated as follows, pursuant to the Seven-Party Agreement (Ariz. Ex. 27 (Tr. 242)):

1.	Sum of first three priorities		3,850,000
	Less:		
	First priority, Palo Verde Irrigation District: 89,000 x 4.0 (Calif. Finding 4C:102)	356,000	
	Second priority, Reservation Division: 20,100 x 3.5 (Calif. Finding 4C:104)	70,500	
	Third priority, that portion for 16,000 acres on Palo Verde Mesa: 16,000 x 4.0 (Calif. Finding 4C:102)	64,000	
	Total deduction	490,500	
	Net, under third priority for Imperial and Coachella		3,359,500
2.	Sixth priority, Imperial and Coachella and the above 16,000 acres on Palo Verde Mesa		300,000
			3,659,500

Because the quantity of 3,659,500 acre-feet is a remainder after deducting the above requirements of Palo Verde Irrigation District and the Reservation Division of the Yuma Project, any adjustment in their allocations in the first and second priorities, up or down, inversely affects the quantity available for Imperial and Coachella. Palo Verde's portion of the third priority is not to be deducted in full, because the 16,000 acres there referred to is on equal priority with the acreage to be served in Imperial and Coachella; for simplification, it is tabulated here as a deduction from the supply available for Imperial and Coachella.

[4]See Calif. Finding 4C:106, p. IV-21, for calculation of net acreage.

net irrigable area in Imperial Irrigation District, 745,000 acres,[5] and Coachella Valley County Water District, 137,900 acres,[6] a total of 882,900 acres. The reduction to 661,000 acres reflects the operation of the first six priorities of the Seven-Party Agreement.

Maximum historic acreage, through 1955, irrigated by Imperial Irrigation District was 474,600 acres in 1955,[7] and by Coachella Valley County Water District was 49,400 acres in 1955.[8] Beneficial consumptive use of Colorado River water for those acreages, including domestic and other incidental uses, was 3,662,000 acre-feet in that year.[9]

4. The Metropolitan Water District of Southern California (Colorado River Aqueduct Project)

Description of the project

The Colorado River Aqueduct Project, financed and constructed by The Metropolitan Water District of Southern California (herein referred to as "MWD"), diverts from the main stream of the Colorado River above Parker Dam, 155 miles below Hoover Dam and 175 miles above the Mexican border. The main aqueduct transports water 242 miles westward, and there connects with a distribution system of approximately 304 miles (including the San Diego Aqueduct of approximately 71 miles), which serves the cities and other public bodies which are members of MWD.[1]

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[5]Calif. Ex. 285 (Tr. 8,220).
[6]Calif. Ex. 318 (Tr. 8,511), table 1.
[7]Calif. Ex. 275 (Tr. 8,210), item 96.
[8]Calif. Ex. 318, note 6 *supra*, table 2.
[9]3,662,000 is the sum of 3,642,000 shown in Calif. Ex. 275, note 7 *supra*, item 70, plus 20,000 shown in Calif. Ex. 279 (Tr. 8,186).
[1]Calif. Ex. 455 (Tr. 9,395), p. 2; Calif. Ex. 457 (Tr. 9,395), p. 17; Ariz. Ex. 1000 (Tr. 211), pp. 18, 20.

The major works of the main aqueduct, large scale construction of which began in 1931 and was completed in 1941, consist of transmission lines, pumping plants, tunnels, canals, covered conduits, inverted syphons, reservoirs, and related works with a designed capacity of 1,605 c.f.s. (cubic feet per second) and an actual capacity of 1,800 c.f.s. The main aqueduct is 242 miles long, including 92 miles of 16-foot tunnels, and 5 pumping plants capable of raising the water 1,617 feet over mountains intervening between the Colorado River and the coastal plain of southern California.[2]

The major works of the distribution system consist of 232 miles of pipeline, tunnels, reservoirs, and related works serving parts of MWD in Los Angeles, Orange, Riverside, and San Bernardino counties, and 71.1 miles of the San Diego Aqueduct (a branch of the Colorado River Aqueduct) serving the parts of MWD in San Diego County.[3] Construction of 150 miles of that part of the system serving Los Angeles and vicinity was completed in 1941, and the balance in 1952.[4] The construction authorized in 1952 to bring the aqueduct system to full capacity was completed in 1960.[5]

The San Diego Aqueduct consists of about 71 miles of conduits, tunnels, and incidental works. Construction of the first barrel of this aqueduct was completed in 1947 and the second barrel in 1954. A third barrel was under construction at the time of trial[6] and was completed in 1960.

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[2]Calif. Ex. 454 (Tr. 9,395); Tr. 9,534-57 (Elder); see Calif. Ex. 455, note 1 *supra*, pp. 2-7.

[3]Calif. Ex. 447 (Tr. 9,395); Tr. 9,495-500 (Elder); see Calif. Ex. 457, note 1 *supra*, pp. 2-5, 17-19.

[4]See Calif. Ex. 457, note 1 *supra*, pp. 3, 17-19.

[5]*Id.* at 24.

[6]*Id.* at 17-26; Calif. Ex. 523 (Tr. 9,395).

Investment

As of November 1956, the total investment by MWD in the Colorado River Aqueduct, including the northern portion of the San Diego Aqueduct and incidental works, was $323,126,531.[7] The completed project required a total investment of about $400,000,000.[8]

The aqueduct system is designed to meet the needs of the expanding population and industry of the coastal plain of southern California at the present rates of growth until about 1970.[9] Prudent practice in the planning and construction of large municipal water supply systems in areas with a history of rapid growth of population and industry requires that the capacity of such works and the firm water supply be sufficient to care for the needs of the population projected so as to avoid disastrous water shortages.[1]

Service area of MWD, population, and assessed valuation

MWD was organized in December 1928,[2] under the authority of the Metropolitan Water District Act.[3] At the time MWD commenced construction of the Colorado River Aqueduct (1931), its corporate area consisted of the area of 13 southern California cities, including 608 square miles;[4] a population of 2,031,000;[5] and as-

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[7]Calif. Ex. 481 (Tr. 9,395); Tr. 9,662-66 (McKinlay).

[8]See pp. 269-70 & note 1 *supra*.

[9]Tr. 9,590-94 (Elder); Tr. 9,833-34 (Morris); Calif. Ex. 527 (Tr. 9,395), tables and charts 1 (Tr. 9,784-92, Dunn), 2 (Tr. 9,793-95, Dunn), and 5 (Tr. 9,805-07, Dunn).

[1]Tr. 9,827-28 (Morris); Tr. 9,685-88 (Beermann).

[2]Tr. 9,501 (Elder).

[3]Calif. Ex. 445 (Tr. 9,395).

[4]Calif. Ex. 448 (Tr. 9,395); Tr. 9,500-02 (Elder); Calif. Ex. 446 (Tr. 9,395).

[5]Calif. Ex. 527 (Tr. 9,395), table 1, chart 1; Tr. 9,784-92 (Dunn).

sessed valuation of $2,431,684,250.[6] By 1956, the corporate area of MWD had increased through annexations to 2,900 square miles, located west of the coastal range, between Ventura County to the northwest and the Mexican border to the south.[7] As of November 1956, MWD had a population of 6,423,000,[8] and an assessed valuation of $9,674,000,560.[1] By June 30, 1960, the district's population had increased to 7,329,000, assessed valuation to $12,714,206,000, and corporate area to 3,393 square miles.[2]

Within the borders of MWD lie great centers of population, including the cities of Los Angeles, San Diego, Long Beach, and Pasadena, and large areas of unincorporated territory.[3] This is one of the major defense areas of the United States, with military, naval, and marine establishments, aircraft and missile companies, and many other vital industries too varied and numerous to tabulate.[4]

Historical development of the Colorado River Aqueduct project

In 1923, defendant City of Los Angeles surveyed routes and began the design for such an aqueduct,[5] and in 1924 appropriated water therefor, under the laws of California.[6] In 1926, the City of San Diego

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[6]*Id.* table 9, chart 9; Tr. 9,812-14 (Dunn).
[7]See note 4 *supra,* Calif. Ex. 447 (Tr. 9,395).
[8]See note 5 *supra.*
[1]Calif. Ex. 479 (Tr. 9,395); Tr. 9,658-61 (McKinlay).
[2]22 MWD ANN. REP, xiii, 5 (1960).
[3]Calif. Exs. 446 and 447 (Tr. 9,395).
[4]Tr. 9,496 (Elder); Calif. Ex. 516 (Tr. 9,708).
[5]Calif. Ex. 411 (Tr. 9,395); Tr. 9,450-67 (Parratt).
[6]Calif. Ex. 419 (Tr. 9,395); Calif. Ex. 419-A (Tr. 9,395).

made appropriations for the same purpose[7] and commenced the design of works.[8] A filing was made by MWD on August 14, 1929.[9] Permits, which in terms supplement MWD's contract rights, were issued by the State of California, dated January 6, 1950, and these permits relate back to the respective dates of applications.[1]

As of June 25, 1929, defendant City of Los Angeles had expended $1,657,822 83 in the design and preliminary construction of the Colorado River Aqueduct.[2] Total spent by the city has been $2,859,678.34. Such preliminary work was later taken over and paid for by MWD.[3] This plan to divert Colorado River water for use on the southern California coastal basin was a major purpose of the Boulder Canyon Project.[4]

Boulder Canyon Project contracts

On September 28, 1931, MWD entered into a contract[5] (amending an earlier contract of April 24, 1930)[6] with the United States, providing for the delivery from

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[7]Calif. Ex. 436 (Tr. 9,395); Calif. Ex. 437 (Tr. 9,395); Calif. Ex. 437-A (Tr. 9,395).

[8]Tr. 9,699-700 (Beermann).

[9]Calif. Ex. 426 (Tr. 9,395).

[1]Calif. Exs. 430, 435, 439 (Tr. 9,395).

[2]Calif. Ex. 413 (Tr. 9,395), line 33, aggregate of columns for years "1920-21" to "1928-29" inclusive, Tr. 9,470-73 (Twohy).

[3]*Id.* line 33, column entitled "Reimbursement Metropolitan Water District"; Tr. 9,470-73 (Twohy).

[4]*E.g.*, H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1, at 20-21 (1928); S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 24-25 (1928).

[5]Ariz. Ex. 39 (Tr. 252).

[6]Ariz. Ex. 38 (Tr. 252).

storage at Hoover Dam of water with the priority and quantity set out in items 4 and 5(a) of the Seven-Party Agreement (1,100,000 acre-feet per annum). (*Supra* p. A3.) On February 15, 1933, defendant City of San Diego entered into a contract with the United States, providing for the delivery from storage at Hoover Dam of water with the priority and quantity set out in item 5(b) of the Seven-Party Agreement (112,000 acre-feet per annum); in 1947, both appropriative and contractual rights of the City of San Diego were assigned to and are vested in MWD.[7]

For the purpose of pumping water into and in the Colorado River Aqueduct, as well as assuring to the United States revenues to repay the cost of the Hoover Dam and power plant, MWD also entered into a 50 year contract dated April 26, 1930,[8] to pay for (whether taken or not) 36 per cent of the firm electrical engery output of that project. The MWD water storage and delivery contract of April 24, 1930,[9] and the energy contract of April 26, 1930, were parts of the same transaction. The contract limits the use of this energy to pumping Colorado River water into and in the aqueduct.

Statute conveying right of way

A qualified fee in the public lands traversed by the Colorado River Aqueduct was granted to MWD by

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[7]Ariz. Exs. 40 (Tr. 252), 41, and 42 (Tr. 253).

[8]Calif. Ex. 415 (Tr. 9,395), text in Sp. M. Ex. 2 for iden. (HOOVER DAM, POWER AND WATER CONTRACTS (Tr. 212)), item 31, p. 323; Calif. Ex. 416 (Tr. 9,395), text in Sp. M. Ex. 2 for iden., *supra*, item 33, p. 351.

[9]See note 6 *supra*.

the United States, pursuant to the act of Congress dated June 18, 1932.[1]

Parker Dam

Parker Dam was built at the expense of MWD by the United States[2] under a contract dated February

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[1]Calif. Ex. 450 (Tr. 9,395).

In reporting on the bill authorizing the grant (Calif. Ex. 451, p. 3, Tr. 9,395), the Committee on Public Lands stated to the House of Representatives that:

"The district has entered into contracts with the Federal Government to purchase power for the purpose of pumping water and for the storage and delivery of water to be impounded in the Boulder Dam. Estimated yearly revenues to the United States from the metropolitan water district under the said contracts are as follows:

Annual obligation for 36 per cent of firm power	$2,488,000
Annual payment for water storage	275,000
Possible revenue from secondary power	500,000
Total	$3,263,000

"The purchase of power by the district is relied upon as a primary source of revenue to repay the Government the expenses of the Boulder Dam project. The bill, therefore, in helping the metropolitan water district also helps the United States Government."

(The figure of $275,000 "annual payment for water storage" is obviously arrived at by multiplying the 1,100,000 acre-feet of water, then under Metropolitan's contract, by 25¢, the agreed price.)

A letter from the Secretary of the Interior to the chairman of the committee is made a part of the report. (Calif. Ex. 451, pp. 3-4, Tr. 9,395.) The Secretary said, in part:

"For your information, the Metropolitan Water District of Southern California is the largest single contractor for Hoover Dam power. All of the electrical energy purchased must be utilized for pumping water into and in an aqueduct from the Colorado River to the coastal plain. This bill provides the necessary right of way for that aqueduct. Inasmuch as a large share of the financial burden of repaying the cost of Hoover Dam is borne by this district, I believe it to be in the interests of the United States to assist the district in the matter of its right of way."

[2]Calif. Ex. 477 (Tr. 9,395), p. 4; Calif. Ex. 483 (Tr. 9,395).

10, 1933,[3] ratified by the Act of August 30, 1935,[4] Parker Dam provides a point of diversion and produces electrical energy for pumping water agreed by the United States to be delivered to MWD from storage at Hoover Dam,[5] under the water delivery contracts referred to above.[6]

Boulder Canyon Project Adjustment Act

In 1940, the Congress adopted the Boulder Canyon Project Adjustment Act,[7] revising the rate structure for energy from Hoover Dam power plant and providing for amortization of the project by funds derived from the sale of electrical energy and from the storage and delivery of water. In the resultant regulations,[8] revenues to be derived from Metropolitan, both for storage and delivery of water and for electrical energy for pumping that water, were relied upon as contributing a substantial part (about one third) of the funds required to amortize the Boulder Project. Full delivery of water under the Metropolitan contract was assumed as was the use of the necessary energy for the pumping of that water.

Integrated plan

The water delivery contracts,[9] electrical energy con-

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[3]Calif. Ex. 459 (Tr. 9,395), text in Sp. M. Ex. 4 for iden. (HOOVER DAM DOCUMENTS, Tr. 255), p. A689.

[4]Calif. Ex. 472 (Tr. 9,395), text in Sp. M. Ex. 4 for iden., note 3 *supra*, p. A701.

[5]See Calif. Ex. 477, note 2 *supra*, pp. 2, 4, 5.

[6]See Ariz. Exs. 38 (Tr. 251) and 39 (Tr. 252).

[7]54 Stat. 774 (1940), 43 U.S.C. §§ 618-618*o* (1958) (text in Sp. M. Ex. 2 for iden. (Tr. 212), p. 33).

[8]General Regulations of May 20, 1941 (text in Sp. M. Ex. 2 for iden., p. 1127).

[9]*Supra* note 6.

tract,[1] and contract for the construction of Parker Dam,[2] all were parts of an integrated plan for the delivery, diversion, and pumping of water of the Colorado River for domestic and municipal use on the coastal plain of southern California, with the priority, and in the quantity set out in the Seven-Party Agreement.[3]

San Diego Aqueduct

The first barrel of the San Diego branch of the Colorado River Aqueduct was constructed by the Bureau of Reclamation for the Navy Department under an executive order dated November 29, 1944,[4] and ratified by the Act of April 15, 1948,[5] to meet a shortage of water in a critical defense area.[6] This construction was completed in 1947.[7]

A second barrel of the San Diego Aqueduct was authorized by the Act of October 11, 1951.[8] This construction was completed in 1954.[9]

Investment in San Diego Aqueduct

As of November 30, 1956, the San Diego County Water Authority, of which defendant City of San Diego is a part, had expended $43,308,849 for the San Diego Aqueduct, together with all other costs in con-

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[1]See Calif. Ex. 415, *supra* p. A30 note 8.

[2]See Calif. Ex. 459, *supra* p. A32 note 3.

[3]See Calif. Ex. 203 (S. REP. No. 592, 70th Cong., 1st Sess. (1928), Tr. 7,715), pp. 24, 25.

[4]Calif. Ex. 489 for iden. (S. Doc. No. 249, 78th Cong., 2d Sess. (1944), Tr. 9,395), pp. 2-3.

[5]Calif. Ex. 500 for iden. (Tr. 9,395), text in Sp. M. Ex. 4 for iden. (Tr. 255), p. A729.

[6]See note 4 *supra*.

[7]See Calif. Ex. 457 (Tr. 9,395), p. 26.

[8]Calif. Ex. 502 (65 Stat. 404, Tr. 9,395).

[9]*Supra* note 7.

nection therewith, to utilize Colorado River water.[1] As of November 30, 1956, the Authority's unpaid obligation to the United States for these costs (less that portion assumed by MWD) was $56,769,439.[2]

As of May 1, 1957, a third barrel of the San Diego Aqueduct (sometimes termed "Second San Diego Aqueduct")[3] was authorized by MWD and San Diego County Water Authority. The northerly portion, 43.5 miles, was financed, constructed, and operated by MWD; the southerly portion, 61.1 miles, was financed, constructed, and operated by the Authority. This construction was completed in 1960 at a cost of $55,000,000, of which MWD will pay $20,000,000 and the Authority will pay $35,000,000.[4]

Financing the project

The first development of the project to August 1, 1941, was financed by the issuance and sale of MWD bonds in the amount of $220,000,000, authorized in 1931, a large part of which initially were sold to the Reconstruction Finance Corporation, an agency of the United States, but were resold by the Reconstruction Finance Corporation, at a profit, to private investors.[5]

Water service

The area served by the Colorado River Aqueduct Project has sustained a phenomenal industrial growth.[6] Many important military installations and defense in-

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[1]Calif. Ex. 524 (Tr. 9,395); Tr. 9,773 (Royer).
[2]Calif. Ex. 525 (Tr. 9,395); Tr. 9,775 (Royer).
[3]Tr. 9,738-39, 9,746-47 (Holmgren)
[4]See Calif. Ex. 457 (Tr. 9,395), p. 19; Calif. Ex. 523 (Tr. 9,395), pp. 11-13.
[5]See Calif. Ex. 455 (Tr. 9,395), p. 2; Calif. Ex. 457, note 4 *supra*, p. 2; Tr. 9,658 (McKinlay).
[6]See Calif. Ex. 527 (Tr. 9,395), table 5, chart 5; Tr. 9,805-07 (Dunn).

dustries are located within MWD's service area.[7]

The climate of southern California is extremely arid. Local water supply is limited and variable,[8] and the area is dependent upon a supplemental supply from the Colorado River Aqueduct.[9]

Service of water through the Colorado River Aqueduct Project commenced in June 1941, and has continued since that date.[1] By the year 1970, all water appropriated and contracted for by MWD from the Colorado River (1,212,000 acre-feet per annum) will be required for beneficial use by MWD on the coastal plain of southern California.[2]

Water requirements

For its full development permitted under the Seven-Party Agreement, The Metropolitan Water District of Southern California reasonably will require the beneficial consumptive use of 1,212,000 acre-feet per annum[3] of water of the Colorado River for domestic, municipal, industrial, and incidental uses in southern California.[4] Maximum historic beneficial consumptive use in evidence was 584,000 acre-feet in 1957,[5] which has in-

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[7]Calif. Ex. 516 (Tr. 9,708).

[8]Tr. 9,406-09 (Morris).

[9]Tr. 9,519-21 (Elder); Tr. 9,830-34 (Morris).

[1]See Calif. Exs. 455 and 457 (Tr. 9,395); Tr. 9,535 (Elder).

[2]Tr. 9,829-34 (Morris).

[3]Calif. Ex. 478 (Tr. 9,395).

[4]Calif. Ex. 447 (Tr. 9,395).

[5]Tr. 19,968 (statement of MWD counsel), cited at Rep. 128 n.73.

creased to nearly 900,000 acre-feet in 1960.[6]

5. Miscellaneous Uses in California

In 1957, there were 4,700 acres of improved land along the Colorado River in California located outside any irrigation district or Indian reservation which were using water, but not under notices of appropriation or water delivery contracts;[1] these are riparian lands and may have riparian rights under California law. The occupants of these lands as of 1957 were effecting the beneficial consumptive use of approximately 8,000 acre-feet per annum of waters of the Colorado River system.[2]

There are a number of small towns in the Colorado River basin in California presently using waters of the Colorado River system. Most of them are within existing projects and are served as part of those projects. However, the city of Needles, located on the Colorado River, is not within any project and presently satisfies its requirements by ground water pumping. The city pumped 2,800 acre-feet in fiscal 1958.[3]

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[6]During the calendar year 1960, MWD's gross diversions from Havasu Lake totaled 894,193 acre-feet. Bureau of Reclamation, U.S. Dep't of the Interior, Region 3, Boulder City, Nevada, *Water Log of the Colorado River, Grand Canyon to International Boundary—For Calendar Year 1960,* col. 4 (provisional records as of Feb. 15, 1961).

During fiscal 1960, 772,813 acre-feet were delivered at the MWD intake. 22 MWD ANN. REP. 15, table 7, col. 5 (1960). Total net deliveries amounted to 734,917 acre-feet. *Id.* at vii and 2, table 3, col. 2.

[1]Tr. 11,978-79 (Rowe).

[2]Tr. 11,998 (Rowe).

[3]Tr. 22,368-69 (Beatty).

6. Recapitulation: Investments in California Projects

The investments in works by means of which the California defendants divert and use waters of the Colorado River system, as of the latest dates shown above, but excluding all expenditures by individual landowners, aggregated in excess of $600,000,000 as set forth above.

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Motion to Reopen the Trial for the Taking of Evidence re Depletion of the Colorado River at Lee Ferry by the Upper Basin and Statement in Support of Motion*

I.

MOTION

The California Defendants Respectfully Move that the Special Master reopen the trial in this cause for the taking of evidence, both oral and documentary, and the making of findings of fact and conclusions of law, relating to the following matters:

(1) The consumptive use of Colorado River system water in the upper Colorado River basin and the depletion of the flow of the Colorado River at Lee Ferry (a) by existing projects, and (b) by reasonably anticipated developments by about 1990.

(2) The effect of the decree proposed by the Special Master in the Draft Report on the water supply available to existing California projects by 1990, on the basis of (i) the upper basin depletion referred to above, (ii) the construction of a Central Arizona Project with a diversion requirement of at least 1,200,000 acre-feet per annum, in addition to the full requirements of existing Arizona main stream projects, and (iii) development in Nevada which will use all main stream water which may be apportioned to her under the proposed decree.

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*This Motion, submitted by the California defendants to the Special Master August 31, 1961 is denied by the Master, Rep. 112 n.41.

II.

STATEMENT IN SUPPORT OF MOTION

A. Why Evidence Must Be Taken

The Draft Report proposes a decision which we say will destroy one California project which serves 7,000,000 people in southern California and will drastically curtail our two great agricultural projects. The proposed decision is based on a novel construction of the Boulder Canyon Project Act and the California Limitation Act first announced on May 5, 1960, when the Draft Report was circulated. The Special Master agrees that the decision would be subject to reexamination were he persuaded that the disaster which we see is truly in prospect, but he sees no such prospect.

The Master includes in the lower basin water supply, against which the decree is to be tested, large quantities of unused upper basin water. Availability of this water to the lower basin was not litigated, and the Master's assumptions with respect thereto were not disclosed until the California rebuttal argument on August 19, 1960. The supposed facts on which the Master relies were clearly not in issue on the pleadings and are not found in the record of this case. The Master's determination of those supposed facts is seriously in error.

These positions of the Special Master, contrary to assertions expressed or implied in the Draft Report, are revealed in the transcript of the August 1960 argument in New York City:

1. The water supply of the lower basin can be determined.

2. Determination of water supply may be useful to decision.

3. The Special Master has in fact reached a conclusion that there will be an abundant supply of water for all lower basin projects. This conclusion rests on supposed facts with respect to upper basin development which he has improperly judicially noticed and which are contrary to what the evidence would show had there been reason or opportunity to produce it. Our motion is directed toward the production of that evidence.

We shall consider these points in the order listed.

1. Water Supply Can Be Determined

In the Draft Report, the Special Master states the conviction that "it is impossible to make an estimate of future [water] supply in the Lower Basin within useful limits of accuracy." (DR 103.) The reasons for our profound disagreement with that statement are set forth in our Comments and Suggestions on the Draft Report (pp. 61-90) in connection with our motion for appointment of disinterested experts to determine supply.

The Master now (as of August 17, 1960) apparently agrees that water supply is determinable.[1]

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[1]"THE MASTER [to Mr. Ely]: I don't want to divert you from your argument, but, after all, we have got a limited time and I might save you some by indicating where my mind is on the subject. If you can persuade me that a finding of [water]

2. Determination of Water Supply Is Useful to Decision

The statement of our reasons why water supply should be determined is contained in our Comments and Suggestions re the Draft Report, pages 68-73.

Further argument appears unnecessary in view of the Master's repeated statements during the New York City argument:

> "I suppose it is true that if a particular determination would lead to a genuine disaster, I suppose we would agree that that would be a good reason for reexamining it to see whether perhaps we did fumble somewheres en route and perhaps the Court ought to so fashion its decree so that disaster should be avoided." [Tr. 22,976.]

> "I naturally am very deeply concerned about any set of facts or arguments which suggest the possibility that the spigots on the Metropolitan Aqueduct will have to be turned shut, and if I believed any such thing I would have strained every legal

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supply is useful to decision, then although I have indicated it's very difficult, there are lots of findings which are difficult, but, if necessary, are made within such degree of accuracy as can be established within the scope of the testimony available[.] [M]y view of the matter is and has been, subject to being persuaded that I am in error, that it is not useful to decision in this particular conference and that, whereas normally, despite that I might have made a finding, because the Court might take a different view of it, in view of the exceeding difficulty of making it, I will abstain from doing so. Now, that is the position. Therefore, save time in your argument that it is useful for decision rather than it is an ascertainable proposition." [Tr. 22,749-50.]

document to try to prevent that because I adhere to the notion that it is true that some of the authors you quoted the other day—that such projects should not be turned off because some interesting legal conception is valid and it has some property significance along the lines you argued this morning.

"I have not heretofore persuaded myself that such was the fact. Nothing I have heard suggests that such is the fact and nothing persuades me that such is likely to be the fact within the unforeseeable future, not to say foreseeable future." [Tr. 23,092-93.]

3. The Special Master Has Reached Erroneous Conclusions With Respect to Water Supply

The Special Master's declarations with respect to the water supply available to the Metropolitan Water District, although contradicted by declarations in the Draft Report,[2] were emphatic and repeated during California's rebuttal argument in New York City on August 19:

"I am morally certain that neither in my lifetime, nor in your lifetime, nor the lifetime of your children and great-grandchildren will there be an

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[2]"[T]he evidence indicates that California is already using some of the water claimed by Arizona." (DR 119.) California's use in the latest year of record for each project totals 4,483,885 acre-feet. (DR 115.)

The Master twice quotes (DR 30-31, 118) with apparent approval the Secretary of the Interior's report in 1948 to Con-

inadequate supply of water for the Metropolitan project.

". . . .

"I am morally certain as certain as I am of the multiplication table, that not within the span of the ages indicated there will be any diminution either in the present uses of the Metropolitan Aqueduct or its contemplated expansion." [Tr. 23,084.]

The Special Master is demonstrably wrong.

Implicit in these declarations is a determination that there will be *more than* 5,062,000 acre-feet per annum of consumptive use available for California. California must receive more than 5,062,000 acre-feet if Metropolitan is to receive its contract quantity of 1,212,000 acre-feet per annum. Metropolitan's rights under the Secretary of the Interior's contracts are junior to 3,850,000 acre-feet of agricultural use. We say *"more than* 5,062,000 acre-feet," because of the Indian rights in California to which the Draft Report accords priority ahead of Metropolitan.[3]

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gress that there will be water for the Central Arizona Project on Arizona's contentions, but not on California's. This report [Ariz. Ex. 71, at 150-51, also designated as Calif. Ex. 7514-F submitted as part of Calif. Offer of Proof dated August 17, 1960] permits California only 4,400,000 acre-feet per annum, less reservoir losses. This determination is based on virgin flow at Lee Ferry (1897-1943) of 16,270,000 acre-feet per annum.

[3]Indian rights in California seem to approximate 33,000 acre-feet per annum of "consumptive use." Calif. Comments re Draft Report, pp. 15 n.9, 16 n.10.

The water supply which must be available to justify the Master's conviction can readily be calculated. If "the spigots on the Metropolitan Aqueduct" are to run full there must be available to Arizona, California, and Nevada for division on the Master's formula a total of more than 8,824,000 acre-feet per annum, divided as follows:

Arizona	3,462,000	acre-feet[4]
California	5,062,000	" "
Nevada	300,000	" "
Total	8,824,000	" "

The flow at Lee Ferry necessary to provide consumptive use of 8,824,000 can be easily estimated by adding (1) 1,500,000 acre-feet per annum for the Mexican Treaty delivery, and (2) the quantity of losses of various kinds, after adjustment for gains below Lee Ferry from inflow to the main stream.

Here is the calculation of the losses and gains testified to by Arizona witness Erickson and California witness Stetson in parallel columns.[5] This testimony is uncontradicted in the record.[6]

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[4]2,800,000 acre-feet plus 662,000 acre-feet of "excess or surplus," equal to Metropolitan's 662,000 acre-feet of "excess or surplus" required to supply Metropolitan's full contract quantity of 1,212,000 acre-feet.

[5]Losses would in fact be substantially higher with the larger flows required to make 8,462,000 acre-feet of consumptive use available from the "mainstream." Erickson's and Stetson's loss figures apply to flows which will produce around 6,000,000 acre-feet of consumptive use from the "mainstream."

[6]Citations to the record are found in Calif. Finding 5E:102 (11), p. V-29.

	Units—1,000 acre-feet per annum			
	Erickson		Stetson	
Mexican delivery	1,500		1,500	
Losses:				
Evaporation from Lake Mead	700		650	
Uncontrollable spills at Hoover Dam	500		300	
Evaporation from reservoirs, Hoover Dam to Mexican boundary	300		300	
Channel losses, net of channel salvage, Hoover Dam to Mexican boundary	300		600	
Regulatory waste (excess arrivals in limitrophe section)	75		200	
Total losses plus Mexican delivery		3,375		3,550
Gains:				
Net gain, Lee Ferry to Lake Mead	950		950	
Bill Williams and Miscellaneous inflow below Hoover Dam	75		75	
Total gains		1,025		1,025
Flow at Lee Ferry not available for beneficial consumptive use in lower basin		2,350		2,525

The foregoing figures represent the water which passes Lee Ferry which cannot be beneficially consumed in the lower basin. This figure determines the flow which must pass Lee Ferry to meet the Master's expectation of an abundant supply for Metropolitan Water District, necessitating under his formula 8,824,000 acre-feet from the main stream for the three lower division states:

	Units—1,000 acre-feet per annum	
	Erickson	Stetson
Water required for use in Arizona, California, and Nevada from main stream	8,824	8,824
Flow at Lee Ferry not available for beneficial consumptive use in lower basin	2,350	2,525
Lee Ferry flow necessary to meet Master's expectation	11,174	11,349

There can be no basis, either from the record or from facts outside the record, for anticipating future flows at Lee Ferry anywhere approaching 11,200,000 acre-feet per annum, at any time in the future after Glen Canyon Dam is closed in 1962. Yet that is the flow which the uncontradicted evidence shows must be available if the Master's assumption of a full supply for the Metropolitan Aqueduct for the "foreseeable" and "unforeseeable" future is to be realized.

Three errors can be identified in the Special Master's conclusion:

(a) *The Master Improperly Treats Unused Upper Basin Water as Part of the Supply Available to the Lower Basin in Testing the Effect of the Recommended Decree*

The Master's inclusion of unused upper basin water[7] in the lower basin supply was revealed in the following colloquy between California counsel and the bench during the California rebuttal argument in New York City on August 19:

> "Mr. Ely: I think what you said yesterday and today is the key to this whole matter, that if there is a possibility or a probability of disaster attending upon the results of your decree it should be taken into account and you now told us this morning that you see not the slightest chance of that within your lifetime or ours.
>
> "The Master: And in the more distant future.
>
> "Mr. Ely: I think you should say that. I think you should say that in your report.

[7]By the term "unused upper basin water," we mean water which is legally and physically available for use in the upper basin although presently unused in that basin.

"The Master: The post-space age perhaps will drain the moon of its water supply. I don't know and don't pretend to guess.

"Mr. Ely: We are in effect relying upon unused Upper Basin water.

"The Master: It is a factor.

"Mr. Ely: It should not be a factor. That is where we break apart. The Colorado River Compact must be respected. It apportions in perpetuity water in the Upper Basin. It is not the basis of a decree here or the basis of financing great projects.

"The Master: What you are saying is if you had known that in 1933 maybe you wouldn't have spent the money to build it because you wouldn't want to have relied upon it. It was built and is gushing with water today and will continue to gush full of water and it doesn't make any difference whether the water is derived from III(a), III(b), III(c), III(d) or unused Upper Basin water or any other supply because unused Upper Basin water is water that rightfully belongs to the Lower Basin under the Compact." [Tr. 23,086-87.]

The foregoing colloquy reveals that the Master's proposed decision is profoundly influenced by the resolution of an issue not tried—availability to the lower basin of water apportioned in perpetuity to the upper basin by the Colorado River Compact. The suit was brought by Arizona to quiet title to specified quantities of water permanently available to the lower basin under the Colorado River Compact. It was tried on that basis.

In 1948, the Secretary of the Interior, in his report to Congress on the Central Arizona Project, stated:[8]

> "If the contentions of the State of Arizona are correct, there is an ample water supply for this project. If the contentions of California are correct, there will be *no dependable water supply* available from the Colorado River for this diversion." (Emphasis added.)

The Secretary referred to water available to the lower basin under the Colorado River Compact, with the upper basin's apportionment in perpetuity subtracted. This was the issue pleaded, tried, and briefed. A decision on any other basis would not provide an answer to the question posed by the Secretary of the Interior which the parties sought to have litigated in their 1952 and 1953 pleadings, and which they thought they were litigating throughout the trial.

The Special Master addressed himself to the Secretary's question in the argument on August 19, 1960:

> "Let me ask one question which is disturbing me. You remember there was a communication from the Secretary of the Interior to the Congress of the United States, or to one of its committees, wherein he said that the [Central Arizona] project is under certain circumstances feasible. I won't go into the details. He further said if Arizona is right then there is water sufficient to operate such a project.

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[8]H.R. Doc. No. 136, 81st Cong., 1st Sess. IV (1949), Ariz. Ex. 70, quoted DR 30.

"Did he thereby mean that he would deprive the Metropolitan Water Project of aqueduct water? Is that what the Secretary of the Interior meant? Or did he mean that if the legal availability was such there would be enough water to supply both?" [Tr. 23,091.]

The Master rephrased his question:

"Did he [the Secretary] mean the Metropolitan District would be curtailed in its capacity for further expansion?" [Tr. 23,092.]

The answer to the Special Master's question is found in the Secretary's communication to Congress.[9] The answer is abundantly clear. Under Arizona's then legal contention, the Secretary reported[10] that California would be limited to 4,400,000 acre-feet plus presumably 55,000 acre-feet "under article III(f)."[11] California's right would be reduced by a proportionate share of reservoir losses, or more than half a million acre-feet. In short, the entire Colorado River Aqueduct supply would be destroyed.

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[9]H.R. Doc. No. 136, 81st Cong., 1st Sess. 151 (1949); reproduced in Calif. Ex. 7514-F for iden., tendered with the August 17, 1960, offer of proof, from Ariz. Ex. 71.

[10]The Secretary's calculation was based on a 16,270,000 acre-foot average annual virgin flow at Lee Ferry—more than 1,000,000 acre-feet larger than any evidence in this case supports. *Id.* at 150.

[11]Line 10 of the table in H.R. Doc. No. 136, note 1 *supra*, shows "total surplus" of 220,000 acre-feet per annum, of which 55,000 acre-feet are allocated to Arizona "under article III(f) of the compact." Under the "excess or surplus" provision of the Limitation Act, California's half would also equal 55,000 acre-feet, although the table does not so state.

(b) *The Special Master Improperly Resorts to Judicial Notice to Determine the Quantities of Unused Upper Basin Water Available to the Lower Basin*

The Master's improper resort to judicial notice was revealed in the following colloquy during the August 19, 1960, rebuttal argument:

> "The Master: There is a provision in the Compact, you know [Article III(e)], that the Upper Basin is not going to withhold water they haven't any use for. Nobody has mentioned that, but it is there. It is as much an obligation of the Upper Basin as III(d).
>
> "Mr. Ely: That is true, your Honor.
>
> "The Master: And I haven't seen any projects which say they are going to use 6½ million acre-feet of water either written, proposed or contemplated.
>
> "Mr. Ely: That is a most important assumption in this lawsuit, if that is the one you are making, your Honor.
>
> "The Master: I am not making an assumption. I said there is nothing in the evidence which indicates any such consumption in the Upper Basin, as you have postulated in the Stetson study.
>
> "Mr. Ely: He wasn't there to do that. His function, as he explained, was to say if the reservoirs are built that have been authorized, how much water will they control, and the residue will come down to the Lower Basin.

"Your Honor, the issue has not been tried as to the rate of expansion in the Upper Basin. We think it is totally irrelevant.[12]

"The Master: No, but there is evidence in the record which shows the maximum consumptive use in the Upper Basin contemplated is not more than four million eight.

"Mr. Ely: I must respectfully differ with you, sir. That is not correct. That issue was not tried. There is in the record one or two pages from a departmental study.

"The Master: If that is not in the record, there is no proof on the subject and there is no proof on it and certainly Mr. Stetson's assumption it will be 6½ million has no rock to sit on." [Tr. 23,081-82.]

The figure of 4,800,000 acre-feet which the Master in the foregoing colloquy described as "the maximum consumptive use in the Upper Basin contemplated" is not in evidence. It is not found in the Draft Report. Its source is the following paragraph from Senate Report No. 128, 84th Congress, 1st Session, on S. 500

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[12]Compare the following colloquy:

"MR. ELY: Your Honor, how soon the Upper Basin may develop is not tried.

"THE MASTER: In a sense that is true. We did have the historic flows at Lee Ferry, we had the historic flows at Lake Mead. Those we had right down to date, at least down to fairly recent date, and, of course, we could take judicial notice of the [Colorado River Storage Project] statute. I think, in fact, it was offered in evidence in some of the reports, and I have the Stetson estimates and I have the Erickson hypothesis and so forth. To that extent we had some material on the Upper Basin." [Tr. 23,104.]

(a Colorado River Storage Project bill), which the Special Master identified as the basis of his information. [Tr. 23,103.] The Senate committee report states:

> "The Committee concluded that it was satisfactorily established by the evidence that the aggregate of the consumptive use of water that will be made, if all of the works hereby proposed to be authorized are eventually constructed after meeting the various conditions imposed, when added to consumptive use already being made in the upper division States, will amount to less than two-thirds of the apportionment made to the upper basin under the compact. When all storage units and participating projects *named in this bill* are constructed, the aggregate of all consumptive uses in the Upper Basin would not exceed *4.8 million acre-feet of water per annum.* This would leave an unused apportionment of 2.7 million acre-feet of the 7.5 million acre-feet apportioned to the Upper Basin to meet any contingencies arising out of litigation over varying interpretations of the compact. In the circumstances, the continuity of the water supply for the Lower Basin would be assured." (P. 4.) (Emphasis added.)

The facts recited in the above quoted paragraph from Senate Report No. 128 are irrelevant, even assuming judicial notice were proper. The committee addressed itself only to specific elements of upper basin depletion —those occasioned by existing projects together with the works named in S. 500. It did not concern itself with either future non-federal development in the upper basin, or federal development under other legislation.

Furthermore, this opinion of the Senate committee does not constitute a fact which is judicially noticeable. The hydrology on which the Senate committee report is based is not an indisputable fact of common knowledge on which evidence is unnecessary.

Finally, the major error is that the Special Master has conclusively established unlitigated facts by judicial notice, without notice to the parties and without affording them an opportunity for refutation. See *Stasiukevitch v. Nicolls,* 168 F. 2d 474, 479 (1st Cir. 1948). Senate Report No. 128 was called to the Master's attention by California counsel during the trial. [Tr. 12,200.] The Master at that time refused to permit California counsel either to read from the document or to comment upon it. It was not cited or referred to in the proposed findings, conclusions, or briefs of any party.

In this case, by stipulated pretrial order, and for the express purpose of giving parties an opportunity to prevent such an improper or mistaken exercise of judicial notice, the Draft Report was circulated prior to submission of a report to the Court. The ground rules for judicial notice established at the beginning of the trial[13] were restated by the Master at the close of the trial:[14]

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[13]"THE MASTER: . . . I would be perfectly agreeable to have the [pretrial] order provide, and not leave it to chance, that the Master shall circulate his proposed report before filing, and then if there is an issue about judicial notice there, we can, if necessary, have it briefed or argued orally, take whatever steps the occasion calls for." [Pretrial conference, Tr. 239-40.] Accordingly, an order to circulate a draft report is incorporated in article III-H of the pretrial order.

[14]Tr. 22,375. The statement was made with respect to the Master's exclusion of Calif. Ex. 5588, S. Doc. No. 23, 84th

"The Master: . . . [O]ne of the reasons why we had all agreed that we would circulate a draft report in advance of filing was that, in the event anything was judicially noticed about which the parties might have argument that it should or should not have been judicially noticed, that would be an appropriate time to call attention to it, because it is impossible to forecast what that might be; . . ."

The Draft Report did not advise us that the Master had judicially noticed that upper basin consumptive use would not exceed 4,800,000 acre-feet per annum. That alleged fact is relevant in this suit, if at all, only to lower basin water supply. The Draft Report advised only that the water supply cannot be determined. Not until the rebuttal argument in New York City did the California defendants learn that the Master in fact believes that water is sufficiently abundant that the Colorado River Aqueduct's junior priority will be fully protected, and that the Master's belief is based on judicial notice with respect to a supposed ceiling of 4,800,000 acre-feet per annum of upper basin consumptive use.

(c) *The Supposed Facts Which the Special Master Reveals He Has Judicially Noticed, and Which May Profoundly Influence His Decision, Are Manifestly Wrong*

First, even if 4,800,000 acre-feet per year were established as the maximum upper basin depletion, the conclusion which the Special Master draws therefrom

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Cong., 1st Sess.: *Report on Depletion of Surface Water Supplies of Colorado West of Continental Divide* (1955) and Calif. Ex. 5588-A, which consists of excerpts therefrom. [Tr. 22,373-74.]

as to available water supply in the lower basin is demonstrably erroneous. The maximum average annual virgin flow at Lee Ferry used in any water supply study in evidence, or asserted by any witness as a basis for water supply calculations, is 15.2 million acre-feet. If the Master's 4.8 million acre-foot ceiling on upper basin depletions be correct, only 10.4 million acre-feet (15.2 minus 4.8) would be available at Lee Ferry for all consumptive use from the main stream, for net main stream losses, and for deliveries to Mexico. This quantity of water is 774,000 acre-feet per year less than 11,174,000 acre-feet, the smallest estimate (based on Erickson's losses) of the minimum Lee Ferry flow that must be available to support the consumptive use which the Master is convinced will be available to the lower basin.

To put it another way, a depletion of 4,800,000 acre-feet in the upper basin, added to the 11,174,000 acre-feet annual average that the Master necessarily supposes will flow at Lee Ferry, requires an average annual undepleted flow of 15,974,000 acre-feet per year, assuming Erickson's losses. Using Stetson's losses, the average annual undepleted Lee Ferry flow would have to be 16,149,000 acre-feet. This is larger than any longtime average figure for undepleted or virgin flow used by any witness. Furthermore, the Secretary of the Interior, to whom the Master would entrust the operation of the river, has recently based his calculations on the 1922-1957 period.[15] The virgin or undepleted flow

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[15]See S. Doc. No. 84, 86th Cong., 2d Sess. (1959), Colorado River Storage Project: A Memorandum and Statement of the Secretary of the Interior Transmitting the Proposed General Principles To Govern, and Operating Criteria for, Glen Canyon and Lake Mead During the Glen Canyon Filling Period, p. xi.

for this period was about 14,200,000 acre-feet per annum average.

Second, the Draft Report reveals that historically, long before the passage of the Colorado River Storage Project Act, Lee Ferry flows were several million acre-feet per year smaller than the quantity the Special Master has apparently assumed to be available now and in the foreseeable and unforeseeable future. For example, the historic flow at Lee Ferry from 1929 through 1958 totaled 355,417,100 acre-feet (DR 102), an average of approximately 11,850,000 acre-feet per year. This quantity leaves an average annual margin of only 676,000 acre-feet per year for increased upper basin depletions over the 11,174,000 acre-feet per annum described above as the flow required at Lee Ferry. This margin is less than the 691,000 acre-feet average annual reservoir evaporation from the four Colorado River Storage Project reservoirs.[16]

Third, on the basis of the increased upper basin uses assumed by the Special Master and the historic flows as set forth in the Draft Report, it can be proved that there is no water supply from the upper basin for the Metropolitan Water District. The Master recognizes a total upper basin depletion of 4,800,000 acre-feet per annum. This is an increase of 2,900,000 acre-feet per annum over the average annual depletion of 1.9 million acre-feet for the period 1912-1957.[17] Deducting this 2,900,000 acre-feet increase in depletion from the 11,850,000 acre-feet per year of Lee Ferry flow, 1929-1958, set forth above, leaves 8,950,000 acre-feet per annum average at Lee Ferry in a future 30-year

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[16]S. Doc. No. 101, 85th Cong., 2d Sess., p. 13.
[17]Hill, Tr. 21,751, 21,754.

period of equal runoff. Deducting the Mexican delivery and the minimum (Erickson) net losses of 2,350,000 acre-feet from this future Lee Ferry flow, the quantity available from the main stream for consumptive use among the three lower division states is 6,600,000 acre-feet per year. Under the Master's formula, California would receive 44/75 of this quantity or 3,872,000 acre-feet. This will supply the California Indians and almost all of the first three agricultural priorities, but there would be no water for the Metropolitan Water District.

B. What Our Evidence Will Prove

We submit the following statement of what our evidence will prove with respect to depletion of the Colorado River at Lee Ferry by projects in the upper basin, and the effect on the water supply of the Metropolitan Water District under the decree proposed in the Draft Report:

1. Existing projects in the upper basin will permanently deplete the flow of the river by approximately 2.55 million acre-feet per annum by 1963.

2. Upper basin projects under construction or now authorized will deplete the flow of the river by about an additional 1.29 million acre-feet per annum between 1963 and 1970, making a total permanent depletion when added to that specified in paragraph 1 of 3.84 million acre-feet per annum by 1970.

3. Upper basin projects pending authorization will deplete the flow of the river by about an additional 1.60 million acre-feet per annum, making a total permanent depletion when added to that specified in paragraphs 1 and 2 of 5.44 million acre-feet per annum by 1980.

4. There is a high degree of probability that additional federal and non-federal upper basin projects, not taken into account in the preceding three paragraphs, will deplete the flow of the river by about an additional 0.75 million acre-feet per annum, bringing the total permanent depletion at Lee Ferry to 6.19 million acre-feet per annum by 1990.

5. There are potential projects in the upper basin which, together with the projects referred to above, could deplete the Lee Ferry flow by a total of more than 9 million acre-feet per annum[18] by the end of this century if the water were both legally and physically available to sustain such use. Economic development and population growth taking place in the upper basin states will bring about this demand for water.

6. In addition to the permanent depletions of the flow at Lee Ferry, referred to in the preceding paragraphs, substantial temporary depletions will occur beginning in 1962 by reason of the initial filling of the four reservoirs authorized by the Colorado River Storage Project Act.[19] These reservoirs have a combined capacity of 34.7 million acre-feet,[20] and the three largest are already well under construction. There will be further temporary filling depletions as other reservoirs are added.

7. Assuming (1) the upper basin depletions of 6.19 million acre-feet per year described above, (2) construction of the proposed Central Arizona Project with a di-

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[18]See H.R. Doc. No. 419, 80th Cong., 1st Sess. 107-51 (1947).
[19]70 Stat. 105 (1956), 43 U.S.C. § 620 (1958).
[20]S. Doc. No. 101, 85th Cong., 2d Sess. 3 (1958).

version requirement of at least 1.2 million acre-feet per annum[21] in addition to the full requirements of existing Arizona projects using main stream water, and (3) developments in Nevada which will use all main stream water available to her under the proposed decree: The Metropolitan Water District's Colorado River Aqueduct would be deprived of its entire water supply by 1990 under the decree proposed in the Draft Report.

Only brief comment is necessary upon the evidence which will prove the foregoing. The upper basin states will undoubtedly use all the water legally and physically available to them. There is no basis for the Special Master's apparent assumption that they will not. The only points upon which there can be any difference of opinion among qualified experts are (a) the rate at which upper basin developments will proceed and (b) the date when their full supply will be put to use.

As to quantities, the evidence which we shall offer conforms substantially to the 1958 estimates of the Bureau of Reclamation contained in Senate Document No. 101, 85th Congress, 2d Session 13 (1958), that depletion by the upper basin will reach 6.19 million acre-feet, exclusive of reservoir filling.

As to the rate of development, we point out that the policy of Congress to initiate the comprehensive development of the water resources of the upper Colorado River basin to permit it to use its apportionment under the Colorado River Compact has been declared by the Colorado River Storage Project Act of 1956.[22] That act also provides the mechanism for aid in financing

[21] See H.R. Doc. No. 136, 81st Cong., 1st Sess. 153 (1949).
[22] 70 Stat. 105 (1956), 43 U.S.C. § 620 (1958).

that development by revenues from generation and sale of hydroelectric power.

The Bureau's projected rate of upper basin development after 1970 set forth in Senate Document No. 101 has already proved to be too slow. In 1958, the Bureau of Reclamation scheduled all storage units of the Colorado River Storage Project and all of its initial participating projects except for a portion of the Central Utah Project (initial phase) for completion between 1963 and 1975.[23] Substantial construction funds have already been appropriated for all four storage units and for six of ten participating projects. Furthermore, the construction schedule set forth in Senate Document No. 101 has already been advanced for most of these projects, and by as much as five years.[24]

C. Conclusion

If the facts were as the Master pictured them on August 19 in the New York City argument, there would be no reason for a decision by the Court. Arizona would be entitled to a decree which frees the tributaries and gives her (if Metropolitan is indeed to have a full supply) more water than she has ever sought from the main stream. California would also receive more water than California sought from the dependable supply in the decree we proposed. It is impossible, on these facts, to find a justiciable case or controversy.

It is apparent that the Special Master has made a major error in overstating the water supply. The con-

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[23]S. Doc. No. 101, at insert following p. 12.

[24]See *Hearings on Public Works Appropriations for 1961 Before the Subcommittee of the House Committee on Appropriations*, 86th Cong., 2d Sess. 481-548 (1960).

sequences of that error are even more serious than the same error of the Compact negotiators in 1922. The life of existing projects is now at stake. The Compact negotiators did the best they could with a short and inaccurate record. The Court today is not similarly handicapped.

However, unless the Draft Report is corrected, the decision will be made without adequate consideration of the facts. The Master concedes that if he took a different view of the water supply, he might take a different view of the law. The same may well be true of the Court. However, the Court must look to the Master's findings in the first instance, and from those findings as they stand in the Draft Report, the Court will learn nothing at all of water supply or the consequences of its decision.

Were this suit a controversy among water users in any of the five litigant states, the Court would inform itself of the facts with respect to water supply[25] and would be aware of the consequences of decision. The sovereign states before this Court are entitled to at least as much consideration.

Dated: August 31, 1960.

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[25]See Calif. Conclusion 6D:206, p. VI-13.

TABLE 1

ANNUAL BENEFICIAL CONSUMPTIVE USE REQUIREMENTS OF EXISTING MAIN STREAM PROJECTS IN CALIFORNIA*

Calif. Finding No.	Date of Priority	Project[1]	Requirements (Acre-Feet)	Net Area (Acres)	Maximum Historic Use In Evidence (Acre-Feet)	Maximum Area Irrigated In Evidence (Acres)	Principal Type of Use
4C:102	7–17–77	Palo Verde Irr. Dist.	420,000	105,000	296,000	74,000	Irrigation
4C:104	7–8–05	Yuma Project, Res. Div.	70,500	20,100	44,500	12,700	Irrigation
4C:105–07	5–16–95	All-American Canal Project (Imperial and Coachella)	3,359,500	661,000 (882,900)[2]	3,662,000	524,000	Irrigation
4C:108–09	6–28–24 4–15–26	Metropolitan Water District	1,212,000	.....	584,000	.....	Domestic[3]
4C:105–07	5–16–95	All-American Canal Project (Imperial and Coachella)	300,000	.....	.....	.....	Irrigation
4C:110	—	Miscellaneous	16,000	.....	8,000	2,400	Irrigation
		Total	5,378,000	786,100 (1,008,000)	4,594,500	613,100	

*NOTE: Quantities rounded to nearest 500 acre-feet and nearest 100 acres.

[1]Projects listed in order of priority as modified by Seven-Party Agreement.

[2]Total net irrigable acreage for which capacity is provided in main canal system.

[3]"Domestic" is used in the sense employed in Article II(h) of the Colorado River Compact.

TABLE 2

ANNUAL BENEFICIAL CONSUMPTIVE USE REQUIREMENTS OF EXISTING MAIN STREAM PROJECTS IN ARIZONA*

Calif. Finding No.	Date of Priority	Project	Require-ments (Acre-Feet)	Net Area (Acres)	Maximum Irrigated Area (Acres)	Principal Type of Use
4D:102	3–1–93	City of Yuma	14,500	—	—	Domestic[1] and Irrigation
4D:103	10–21–03	Colorado River Indian Reservation	329,500	98,900	30,000	Irrigation
4D:104	7–8–05	Yuma Project, Valley Division	166,500	52,000	47,600	Irrigation
4D:105	7–8–05	Yuma Auxiliary Project (Unit B)	13,000	3,300	2,500	Irrigation
4D:106 & 107	7–8–05	Yuma Mesa } Gila Project,		25,000	14,600	Irrigation
		North Gila } Yuma Mesa	300,000	6,700	6,900	Irrigation
		South Gila } Division		8,300	10,000	Irrigation
4D:106 & 108	11–10–51	Gila Project, Wellton-Mohawk Division	300,000	75,000	30,500	Irrigation
4D:110	Undated	Special use contracts	6,000	—	—	Domestic[1]
4D:109	Undated	Miscellaneous	80,000	—	11,400	Irrigation
		Total	1,209,500	269,200	153,500	

*NOTE: Quantities rounded to nearest 500 acre-feet and nearest 100 acres.

[1]"Domestic" is used in the sense employed in Article II(h) of the Colorado River Compact.

TABLE 3

ANNUAL BENEFICIAL CONSUMPTIVE USE REQUIREMENTS OF EXISTING MAIN STREAM PROJECTS IN NEVADA

Calif. Finding No.	Date of Priority	Project	Requirements (Acre-Feet)*	Net Area (Acres)	Maximum Historic Use (Acre-Feet)	Maximum Area Irrigated (Acres)	Principal Type of Use[1]
4E:102	6–25–29	Boulder City	5,000	—	2,750	—	Domestic
4E:103	1–28–42	Defense Plant Corp.	32,500	—	**	—	Domestic
4E:104	3–28–42	Basic Management, Inc.	8,500	—	**	—	Domestic
4E:105	3–30–42	Reconstruction Finance Corp.	3,500	—	**	—	Domestic
4E:106	6–19–50	Las Vegas Valley Water District	43,000	—	**	—	Domestic
4E:107	3–26–54	Manganese, Inc.	1,500	—	**	—	Domestic
4E:108	5–23–55	E. L. Cleveland	1,000	230	—	—	Irrigation
4E:109	6–29–55	City of Henderson	25,000	—	**	—	Domestic
4E:110	12–27–55	River Valley Resort, Inc.	500	115	—	—	Domestic and Irrigation
		Total	120,500	345	24,450	—	

*Rounded to nearest 500 acre-feet.

**The maximum combined use of Defense Plant Corp., Basic Management, Inc., Reconstruction Finance Corp., Las Vegas Valley Water District, Manganese, Inc., and City of Henderson was 21,700 acre-feet. The record does not show segregation among these users. The aggregate quantity is reflected in the total.

[1]"Domestic" is used in the sense employed in Article II(h) of the Colorado River Compact.

TABLE 4*
Colorado River Storage Project and Lake Mead
Summary of operation
1975 Conditions
(Unit—1,000 acre-feet)

Calendar year	Lake Mead				
	Total inflow	Evaporation	Power releases		Total reservoir content end of year[1]
			Scheduled	Other	
(1)	(16)	(17)	(18)	(19)	(20)
					25,465
1906	11,100	893	9,800		25,872
07	15,829	978		359	30,564
08	11,237	1,033		404	30,564
09	19,298	1,033		8,465	30,564
1910	12,595	1,033		1,762	30,564
11	13,256	1,033		2,423	30,564
12	16,292	1,033		5,459	30,564
13	11,723	1,033		890	30,564
14	17,138	1,033		6,305	30,564
15	12,049	1,033		1,216	30,564
16	16,617	1,033		4,784	30,564
17	19,738	1,033		8,905	30,564
18	12,466	1,033		1,633	30,564
19	10,300	1,028			30,036
1920	17,011	1,030		5,653	30,564
21	18,528	1,033		7,695	30,564
22	16,593	1,033		5,760	30,564
23	15,330	1,033		4,497	30,564
24	12,814	1,033		1,981	30,564
25	10,100	1,027			29,837
26	11,459	1,024			30,472
27	13,642	1,030		2,720	30,564
28	14,393	1,033		3,560	30,564
29	15,544	1,033		4,711	30,564
1930	11,703	1,033		870	30,564
31	10,100	1,023			29,841
32	10,700	1,013			29,728
33	10,200	1,004			29,124
34	10,100	987			28,437
35	9,900	966			27,571
36	10,300	947			27,124
37	10,800	942			27,182
38	10,600	940			27,042
39	10,400	932			26,710
1940	10,500	923	9,800		26,487

TABLE 4

Calendar year	Lake Mead (Continued)				
	Total inflow	Evapo-ration	Power releases		Total reservoir content end of year[1]
			Scheduled	Other	
(1)	(16)	(17)	(18)	(19)	(20)
1941	11,700	935	9,800		27,452
42	10,300	943	↑		27,009
43	10,200	928			26,481
44	10,300	913			26,068
45	10,500	903			25,865
46	10,200	893			25,372
47	10,400	881			25,091
48	9,800	863			24,228
49	12,579	878			26,129
1950	9,800	894			25,235
51	9,900	868			24,467
52	14,619	918			28,368
53	9,800	963			27,405
54	9,900	935			26,570
55	10,300	916			26,154
56	10,000	898			25,456
57	10,900	890			25,666
58	11,300	902			26,264
1959	9,900	899	9,800		25,465
Total 31–59	305,998	26,897	284,200		
06–59	661,753	52,501	529,200		
Average 31–59	10,552	928	9,800		26,689
06–59	12,255	972	9,800		28,371

[1]Surface storage based on 1948 Lake Mead survey plus dead storage plus 12½ percent bank storage.

*This table is a reproduction of columns 1, 16, 17, 18, 19, and 20 from table 5, p. 10 of Bureau of Reclamation, Regional Office, Region 4, U.S. Dep't of the Interior, *Financial and Power Rate Analysis—Colorado River Storage Project and Participating Projects* (September 1960).

TABLE 5*
Colorado River Storage Project and Lake Mead
Summary of operation
2020 Conditions
(Unit—1,000 acre-feet)

February 1960

Calendar year	Lake Mead				
	Total inflow	Evaporation	Power releases		Total reservoir content end of year[1]
			Scheduled	Other	
(1)	(16)	(17)	(18)	(19)	(20)
					19,607
1906	9,700	758	8,500	—	20,049
07	12,920	807	8,500	—	23,662
08	9,300	856	8,500	—	23,606
09	16,668	966	8,500	1,208	29,600
1910	11,417	1,033	8,500	1,884	29,600
11	11,556	1,033	8,500	2,023	29,600
12	14,268	1,033	8,500	4,735	29,600
13	10,181	1,033	8,500	648	29,600
14	15,116	1,033	8,500	5,583	29,600
15	10,525	1,033	8,500	992	29,600
16	13,769	1,033	8,500	4,236	29,600
17	17,592	1,033	8,500	8,059	29,600
18	10,862	1,033	8,500	1,329	29,600
19	8,900	1,025	8,500	0	28,975
1920	14,901	1,031	8,500	4,745	29,600
21	16,455	1,033	8,500	6,922	29,600
22	14,828	1,033	8,500	5,295	29,600
23	13,415	1,033	8,500	3,882	29,600
24	11,254	1,033	8,500	1,721	29,600
25	8,700	1,022	8,500	0	28,778
26	9,576	1,012	8,500	0	28,842
27	12,178	1,030	8,500	1,890	29,600
28	12,363	1,033	8,500	2,830	29,600
29	13,946	1,033	8,500	4,413	29,600
1930	9,776	1,033	8,500	243	29,600
31	8,700	1,022	8,500	—	28,778
32	9,300	1,008	8,500	—	28,570
33	8,800	995	8,500	—	27,875
34	8,700	975	8,500	—	27,100
35	8,500	948	8,500	—	26,152
36	8,900	927	8,500	—	25,625
37	9,400	915	8,500	—	25,610
38	9,200	912	8,500	—	25,398
39	9,000	902	8,500	—	24,996
1940	8,800	888	8,500	—	24,408

TABLE 5

Lake Mead (Continued)

Calendar year	Total inflow	Evaporation	Power releases		Total reservoir content end of year[1]
			Scheduled	Other	
(1)	(16)	(17)	(18)	(19)	(20)
1941	10,600	896	8,500	—	25,612
42	8,900	908	8,500	—	25,104
43	8,800	890	8,500	—	24,514
44	8,900	874	8,500	—	24,040
45	9,100	862	8,500	—	23,778
46	8,800	852	8,500	—	23,226
47	9,000	838	8,500	—	22,888
48	8,500	823	8,500	—	22,065
49	8,800	805	8,500	—	21,560
1950	8,500	788	8,500	—	20,772
51	8,500	770	8,500	—	20,002
52	11,377	788	8,500	—	22,091
53	8,500	802	8,500	—	21,289
54	8,500	782	8,500	—	20,507
55	8,900	768	8,500	—	20,139
56	8,600	758	8,500	—	19,481
57	9,500	752	8,500	—	19,729
58	9,900	762	8,500	—	20,367
1959	8,500	760	8,500	—	19,607
Total					
31–59	261,477	24,970	246,500	0	
06–59	571,643	50,005	459,000	62,638	
Average					
31–59	9,016	861	8,500		23,492
06–59	10,586	926	8,500	1,160	25,881

[1]Includes 12½ percent bank storage plus 2,620,000 acre-feet dead storage. Assumes 1,000,000 acre-feet of sediment deposition between 1970 and 2020.

*This table is a reproduction of columns 1, 16, 17, 18, 19, and 20 from table 7, p. 12, of Bureau of Reclamation, Regional Office, Region 4, U.S. Dep't of the Interior, *Financial and Power Rate Analysis—Colorado River Storage Project and Participating Projects* (September 1960).

TABLE 6

CALCULATION OF FUTURE USABLE LOWER BASIN WATER SUPPLY
BASED ON 1960 BUREAU OF RECLAMATION PROJECTION*

CALCULATION OF THE FUTURE WATER SUPPY AVAILABLE TO METROPOLITAN WATER DISTRICT UNDER MASTER'S RECOMMENDED DECREE
(Acre-Feet)

		Year 1975	Year 2020
Release from Hoover Dam		9,800,000	8,500,000
Deduction for downstream requirements:			
Evaporation from Lakes Mohave and Havasu	300,000		
Natural river losses	600,000		
Regulatory waste	200,000		
Mexican Treaty obligation	1,500,000		
Subtotal	2,600,000		
Usable inflow	75,000		
Net deductions		2,525,000	2,525,000
Available for consumptive use in Arizona and California		7,275,000	5,975,000
Nevada entitlement from above Hoover Dam[1]		300,000	250,000
Total "mainstream" supply for allocation		7,575,000	6,225,000
California's share		4,438,000	3,652,000
To California users with rights senior to Metropolitan Water District (including Indian reservations)		3,900,000	3,900,000
To Metropolitan Water District		538,000	(− 248,000)

[1]Part of Nevada's main stream use is below Hoover Dam, but it is assumed for purposes of this table that all of Nevada's use is pumped from the reservoir above the dam. Because some of Nevada's uses are from the river below Hoover Dam the water available to California is less than here shown.

CALCULATION OF THE YEAR IN WHICH METROPOLITAN WATER DISTRICT WILL RECEIVE NO WATER UNDER MASTER'S RECOMMENDED DECREE

	Acre-Feet
Main stream supply in 1975	7,575,000
Main stream supply in 2020	6,225,000
Decrease in main stream supply over 45-year period	1,350,000
Annual rate of decrease (1,350,000 acre-feet ÷ 45 years)	30,000
Quantity of California rights (including Indian reservations) which are senior to Metropolitan Water District	3,900,000
Quantity from main stream necessary to satisfy California's right to 3,900,000 acre-feet	6,650,000
Difference between 1975 main stream supply (7,575,000) and quantity necessary to satisfy California rights senior to Metropolitan (6,650,000)	925,000
Number of years after 1975 during which decrease in main stream supply will amount to 925,000 acre-feet (925,000 ÷ 30,000)	31 years
The year in which there would be no supply for Metropolitan, 1975 plus 31 years equals	Year 2006

*BUREAU OF RECLAMATION, REGION 4, U.S. DEP'T OF THE INTERIOR, FINANCIAL AND POWER RATE ANALYSIS, COLORADO RIVER STORAGE PROJECT AND PARTICIPATING PROJECTS (September 1960).

BASIC WATER RIGHTS: LEGAL SOURCES

APPROPRIATION ONLY

Arizona: Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888); *Colorado:* Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); *Idaho:* Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. 1059 (1909); *Montana:* Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702 (1921); *Nevada:* Jones v. Adams, 19 Nev. 78, 6 Pac. 442 (1885); *New Mexico:* Hagerman Irr. Co. v. McMurry, 16 N.M. 172, 113 Pac. 823 (1911); *Utah:* Stowell v. Johnson, 7 Utah 215, 26 Pac. 290 (1891); *Wyoming:* Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845 (1896).

BOTH APPROPRIATION AND RIPARIAN

California: United States v. Gerlach Live Stock Co., 339 U.S. 725, 749 (1950); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); CALIF. CONST. art. XIV, § 3; *Kansas:* 4 KINNEY, IRRIGATION AND WATER RIGHTS 3383 (2d ed. 1912); *Nebraska: Id.* at 3422; *North Dakota: Id.* at 3486; *Oklahoma, Oregon,* and *South Dakota:* Hutchins, History of the Conflict Between Riparian and Appropriative Rights in the Western States 10, 12-13, 29 (presented at Water Law Conference, University of Texas School of Law, 1954); *Texas:* 4 KINNEY, *op. cit. supra,* at 3576-78; *Washington: Id.* at 3625, 3638-39.

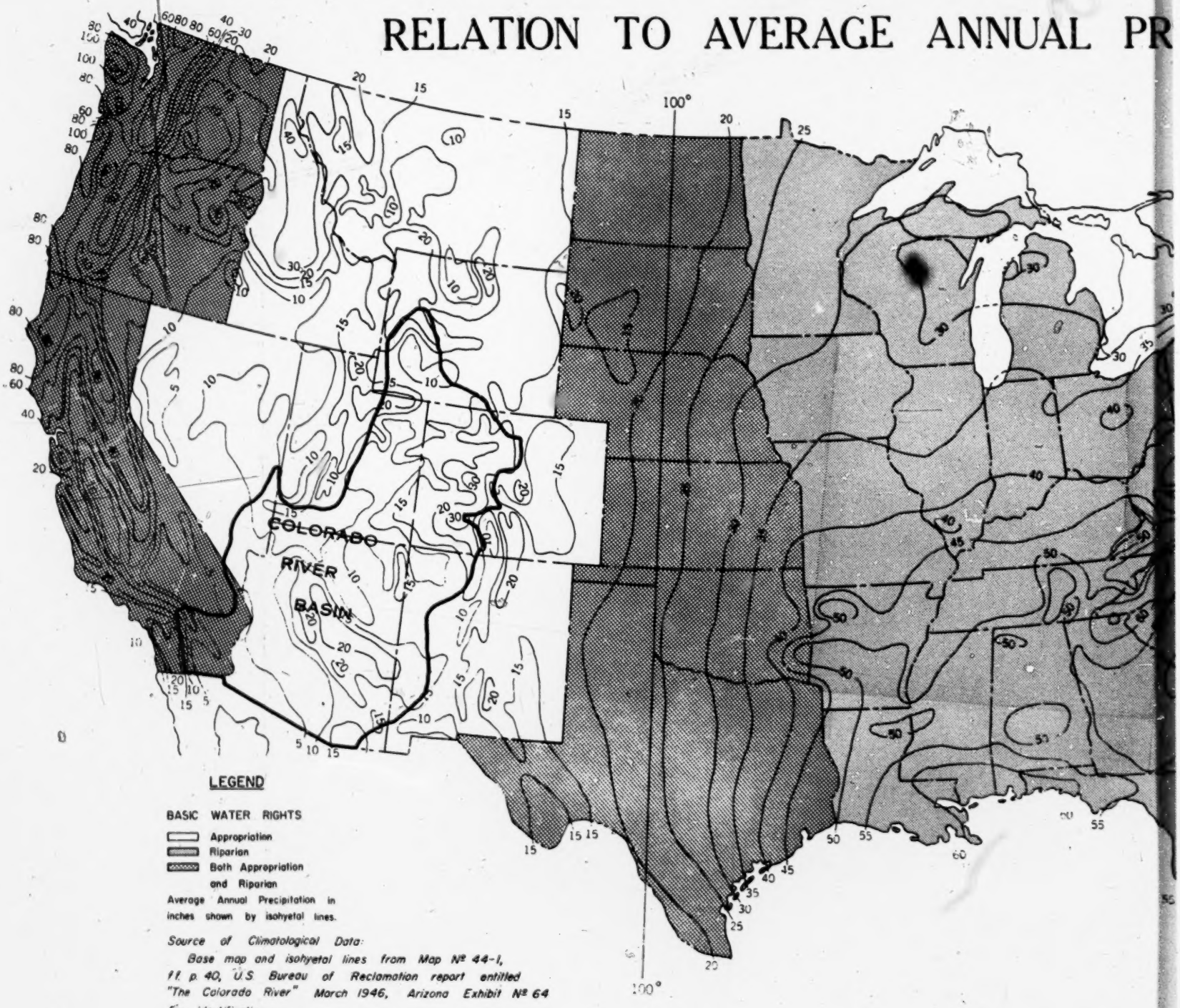
RIPARIAN

Fisher, *Western Experience and Eastern Appropriation Proposals* in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 75, published by The Conservation Foundation (Haber & Bergen ed. 1958); Lauer, *The Riparian Right as Property,* in Legislative Research Center, University of Michigan Law School, WATER RESOURCES AND THE LAW 133 n.3 (1958).

MAP OF THE UNITED STATES SHOWING

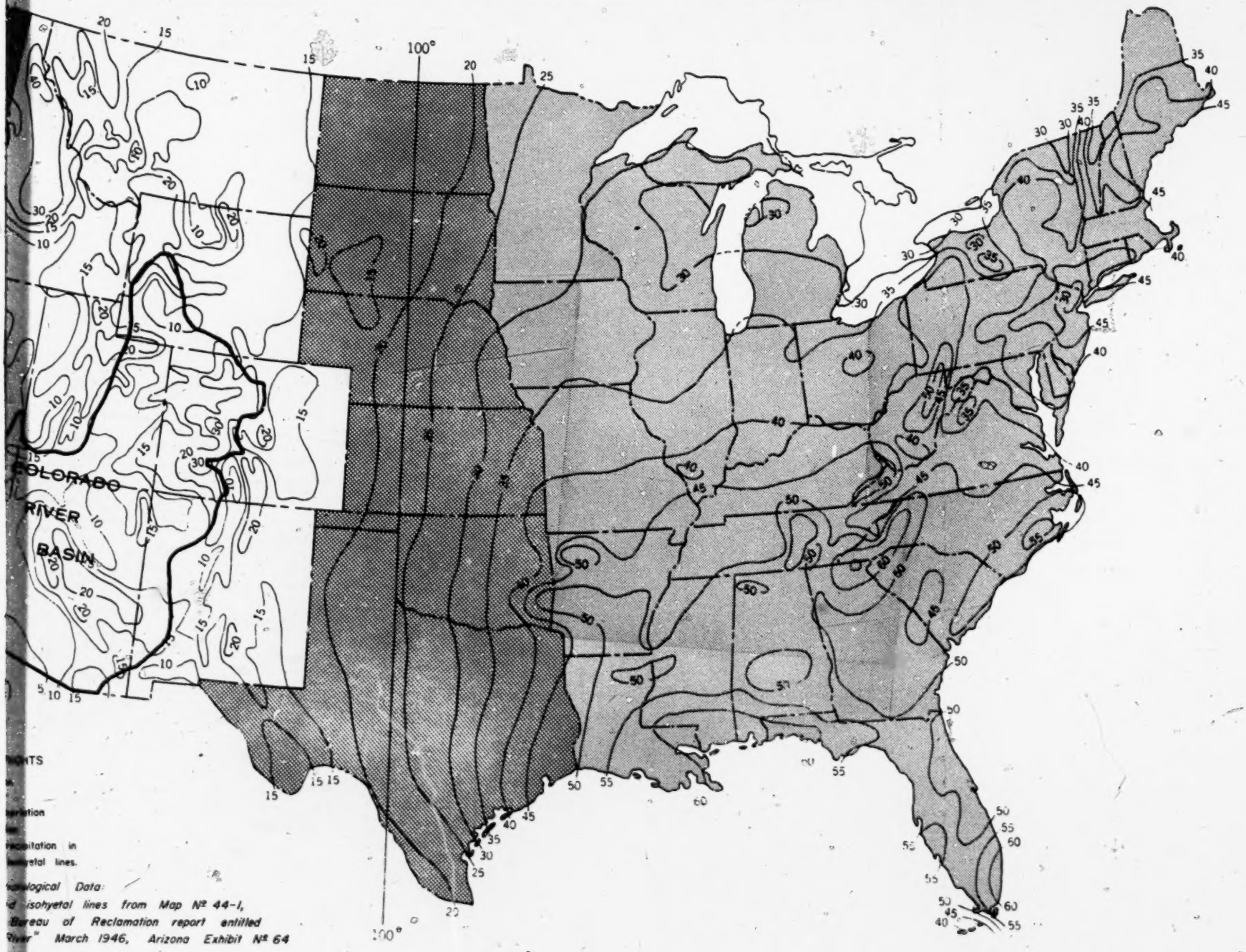
WATER RIGHTS DOCTRINES AND

RELATION TO AVERAGE ANNUAL PR



MAP OF THE UNITED STATES SHOWING

WATER RIGHTS DOCTRINES AND THEIR RELATION TO AVERAGE ANNUAL PRECIPITATION



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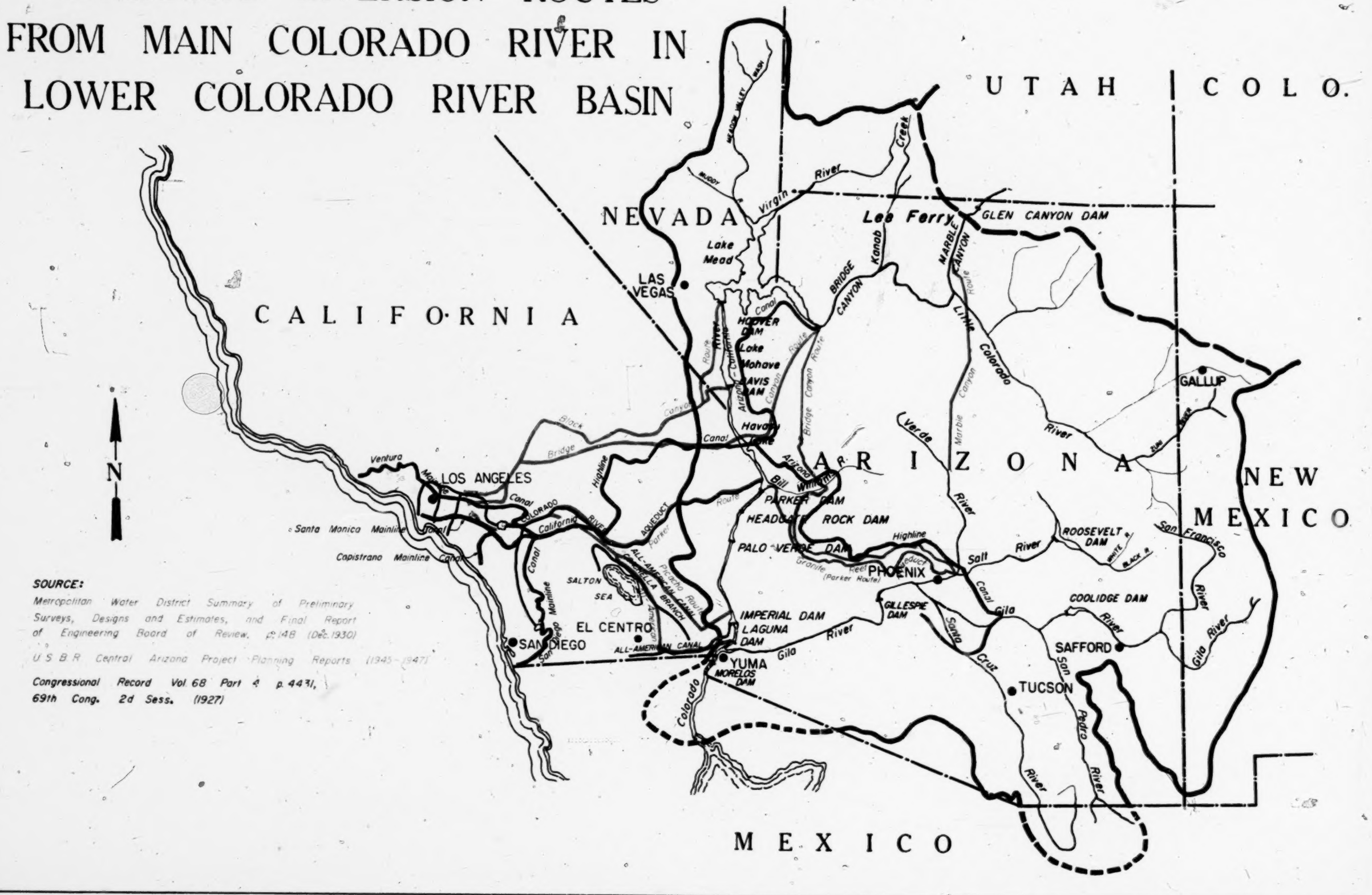
...River" March 1946, Arizona Exhibit Nº 64

ALTERNATE DIVERSION ROUTES FROM MAIN COLORADO RIVER IN LOWER COLORADO RIVER BASIN



SOURCE:

Metropolitan Water District Summary of Preliminary Surveys, Designs and Estimates, and Final Report of Engineering Board of Review, p. 148 (Dec. 1930)

U. S. B. R. Central Arizona Project Planning Reports (1945-1947)

Congressional Record Vol. 68 Part 4 p. 4431, 69th Cong. 2d Sess. (1927)

SOURCES:

[1]Not shown are noncontract uses by trespassers on federal lands, by owners of private lands not within organized irrigation districts or federal reservations, and by national wildlife refuges.

[2]Tr. 22,368-69; ground water adjacent to the Colorado River pumped since early 1880's.

[3]Ariz. Exs. 38 (Tr. 251), 39 (Tr. 252), and 40 (Tr. 252). See also Ariz. Ex. 41 (Tr. 253), contract of Oct. 4, 1946, merging rights of San Diego under her contract (Ariz. Ex. 40) with rights of Metropolitan Water District under her contract (Ariz. Ex. 38 as amended by Ariz. Ex. 39).

[4]Ariz. Ex. 33 (Tr. 249).

[5]Ariz. Ex. 34 (Tr. 249), Coachella lands included within Imperial contract; Ariz. Ex. 36 (Tr. 250).

[6]Ariz. Ex. 34 (Tr. 249).

[7]The Bard Irrigation District (Tr. 8,819-20; Calif. Ex. 50 (Tr. 6,898)) has no contract. Individual water users hold water right applications which, on Secretarial approval, become contracts; exemplary contracts are Calif. Exs. 378-380 (Tr. 8,852), dated 1917, 1910, and 1948. See Calif. Ex. 381 (Tr. 8,855).

[8]These Indian lands do not require contracts. Rep. 312 n.3a.

[9]*Ibid.*

[10]Ariz. Ex. 93 (Tr. 359).

[11]From at least 1918 until 1953, this project was served under a water delivery contract between the United States and the North Gila Valley Irrigation District. Ariz. Ex. 91 (Tr. 356). In 1953 the same parties executed a supplemental contract under which present deliveries are made. Ariz. Ex. 95 (Tr. 360).

[12]Area is irrigated by private pumping without contracts and by holders of Warren Act contracts (see note 14 *infra*). (Rep. 53; Tr. 2,209-10; Ariz. Exs. 76 (Tr. 318), table 2; 77B (Tr. 3,992), at 43 (area A-7-C); and 79 (Tr. 327), at 6.) The United States is planning to enter into a contract with the Yuma Irrigation District for this area. Rep. 213.

[13]Ariz. Ex. 96 (Tr. 361); deliveries of water started in 1943 (Ariz. Ex. 186 (Tr. 2,361)).

[14]Part of Ariz. Ex. 165 (Tr. 2,247); tabulated in Ariz. Ex. 163 (Tr. 2,223); Warren Act is 36 Stat. 925 (1911), 43 U.S.C. §§ 523-25 (1958).

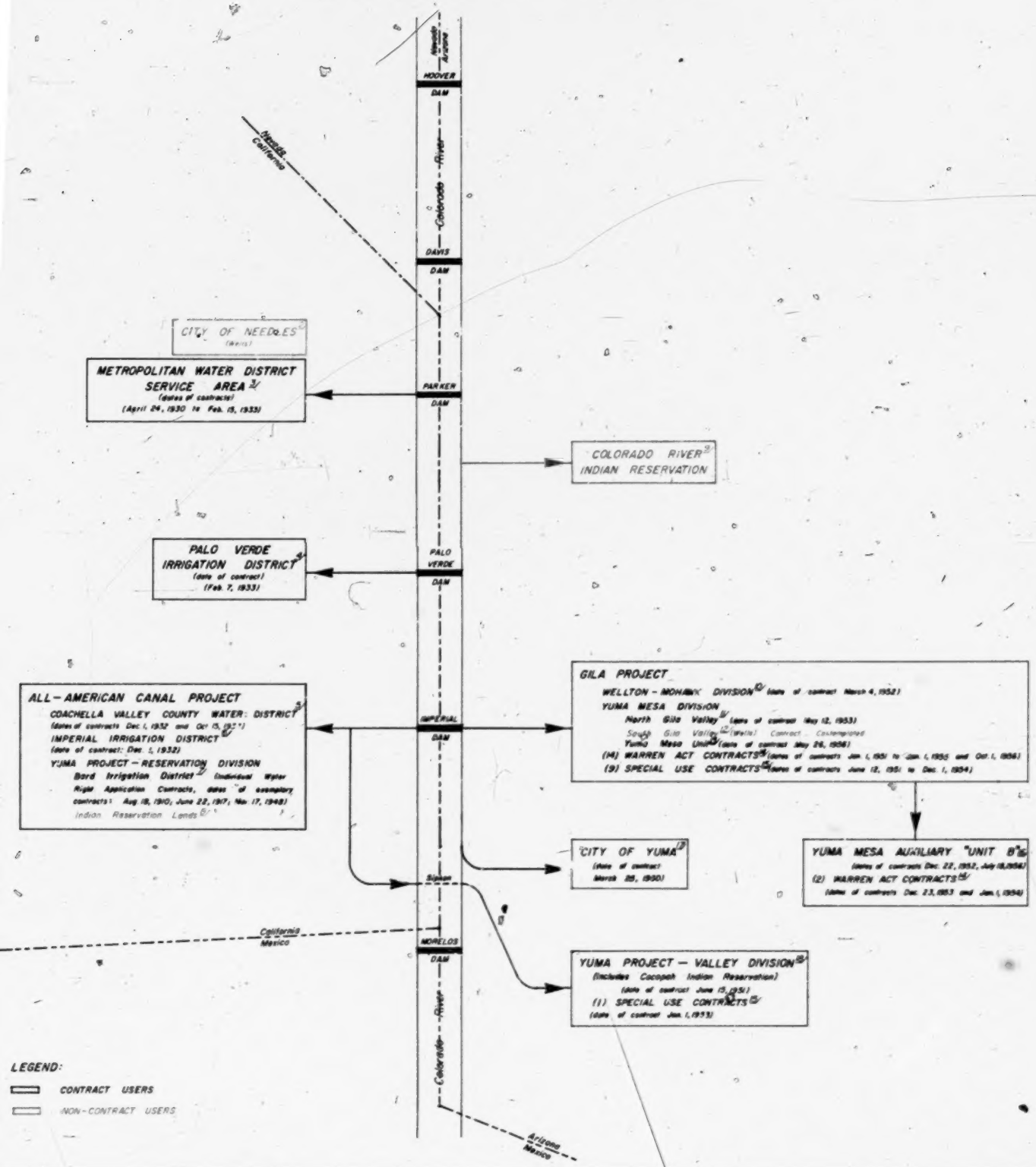
[15]Part of Ariz. Ex. 165 (Tr. 2,247); tabulated in Ariz. Ex. 163 (Tr. 2,223); Miscellaneous Special Use Act is 41 Stat. 451 (1920), 43 U.S.C. § 521 (1958).

[16]Ariz. Ex. 94 (Tr. 359) as amended by U.S. Ex. 7 (Tr. 15,383-84).

[17]Calif. Ex. 7611 for iden. (See also contracts No. 158r-303 and 304 tabulated in Ariz. Ex. 163 (Tr. 2,223), at sheet 2.) Use of Colorado River water began in 1893. Tr. 19,897-900, 19,901; Ariz. Ex. 316A (Tr. 19,980).

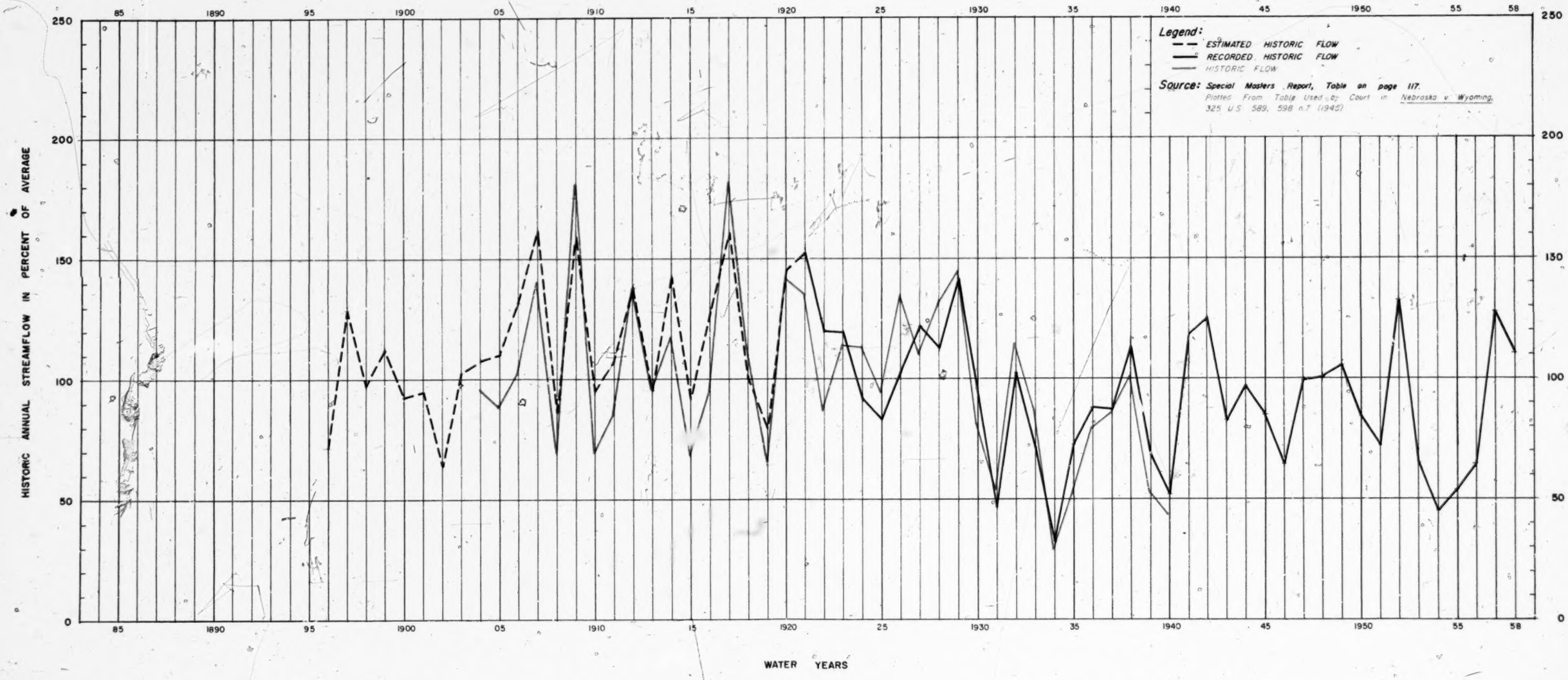
[18]From 1906 until 1951, this project was served under a water delivery contract between the United States and the Yuma County Water Users' Ass'n. U.S. Ex. 19-T (Tr. 15,518). In 1951 the same parties executed a supplemental contract under which present deliveries are made. Ariz. Ex. 92 (Tr. 357).

DIAGRAMMATIC SKETCH SHOWING CONTRACT AND NON-CONTRACT[1] USES ALONG THE COLORADO RIVER IN ARIZONA AND CALIFORNIA



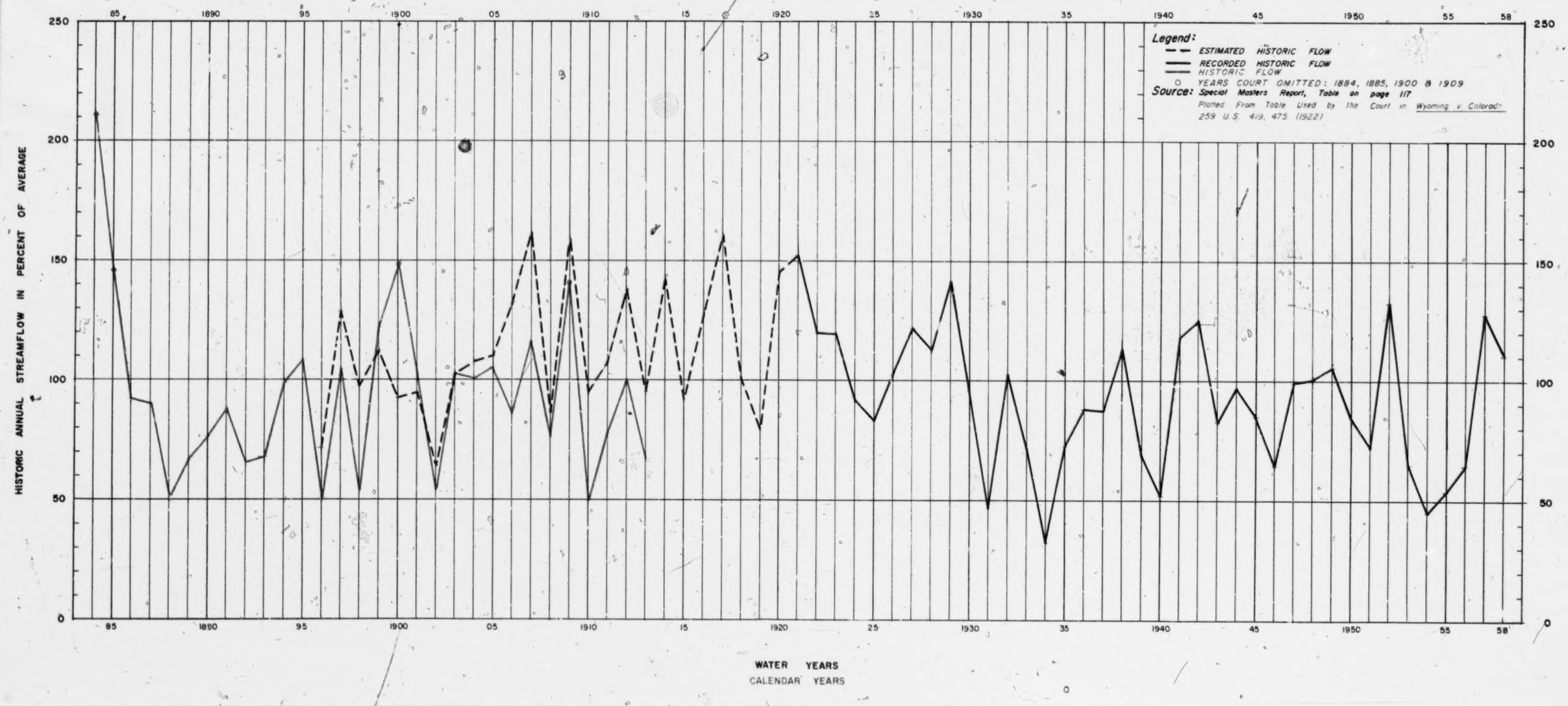
COMPARISON
OF
FLUCTUATION IN ANNUAL FLOW AND LENGTH OF RECORD

COLORADO RIVER AT LEE FERRY
AND
NORTH PLATTE RIVER AT PATHFINDER



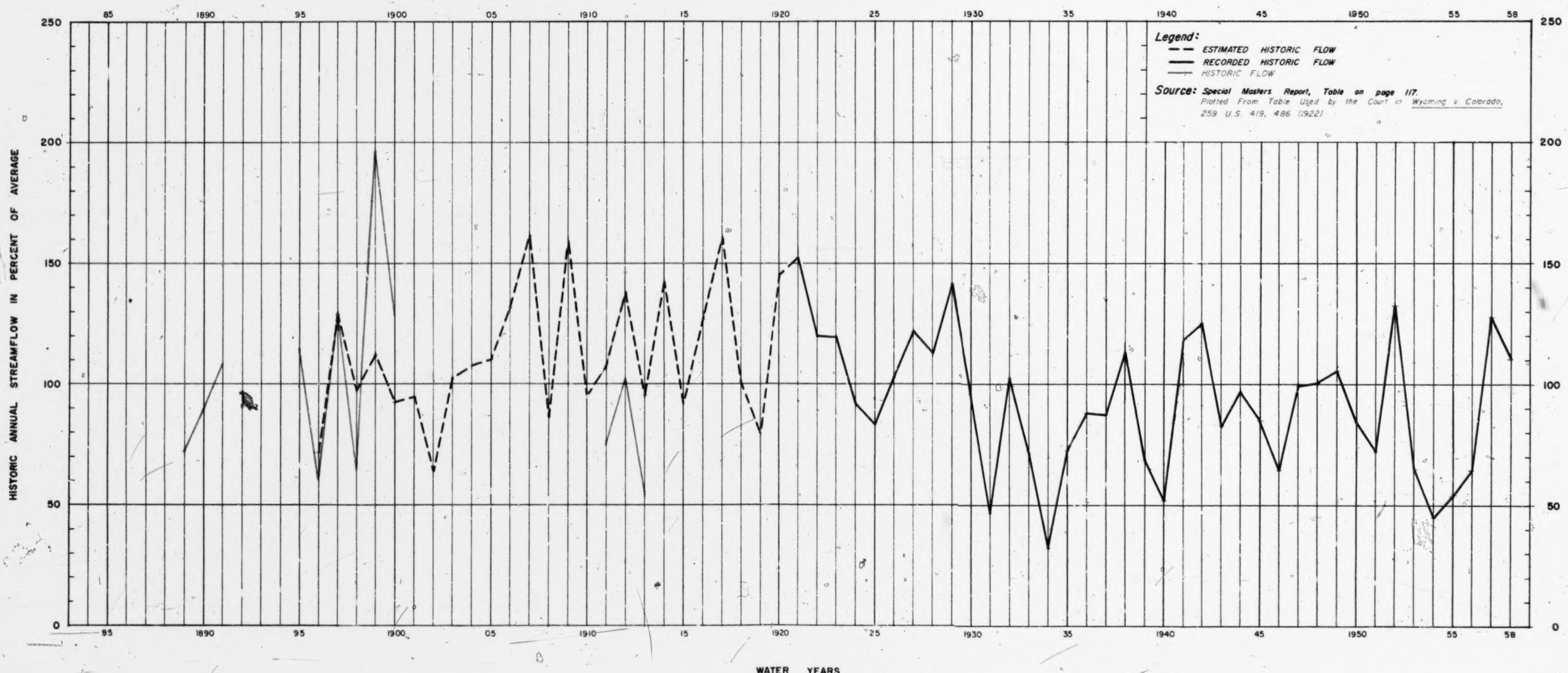
COMPARISON
OF
FLUCTUATION IN ANNUAL FLOW AND LENGTH OF RECORD

COLORADO RIVER AT LEE FERRY
AND
CACHE LA POUDRE RIVER AT MOUTH OF CAÑON



COMPARISON
OF
FLUCTUATION IN ANNUAL FLOW AND LENGTH OF RECORD

COLORADO RIVER AT LEE FERRY
AND
LARAMIE RIVER



COMPUTATION OF DEPENDABLE SUPPLY

(Explanation accompanying plate 7, schematic diagram, and plate 8, bar graph.)

The following table (in millions of acre-feet per annum) presents data which are illustrated on plates 7 and 8. The numbered items in the table correspond to the circled numbers on the two plates.

Column 1 shows the calculation of the dependable supply by Mr. Stetson for California (Rep. 110-13). It is illustrated on plate 7, a schematic diagram. It is explained in detail in California Findings and Conclusions, part V, pp. V-3 through 33.

Columns 2, 3, and 4 show the calculations of the dependable supply by Mr. Erickson for Arizona (Rep. 110-13).

The comparison of the figures in columns 1, 2, 3, and 4 is shown graphically on plate 8.

The period for all four studies is 1909-1956. The studies presented in columns (1) and (2) are based on all existing and authorized upper basin storage, equivalent to 25 million acre-feet of effective storage capacity at Lee Ferry. (See Tr. 11,721-22.) The Erickson studies presented in columns (3) and (4) raise this effective capacity to 35 million acre-feet. Column (4) assumes upper division delivery at Lee Ferry of an average of 1,280,000 acre-feet of controlled release for the Mexican Treaty obligation. (Ariz. Ex. 358 (Tr. 18,097); see pp. 245-46 and note 4 *supra*.)

(Table on following page.)

(See explanatory note on preceding page.)

Item	Stetson[1] (1)	Erickson[2] (2)	Erickson[3] (3)	Erickson[4] (4)
1. "Virgin flow" Colorado River at Lee Ferry	15.2	15.2	15.2	15.2
2. Upper basin depletion at Lee Ferry	6.5	6.8	7.2	6.2
3. Total inflow to lower basin at Lee Ferry (1 minus 2)	8.7	8.4	8.0	9.0
4. Net gain Lee Ferry to Hoover Dam	0.95	0.95	1.0	0.95
5. Lake Mead evaporation	0.65	0.7	0.6	0.45
6. Regulated release from Hoover Dam (3 plus 4 minus 5)	8.7	8.2	8.4	9.5
7. Reservoir evaporation Hoover Dam to upper Mexican boundary	0.3	0.3	0.3	0.3
8. Usable inflow Hoover Dam to upper Mexican boundary	0.075	0.075	0.075	0.075
9. Natural river losses Hoover Dam to upper Mexican boundary	0.6	0.3	0.3	0.3
10. Mexican Water Treaty	1.5	1.5	1.5	1.5
11. Water to Mexico in excess of treaty requirement	0.2	0.075	0.075	0.075
12. Unusable spill from Hoover Dam	0.3	0.5	0	0
13. Net usable supply for lower basin from main stream (6 plus 8 minus 7, 9, 10, 11, and 12)	6.175	6.1	6.3	7.4

[1]Calif. Exs. 2216 and 2216A (Tr. 11,825), as corrected at Tr. 21,836.

[2]Tr. 18,913-15.

[3]Tr. 18,812-19. Due to an apparent arithmetical mistake, the witness erroneously stated that the net usable supply on the basis of this study would be 6.5 million acre-feet per annum.

[4]Ariz. Ex. 366 (Tr. 18,097).

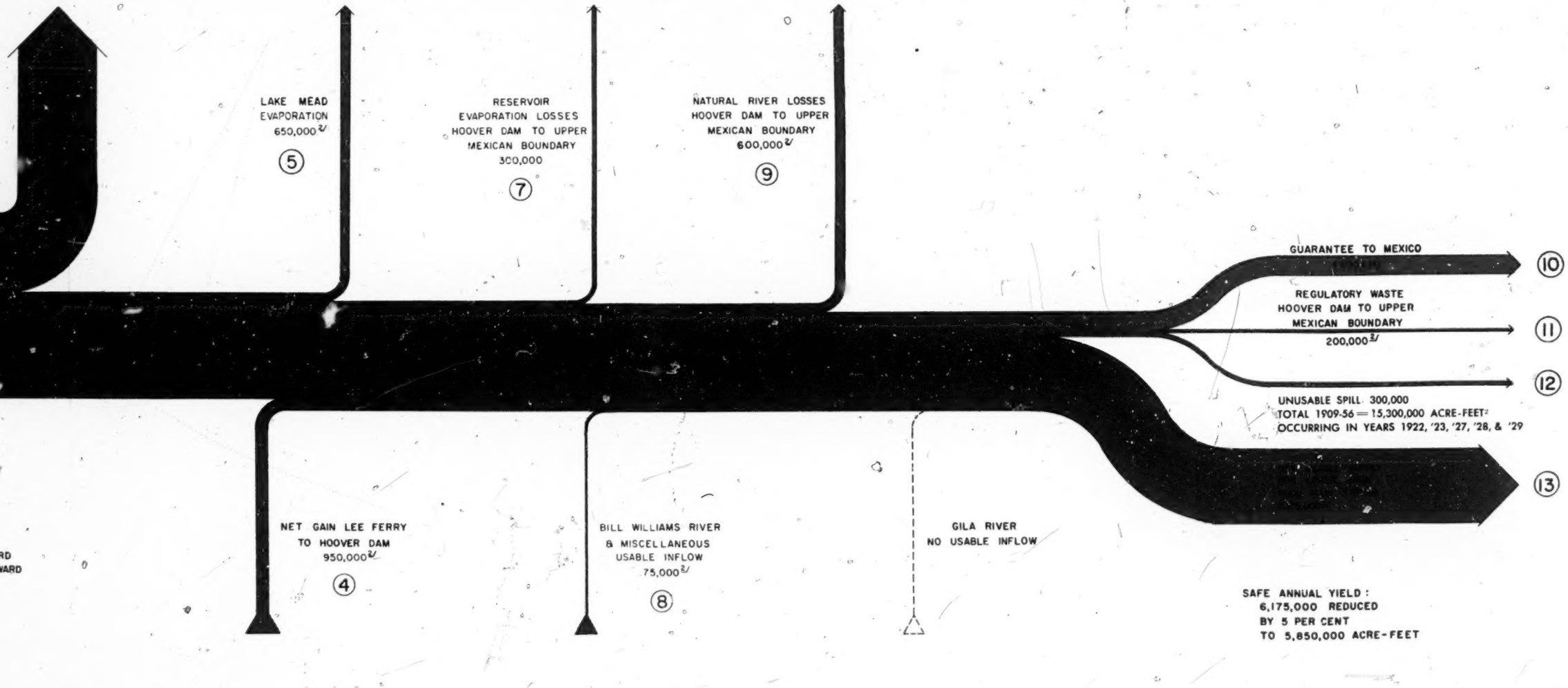
SCHEMATIC DIAGRAM SHOWING WATER SUPPLY AVAILABLE ON LONG TERM BASI FROM MAIN STREAM OF COLORADO RIVER IN LOWER BASIN PERIOD OF STUDY 1909-1956

(AMOUNTS SHOWN ARE AVERAGES PER YEAR IN ACRE-FEET)

1/ SUBJECT TO ADJUSTMENT UPWARD
2/ SUBJECT TO ADJUSTMENT DOWNWARD

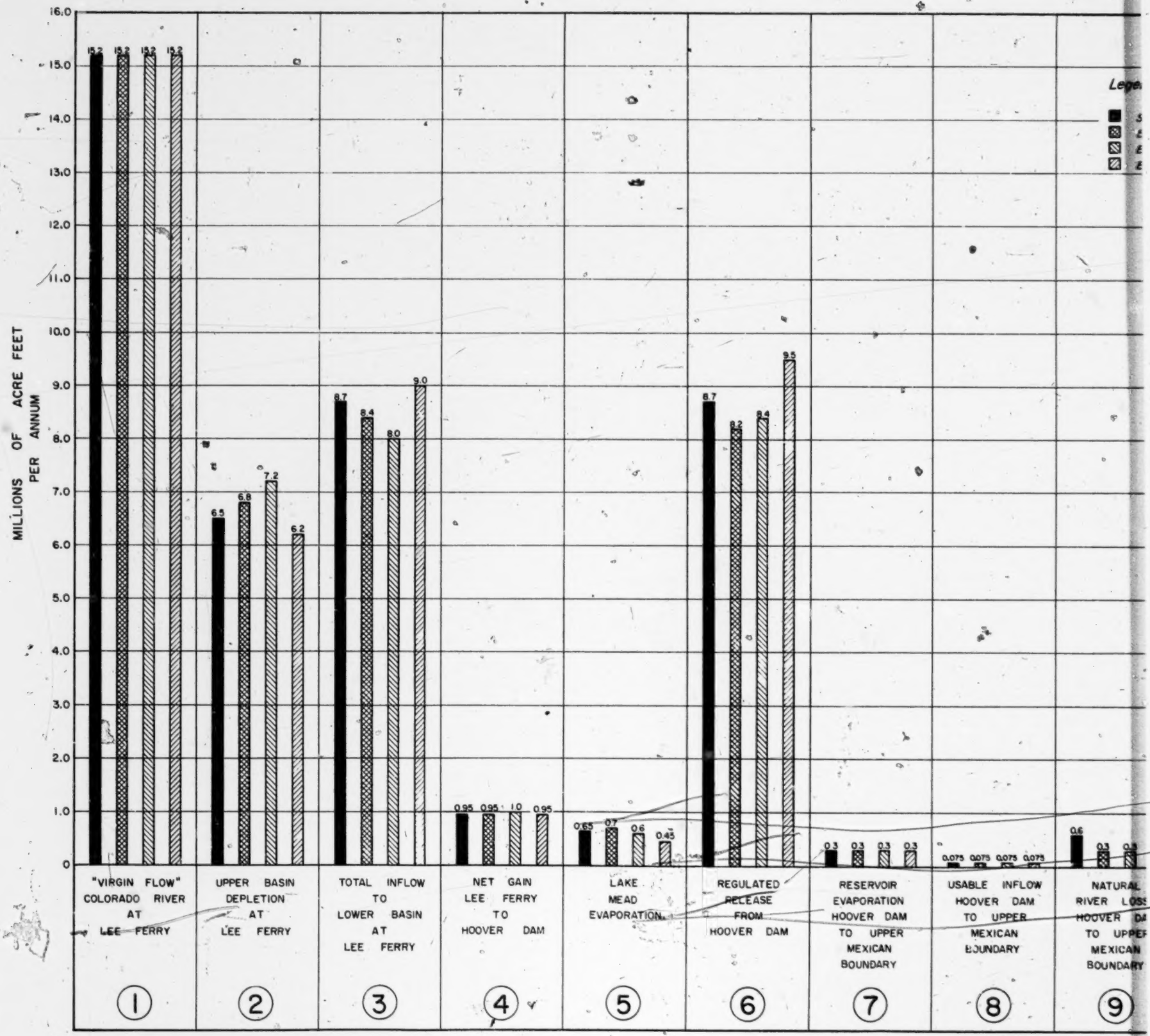
SCHEMATIC DIAGRAM SHOWING
WATER SUPPLY AVAILABLE ON LONG TERM BASIS
FROM MAIN STREAM OF
COLORADO RIVER IN LOWER BASIN
PERIOD OF STUDY 1909-1956

(AMOUNTS SHOWN ARE AVERAGES PER YEAR IN ACRE-FEET)

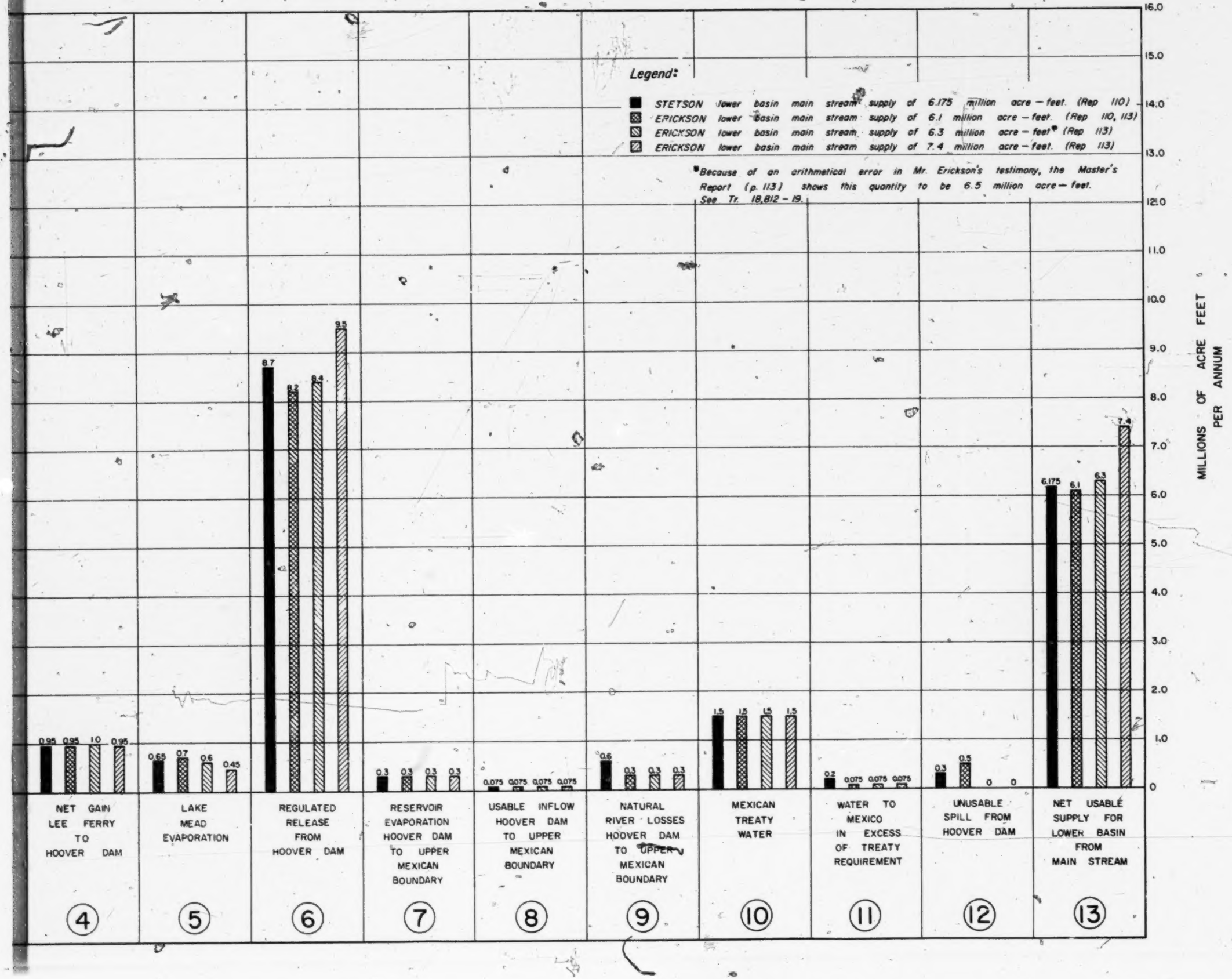


(For explanation of plate 8, see computation of dependable supply preceding plate 7.)

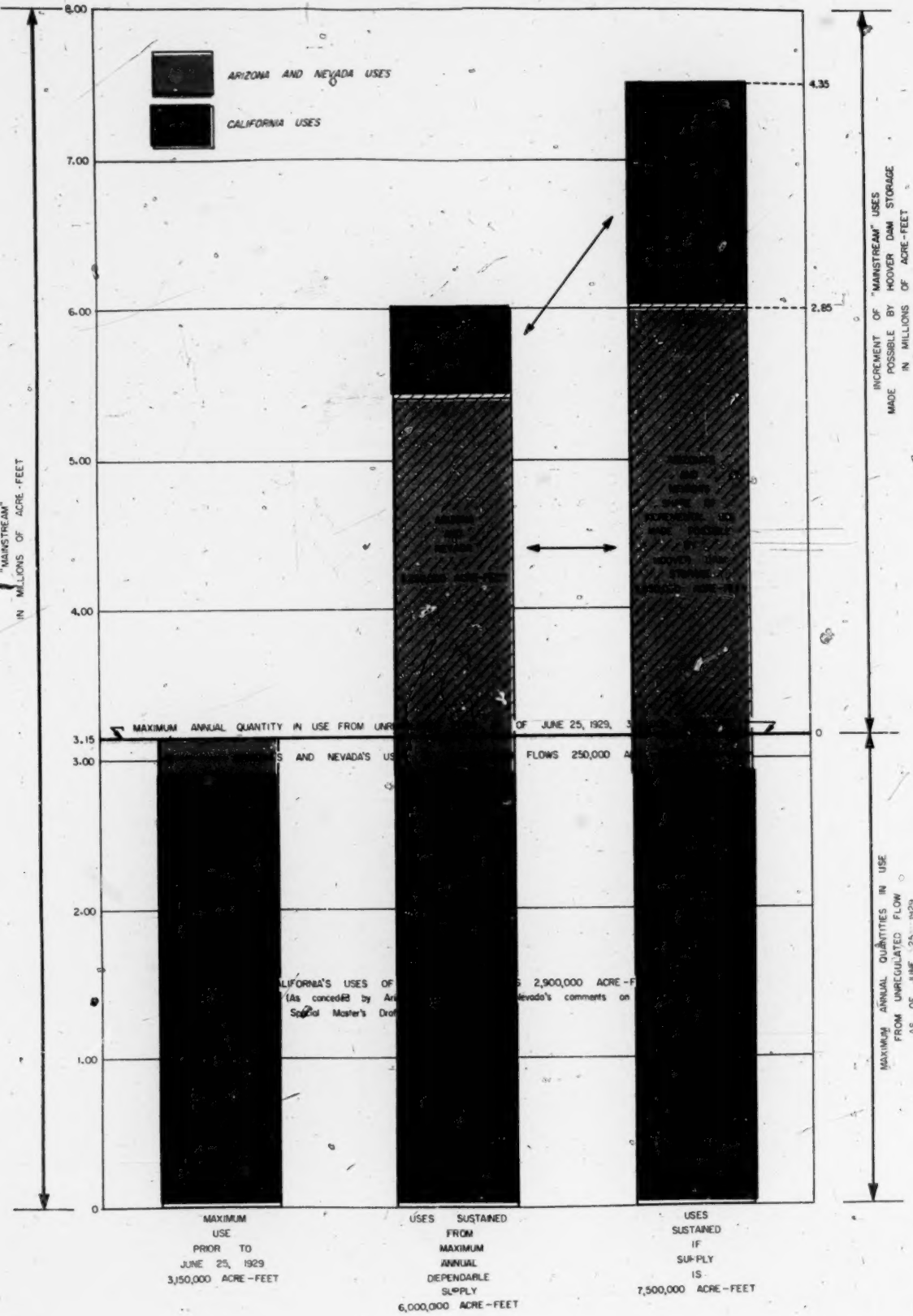
COMPARISON OF LONG TERM MAIN STREAM WAT



ON OF LONG TERM MAIN STREAM WATER SUPPLY STUDIES



ALLOCATION UNDER SPECIAL MASTER'S DECREE OF INCREMENTAL USES MADE POSSIBLE BY HOOVER DAM STORAGE



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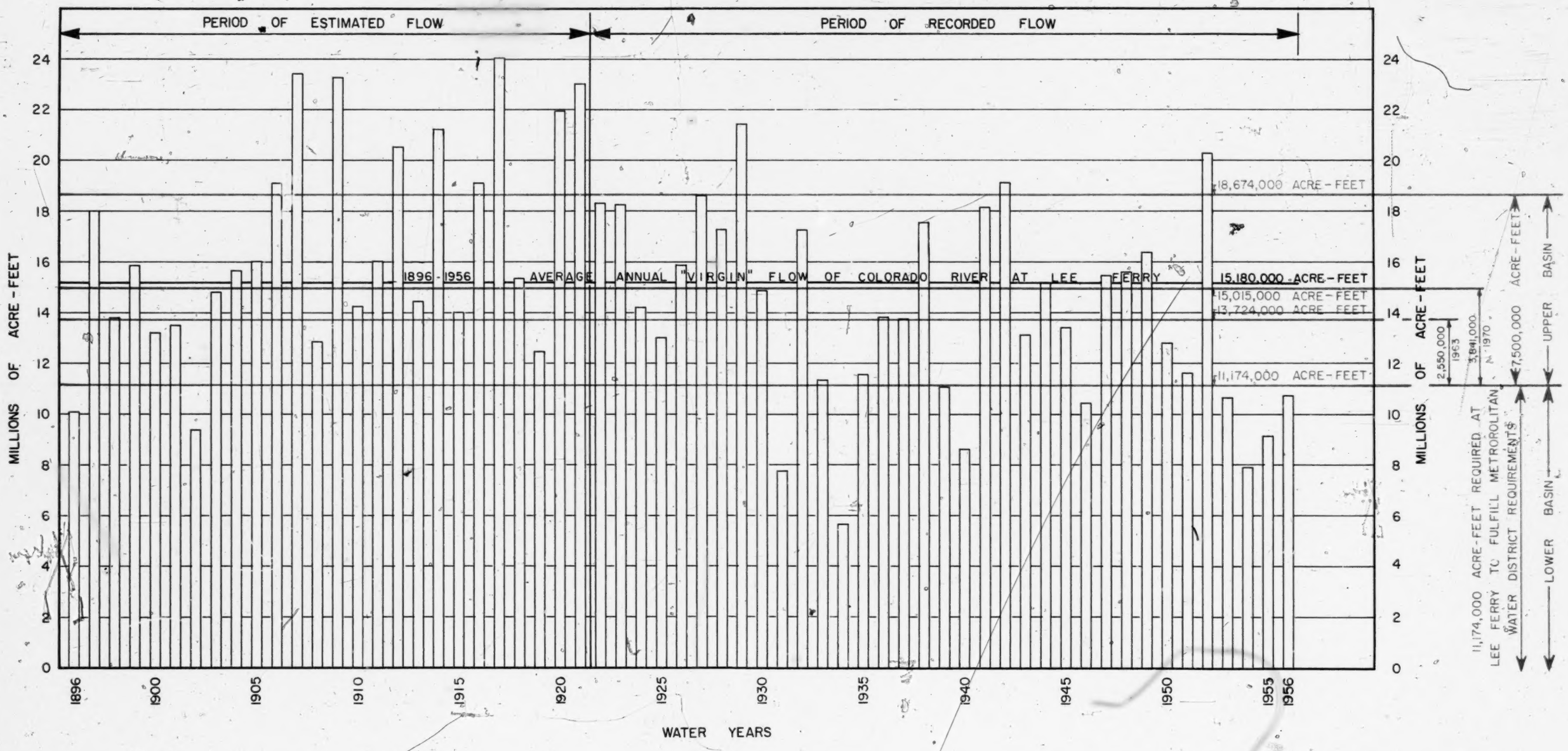
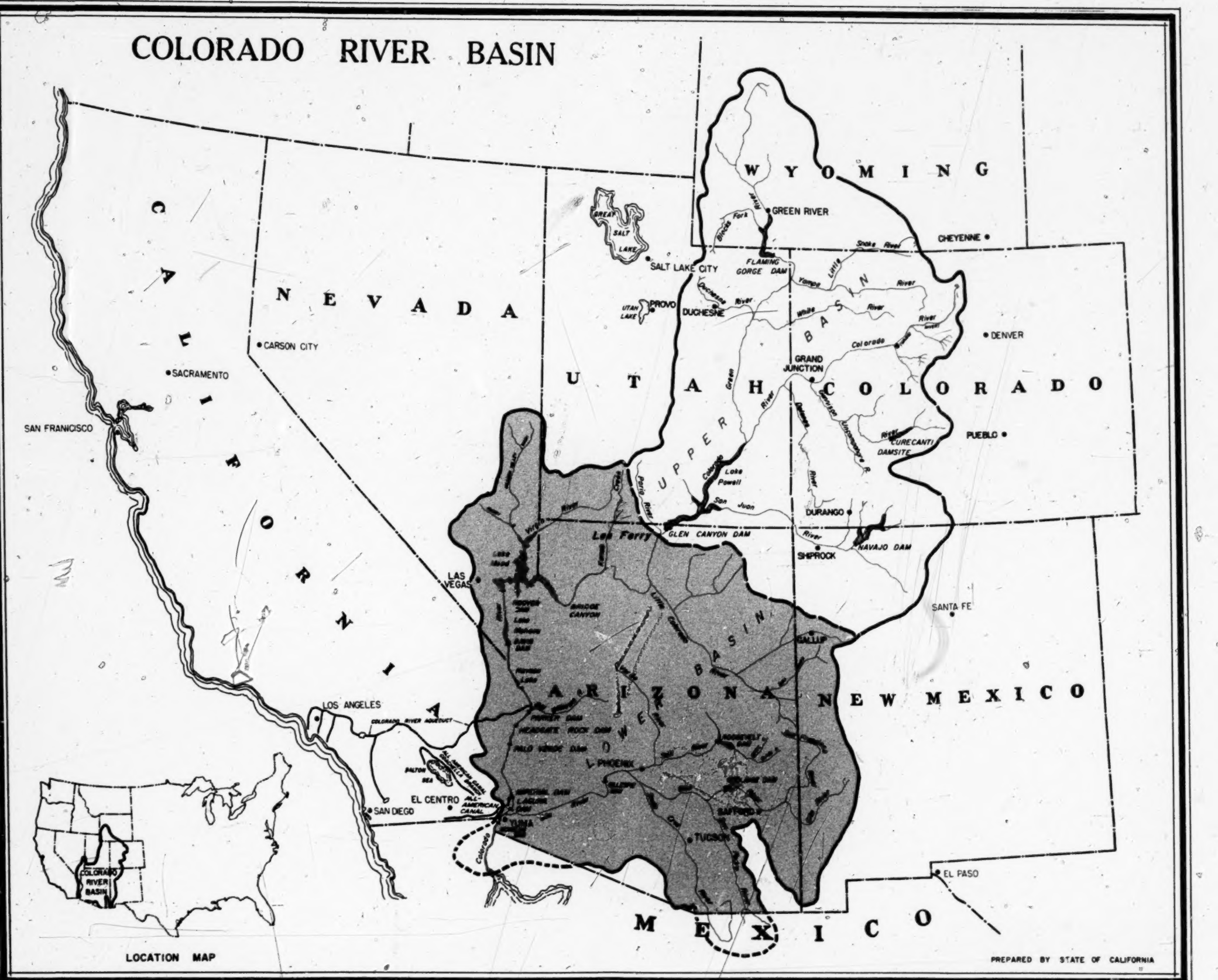
AND
REQUIREMENTS DEPENDENT THEREON



COLORADO RIVER BASIN



PREPARED BY STATE OF CALIFORNIA

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SUPREME COURT, U. S.

No. 8 Original

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

BRIEF IN SUPPORT OF EXCEPTIONS OF THE UNITED STATES, INTERVENER, TO THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 9 ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

BRIEF IN SUPPORT OF EXCEPTIONS OF THE UNITED STATES, INTERVENER, TO THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE

SPECIAL MASTER'S REPORT

The report of the Special Master dated December 5, 1960, was received and ordered filed by this Court on January 16, 1961 (364 U.S. 940).

JURISDICTION

This is an original case in which the jurisdiction of this Court rests on Article III, Section 2, of the Constitution.

QUESTIONS PRESENTED

1. Whether in making contracts with the States in the Lower Colorado River Basin for the storage of water in, and the delivery of water from, Lake Mead the Secretary of the Interior is authorized to make deductions for upstream consumptive use in Arizona

and Nevada of water which would otherwise flow into Lake Mead.

2. Whether the Secretary of the Interior may deliver water pursuant to contracts under the authority of the Boulder Canyon Project Act without regard for State law.

3. Whether the contract entered into by the Secretary of the Interior with the State of Nevada exhausts his authority under Section 5 of the Boulder Canyon Project Act so that he may not contract further for the use of impounded water within the State of Nevada or use such water for federal projects.

4. Whether water salvaged on wildlife refuges may be used there without regard to priorities otherwise applicable.

STATUTES AND COMPACT INVOLVED

The relevant statutes are the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. 617; the California Limitation Act, Act of March 4, 1929, Ch. 16, 48th Sess., Statutes and Amendments to the Codes, 1929, pp. 38–39, both of which are set forth in appendices to the Special Master's Report at pp. 379 and 397, respectively. Also involved is the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, set forth in an appendix to the Special Master's Report beginning at p. 371.

STATEMENT

This litigation was commenced by Arizona in 1952 by a bill of complaint against California and seven of its agencies, asking for an adjudication of Arizona's rights to the use of the waters of the Colorado

River. The United States, Nevada, New Mexico, and Utah became parties either by intervention or by order of this Court (344 U.S. 919; 347 U.S. 985; 350 U.S. 114, rehearing denied, 350 U.S. 955). The present Special Master was appointed on October 10, 1955 (350 U.S. 812). After pre-trial proceedings, extensive hearings were conducted, briefs were exchanged, a draft report was submitted and commented on both in writing and at oral argument, and the present report was filed. All of the parties except Utah filed exceptions to this report in February, 1961, and it is the consideration of these exceptions which is now before this Court.

SUMMARY OF ARGUMENT

A. Our first two exceptions, which are here treated together, concern the question of whether Arizona and Nevada are to be charged with consumptive use of water upstream from Lake Mead, or whether their full allocations may be taken from Lake Mead and from the mainstream below without regard to the extent that they may have lessened the amount of water flowing into Lake Mead. It is the position of the United States that the authority of the Secretary of the Interior under Section 5 of the Boulder Canyon Project Act to contract for the storage and delivery of water includes the authority to make appropriate adjustments for upstream use. The Special Master rejected this position, holding that the only power of physical control, and therefore the only authority to contract, existed with respect to the water in Lake Mead and the mainstream below Lake Mead.

The provisions of the Boulder Canyon Project Act, when read in the light of its history, indicate an intent to authorize the Secretary of the Interior to divide the mainstream waters available in the Lower Basin. Hoover Dam was constructed to impound and regulate those waters. This purpose would be impaired by permitting Arizona and Nevada to make diversions upstream without a corresponding reduction in their entitlements to stored water.

The Special Master's rejection of this proposition rests in part on a theory that to make adjustments for upstream uses would impair the permanency of the Secretary's contracts in violation of the Project Act and also in violation of State law. But, as the United States understands the effect of making such deductions for upstream use, existing contract rights would not be curtailed. Either the upstream uses would be subject to prior contract, or, if they are prior, would result in authority to the Secretary to limit the quantity of water to be allocated by contract to less than the full amount. In either event, no existing contracts would lose their required permanency.

We believe that this interpretation gives added certainty to the allocations under the Project Act and would give some protection to California's established projects.

B. Our third exception relates to the extent that Congress has subjected the authority of the Secretary of the Interior under the Boulder Canyon Project Act to State law. Although the Special Master refused to pass upon the legality of rights of the United States to make deliveries under contracts it has made,

he did include in his findings a statement that rights under those contracts would be subject to internal State law. This position is also reflected in his recommended decree. We urge that these conclusions should be disapproved.

As we read the Project Act, the Secretary is given full authority to build a dam, store mainstream water, and deliver it to users under contracts to be executed by him. We believe that this affirmative authority is not limited by a requirement that he comply with State law. This is in accord with general principles under which the United States may perform its functions without regulation by the States. It is also in accord with decisions of this Court with respect to the authority granted the federal government in comparable statutes dealing with the use of water where it has been held that control of the operation of these federal projects shall rest entirely in the Secretary. And it is in accord with 59 years of administrative practice under the reclamation laws.

The countervailing argument is that by Section 18 of the Project Act Congress subjected the authority of the Secretary to State law. Both the legislative history of this section and the interpretation of comparable provisions of the Reclamation Act and the Federal Power Act indicate that Section 18 does not mean what the Special Master believed.

C. Our fourth exception takes issue with a single sentence in the Special Master's report in which he held that the Nevada contract, unlike the Arizona contract, contemplated that the State should subdivide the allocation among users. Our position is that Sec-

tion 5 of the Project Act requires that deliveries from Lake Mead be made to users only pursuant to contracts with the Secretary of the Interior. Insofar as the contract with Nevada contemplates use by Nevada, it may fulfill the requirements of Section 5. With respect to other users, we urge that the language of the Nevada contract does not show an intent to depart from the procedure required by Section 5 of the Project Act and followed in Arizona and California.

D. Finally, we excepted to the failure of the Special Master to recognize the right of the United States to use on its wildlife refuges water reclaimed by federal work on those refuges. Our position here is simply predicated on the theory that he who reclaims water may use it.

ARGUMENT

In large part the United States supports the Special Master's Report as filed. However, we have filed five numbered exceptions which deal with specific sections of the report and the recommended decree. Although the fundamental conclusions in the report and major provisions of the decree do not depend upon the resolution of these issues, they are sufficiently significant to make it appropriate to have noted the exceptions and to file this brief in support of them. However, we anticipate that our answering brief in response to the exceptions of the other parties will deal more directly with the principal issues in the case on which we support the report.

Since our Exceptions I and II are closely related, we shall combine our argument in support of them

under a single heading, but will continue to number the points here to correspond with the numbers given the exceptions.

POINTS I and II

IN MAKING ALLOCATIONS OF WATERS FROM LAKE MEAD AMONG LOWER COLORADO RIVER BASIN STATES, THE SECRETARY OF THE INTERIOR IS AUTHORIZED TO MAKE DEDUCTIONS TO COMPENSATE FOR UPSTREAM CONSUMPTIVE USE IN ARIZONA AND NEVADA OF WATER WHICH WOULD OTHERWISE FLOW INTO LAKE MEAD

Our Exceptions I and II are specifically addressed to the Special Master's definition of the term "mainstream" as excluding water above Lake Mead (Report, pp. 173, 183, 185, 225, 226, 316–321; Recommended Decree, p. 345) and to his disapproval of provisions in contracts between the Secretary of the Interior and the States of Arizona and Nevada which condition the amount of water to be delivered thereunder on the amount of depletion of the flow into Lake Mead by upstream uses in these States (Report, pp. 237–247, 226–228).[1]

---

[1] Article 7(d) of the Arizona contract provides as follows:

"The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act." (Report, p. 401, App. 5.)

Article 5(a) of the amended Nevada contract contains this language:

"Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder

In broad terms, the issue on both of these exceptions is whether the Special Master was correct in construing the authority of the Secretary of the Interior as limited to water to be taken from Lake Mead or from the mainstream below Lake Mead without consideration of upstream uses. We urge that the Boulder Canyon Project Act authorizes the Secretary of the Interior to take into consideration all consumptive use of water in Arizona and Nevada which would have flowed into Lake Mead if it had not been used within the Lower Basin.

A brief discussion of the geography involved is necessary to understand these exceptions. For the convenience of the Court a slightly altered copy of the map which California attached to its exceptions is attached as an appendix. The dividing line between the Upper and Lower Colorado River Basins is located at Lee Ferry, near the northern boundary of Arizona. From there, the river flows for 275 miles before it reaches the upper limits of Lake Mead, the reservoir formed by Hoover Dam. During much of the distance the Colorado River traverses between Lee Ferry and Lake Mead there are deep canyons which make diversion of the waters impractical.

Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power." (Report, pp. 420–421, App. 7.)

However, there are areas where, by the building of extensive facilities, the waters could be diverted, and, in fact, one of the possible points for diversion for the proposed Central Arizona Project lies in this area. Also in this reach of the river, above Lake Mead but below Lee Ferry, the river is joined by several tributaries, principally the Little Colorado River (Arizona and New Mexico) and Johnson and Kanab Creeks (Utah and Arizona). The Virgin River (Nevada, Utah, and Arizona) flows into Lake Mead. The parts of Arizona, Nevada, Utah, and New Mexico drained by these tributaries are included in the Lower Basin of the Colorado River system. It is obvious that consumptive use of the waters before they reach Lake Mead will reduce the quantity of water which will be impounded there subject to delivery under contracts entered into by the Secretary of the Interior.

The United States has asserted that, under a proper construction of the Boulder Canyon Project Act, the Secretary is required to consider uses in Arizona and Nevada from the mainstream above Lake Mead and from tributaries entering the mainstream between Lee Ferry and Lake Mead. Thus we would include in the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act not only waters impounded in Lake Mead, but also all water which would have reached the mainstream above Hoover Dam except for consumptive uses in Arizona and Nevada. The Special Master disagrees, holding that the Secretary may consider only the waters which are actually impounded in Lake Mead and are taken therefrom or from the mainstream below.

Under the terms of the Colorado River Compact, the consumptive use of part of the waters of the Colorado River system was divided between the Upper and Lower Basin States. Since the effectiveness of this Compact depended upon Arizona's approval, which was not forthcoming, the Project Act was made dependent on a modification of the Compact and California's adoption of a Limitation Act accepting a 4,400,000 acre-foot limitation on its use of the initial 7,500,000 acre-feet of mainstream water available annually for the Lower Basin. According to the Special Master's interpretation, the limitation also permits the consumptive use in California of not more than one-half of these waters annually available in excess of 7,500,000 acre-feet. As the Special Master found, the Project Act contemplated the control and use of "substantially all the water of the mainstream" (Report, p. 153) and the distribution of this water under contract by the Secretary of the Interior. It would frustrate this purpose if some of the States could avoid the Project Act allocations by taking the water prior to its entry into Lake Mead.

Section 5 of the Project Act specifically authorizes the Secretary of the Interior "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof * * *." To be effective such contracts may reasonably require that the uses of water of the mainstream above the dam and the tributaries feeding it should be accounted for in allocations of the water in storage. Unless the Secretary's authority is read in this manner, there is a serious flaw in his

authority to make the distribution among the Lower Basin States.

The Special Master's conclusion that the waters contemplated by Congress in enactment of Section 4(a) of the Project Act are mainstream waters is based on the legislative history, reviewed at pp. 173 to 200 of the Report, which clearly so indicates. His conclusion that the aggregate waters from which California's share is to be derived do not include waters taken from the mainstream or the tributaries above Lake Mead—that the waters contemplated by Congress in the enactment of Section 4(a) of the Project Act are only those which actually arrive in Lake Mead or in the mainstream below Hoover Dam—is predicated primarily on this reasoning:

> * * * The Project Act was concerned primarily with the construction and operation of Hoover Dam, and most of its provisions relate to this basic purpose. Hoover Dam gives the United States physical control over the water stored in Lake Mead and over the use of substantially all of the water in the mainstream below, but it does not enable the United States physically to control the use of water from the mainstream above Lake Mead. Consistently with this physical fact, the provisions of the Project Act do not purport to govern the mainstream above Lake Mead. Section 5 authorizes the Secretary of the Interior to contract for the delivery of water stored in Lake Mead at points which may be agreed upon along the Lake and the mainstream below; that section specifically applies only to water in Lake Mead and to water released therefrom. Also Sections 6 and 8 of the Project Act apply in terms to water con-

> trolled by the United States by means of Hoover Dam.
>
> Section 4(a) must be interpreted within the context just described. Consistent with the other provisions of the Project Act, I interpret Section 4(a), as applying only to Lake Mead and the mainstream below. * * * [Report, p. 183. See also p. 173.]

This analysis, however, overlooks the previously determined fact that Congress authorized a project which it "realized * * * would impound *substantially all* the water of the mainstream * * *." (Report, p. 153; emphasis added.) It appears to attribute to Congress a disregard for anything which might happen above the reservoir to frustrate or partially to frustrate the purposes of the dam. Such disregard for the successful accomplishment of the purposes of the project should not be implied simply from the fact that Congress gave the Secretary of the Interior specific instructions with respect to the operation of the dam and the delivery of waters stored thereby, and spoke otherwise in terms of water "controlled by the United States."[2] It is more reasonable to conclude that when Congress authorized the construction of a

[2] At page 114 of the Report, the Special Master states that no new projects in either the Lower or Upper Basins which would affect Lower Basin mainstream supply can be constructed without congressional action or acquiescence. While we agree with this statement and that the authorities cited support it, nevertheless we think that when Congress (1) authorized the construction of Hoover Dam, which it realized would impound substantially all of the mainstream waters, and (2) authorized the Secretary of the Interior to contract for the storage of such waters and the delivery thereof, it did not contemplate that the contracts the Secretary might make pursuant to that authorizaton might be defeated by a future determination by Congress to divert, or permit the di-

dam capable of impounding and controlling "substantially all the water of the mainstream" and entrusted the operation of that structure to the Secretary of the Interior, Congress intended that the Secretary should do everything reasonably within his broad powers to assure that the waters of the tributaries and mainstream above the dam would not be intercepted before reaching the reservoir.

At pp. 160–161 of the Report the Special Master has very properly declared:

> Clearly the United States may construct a dam and impound the waters of the Colorado River, a navigable stream. *Arizona* v. *California*, 283 U.S. 423 (1931); see *United States* v. *Twin*

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version of, the mainstream waters before they reach Lake Mead. The words of this Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 299–300, respecting the Central Valley Project would seem to be equally applicable to this suggestion concerning the Boulder Canyon Project:

"* * * It would be a physical impossibility to withdraw the facilities. As for the possibility of discrimination in the administration of those facilities, it seems farfetched to foresee the Federal Government 'turning its back upon a people who had been benefited by it' and allowing their lands to revert to desert.[10] The prospect is too improbable to figure in our decision."

"[10] [footnote, 357 U.S. at 300] Senator Gore (then Representative) gave this compelling answer to these trepidations in 1947; 'I cannot conceive of a Government that would spend $384,000,000 building one of the great reclamation-irrigation projects of the world and suddenly because some evil agent of Government had gotten into a bureau, turning its back upon a people who had been benefited by it and who in turn had greatly benefited the Nation by production of food stuffs and wealth. I just do not conceive of the United States as being that kind. * * *' Hearings before the Subcommittee of the House Committee on Appropriations on the Interior Department Appropriation Bill for 1948, 80th Cong., 1st Sess. 737."

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> *City Power Co.*, 350 U.S. 222 (1956); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690 (1899). Clearly, also, once the United States impounds the water and thereby obtains physical custody of it, the United States may control the allocation and use of unappropriated water so impounded. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950). * * *

It is just as clear that in making contracts for the storage and delivery of water which it has impounded the United States may properly attach conditions requiring those with whom it contracts and others subject to their control not to interfere with water which would otherwise reach the reservoir. And it is equally clear that in Section 5 and the general scheme of the Project Act Congress has authorized the Secretary so to condition the contracts he makes.

The Special Master has cited three principal reasons for his conclusion that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract, to the extent they make the quantities of water deliverable from Lake Mead dependent upon the extent of depletions in the respective States of inflow into Lake Mead, are not authorized by the Project Act and are therefore not enforceable. He says these provisions—

> (1) "are contrary to the command of Section 5 that 'contracts respecting water for irrigation and domestic uses shall be for permanent service * * *,'"

(2) "violate Section 18 [of the Project Act];" and

(3) "result in an allocation of mainstream water totally out of harmony with the limitation on California contained in Section 4(a)." (Report, p. 237.)

There is no inconsistency between these contract provisions and the "permanent service" requirement of Section 5 of the Project Act. As the Report recognizes, pp. 152, 162–163, 202, the Secretary of the Interior was under no compulsion to contract with Arizona and Nevada for the delivery of any particular quantities of water. What he has contracted for is the delivery from Lake Mead

(1) to Nevada of so much water, *"including all other waters diverted for use within the State of Nevada from the Colorado River system,* as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year." (Report, p. 420, App. 7.)

(2) for use in Arizona of the quantities specified in paragraphs (a) and (b) of Article 7 of the Arizona contract, less the amount by which consumptive uses above Lake Mead shall diminish the flow into Lake Mead (paragraph (d), Article 7). (Report, pp. 400–401, App. 5.)

We do not understand anyone to contend that at the present time the amounts of water which the Secretary of the Interior has contracted to deliver for uses in Arizona and Nevada, respectively, when added to existing upstream appropriations, exceed the amounts allocable to those states. Thus there is no impediment to the fulfillment of both the contracts

and the upstream appropriations as they presently exist. However, if there should be an overage in the future, the permanence of the Secretary's contracts would not be impaired. If the contract rights preceded in time the upstream appropriations, the Special Master recognizes (Report, p. 241) that under the law of both States the contract rights would be senior. Thus there would not be permitted any diversion upstream that would interfere with the senior contract use and thus there would be no occasion for any reduction of deliveries under the contracts and no impairment of their permanence. If, on the other hand, new upstream appropriations should precede the execution of contracts for the full allocations to these States, then the Secretary would be authorized to refuse to enter into contracts for the full allotments. Although this would reduce the quantity of water which the Secretary would contract to deliver, it would not affect the permanency of contracts already made.

The flaw in the Special Master's conclusion is the assumption that upstream uses under new appropriations would cut into deliveries under existing contracts. This is not required either under the State law, as interpreted by the Special Master, or by the provisions of the contracts themselves. Certainly the requirement for permanency was not intended to permit a State to increase its allotment by contracting for the delivery of water from Lake Mead and then proceeding to duplicate its share by withdrawing from the source of that water. The United States in contracting with a State does its part to meet the permanency requirement as to the State when it agrees to

deliver a specified quantity of stored water for use in the State unless the State elects to take or to permit its citizens to take its allotment upstream from the reservoir.

The Special Master errs in suggesting (pp. 239–240), that the provisions in question "generate new causes of uncertainty." On the contrary, they are designed to protect against the very real uncertainty which would arise if the Secretary were to contract for delivery of water from storage without regard to how far the amounts of water available for storage might be affected by upstream depletions. It is to be emphasized that the contracts under discussion are contracts with the respective States, designed primarily to allocate waters for use within those States; they are not definitive contracts for the delivery of specified quantities for specific projects. The States have the choice of having additional projects to be served with stored water or of foregoing them in favor of additional upstream projects. As a consequence, the aggregate water supply for the entire Boulder Canyon Project, including uses in California as well as those in Nevada and Arizona, is made more, and not less, certain. The hazard of impairment of the Project water supply by uncontrolled depletions upstream from the dam is removed. With such depletions taken into account in making commitments for delivery from Lake Mead, the principal uncertainty as to supply remaining results from the forces of nature.

The Special Master's conclusion that Articles 7(d) of the Arizona contract and 5(a) of the Nevada

contract violate Section 18 of the Project Act is equally unsound. Section 18 provides that nothing in the Project Act—

> shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or interstate agreement.

Apparently the Special Master again construes the contract as requiring rights to delivery under contract to be terminated by later upstream appropriations.[3] He states that this is a flagrant violation of Section 18 and a dictation to Arizona and Nevada of priorities within those States. However, as we point out above, the contract provisions do not require a termination of rights because of subsequent appropriations. Thus this objection is merely an alternative method of stating the first stated objection and falls for the same reason.

As a third reason cited in the report for the conclusion that the Article 7(d) and Article 5(a) provisions are illegal, the Special Master states that enforcement of these provisions would result in an allocation of mainstream water out of harmony with the limitation on California imposed by Section 4(a) of the Project Act (Report, pp. 241–247). In explanation, he supposes total releases from Hoover Dam to permit consumptive uses of 7.7 million acre-feet in

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[3] We set forth what we believe to be the correct interpretation of Section 18, *infra*, pp. 34–37.

California, Arizona, and Nevada in a year when Arizona's diversions from the Little Colorado deplete the flow into Lake Mead by .1 million acre feet.

> Under the interstate apportionment established by the Section 4(a) limitation on California and the delivery contracts with Arizona and Nevada, of the first 7.5 million acre-feet of mainstream consumption, Arizona would be allocated 2.8 million acre-feet, California 4.4, and Nevada .3. Of the .2 million acre-feet constituting surplus, Arizona and California would each be allocated one-half. Thus to California would be apportioned a total consumption of 4.5 million acre-feet for the year in question. She could not consume more than this amount because of the Section 4(a) limitation, which is based on mainstream considerations only. To Nevada would be apportioned a total consumption of .3 million acre-feet, and she could not utilize more than this since that constitutes her full contractual allotment. To Arizona would be apportioned a total consumption of 2.9 million acre-feet. But if Article 7(d) of her contract were applied in this situation, the Secretary's delivery obligation of 2.9 million acre-feet would be reduced by the amount of the depletion of the flow into Lake Mead, and Arizona could consume only a total of 2.8 million acre-feet from the mainstream. Thus, although 7.7 million acre-feet were released for consumption within the three states for the year, only 7.6 million acre-feet could be utilized under the statutory and contractual limitations. 100,000 acre-feet of water released for consumption could not be used. [Report, pp. 242–243.]

We do not agree with this conclusion. We suggest that the 100,000 acre-feet of Little Colorado depletions is part of the total mainstream supply available for allocation. This is necessary to achieve Congress' purpose to impound and regulate "substantially all the mainstream water" and to accomplish the interstate allocation established by the Section 4(a) limitation on California and the delivery contracts with Nevada and Arizona. We urge the Court to adopt this view.

The Special Master states at pages 243–244 of his report that charging the States with upstream uses, as provided by Articles 7(d) and 5(a), presents problems of measurement since, "for example, 100,000 acre-feet of consumptive use on the Little Colorado will result in a depletion of the flow into Lake Mead by a substantially smaller quantity of water." It is appropriate that Arizona and Nevada should be charged only to the extent such upstream uses actually deplete the mainstream supply available for division between the three States. There is no incompatability between such measurement of the upstream uses and the measurement of Lake Mead and downstream uses by diversions less returns. It is to be remembered that the Article 7(d) and 5(a) provisions have been imposed as conditions upon the deliveries for use in Nevada and Arizona of stored waters in order to protect the common supply available for downstream division. It should not be necessary for the Secretary to charge those States, against their shares of the common supply, with a greater quantity of usage than that quantity by which the upstream uses deplete the common supply.

The task of measuring upstream depletions of the flow into Lake Mead would present an additional, but by no means impossible, complication. The measurement at downstream points of depletions of flow by upstream diversions is based on concepts and standards which receive rather general acceptance in the engineering profession today. (Ariz. Exs. 65 and 65A; Upper Colorado River Basin Compact, Article VI, 63 Stat. 31.) Any problems in administration of the 7(d) and 5(a) contract provisions (Report, p. 246) would be relatively slight in comparison with the complications which might well be involved in case of suit by California to protect itself against "undue depletions on the tributaries and the mainstream above Lake Mead * * *." (Report, p. 247.)

The adverse effect upon California's established projects of the ruling with respect to the Article 7(d) and 5(a) contract provisions ought not to be imposed in the absence of a clear requirement therefor in the controlling statute or its legislative history. We believe no such requirement exists.

POINT III

RELATIVE RIGHTS INTRASTATE TO THE DELIVERY OF COLORADO RIVER WATERS, IN TERMS OF QUANTITY AND PRIORITY, ARE GOVERNED BY THE TERMS OF THE DELIVERY CONTRACTS MADE UNDER AUTHORITY OF THE PROJECT ACT AND BY APPLICABLE FEDERAL LAW RATHER THAN BY STATE LAW

The United States urged the Special Master to determine its right to deliver water to Boulder City, Nevada, under the Act of September 2, 1958, 72 Stat.

1726, and to the several mainstream federal reclamation projects and to nearby lands and users under a variety of contracts which have been made respecting such deliveries. He has declined to make such determinations for these stated reasons:

> The relevant issues for such a decision have not been tried and it would be impossible to determine here all of the relevant rights and priorities under the applicable state laws which would affect a project's water rights. Furthermore, persons who are the most concerned with this decision are other users or potential users in the states, who are not parties to this suit. [Rept. 218, and see 303.]

We do not agree that the relevant issues were not tried; that it would be impossible in this litigation to determine the right of the United States to deliver the waters contracted for or otherwise committed to the several contracting districts and other users; or that there are others not party to this case who are either indispensable or necessary parties to such determination. However, in the interest of expediting a conclusion to this litigation, we have not taken exception to the Special Master's refusal to rule now on these issues.

However, while the Special Master declined to make the determinations sought in this respect, he did state "* * * that state law governs intrastate rights and priorities to water diverted from the Colorado River." (Rept. 216; 303.) And he further declared that "How much water a particular project or user may receive out of a state's total apportionment as against other users in the state who also have

or may in the future obtain delivery contracts with the Secretary of the Interior must be decided under State law." (Rept. 218.) This view is reflected in the recommended Decree (Art. II(C)(1)), which would enjoin the United States, its officers, attorneys, agents and employees from releasing water for "any use or user in violation of state law" except as otherwise provided in the recommended Decree and except as federal statutes otherwise specifically direct. (Rept. 350.) We have excepted to the quoted statements appearing on pages 216 and 218 of the Report, the expressions on pages 217–218 in support thereof, and the quoted portion of the recommended Decree, as inconsistent with the Special Master's primary holding, unnecessary to the decision of this case and in error.

A. THE STATEMENTS IN THE REPORT AND THE PROVISION OF THE RECOMMENDED DECREE RESPECTING APPLICABILITY OF STATE LAW TO THE DETERMINATION OF RELATIVE RIGHTS INTRASTATE TO USE THE BOULDER CANYON PROJECT WATERS ARE UNNECESSARY TO THE RECOMMENDED DECISION AND SHOULD BE ELIMINATED

Since the Special Master has declined to rule on the rights, intrastate, of the United States to deliver water to those agencies and other persons with whom contracts have been made,[4] the statements in the Report respecting the applicability of State laws to such rights and the rights of users under such contracts are not necessary to the recommended decision. This is likewise true as to the language of Art. II(C)(1)

[4] The direction to the Secretary of the Interior by the Act of September 2, 1958, 72 Stat. 1726, to deliver water to Boulder City, Nevada, is treated by the Master as the equivalent of a contract. (Rept. 303.)

of the recommended Decree (Rept. 350) which would enjoin the United States, its officers, from releasing water for "any use or user in violation of state law."[5]

It is submitted that, for the reasons hereinafter set forth, this language in the Report and the related provision of the recommended Decree are erroneous. Acceptance of the Report by the Court without correction of the error might be prejudicial, both to the United States and those with whom contracts have been made, in future litigation to determine the matters upon which the Special Master has declined to rule. It is accordingly urged that the material referred to be purged from the Report and the recommended Decree.

B. BY SECTION 5 AND OTHER PROVISIONS OF THE BOULDER CANYON PROJECT ACT THE SECRETARY OF THE INTERIOR IS GIVEN BROAD POWERS IN THE ADMINISTRATION AND DISPOSITION OF THE PROJECT WATER SUPPLY, INCLUDING THE POWER, BY CONTRACT WITH WATER USERS, TO MAKE ALL APPROPRIATE PROVISIONS RESPECTING QUANTITIES OF WATER TO BE DELIVERED TO DIFFERENT USERS AND THE CONDITIONS ON AND UNDER WHICH DELIVERIES WILL BE MADE

The Boulder Canyon Project Act was enacted by Congress in valid exercise of its powers (1) to control the navigable waters of the United States for the purposes of commerce, including, *inter alia,* the control of floods, improvement of navigation, power production, and watershed and river development, *Okla-*

[5] We believe that if this provision of the recommended decree is to be retained it should be revised to prohibit the violation of the provisions of applicable law. Certainly as far as the United States itself is concerned, it is not theoretically possible for it to violate State law in a field where federal law is dominant. The suggested modification would recognize any State law which might be applicable by adoption as federal law.

homa v. *Atkinson Co.*, 313 U.S. 508; *Arizona* v. *California*, 283 U.S. 423; *United States* v. *Appalachian Power Co.*, 311 U.S. 377; (2) to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvement, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275; and (3) to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Constitution of the United States, Article IV, Section 3, Clause 2. And see *United States* v. *Grand River Dam Authority*, 363 U.S. 229; *Winters* v. *United States*, 207 U.S. 564; *Federal Power Commission* v. *Oregon*, 349 U.S. 435; *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690.

In broad language, Section 1 of the Act (Report, p. 379, App. 3) authorized the Secretary of the Interior to construct, operate and maintain the Project, including Hoover Dam, Imperial Dam, and the All-American Canal system[6] "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making

[6] Additional works and projects, such as Parker Dam, Davis Dam, the Gila Reclamation Project, the distribution system and appurtenant flood control works for the Coachella Division, All-American Canal System, Boulder Canyon Project, have since been authorized to supplement and be integrated with the works originally authorized. See, *e.g.*, 49 Stat. 1039; 61 Stat. 628; H. Doc. 415, 80th Cong., 1st Sess.

the project herein authorized a self-supporting and financially solvent undertaking * * *."

With respect to the storage and disposition of the project water supply, Section 5 (Report, p. 384, App. 3) specifically authorizes the Secretary "to contract for the storage of water * * * and for the delivery thereof at such points on the river * * * as may be agreed upon, for irrigation and domestic uses * * *." That section further provides, *inter alia,* as follows:

> Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.[7]

In light of the constitutional background for the Project, the language of Section 5 is clearly designed to and does vest in the Secretary of the Interior, as an element of project operation, full authority to contract with users of project waters and to specify the quantities to be delivered to various users and relative priorities as between them.[8] The Section 5 contract authority is substantially unlimited insofar as the

[7] The provisions of Sec. 5, and of Sec. 6 hereinafter referred to, clearly constitute reasonable conditions and limitations on the use of federal funds, federal property, and federal privileges. *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275.

[8] The views expressed by opponents of the Act during the debates in Congress support this analysis of the Section 5 language. H.R. 5773, 70th Cong., 1st Sess., December 5, 1927, contained language substantially as enacted in the first paragraph of Section 5 of the Act. During the debate in the House

project water supply is concerned except for (1) the requirement that contracts shall be "for permanent service and shall conform to paragraph (a) of section 4," and (2) the provisions of Section 6 prescribing priorities as between the various project purposes enumerated in Section 1.[9]

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regarding H.R. 5773, Mr. Douglas of Arizona, while speaking in opposition to the bill, stated:

"The bill further provides for congressional amendments of State water codes. Further than that, it vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam." (Cong. Rec., Vol. 69, p. 9623.)

During the same discussion, Mr. Colton of Utah stated in opposition to the bill:

"You are saying that you are going to take it [water] away from the States and place it in the Federal Government, and Section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below." (Cong. Rec., Vol. 69, p. 9648.)

Mr. Colton later remarked, after quoting the first portions of Section 5:

"If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I cannot understand the English language; and, gentlemen, that is exactly what we are objecting to." (Cong. Rec., Vol. 69, p. 9649.)

The proponents of the bill made no response to this interpretation.

[9] Section 6 (Report, p. 387, App. 3) provides as follows:

"That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. * * *"

The requirement for satisfaction of "present perfected rights" is dealt with at pp. 307-312 of the Report. And see p. 161.

The broad discretion of the Secretary in the matter of making delivery contracts is recognized at page 215 of the Report:

> * * * I interpret the Boulder Canyon Project Act as empowering the Secretary of the Interior to contract for delivery of mainstream water to states and to individual users, whether private or public. The Project Act does not require or even suggest that the delivery contracts must be made only with states. It is certainly within the discretion of the Secretary, under the Project Act, to contract directly with individual users in the various states for the delivery of water. * * *

This holding accords with the previous statements at pages 152–153:

> The Act itself clearly reserves to the United States broad powers over the water impounded in Lake Mead and delegates this power to the Secretary of the Interior, as agent of the United States. He is specifically authorized to impound the water of the Colorado River in Lake Mead and to exercise custody over the water so impounded through his control, management and operation of the dam and reservoir. No user, whether it be a state or an individual, may receive the impounded water unless the Secretary, by contract, agrees to release it for delivery to that user. Nothing in the Act purports to require the Secretary to agree to deliver specific quantities of water to any particular state or user, except that Section 6 requires him to satisfy water rights perfected as of June 25, 1929. [fn.] *On the contrary, the Act clearly contemplates that water un-*

> *appropriated as of that date is to be made available for use within a state only if the Secretary, within his discretion, contracts for the delivery of the water to that state. In short, no contract, no water,* * * *. [Emphasis added; fn. omitted.]
>
> And at page 216 appears this language:
>
> In other words, the Secretary has agreed with the State of Arizona that he will deliver a certain amount of water to Arizona users, but he has reserved to himself discretion to decide with which users he will contract. This being the case, the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for delivery to them of certain amounts of water out of the total amount allocated to Arizona. This is precisely what the Secretary has done in the contracts which are before us in this case.

Pursuant to the broad authority conferred by Sections 1 and 5 of the Project Act, the Secretary early in the life of the Project Act made contracts with a number of agencies within the State of California, incorporating in each the so-called Seven-party agreement. This agreement specifies the quantities of Colorado River water which the several agencies may receive and the relative priorities as between them. (See, *e.g.*, Article (6) of the contract of February 7, 1933, between the United States and the Palo Verde Irrigation District, Report, pp. 424–429, App. 8.) The amounts and priorities so specified were "in accordance with the recommendation of the Chief of the Division of Water Resources of the State of

California" (Report, p. 424), but there has never been a determination that they accord in all respects with California law. Regardless of the recommendation of the Chief of the Division of Water Resources, the rights of the several agencies party to those contracts to receive, and of the United States to deliver, water in accordance with the specified quantities and priorities, do not come about by application of state law—they are a matter of contract between the United States and the agencies except as the Project Act provision for satisfaction of "present perfected rights" (Report, pp. 307–312) may require a different order of delivery.

Also under the broad authority vested in him to contract for use and disposition of the Project water supply, the Secretary has made contracts with a water users association and four irrigation districts in Arizona, each of which provides for the delivery of so much water as may be ordered and "reasonably required and beneficially used" within the particular project area, subject only to availability of the water under the Colorado River Compact and applicable federal laws.[10] (Report, pp. 212–214.) There are also outstanding water right application contracts with the individual non-Indian landowners in the Reservation Division of the Yuma Project in California (Report, p. 212). These water right application contracts generally provide for the delivery of either

[10] These contracts make no provision as to relative priority. Presumably, then, the rule of ratability would apply as between them except as the Project Act requirement for satisfaction of "present perfected rights" establishes a different order. See *infra*, pp. 32–34.

a specified quantity of water or so much as may be required to irrigate the lands to be served, subject to a limitation that the amount to be delivered shall not exceed an "equitable proportionate share * * * of the water actually available at the time for all of the area being watered from the same source of supply, *such proportionate share to be determined by the project manager.*" (Cal. Ex. 380; emphasis added.) The Secretary has also made a number of special contracts for the delivery of water through the facilities of the Yuma, Yuma Auxiliary, and Gila Reclamation Projects, for use outside the project areas. (Rept. 214; Ariz. Ex. 163 and 165.) Each of them specifies water quantity and, without regard to the Arizona law relating to priority of appropriation, provides, in accordance with applicable federal law (43 U.S.C. 521; 43 U.S.C. 523), that the use of water thereunder shall be subordinate to the use of water on the respective project areas.[11]

The Special Master has found each of these contracts valid with the exception of one special-use contract which he has found violates the "permanent service" requirement of Section 5 of the Project Act (Report, p. 218). He has also found that the Act of

[11] A more recent demonstration of exercise by the Secretary of his broad authority to contract with respect to the disposition of project water, and in so doing, to determine rights, quantities and priorities, intrastate, is to be found in the contract of November 12, 1959 between the United States and the City of Yuma. By this contract, executed subsequent to the conclusion of the evidence before the Master, the Secretary contracted to deliver a specified quantity of Colorado River water to the City of Yuma but assigned such contract a priority subsequent to all earlier Arizona contracts.

September 2, 1958, 72 Stat. 1726, providing that the Secretary of the Interior shall supply Boulder Canyon Project water to Boulder City, Nevada, effects a valid commitment to the use of Boulder City of a part of Nevada's entitlement under that state's amended contract with the Secretary. (Report, p. 303.)

But in addition to the broad authority to make contracts respecting water deliveries which is extended to the Secretary by Section 5 of the Project Act, Section 14 provides:

> This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Ever since the Reclamation Act was enacted in 1902 (32 Stat. 388), the rights of landowners to receive and use the waters developed by a federal reclamation project have been derived under and determined by contracts made with the United States in pursuance of applicable federal law.[12] As noted

[12] Section 10 of the Act (32 Stat. 390, 43 U.S.C. 373) conferred on the Secretary of the Interior broad authority "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." Section 5 (32 Stat. 389, 43 U.S.C. 431, 439) required that entries upon public lands to be irrigated by project works be in compliance with the homestead laws and required that at least half the irrigable lands of each entry be reclaimed. Section 5 also provided that "No right to the use of water" developed by the project works "shall be sold" for a tract exceeding 160 acres to any one landowner and that, *inter alia*, "no such right shall permanently attach until all payments therefor are made." Forfeiture of rights for failure to make stipulated payments was

supra, p. 31, the water right application contracts on the Yuma Project, one of the earliest projects built under authority of the Reclamation Act, establish the rule of ratability on an acreage basis in case of shortage in the project water supply. (Cal. Ex. 379.) Later applications on the same project expressly provide that the proportionate share of each landowner should "be determined by the project manager." (Cal. Ex. 378, 380; Ariz. Ex. 168.) The water-right applications on the Salt River Reclamation Project

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likewise provided for. The proviso to Section 8 (32 Stat. 390, 43 U.S.C. 372) provides: "That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Further evidence of the retention and exercise by the United States, acting through the Secretary of the Interior, of its power to control the acquisition and definition of rights to receive and use the waters of a federal reclamation project is to be found in many of the subsequent acts of Congress relating to such projects. (See 43 U.S.C., chapter 12.) E.g., the Act of August 13, 1914, 38 Stat. 686, Section 8 (43 U.S.C. 440) authorized the Secretary to make general rules and regulations governing the use of water in the irrigation of the lands within any project and to impose specified requirements respecting the areas under each water-right application or entry to be reclaimed within three and five irrigation seasons and to provide for continued compliance with such requirements. "Failure on the part of any water-right applicant or entryman to comply with such requirements shall render his application or entry subject to cancellation." And the Act of May 25, 1926, 44 Stat. 636 (43 U.S.C. 423–423g), established a procedure for exclusion from an established project of lands found to be unproductive and provided that "the water right formerly appurtenant to such permanently unproductive lands shall be disposed of by the United States under the reclamation law * * *." (43 U.S.C. 423.)

in evidence here contain a similar provision. (U.S. Ex. 31.)

The rule of ratability so frequently applied in the making of contracts for disposition of a reclamation project water supply differs greatly from State laws of prior appropriation. But it is consistent with the broad authority of the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." (43 U.S.C. 373.) And the practice which the Secretary has followed and which we believe he is authorized to continue to follow in the making of contracts relating to the storage and delivery of the Boulder Canyon Project water supply, including the fixing, intrastate, of particular quantities and relative priorities, is equally consistent with the broad authority conferred by Sections 1 and 5 of the Project Act.

C. SECTION 18 OF THE PROJECT ACT DOES NOT LIMIT THE BROAD AUTHORITY CONFERRED ON THE SECRETARY OF THE INTERIOR BY SECTIONS 1 AND 5 TO OPERATE THE BOULDER CANYON PROJECT AND TO CONTRACT FOR STORAGE AND DELIVERY OF THE PROJECT WATER SUPPLY

In concluding that "state law governs intrastate rights and priorities to water diverted from the Colorado River," the Special Master relies primarily upon Section 18 of the Project Act. That section provides

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within

> their borders, except as modified by the Colorado River compact or other interstate agreement.

But the first thing to note about this language is its reference to "such rights as the States *now* have." Although the Report does not discuss the significance of this language, it was explained when the amendment which became Section 18 was proposed.

During the discussion in the Senate regarding H.R. 5773, which the House had approved with amendments, Mr. King of Utah offered as an amendment language identical with Section 18 as enacted. Mr. Johnson of California, a proponent of the bill, then stated:

> Mr. President, with the understanding that the verb relates to the present—the rights they now have to do all of the things that subsequently follow—I have no objection to the amendment. [70 Cong. Rec. 593.][13]

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[13] Other proposals which were much more appropriately worded to accomplish the intent which the Special Master attributes to Section 18 were not accepted.

The House Committee on Irrigation and Reclamation appended a draft of a substitute bill to its report on H.R. 9828, the second version of the third Swing-Johnson Bill. Contained in this draft was the following provision:

"SEC. 8(a) All appropriations of water from the Colorado River, incident to or resulting from the construction, use, and operation of the works herein authorized, shall be made and perfected in conformity with the laws of those states which may or shall have approved the Colorado River compact ratified in section 12 of this act." (H. Rept. 1657, 69th Cong., 2d Sess., p. 32.)

Neither H.R. 9826 nor the substitute draft were enacted into law. However, much of the language in the substitute draft reappeared in the bill which finally became the Boulder Canyon

This emphasis on the word "now" makes plain that Section 18 was intended to do no more than preserve whatever rights the States of the Lower Basin then had to use, and to regulate the use of, waters then subject to their jurisdiction. But these States were then and, we submit, are now without right or authority to use or regulate the use of the waters of the Colorado River as against the exercise by the United States of its right and power to use and control the use of such waters for constitutionally authorized purposes.

The Colorado River is a navigable stream and the Boulder Canyon Project was authorized and constructed in valid exercise of the commerce power (*Arizona* v. *California,* 283 U.S. 423) and other fundamental powers of the United States under the Constitution. *Supra,* pp. 24–25.

In 283 U.S., at pages 451–452, the Court said:

> The United States may perform its functions without conforming to the police regulations of a state. *Johnson* v. *Maryland,* 254 U.S. 51; *Hunt* v. *United States,* 278 U.S. 96. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the state Engineer for approval. * * *

This holding with respect to the Arizona law which purported to require submission of the plans and specifications for Hoover dam to the State Engineer

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Project Act, but Section 8(a) of the substitute draft was omitted.

And see 69 Cong. Rec. 10467.

for approval was but the inevitable consequence of the supremacy clause of the Constitution (Art. VI, Cl. 2) as it has been construed and applied by this Court since the decision of *McCulloch* v. *Maryland,* 4 Wheat. 316, in 1819. The laws of the several States relating to the appropriation, control and use of water which the Special Master says control quantities of and priorities for project water intrastate are police regulations like that provision of the Arizona law considered in the first *Arizona* v. *California* decision.[14]

Applying the same principles in *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 295, after upholding the constitutional authority of the United States to construct and operate the great Central Valley Reclamation Project in California, the Court said:

> The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. *Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534 (1958). Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.

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[14] *Vineyard Land & Stock Co.* v. *District Court,* 42 Nev. 1, 171 Pac. 166, 173, 174 (1918); *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 448, 449 (1916); *In re Mass,* 219 Cal. 422, 424, 27 P. 2d 373 (1933); Kinney, *Irrigation and Water Rights* (2d ed.), vol. 3, sec. 1341, pp. 2428, 2429; Wiel, *Water Rights in the Western States,* (3d ed.), vol. 2, sec. 1184, p. 1097; 30 Am. Jur., *Irrigation,* sec. 3, p. 851.

The Court's opinion in *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, is especially pertinent:

> The [Federal Power] Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. * * * [328 U.S. 171.]
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * *
>
> * * * * *
>
> It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others. [328 U.S. 181–182.]

See also *Tacoma* v. *Taxpayers,* 357 U.S. 320; *United States* v. *Appalachian Power Co.,* 311 U.S. 377; *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508.

Equally applicable are the decisions of this Court respecting the States' lack of authority to impose conditions upon the use by the United States of its property.[15] See *Ivanhoe Irrigation District* v. *Mc-*

[15] We do not argue the question of federal ownership of the rights to use the waters of the Colorado River or the unappropriated rights to use the waters of the tributaries. But see: *United States* v. *Grand River Dam Authority,* 363 U.S. 229; *Winters* v. *United States,* 207 U.S. 564; *Federal Power Commission* v. *Oregon,* 349 U.S. 435. Since the contracts for the stor-

Cracken, supra, p. 37; *Gibson* v. *Chouteau,* 13 Wall. 92; *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690, 703; *Winters* v. *United States,* 207 U.S. 564; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 404; *United States* v. *Oregon,* 295 U.S. 1; *Camfield* v. *United States,* 167 U.S. 518; *Hunt* v. *United States,* 278 U.S. 96. In *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 445, where the jurisdiction of the Federal Power Commission rested upon the fact that the project involved would be located on reserved lands of the United States, the Court said:

> To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision.

Statutory language which merely preserves "such rights as the States now have" cannot be construed as a grant to the States of any part of the federal government's authority to control the operation of its own projects. Freedom of the States to enact laws does not compel the conclusion that the Secretary of the Interior is bound by those laws. Language more clear and definitive than that of Section 18 is necessary to warrant the conclusion that "Congress has specifically declined to give the Secretary of the Interior authority to deliver water to users within a

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age and delivery of waters impounded by Hoover dam involve the use of federal funds, federal properties and federal privileges in the sense of physical facilities, and because the Project is authorized in part "for reclamation of public lands" (Project Act § 1), decisions respecting the States' lack of authority to control the use of federal property are applicable.

state in disregard of the state's water law." (Report, p. 217.)

The second thing to note about Section 18 is its generality in contrast with the specific contracting authority granted by Section 5. Of course, it is always held that the specific language of a statute qualifies the general language thereof and not vice versa. *Ivanhoe Irrigation District* v. *McCracken, supra; Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 228–229; *Mac-Evoy Co.* v. *United States*, 322 U.S. 102, 107; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; *Arizona* v. *California*, 283 U.S. 423; *Baltimore National Bank* v. *Tax Commission*, 297 U.S. 209, 215. That Section 5 specifically authorizes the making of water delivery contracts on such terms as the Secretary deems appropriate, except as his discretion may be limited by other specific provision, is demonstrated in subdivision B, *supra*, of this part.

Finally, there is to be noted the similarity of Section 18 to Section 8 of the Reclamation Act of 1902 [16] and Section 27 of the Federal Power Act.[17]

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[16] The language of this section pertinent to this consideration is as follows:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *." (June 17, 1902, ch. 1093, § 8, 32 Stat. 390, 43 U.S.C. 383.)

[17] "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control,

The Special Master suggests that Section 8 of the Reclamation Act, together with the fact that the Project Act is denominated "as a supplement" to reclamation law, "buttress" the conclusion "apparent from the plain language of Section 18 itself, that state law governs rights and priorities among intrastate users." (Report, p. 218.) But the fact is that both Section 8 of the Reclamation Act and Section 27 of the Federal Power Act have been construed by this Court as *not* having the effect which the Report would attribute to Section 18 of the Project Act.

In its decisions respecting the meaning of Section 8 of the Reclamation Act, this Court has distinguished between the *acquisition* of rights to use water for a reclamation project and the *operation* of the project. This was clearly set forth in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275. As to acquisition of rights, the Court said at page 291:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein.[18]

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appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (June 10, 1920, ch. 285, § 27; 41 Stat. 1077, 16 U.S.C. 821.)

[18] In this sense § 8 has been construed as meaning that if, in the construction or operation of a reclamation project, the United States impairs rights recognized under State law, compensation must be paid without regard to whether the rights would be valid as against the United States under federal law. *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725.

But the operation of federal reclamation projects was excluded from any effect by Section 8 by this statement (*id.* at 291–292):

> But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

We submit that the Special Master has overlooked this distinction in his reliance on Section 8 and the cases cited.[19]

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[19] Regardless of what the language in *Ivanhoe* may indicate respecting the effect of § 8 as to the relative rights between a reclamation project and other users within the same State, that is not the question with which we are here concerned. Here, under § 5 of the Project Act, "*No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*" It is the relative rights of users under contracts made in accordance with this requirement with which we are concerned. There is no question, and there can be none under the Boulder Canyon Project Act, respecting the rights of persons who are not participating in the project water supply in accordance with the Project Act. In *Nebraska* v. *Wyoming*, 325 U.S. 589, 615, the Court made the same distinction that it made in *Ivanhoe*, as indicated in the quotation in the text. Moreover, the Court in its discussion of § 8 there was not considering the problem we are confronted with here—that of whether relative rights within a federal project to use the project water supply are governed by State law or by the contracts which have been made in pursuance of applicable federal law. The question there was one of title as between the United States and the project landowners. And while under

The contracts which the Secretary has made with the reclamation projects, lands bordering reclamation projects and special users, are for the purpose of disposing of or allocating the impounded Colorado River waters. The power of the Secretary to determine, without threat of veto by State authorities, the quantities and priorities of the water to be de-

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the particular facts of that case the Court held title to the project water supply was not in the United States, we think the following excerpts fairly indicate the true intent of the holding:

"* * * The water right is appurtenant to the land, the owner of which is the appropriator. * * * Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' * * * We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made. * * * [In this case, it is to be noted, an entirely different procedure has been followed. The United States has *not* followed State prescribed procedures to appropriate the Boulder Canyon Project water supply.] The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal Government. Thus even if we assume that the United States owned the unappropriated rights, they were acquired by the landowners in the precise manner contemplated by Congress." (325 U.S. 614–615.)

And in *Ickes* v. *Fox*, 300 U.S. 82, without discussing the holding as to title to the project water rights, it is even more plain that the determination of title in the project landowners was based, not on State law, but rather on contracts made under federal reclamation law. At page 95 the Court said: "Appropriation was made not for the use of the government, but, *under the Reclamation Act*, for the use of the land owners; and *by the terms of the law and of the contract already referred to*, the water-rights became the property of the land owners * * *." (Emphasis added.)

livered is as essential to efficient and effective operation intrastate as his power to select the persons to whom the water will be supplied. Therefore, as these contracts pertain to the operation of the Boulder Canyon Project, it is clear under the decision in *Ivanhoe* that there is nothing in § 8 of the Reclamation Act, or in § 18 of the Project Act, to preclude the Secretary from delivering water in the amounts and priorities as determined under the contracts, without regard to state laws relating to appropriation, control and use of water.

Sections 9(b) and 27 of the Federal Power Act were construed in *First Iowa Cooperative* v. *Federal Power Commission,* 328 U.S. 152. The issue before the Court was whether under the Federal Power Act a power company, as a condition precedent to the issuance of a federal license to construct, operate, and maintain a power project in navigable waters, had to prove to the Commission that it had met the requirements of the laws of Iowa. This Court held that it was not required to do so as this would give the state a veto over the federal project. At page 164 the Court said:

> * * * Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.

After holding that Section 9(b) [20] of the Act does not require compliance with State law, the Court observed that Section 27 (328 U.S. at 175):

> * * * expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act.

And it further explained the effect of that section by this statement (*id.* at 175–176):

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. * * *

In other words, the Court considered Section 27 to be an expression of Congress' intention not to exercise its full power to pre-empt the navigable waters of the United States without regard to rights

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[20] Section 9(b) provides:

"That each applicant for a license hereunder shall submit to the commission—

* * * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act." June 10, 1920, ch. 285, § 9, 41 Stat. 1068; 16 U.S.C. 802.)

to the use thereof recognized under state law. See *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, and, as to Section 8 of the Reclamation Act, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53; *United States* v. *Twin City Power Co.*, 350 U.S. 222.

Similar meaning is to be given to Section 18 of the Project Act. Section 18, like Section 27, "saves" such rights as the States then had to waters subject to their respective jurisdictions and to enact laws relating thereto, *but without extending such saving to all vested rights recognized by the States;*[21] *but* Section 5, like Section 9, is not limited or controlled by State law simply because Section 18, as Section 27, "saves" certain rights of the States. Similarly, though Congress by Section 18 has "saved" the right of the States to *enact* laws respecting waters subject to their jurisdiction, there is nothing, either in Section 18 or Section 5, which requires that users under contracts made with the Secretary of the Interior be "under no disability to receive such water under the applicable state law."

We are not unmindful that the language to which we object in Article II(C)(1) of the recommended Decree is qualified by the words "except as federal statutes may otherwise specifically direct." And we realize that at page 217, note 83, the Special Master

[21] The limit of the Project Act's recognition of what might have qualified as state recognized vested rights to use the mainstream waters is the § 6 requirement for the satisfaction of "present prefected rights." Report, pp. 307–312, 161.

has disclaimed any intention to pass on the question "whether other federal statutes such as the Gila Project Reauthorization Act, 61 Stat. 628 (1947), supersede state law in particular cases." But we are also aware that, notwithstanding the specific direction by Congress to the Secretary of the Interior by the Act of September 2, 1958, 72 Stat. 1726, to deliver water to Boulder City, Nevada,[22] the Special Master apparently does not consider this statute any more "specific" than he appears to consider Section 5. For at page 303 of the Report he declares: "Boulder City's priorities are to be determined in the same manner as those of all other Nevada users, *under Nevada law,* * * *." (Emphasis added.)

We respectfully submit that under Sections 1 and 5 of the Project Act the Secretary of the Interior is expressly authorized to make contracts for the storage of water in Lake Mead and for the delivery of such water for the purposes specified in the Act; that this authority of necessity includes authority to contract for the storage and delivery of specific quantities and for the order in which the contracts of the various users will be satisfied; and that there is nothing in Section 18 of the Project Act which can be construed as taking from the Secretary and vesting in State agencies any part of the authority so conferred on the Secretary.

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[22] Section 9(d) of the Act provides that if the requirements of the municipality shall at any time exceed 3,650 gallons a minute the Secretary may furnish whatever additional water and whatever additional carrying capacity may be needed.

POINT IV

THE NEVADA WATER DELIVERY CONTRACT DOES NOT EXHAUST THE AUTHORITY OF THE SECRETARY OF THE INTERIOR UNDER SECTION 5 OF THE BOULDER CANYON PROJECT ACT TO CONTRACT FURTHER FOR THE USE OF IMPOUNDED WATER WITHIN THE STATE OF NEVADA OR TO APPLY UNUSED WATER TO USE ON FEDERAL PROJECTS

At page 210 of the Report the Special Master stated:

> It should be noted that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior. On the contrary, the State of Nevada is free to determine who shall use the water, subject only to the Secretary's approval of the points of diversion.

The United States has excepted to this and urges that the language of the recommended decree, referred to in the footnote, should not be construed to implement it.[23]

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[23] Article II(B)(6) of the Recommended Decree in the Special Master's Draft Report (p. 309) stated that water apportioned for consumptive use in a state but not consumed

"*whether for the reason that users therein do not have delivery contracts for the full amount of the state's apportionment*, or that they cannot apply all of such water to beneficial uses * * *." (Emphasis added.)

might be released by the Secretary of the Interior for use in other States. Nevada, in commenting on the Draft Report, proposed that the provision emphasized in the language quoted be amended so as to give recognition to Nevada's contention that the requirements of Section 5 of the Project Act are fully satisfied by Nevada's amended contract insofar as uses of stored water in that State are concerned. The United States

Article 5(a) of the contract, as amended January 3, 1944 (Rept. p. 420, App. 7), provides that, subject to availability of the water for use in Nevada, the United States shall annually deliver to the State from storage in Lake Mead—

> so much water, *including all other waters diverted for use within the State of Nevada from the Colorado River system,* as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. * * * [Emphasis added.]

In our view this contract, like the Arizona contract, is effective to allocate for use in the State the quantity of water therein specified, in accordance with the plan for interstate allocation of mainstream water contemplated by the Project Act. But only to the extent that Nevada itself may qualify as a *user* of water does it satisfy the requirement of Section 5 that no person shall have or be entitled to have the use of the stored water except by contract made as stated in that section. Uses in Nevada made by others than the State continue to be governed by that requirement and, as demonstrated in part III, *supra,* the validity of such uses and the extent of the rights therefor must depend upon their recognition by contracts with the users

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opposed this proposal during the argument before the Special Master August 17–19, 1960. Article II(B)(8) (which is the counterpart of II(B)(6) in the earlier draft) of the Recommended Decree reads:

"* * * whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses * * *." (Rept., p. 349.)

made by the Secretary in conformity with *all* of the Section 5 requirements. While Nevada may make recommendations to the Secretary respecting the making of contracts with users in that State, the provisions of Section 5 do not authorize or permit the substitution of State regulation for the discretion which the Project Act authorizes the Secretary to exercise.

We submit that the statement at page 210 of the Report to which we have excepted is in conflict with the provisions of Section 5. We submit further that it does not give proper meaning to the language of Article 5(a) of the contract underscored in the quotation above. If that language is read to mean what it says, the contract will not only be given literal meaning, but the conflict with Section 5 of the Act, which the Master's interpretation engenders, would be eliminated.

The underscored language excludes from the agreement to deliver "to the State" all other diversions for use within the State. Such exclusion preserves the Secretary's authority to contract with users in Nevada and precludes the possibility of an attempted waiver of the Section 5 requirement for contracts with *all* users. It likewise constitutes an effective reservation of the United States' general power to provide, within the unused part of Nevada's allocation, for uses on federal projects within Nevada. (Rept., 257–266; 292–294; 297; 303). So construed, it is plain that the language of Article 5(a) of the contract providing for delivery "to the State" is but a shorthand way of saying, as in the Arizona contract

(Rept. 400, App. 5): "The United States shall deliver * * * water * * * for * * * use * * * in [Nevada] * * *."

We have shown in Point III, *supra,* that there is no basis in the Project Act, or in the decisions of this Court, for concluding that the Secretary of the Interior is subject to the control of Nevada in delivering water from storage in Lake Mead. The State of Nevada is not "free to determine who shall use the water." Nor is it free to determine the priority of the various water users under such contracts as may be made. These matters rest within the discretion of the Secretary of the Interior in exercising his authority to make contracts disposing of waters of the Colorado River impounded by Hoover Dam.

The Court is requested to reject the conclusion at page 210 of the Report, above quoted, and to make clear that Article II(B)(8) of the Recommended Decree, if it is approved by the Court, does not impair either the authority of the Secretary to contract with users in Nevada under Section 5 of the Project Act or the general power of the United States to apply unused waters within the Nevada apportionment to use on federal projects in that State.

POINT V

THE UNITED STATES IS ENTITLED TO USE ON ITS WILDLIFE REFUGES WATERS SALVAGED IN DEVELOPMENT OF THE REFUGE AREAS WITHOUT REGARD TO PRIORITIES ESTABLISHED BY CREATION OF THE REFUGES

With respect to the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife

Refuge, both on the mainstream of the Colorado River, the United States proved that the change in and control of the vegetation which will be effected by the development of these refuge areas will result in water consumption less than that which presently occcurs in the overflow and undeveloped areas where the refuges are presently located. (Tr. 15,691; 15,694; 15,753; 15,759–60.) The Special Master omitted to make the Findings of Fact proposed by the United States reflecting this salvage of water, and further omitted to provide in the Conclusions of Law and Recommended Decree that water salvaged by the United States from the mainstream of the Colorado River may be used by it on federal mainstream Wildlife Refuges without limitation by the priority dates decreed for the respective refuge areas.

It is a fundamental maxim of water law that the right to use the portion of stream flow salvaged by means of artificial improvements belongs to the one making the improvements. Hutchins, *Law of Water Rights in the West,* pp. 361, *ff.* Decisions in support of this proposition have been rendered by a number of the Supreme Courts of the western States.[24] Recognition of the salvage doctrine is to be found also in the decisions of this Court. *Washington* v. *Oregon,* 297 U.S. 517, 522–23; *Nebraska* v. *Wyoming,* 325 U.S. 589, 618–9.

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[24] For example, *Pomona Land & Water Co.* v. *San Antonio Water Co.*, 152 Cal. 618, 623–624 (1908); *Reno* v. *Richards*, 32 Idaho 1, 6, 12–13 (1918); *Ironstone Ditch Co.* v. *Ashenfelter*, 57 Colo. 31, 43–44 (1914).

The application of this principle in this case will not disarrange the allocation or priority schedule recommended by the Special Master. Quantities and priorities of water rights for the mentioned Refuges are provided by Article II, Subdivision (C), paragraphs (2)(g) and (2)(h), of the Recommended Decree (Rept., pp. 352–353). Recognition of the additional basis of right, the right to use water salvaged by the development of these Refuge areas without limitation by priority dates, would in no way increase the quantities used beyond those presently specified in the Recommended Decree. We believe there should be added to each of the paragraphs of the Recommended Decree last above noted a proviso to the following effect:

> *Provided,* That to the extent the water used on such Refuge shall be salvage water resulting from development of the refuge area, such water may be used without regard to such priority dates.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the exceptions filed by the United States should be sustained.

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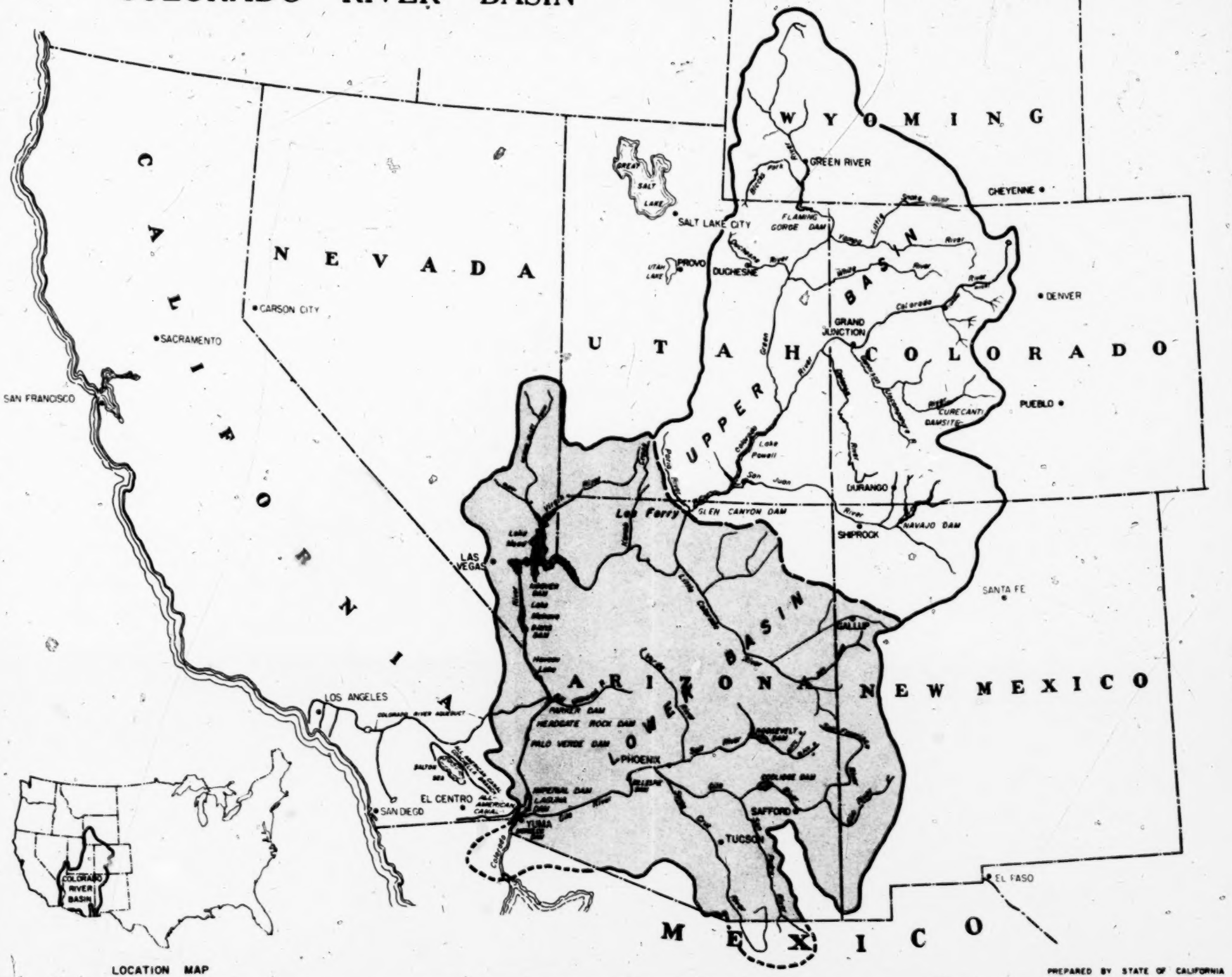
COLORADO RIVER BASIN



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*
vs.
STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*
STATE OF NEVADA, *Intervener,*
STATE OF NEW MEXICO, *Impleaded,*
STATE OF UTAH, *Impleaded.*

ANSWERING BRIEF FOR THE STATE OF NEVADA,

Intervener

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ANSWERING BRIEF FOR THE STATE OF NEVADA, Intervener

PATTERN OF THE BRIEF

In aid of a useful arrangement of material, Nevada in this Brief will, in answering the Opening Briefs, first outline her position in opposition to them. Then she will consider the Briefs of the other parties separately, stating first its answer to California (pp. 29–48, *infra*). The answer to California's lengthy Brief

will consist principally of a discussion of the general issues rather than any attempt to make a detailed point by point reply. It will answer those portions of the Brief of the United States to which it wishes to reply (pp. 49–61, *infra*); and lastly, its comments on Arizona's Brief (pp. 61–65, *infra*). Since Utah and New Mexico have filed no Briefs, no comment is made on the Master's decision with respect to the rights of those States.[1]

SUMMARY OF ARGUMENT

I

It is clear from the Opening Briefs filed herein that Intervener Nevada's principal controversy is with California. For California seeks to reduce Nevada's contract rights to the beneficial consumptive use of 300,000 acre feet of the waters of the Colorado River stored in Lake Mead to a mere 120,500 acre feet. This controversy will, of course, be resolved by the basic issues in the case.

Nevada has a subsidiary controversy with the United States who contests the Master's findings that that portion of Article 5(a) of Nevada's amended contract requiring the deduction of her tributary uses from her contract supply is invalid. The United States further objects to the Master's finding that Nevada's basic contracts are sufficient and that it is not necessary to have additional contracts with each individual water user. Finally, there is a difference of views between Nevada and Arizona who contends that Article 7(g) of her contract, wherein she agreed that Nevada could have 4 percent of any excess or surplus water, is invalid.

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[1]The omission herein of an answer to any specific argument or point in any one of the Briefs does not necessarily indicate the agreement of Nevada to the position taken by the other parties. Some arguments are unanswered as a result of judgment concerning their relative importance and relevancy and a desire to eliminate controversy on as many issues as possible.

II

Nevada is entitled to the beneficial consumptive use of 300,000 acre feet of water stored in Lake Mead under any theory that may be adopted by this Court in deciding this case. Whether Section 4(a) of the Boulder Canyon Project Act (hereinafter, Project Act) relates only to mainstream water, as the Master found, or water of the entire system, does not affect the validity of Nevada's allocation of 300,000 acre feet of Lake Mead stored water. It affects only the accounting necessary to determine the quantity of excess or surplus water, if any.

Nevada's contract rights are valid whether Section 4(a) of the Project Act constitutes a statutory contractual allocation, or whether the contracts were made under the general Reclamation Law. The amount contracted to Nevada corresponds to the amount discussed as her allocation in the Congressional debates preceding passage of the Project Act. It is an amount which reflects a proper exercise of the discretion vested in the Secretary of the Interior.[2] Likewise, Nevada's contracts are valid if that section is a mandatory formula, as Arizona contends. Particularly, both the amount of water awarded Nevada in her contracts, and the validity of the contracts, must be upheld in the event that the Court determines this case upon the basis of an equitable apportionment of the waters of the Colorado River among the three sovereign States in the Lower Basin.

Nevada is unique in that it has no other source of water than Lake Mead. There is no ground water to be developed, or any salt or brackish water that can be converted. The Colorado River water is literally the life blood of the area and is the controlling factor as to the population that can live there. On the other hand, California has alternate sources of water, both by

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[2]Hereinafter "Secretary" shall mean the Secretary of the Interior.

the newly authorized diversions from the water-surplus area of Northern California and from the salt water conversion program now actively under development.

III

There is a complete answer to much of California's argument when it is realized that since the Colorado River is a navigable river, the Secretary, by reason of the Project Act and the construction of the Hoover Dam, had a right to, and did take full and complete control of all of the water of the Colorado River at that point, free of any prior claims. California's uses on the Yuma Project (partly an Indian Reservation project) and in the Palo Verde Valley, which existed prior to this time, undoubtedly thus lost their priority. But this is academic because the Master has defined the present perfected rights which existed as the date the Project Act became effective (June 25, 1929), so as to include these rights, and has provided for their protection in short water years. There is no evidence of any conceivable water shortage which would diminish these rights under the Recommended Decree.

The rights of the Imperial Irrigation District, which had been using water which flowed northward out of Mexico, after having been diverted through that nation, was likewise of a type which could not claim priority over the right of the Secretary of the Interior to store water at Lake Mead. In addition, by reason of the specific provisions of the Project Act which, among other things, provided for the construction by the United States of a new diversion point for an All-American Canal leading to this District, and for contracts providing Lake Mead stored water for use thereon, the Imperial Irrigation District right became and is solely a right to Lake Mead stored water, under the terms and conditions of its contract. The right of the Metropolitan

Water District, which was only a paper filing at the effective date of the Project Act, depends entirely on a contract with the United States dated April 24, 1930, and subsequent contracts. All of these California uses or rights were changed from whatever status they may have had as normal flow rights prior to the construction of Hoover Dam, and thereafter became merely contract rights for stored water on a parity with similar rights of Arizona and Nevada and the water users in those States. This is precisely in accord with the provisions of Article VIII of the Colorado River Compact (hereinafter, Compact).

IV

There is no validity in California's repetitious argument that she still retains, after the construction of Hoover Dam and Lake Mead, water rights founded upon which she terms "equitable apportionment and priority of appropriation."

The doctrine of appropriation (first in time is first in right) is the foundation of Western water law as to intra-state rights, and grew out of the customs and usages of those who first settled the arid West. It is the very antithesis of any kind of apportionment, equitable or otherwise. On the other hand, the doctrine of equitable apportionment grew out of what might be termed "interstate-international" law, as developed by this Court in determining controversies between sovereign States. The coupling of the two in one descriptive phrase is a misnomer, and leads only to confusion. Priority of appropriations is not controlling in an interstate equitable apportionment suit. It is only one of many factors to be considered. This is particularly true where, as here, the apportionment must be of stored water, the rights to which are represented by contracts with the Secretary of the Interior.

V

"Present perfected rights" as used in the Compact, the pertinent statutes, and the contracts, has a definite and precise meaning. Originating in the Compact, it is clear that it was intended to refer to something other than appropriations, which might exist under State law as only paper filings or partially used appropriations. It seems the most logical to interpret such rights as those which had been perfected and were in use at the date of the execution of the Compact (November 24, 1922). But, in any event, this phrase could not include any rights other than those actually perfected as of the effective date of the Project Act, as the Master determined.

VI

A finding as to the dependable supply of the Colorado River, sufficiently accurate for an allocation in perpetuity is impossible of attainment. There is no need for making it in this action. The Recommended Decree fully protects the rights of all the parties. It is not needed as a foundation for a justiciable controversy for the controversy is one concerning the waters stored in Lake Mead and the validity and effect of the contracts disposing of it. This controversy, in existence for years, is entirely independent of any question of dependable supply.

VII

There is nothing in the Brief of the United States which seriously challenges the soundness and correctness of the Master's decision holding that the provisions of Article 7(d) of the Arizona contract and Article 5(a) of the amended Nevada contract, which charges tributary uses in these States against the contract amounts to be delivered from storage in Lake Mead, are in violation of the Project Act and unenforceable.

There are reasons other than those relied upon by the Master why his decision is proper and sound. The legislative history of Section 4(a) of the Project Act demonstrates clearly that Congress intended that Nevada should have an undiminished 300,000 acre feet of beneficial consumptive use from the mainstream. There is nothing in it even remotely suggesting that this amount should be reduced by tributary uses in Nevada above Lake Mead.

There is nothing in the Project Act that authorized, directed or permitted the Secretary to limit Nevada's allocation of water from Lake Mead by deducting therefrom tributary uses in Nevada. Nor could any act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed.

If the Court should concur in Arizona's view that the second paragraph of Section 4(a) of the Project Act established a formula for the allocation of mainstream water among the three Lower Basin States which the Secretary, in making water delivery contracts, is required precisely to follow, then these provisions in both the Arizona contract and the Nevada contract, which obviously deviate from the formula, are void.

The Nevada contract is entirely consistent and in accord with Section 5 of the Project Act. Nevada is a "person" as used in that section, and therefore entitled to have the use of the water contracted for.

The Nevada contract was drafted in the light of circumstances peculiar to Nevada. Existing and future uses of Lake Mead water will be for industrial and municipal use. It would be ridiculous to require individual and duplicate contracts for each industrial and municipal user of Lake Mead water. It is logical and sensible that the water delivery contracts be with the State of Nevada, acting through its Colorado River Commission of Nevada, an entity created by law specifically for this purpose.

VIII

Nevada is in general agreement with the position taken by Arizona since it supports the Master's Report and Recommended Decree in all essential respects.

We concur generally with Arizona's argument that the Project Act provides for the storage of mainstream water only and for its allocation among the three Lower Basin States. Whether this Court concludes that the Master was correct or whether Arizona is correct, in their respective interpretations of the Compact with respect to mainstream water, the results, so far as Nevada's rights are concerned, would be the same. Nevada would still be entitled, under its contracts, to an undiminished 300,000 acre feet of water from Lake Mead.

One point of difference between Arizona and Nevada concerns the validity of Article 7(f) of the Arizona contract which provides for the recognition by Arizona of the right of Nevada to contract with the United States for the use of 4 percent of any excess or surplus water which she claims to be invalid. The Master held this provision to be valid and Nevada concurs.

In the unlikely event that this Court should find Article 7(f) of the Arizona contract void, then Nevada submits that that part of the Recommended Decree permitting Nevada to contract with the United States for 4 percent of the excess or surplus should be retained irrespective of any provisions of the Arizona contract. Nevada's right to an equitable share of the excess or surplus is not dependent upon any recognition or consent by Arizona in its contract, or otherwise.

Nevada concurs in Part II of Arizona's Brief in opposition to the views expressed by the Master with respect to the unrestricted right of the United States to reserve water for all Federal establishments.

ARGUMENT

I

NEVADA'S ALIGNMENT AS AGAINST OTHER PARTIES

Nevada, an intervener, submits that it is now more apparent than ever that the final decree to be entered herein should uphold the validity of her contracts with the United States[3] as awarding her the right to the full beneficial consumptive use of 300,000 acre feet[4] of Colorado River water from Lake Mead, or below, as and when needed. Also, that she is entitled to this amount of water under whatever interpretation there may be made of the language of Section 4(a) of the Boulder Canyon Project Act.[5] Or, more broadly speaking, under whatever theory may be followed in apportioning Colorado River water among the States of the Lower Basin.

It is clear that the real controversy in this action, so far as Nevada is concerned, is between her and California. There is a subsidiary controversy between Nevada and the United States, so far as the latter urges diminution of Nevada's full 300,000 acre feet claim by deduction of Nevada upstream tributary uses; and contends that each Nevada user must have an individual contract with the Secretary.

The direct conflict between California and Nevada is this: As against Nevada's claim to a full 300,000 acre feet of beneficial consumptive use from Lake Mead, California asserts that

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[3]Appendices 6 and 7, Report, pp. 409–422.

[4]Throughout this Brief, when referring to Nevada's rights to 300,000 acre feet, it is always intended that this figure be read as a beneficial consumptive use of that amount, whether those specific words are used or not. And "consumptive use" is used as meaning diversions from the stream less return flow, as defined by the Master in his Recommended Decree (Paragraph I, (A), Report, p. 345).

[5]45 Stat. 457, 43 U.S.C. 617.

Nevada is entitled only to the amount needed for the ultimate development of mainstream projects authorized or constructed to date in the total amount of 120,500 acre feet.[6] In this connection she concedes that Nevada is additionally entitled to her uses on the tributaries which flow into Lake Mead (the Muddy and Virgin Rivers) in the amount of 31,000 acre feet of beneficial consumptive use. Elsewhere, California argues, however, that in the event Nevada's contract rights are upheld, that this Court should overrule the Master's decision invalidating that provision in Section 5(a) of that contract, which provides that Nevada's mainstream uses shall be diminished to the extent of her upstream tributary uses. In other words, California aligns herself with the United States on this phase of the case.

The differences between Nevada and the United States divides itself into two parts. Nevada urges the correctness of the Master's recommendation declaring the invalidity of the provision in Article 5(a) of the contract between Nevada and the United States which provides that her use of mainstream water should be reduced by deducting therefrom the amounts of her upstream tributary uses. And the United States denies that the Colorado River Commission of Nevada, a statutorily created entity[7] created for the express purpose of contracting for, receiving, paying for and controlling the distribution of all Colorado River water to which Nevada is entitled, can alone contract for Nevada's water supply. It urges that, in addition, separate contracts must be made between the Secretary and each individual user in Nevada, although concededly, the Nevada contracts do not so specifically provide, as contrasted with the Arizona contract[8] which does so provide.

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[6]California's Brief, pp. 18, 22.

[7]Appendix II, Nevada's Opening Brief, pp. 106–109.

[8]Appendix 5, Report, pp. 399–407.

The controversy between Nevada and the United States admittedly involves only an interpretation of the applicable statutes, and a correlative determination of the power of the Secretary in the pertinent respects.

On the other hand, the resolution of the controversy between Nevada and California involves the whole question as to the fundamental correctness of the Master's Report. The basic concepts upon which the Master, among other things, found that Nevada was entitled to the benefit of her two contracts with the United States, giving her the right to apply up to 300,000 acre feet of Colorado River water to beneficial consumptive use, are challenged by California with a myriad of points of attack. In Nevada's opinion, to attempt to answer California's voluminous Brief, paragraph by paragraph, or even topic by topic, would be pointless and result only in endless repetition—in fact, such repetition is the outstanding characteristic of the California Brief. On the other hand, the resolution of a few fundamental questions can perhaps better indicate the incorrectness of the California position.

Since Arizona supports the Master's Report and Recommended Decree in all essential respects, Nevada is in general agreement with Arizona, except that she does take issue with Arizona as to the validity of Article 7(g) of the Arizona contract, which recognizes the right of Nevada to contract with the United States for 4 percent of any excess or surplus. Nevada asserts the validity of this paragraph.

Nevada does not take issue with either Utah or New Mexico on any aspect of the Master's Decision and Recommended Decree relating to those States.

II

NEVADA ENTITLED TO AN UNDIMINISHED 300,000 ACRE FEET OF STORAGE UNDER ANY THEORY

From the point of view of the State of Nevada, the Decree herein should award her the right to the beneficial consumptive use of 300,000 acre feet of water stored in Lake Mead under any theory that might be adopted by this Court in deciding this case. This is true whether it be determined that Section 4(a) of the Project Act related only to mainstream water, as the Master found, or to system water, as contended by California.

This is true whether Section 4(a) of the Project Act is construed as authorizing and directing the Secretary, under Section 5, to make allocations of mainstream water among the three Lower Basin States by means of water delivery contracts, as the Special Master decided, or whether Section 4(a) is construed as establishing a mandatory formula for the allocation of mainstream water among the three Lower Basin States which the water delivery contracts made by the Secretary are required to conform, as contended by Arizona. Likewise, this would be true if contracts for the delivery of storage water were made by the Secretary under the general Reclamation Law[9] irrespective of the Project Act. Particularly, if any or all theories of statutory or secretarial allocations are discarded and the case be determined on the basis of equitable apportionment among the three Lower Basin States, a confirmation of the 300,000 acre feet right of Nevada is emphatically correct and proper.

A. The Controversy as to Whether Section 4(a) Relates to Mainstream Water Only.

Of course, one of the crucial decisions of the Master was his determination that by the language used in Section 4(a) of the

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[9] Act of Congress, approved June 17, 1902 (32 Stat. 388, 43 U.S.C. 391) and acts amendatory or supplementary thereto.

Project Act, the Congress intended that 7,500,000 acre feet of mainstream water should be annually allocated so that California should receive 4,400,000 acre feet (the maximum permitted under the specific limitation imposed upon her by the Project Act; a limitation which California accepted by its own legislative Act),[10] Arizona 2,800,000 acre feet and Nevada 300,000 acre feet; referring in all instances to beneficial consumptive use. As set out in his Report (pp. 151–185) the reasons for arriving at this conclusion are logical and convincing and no good purpose would be served by repeating or elaborating upon them in this Brief. California, disagreeing violently with this conclusion, devotes a large part of her Opening Brief to argument upon this phase of the case. (California's Brief, pp. 69–138.) In the last analysis, her argument amounts to repeating innumerable times and in a bewildering variety of approaches, the theme that "Compact means Compact." And that, accordingly, it must follow that since the waters apportioned by Article III(a) of the Colorado River Compact[11] were those of the entire Colorado River System, the 7,500,000 acre feet referred to in Section 4(a) to which California's limitation applies would be system water and not mainstream water.

So far as the claim of Nevada to the beneficial consumptive use of 300,000 acre feet of Lake Mead water is concerned, the determination of this particular question is immaterial. Under the Master's Recommended Decree, this amount of beneficial consumptive use is awarded to Nevada out of mainstream water. If California is correct, and Section 4(a) should be interpreted as applying to system water instead of mainstream water, the situation, so far as this right of Nevada is concerned, is

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[10]California Limitation Act, Act of March 4, 1929; Ch. 16, 48 Session; Statutes and Amendments to the Codes, 1929, pp. 38–39.

[11]Appendix 2, Report, pp. 371–376.

unchanged. Her contracts call for this amount of stored water. Lake Mead will be the source of the supply. The interpretation of this Section as to whether it applies to the mainstream or the tributaries goes only to the accounting phase; and that accounting would not affect Nevada's 300,000 acre foot allocation.

The only phase of the interstate allocation affected by the determination as to whether Section 4(a) relates to mainstream water only, or system water, is in the determination of the excess or surplus. Nevada is interested in that phase of the case to the extent that when proper contracts with the United States have been executed, she will be entitled to 4 percent of the surplus to be deducted from Arizona's one-half share. As mentioned in Nevada's Opening Brief (p. 40), it is her opinion that there is ground to believe the Master erred in classifying the one million acre feet of water apportioned by Article III(b) of the Compact as excess or surplus. We once more comment that if the Master's decision on this point should be reversed and it be held that Section 4(a) be deemed to refer to 7,500,000 acre feet of system water, then it automatically follows that the million acre feet apportioned by Article III(b) to the Lower Basin would not be surplus or excess. California would not be entitled to take one-half of that million acre feet over and above her 4,400,000 acre foot limitation. In short, the total combination of the Master's determination that while the 7,500,000 acre feet allocated is mainstream water only, but that Article III(b) is excess to which California is entitled to one-half, is a decision extremely favorable to California.

B. Nevada's Rights Under a Statutory Contractual Allocation.

It is the position of all the active parties to this action, other than the State of California, that the Master is correct in his Report and Recommended Decree in determining that properly interpreted Section 4(a) of the Project Act created a statutory

contractual allocation scheme; that is, by the Project Act Congress authorized and directed the Secretary, under Section 5, to make allocations of mainstream water among the three Lower Basin States by water delivery contracts. Under this theory of the case, Nevada is entitled to an undiminished 300,000 acre feet of beneficial consumptive use from the waters stored in Lake Mead.

This is a lesser amount than will be needed by Nevada by the year 2000, according to her evidence herein (Appendix I, Opening Brief, pp. 63–105). However, under all the circumstances, Nevada has not excepted to the Master's Report and is willing to accept a decree awarding her this amount of Lake Mead water as being proper.

Here we find the provisions of the Project Act expressly providing that there shall be contracts with reference to the water stored in Lake Mead and that no one is entitled to water without such a contract. These provisions carry with them the necessary ingredient of authority in the Secretary to determine the amount of water for which he will contract as to each user. It is inherent in the Project Act itself, and clear from the legislative history, that secretarial contracts would be used in determining the amounts of water to be ultimately diverted in each State.

It offends nothing in the Project Act for this Court to now find valid the contracts which the Secretary has made, including the two awarding Nevada the beneficial consumptive use of 300,000 acre feet.[12] The amount contracted for is precisely the amount that

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[12]Wherever in this Brief Nevada asserts its right to the beneficial consumptive use of 300,000 acre feet under its contracts, it is intended to express the single exception that the provision in Article 5(a) of that contract charging tributary uses against the 300,000 acre feet is not valid, whether expressly stated at that time or not. For brevity's sake, an attempt has been made to eliminate the constant repetition of this exception, but it is always there in this presentation.

was discussed as being Nevada's requirement through the whole legislative debate in Congress. It is the amount prescribed as a proper allocation to Nevada in the preapproved Tri-State Compact referred to in the second paragraph of Section 4(a) of the Project Act. In fact, it is the precise amount which the Master found as Nevada's share if the Act is treated as a statutory allocation.

The contract amount is a fair and equitable amount if Nevada's future needs are taken into account as shown by Nevada's evidence herein. The proof shows that by the year 2000 Nevada's needs, even if her growth continues at no greater than the present rate, will exceed this amount before the end of the century. It is a fair amount, having in mind the fact that Colorado River water, and specifically waters stored in Lake Mead, are the sole possible sources of supply for the Southern Nevada area.

Taking all of the above into account, the Secretary acted within the boundaries of his authority and within the complete limits of his discretion in contracting with Nevada for the beneficial consumptive use of 300,000 acre feet. In fact, this amount is in the nature of a borderline amount, and any attempt to limit Nevada to a lesser amount could well be described as an abuse of discretion. Certainly nothing in the Nevada contracts (except only part of Section 5(a)) can in any way be characterized as a violation of the Secretary's discretionary power if the case is viewed in that light. Having full right to the waters stored in the reservoir, the Nevada contracts made by the Secretary are valid and binding and should be given full force and effect.

Paranthetically, we might here mention in passing that several remarks or intimations in the California Opening Brief indicate its contention that contracts, such as those of Nevada, are similar to water right appropriations, and the accompanying implications that unless the use thereof is completed with what is defined as

due diligence, the right covered therein might be lost. This we directly challenge.

Obviously, it is the duty of the State to provide for its future growth and its future citizens equally as it must provide for those presently in existence. The development of large scale projects such as will be required to complete the full use of Nevada's water rights must and should extend over a period of many years. The Project Act itself stated that the contract should be for permanent service. There is nothing in the Project Act or in the basic law indicating that Nevada's contracts are defeasible, or that the right to use the amount of water provided can be lost if not promptly exercised. The contracts themselves, and the Recommended Decree, protect against any waste of water by allowing interim use thereof prior to the time required by the contracting State.

Arizona, while agreeing that the Project Act authorizes and directs the Secretary to allocate mainstream water by water delivery contracts among the three Lower Basin States, goes further and contends that the second paragraph of Section 4(a) established a formula for the allocation of the waters of the mainstream among the three Lower Basin States to which the water delivery contracts made by the Secretary are required precisely to conform. If this Court should agree, then clearly Nevada would be entitled to an undiminished 300,000 acre feet of beneficial consumptive use from stored water in Lake Mead.

C. Nevada's Rights Under Contracts Made Under the General Reclamation Law.

Another alternative theory upon which Nevada's right to an undiminished 300,000 acre feet of storage from Lake Mead could be sustained, is the Secretary's authority to make contracts under the general Reclamation Law. The Secretary, under the

general Reclamation Law,[13] had the basic right and obligation to make water delivery contracts for the delivery of stored water which, in effect, would constitute an allocation among the three Lower Basin States, irrespective of the Project Act.

Such a conclusion is entirely consistent with the historical operation of the Bureau of Reclamation in the myriad projects which it has constructed throughout the arid West. Both by practice and by statute it has been the undeviating policy of the Secretary to allocate and provide for the delivery of water stored in Federally constructed reservoirs by contracts.[14] In the case of projects built under the Reclamation Law, the Secretary acquires the necessary water right for impounding water in storage reservoirs for the benefit of the ultimate users, but the rights to the stored waters *as between the Secretary and the contracting parties are fixed by contract.*

Thus, the Master's decision that the water delivery contracts constituted a contractual allocation of mainstream waters to Arizona and Nevada in the quantities specified in their respective contracts can be sustained both under the Project Act and the general Reclamation Law.

D. Nevada's Rights Under an Equitable Apportionment by the Court.

Nevada, as *parens patriae*, at the very inception of her intervention in this case premised her right to the beneficial consumptive uses of the waters of the Colorado River flowing within her

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[13]Specifically, e.g., Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 43 U.S.C. Sec. 423e; Reclamation Project Act of 1939, Secs. 9(d) and 9(e), 53 Stat. 1187, 43 U.S.C. 85, as amended, 43 U.S.C. 485L(d).

[14]*Nebraska* v. *Wyoming*, 325 U.S. 589, 640 (1945).

boundaries upon the doctrine of equitable apportionment thereof among sovereign States of the Union as heretofore developed, sanctioned and applied by this Court.[15]

Nevada's position in this respect was outlined in its Opening Statement to the Master (Tr. 16152–16193) and thereafter fully submitted to him in Nevada's Briefs.[16] It may well be that this Court may decide the issues upon the equitable apportionment doctrine, particularly in view of the sovereign status of the parties; if so, every element of equity justifies an apportionment to Nevada at least as large as her contract amount.

California urges that the theory of an equitable apportionment is the proper theory for the disposition of this case. But she then distorts her argument into contending for a pure priority adjudication, even going to the extreme of saying that the word "equitable" as used in the statement is a mere word of art and does not bring into play the fundamental principles of equity as that term is customarily used. (California's Brief, pp. 52–64.)

A reading of the cases in which water has been apportioned among States by this Court indicates an almost diametrically opposite conclusion. It has been made clear in *Nebraska* v. *Wyoming*, 325 U.S. 580, 618, that all of the pertinent facts and circumstances affecting an apportionment must be taken into account. In that particular case, the Court made it clear that it was apportioning only natural flow water, and in that limited field followed substantially the priorities of appropriations in the respective States.

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[15]*Kansas* v. *Colorado*, 206 U.S. 46 (1907), 185 U.S. 146 (1902); *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931); *New Jersey* v. *New York*, 283 U.S. 336 (1931); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Nebraska* v. *Wyoming*, 325 U.S. 580 (1945).

[16]Vol. II, Opening Brief, pp. 32–54, Answering Brief, pp. 15–27, Reply Brief, pp. 12–15.

But here, at the very outset, we find an entirely different circumstance. A judicial apportionment in this action must involve the apportionment of stored water. In fact, the principal water to be apportioned is that water stored behind Hoover Dam in Lake Mead and controlled and diverted by the other dams downstream. All of these are structures constructed by the United States and under the management and control of Federal officials. The Project Act authorizing the reservoir which is the source of the stored water which must be apportioned specifically provided that this storage water was to be disposed of by contract and not used by anyone unless the user had a contract. The same Act imposed specific limitations as to the quantities of this stored water which California might use.

Pursuant to this, contracts have been made (a) with the individual California users, (b) with the State of Arizona for a gross amount of 2,800,000 acre feet and with individual users in Arizona for their particular portions of this gross amount, and (c) with the State of Nevada for its 300,000 acre feet.

If the Court should make an equitable apportionment of the waters of the Colorado River, how can it ignore these contracts for stored water? It would seem that they are, of necessity, the basic yardsticks which the Court should use to determine the rights of the respective States as *parens patriae*. California, under any theory, cannot be awarded more than that to which she is entitled under her Limitation Act. The water which she must be awarded is her contract entitlement, subject to that limitation. She cannot be awarded water rights of any greater magnitude nor any other character.

Likewise, in the case of Arizona, if the Court is apportioning the waters of the Colorado River it must assume that Arizona is entitled to use out of Lake Mead the amount of water covered by her contracts with the Secretary. We cannot conceive that it

is the function of the Court in a judicial apportionment suit to either declare a contract such as this invalid, or to frustrate in any way its operation.

The same is true with respect to Nevada and its contracts totaling 300,000 acre feet of beneficial consumptive use out of Lake Mead. Since the Colorado River flows in a very deep and narrow canyon as it leaves Hoover Dam, the possibility of using, by direct diversion from the stream itself, any water in Nevada, other than a very small amount in the Fort Mohave area, is very remote.

The geography of the area and the basic economics dictate that Nevada must take substantially all of its water by pumping from Lake Mead. Even so, it is necessary to lift the water a thousand feet or more. Already, Nevada has constructed at great expense an initial pumping system, and is planning and studying for future development.[17] In apportioning the waters of the stream, the basic fact is that Nevada's water right can be only Lake Mead storage water.

It would seem that in making such a judicial equitable apportionment, the Court could not reduce Nevada's rights under her contracts with the Secretary unless they were found to be unfair or inequitable. There is nothing in this record even remotely hinting that such is the fact. As mentioned in her Opening Brief (p. 32), Nevada is unique among the States of the Lower Colorado River Basin in that there is no other possible source of water for the future development of Southern Nevada than the water from

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[17]Since Nevada filed its Opening Brief, the Bureau of Reclamation has been authorized, and there has been made available to it, a $75,000 appropriation for F.Y. 1962 for a project study to commence July 1, 1961, to pump Lake Mead water to Eldorado Valley, Boulder City and Las Vegas Valley, including Nellis Air Force Base. The study will take three years to complete.

the mainstream of the Colorado. In testing the fairness of her contract rights, the needs of the State should be definitely taken into account. We will not repeat here the detailed discussions of these specific needs. They were set out in the Opening Brief, and particularly Appendix I, pp. 63–105.

For example, if Nevada were prevented from using the water which she is presently diverting from Lake Mead, the effect would be so disastrous as to even result in the forced migration of a part of the present population of the Clark County area. It is only with the knowledge that she will be entitled, from time to time, to increase her withdrawals up to her full contract amount that there can be any hope for an increased population in the area. To fix Nevada's water rights as proposed by California would be to create an absolute strangle hold on the future growth and development of Southern Nevada. Without water from Lake Mead, additional population cannot survive. It is not a question of comparative cost, nor is it in any way theoretical. It is simply the fact that to grow and expand Nevada must be entitled to take this additional contracted water from Lake Mead—its only possible source. No opportunity exists for developing underground water, for there is no more. No opportunity exists for converting salt or brackish water, as there is no such water available.

Certainly these vital factors must be taken into account in making an apportionment to Nevada which will permit a reasonable future growth. Nothing in the theory of judicial apportionment justifies what is, in effect, an economic block, or which, as California states, in effect, to Nevada: "We will let you complete the projects presently existing, but beyond that you can never go."

In testing California's demand that she so stop the growth and development of the State of Nevada by taking the water for use in California, we believe that the Court must take into account, along with many other factors, the question of whether or not

California has alternative sources of supply. California claims she is entitled to and must reduce the contract entitlements of Arizona and Nevada so she can take large quantities of water out of the Colorado River Basin into the great urban areas lying along the Pacific Coast. However, at the same time that she is urging this extreme doctrine in this case, at least two events are taking place which indicate there are other sources of water for this California region.

First, there is the great drive (almost a "crash" program) presently under way for the development of an economical process for the conversion of salt water for municipal use. In Nevada's Opening Brief (p. 34) reference is made to existing legislation to promote this program. Since then, legislation is pending, with full administration approval, to expand this program. A brief description of the pending legislation appears in Appendix I, pp. 68–70, *infra*.

The other imminent source of water for the region for which California cries disaster in its Brief is the so-called California Water Plan. There is a great surplus of water in Northern California. It is physically feasible to transport a large amount of this to the very regions in the south which are demanding Colorado River water. The people of California have voted $1,750,000,000 of bonds to finance this project, in accordance with the authorization contained in the "California Water Resources Bond Act," passed by the California Legislature in 1959. Brief reference is made to this legislation in Nevada's Opening Brief (p. 32). There is attached hereto as Appendix II, pp. 71–80, *infra*, a more detailed description of the scope of this legislation and of the facilities authorized to make water available to Southern California.

Along with the other California users the Metropolitan Water District is presently taking all needed water from the Colorado River. Everyone concedes that it will be many years, if ever,

before the Upper Basin develops its use up to the amount permitted by the Compact. Also, because of their size and cost, the projects by which Arizona and Nevada will use their allocations will require a number of years for completion. Because of this delay in uses by other States there will be ample time for the construction of the California Water Plan Project and of any necessary conversion plants, if the remote possibility ever develops that the uses allocated to the other States by the Master's Recommended Decree threaten to injure California. The Master explains why he believes this to be a remote possibility (Report, p. 102). The situations just discussed indicate other reasons why the contingency is extremely remote that there would ever be any disaster to California, or even limitation on her growth, for lack of water.

These are some of the factors this Court should consider in determining whether it would judicially authorize the taking from Nevada and the giving to California of the water covered in Nevada's contracts with the Secretary. Compared with California's total needs, the 180,000 acre feet which California seeks to seize from Nevada is relatively small. But to Nevada, this water is vital; to be deprived of it would indeed be a monumental catastrophe.

Among the provisions of the Recommended Decree are those providing that whenever there is not sufficient water available in any given year to supply the State allocations in full, the water shall be delivered on a pro-rata scale. This is accompanied by the further provision that those rights which could be classified as present perfected rights as of June 25, 1929, be first served, in their order or priority, even to the extent of ignoring State lines. It would seem that in this portion of the Recommended Decree the Master is making a judicial equitable apportionment of the water. Neither the Project Act nor any of the contracts provide for such proration in years of short water supply.

This is a fair and proper exercise of the judicial power. The incorporation of this provision in the Recommended Decree does not in any way infringe on any of the rights which California possessed after the completion of the reservoir. The provision giving protection to present perfected rights would give full protection to the Yuma, Palo Verde and Imperial rights of California. The effect of the proration, if any, upon California would fall upon her later rights, such as that of Metropolitan Water District. This District's Colorado River rights were obtained, and all of their facilities were constructed, with full knowledge of the provisions of the Project Act and the legislative history connected with its passage. Certainly, as sovereign States, Arizona, California and Nevada all stand on a parity, each with the other. The provisions for proration in short water years (especially since the older California uses are protected as present perfected rights) is a concrete expression of this rule of parity between States. It is a very effective and proper method of exercising the power of equitable apportionment by judicial decree.

III

COMMENTS ON CALIFORNIA'S BRIEF

A. Water Rights in Lake Mead.

Basic to the determination of this case is the ascertainment of the precise character, quality and quantity of the water right possessed by the Secretary, acting for the United States, to store water in Lake Mead. And the determination as to what, if any, rights in the river are superior to the right of the Secretary, acting for the United States, in connection with this reservoir. Strangely, the many voluminous briefs filed with the Master, and with this Court, have to date been rather silent on this point.

Obviously, to fill the reservoir the Secretary must have some sort of a water right. Once the gates in the dam were closed and

the storage of water began, then the water naturally flowing in the river at that point came under the control and management of the United States, acting through the Secretary. It changed its character. It became, instead of naturally flowing water, purely simply storage water.

This is not unusual, but on the other hand, a rather common occurrence in all of the arid Western States. We do not believe that it can be denied that in all States applying the appropriation doctrine any one constructing a reservoir must have a legal right to stop the flow of the river, impound it in his reservoir, and convert it into stored water. Of course, only water not already appropriated is ordinarily available for appropriation by the entity constructing the reservoir. By Section 8 of the Reclamation Act of 1902,[18] the Secretary was required to acquire water rights under State law for any projects to be constructed by him, and to recognize existing rights under State law in connection with projects constructed under the Reclamation Law. It has been the universal rule of the Secretary to do so in all projects in the United States *except* in the case of Hoover Dam and Lake Mead. *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725, 740, 759–760 (1950).

Here, the Project Act authorized the construction by the Secretary of a reservoir of a capacity of not less than 20 million acre feet of water—equal to more than the usual annual flow of the Colorado River at that point. Such a reservoir could only be filled by preempting the flow of the Colorado River. That is exactly what has happened since the completion of Hoover Dam.

The Colorado River is admittedly a navigable stream. The Master pointed out (Report, p. 163) that the Congress stated in both Sections 1 and 6 of the Project Act that the improvement of navigation was enumerated as the first purpose of the dam and

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[18] 32 Stat. 390, 43 U.S.C. 372, 383.

reservoir. Under the numerous and clearly applicable decisions of this Court under this set of circumstances the Secretary had the legal right to take into his possession sufficient flow of the river to create the planned storage. *Arizona* v. *California*, 283 U.S. 423 (1931); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1912); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 890 (1899); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940). And had the right to control the allocation and use of the water so impounded. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950).

The history of the last 30 years has indicated that even though the Secretary has taken control of all water reaching Lake Mead, still he has not been able to accumulate adequate storage for all needs.

Again, reverting to the usual reservoir project constructed under general Reclamation Law, the stored water made available by the dams and reservoirs have been in every instance allotted to the water users, either directly or through their representatives (such as irrigation districts or water users' associations) by contract. This is made clear by the Court in *Nebraska* v. *Wyoming*, 325 U.S. 589, 640, where this Court stated:

> "All of the storage water is disposed of under contracts with project users and Warren Act Canals. It appears that under that system of administration of storage water no state and no water users within a state are entitled to the use of storage facilities or storage water unless they contract for the use."

These contracts provide the amounts of water to be delivered, the terms and conditions of delivery, payments, and other necessary details. In other words, once stored, the water has changed its character from normal flow, flowing in a stream available for

use by priorities, into a different character of water, namely, stored water available for use and delivery only by contracts with the United States, acting through the Secretary. In every instance, it has been the universal custom that the contracts for storage water for any given reservoir are of equal priority, and in times of shortage the owners of storage space share pro-rata.

There is nothing in the Project Act to indicate that Congress planned any other or different program with respect to the storage to be provided on the Colorado River. On the contrary, there is much to indicate that the Congress planned to follow exactly the historical pattern. It was provided in the first section that among the purposes of the reservoir was that of ". . . providing for storage and future delivery of the stored waters thereof . . ." In Section 5, the Secretary was authorized ". . . to contract for the storage of water in said reservoir and for the delivery thereof . . .;" that the "contracts representing water for irrigation and domestic uses shall be for permanent service . . ." And finally, as has been emphasized by the Master in his Report:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Section 14 also provides:

> "This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

Assessing this whole situation in the light of the historical pattern of the creation of reservoir water rights and the paramount and superior rights of the Federal Government under the navigation servitude on navigable streams, and the pertinent language in the Project Act, there can be no escape from the fact that: (1) The Secretary acquired a prior and superior right to all the waters

of the Colorado River for storage in Lake Mead, (2) that as a matter of law, this right was superior to the claim of any other rights on the river, even those preexisting,[19] and (3) that the water stored in the reservoir was thereafter available only to those having contracts with the Secretary therefor and subject to the terms and conditions of those contracts. The rights of California which she claims have been invaded or destroyed by the Master's Recommended Decree are contract rights for stored water and nothing more. As such, they are subject to all of the conditions and limitations of contracts made in accordance with the Project Act.

B. What Happened to the California Rights When Hoover Dam Was Constructed?

If we assume that as a result of the construction of the Congressionally authorized Hoover Dam, which had among its stated purposes that of the improvement of navigation, the Secretary acquired a right to store water sufficient to fill the reservoir, what happened with respect to the then existing California uses? If we accept this assumption, and if the Secretary required the entire flow of the river to fill the storage space he had created, then he had a right to take all the flow, regardless of any then existing prior uses.

The uses in California for which she claims priority, and whose priority is asserted to be destroyed by the provisions of the Recommended Decree should be separately analyzed for clarity in thinking.

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[19]While Section 6 of the Project Act provides for the satisfaction of "present perfected rights" these rights are to be satisfied out of *storage* created by Hoover Dam and not from the *natural flow*. There is nothing in any of the California water delivery contracts which recognizes and preserves any *natural flow* rights. After storage was created by the construction of Hoover Dam normal flow rights as such ceased to exist.

California's oldest uses are those of the Palo Verde Valley totaling 120,560 acre feet[20] and of the Yuma Project, Bard District, amounting to 17,000 acre feet.[21] These uses of the natural flow of the river were always good in that the flow never dropped too low to supply them. They are given the first priorities in California's Seven-Party Agreement. They are in no danger of being diminished by any conceivable application of the Master's Recommended Decree. Not even California contends that these rights could be adversely affected. So that, in that respect, these particular California rights will not be affected one way or the other by the present proceedings.

The Yuma Project, a Federally constructed project, was a project under the control and supervision of the Secretary. There were existing individual water contracts whereby the Secretary had agreed to deliver water to the users on the so-called non-reservation portion of the project. The reservation division, being Indian lands, would be entitled to be supplied by the Secretary with the priority established under the so-called Winters' Doctrine (*Winters* v. *United States*, 207 U.S. 564 (1908)).

The right of the Palo Verde Irrigation District would probably not have any ground upon which to claim a priority over the right of the Secretary to store water in Lake Mead. However, an exact classification or definition of this right does not seem necessary in the disposition of this case because the Secretary has entered into a contract with this District for the full amount of its claim[22] and this contract includes, as do all of the

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[20]Calif. Exs. 352 and 356; Appendix III, Nevada's Opening Brief, p. 110.

[21]Calif. Exs. 375 and 376, Appendix III, Nevada's Opening Brief, p. 110.

[22]Appendix 8, Report, p. 423.

California water delivery contracts, the intra-state priorities provided by the Seven-Party Agreement entered among the California claimants. By this agreement, Palo Verde Irrigation District is given the first claim to waters available to the State of California. There is not an iota of evidence in the record to indicate that either the right of the Palo Verde Irrigation District or that of the Yuma Project would ever be in any way diminished. In other words, there is no evidence of any stream flow so low but that these two uses would be fully supplied under any conceivable situation that might arise as a result of the Master's Recommended Decree.

There next comes the claim of the Imperial Irrigation District. There had been a use on this project of up to 2,807,000 acre feet by June 25, 1929.[23] By the Seven-Party Agreement, this project has a third priority among California claimants, and is a part of a total of 3,850,000 acre feet allotted collectively for irrigation uses as a first intra-state priority to the Palo Verde Irrigation District, the Bureau of Reclamation's Yuma Project and the Imperial Irrigation District. There is no more reason to believe that this project could have any priority as against the Secretary acting under the navigation power of the United States than in the case of the Palo Verde Irrigation District.

Many pages of the record herein describe the troubles and the vicissitudes which had long affected this water use. Several different diversion points had been tried, one after the other, to accomplish diversions. The Colorado River had, in one flood period, changed its course so that it flowed through the diversion canal and into the Salton Sea. This continued for several years,

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[23]Calif. Exs. 270 and 273; Appendix III, Nevada's Opening Brief, p. 110.

and it was only after the expenditure of great sums of money that the river was turned back into its original channel. The threat of a repetition of this event hung over the Imperial Valley at all times.

In other years of low water there was insufficient flow in the river to fully supply the needs of the valley, particularly in the summer months. Great damage resulted from water shortage.

The waters of the Colorado River at this point were heavily laden with silt which caused tremendous difficulties at the diversion works and, at times, hindered or prevented the diversions.

So that, all factors considered, this use, prior to the construction of Hoover Dam, was a highly precarious one. If California could convert this to a contract right to take storage water out of a large reservoir, which reservoir would likewise control the flood and silting conditions, she had everything to gain and nothing to lose.

But even more important is the fact that the Project Act itself completely altered the situation with respect to the Imperial Irrigation District. As an integral part of the authorized project, the Secretary was authorized to construct a main canal located entirely within the United States connecting the Laguna Dam (a structure owned by the United States), or such other suitable diversion dam as the Secretary might select, for the Imperial and Coachella Valleys in California. It is further provided in Section 4(b) that before money was appropriated for, or construction work done upon the facilities for conveying water to the Imperial Valley there must be a contract insuring repayment of all costs in the manner provided in the Reclamation Law. Along with the construction of Hoover Dam, the Secretary constructed a new diversion dam (Imperial Dam) on the Colorado River, and the main canal and appurtenant structures leading therefrom

to the Imperial and Coachella Valleys. Subsequently, a contract was entered into[24] between the Secretary and Imperial Irrigation District for the delivery of water stored in Lake Mead through such works and for the repayment of the cost of construction of such works. Storage water has been supplied to the Imperial Irrigation District and Coachella Valley County Water District and delivered through such Federally constructed works constantly since their completion.

It would seem that as a result of the applicable legal principles, the construction of these works by the United States and the existing contracts, that the water rights of the Imperial Irrigation District are, and have been ever since the construction of the Hoover Dam, vastly different than they were prior to the passage of the Project Act. Of necessity, their water right, if one they had, also changed from a claim on the normal flow of the river to a supply from storage created and operated by the United States. It had become a supply provided for and regulated by a contract with the Secretary. The point of diversion from the river had been changed. Parenthetically it might be noted that there is no evidence indicating the State authorized a change in point of diversion as provided in State law, as would have been the required procedure if Imperial Valley were relying on old normal flow rights. The delivery is now through the All-American Canal instead of the District receiving back from Mexico the unused residue of the amounts previously diverted into and transported through Mexico. Because of these factors the Imperial Irrigation District presently has a vastly different type and character of water right and, in fact, a much more valuable one.

As a result of what might be generally described as these great

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[24]Special Master's Ex. No. 4, Hoover Dam Documents, p. A595.

Federal subsidies, the Imperial Irrigation District was freed from the ever-present threats of destruction by flood and silting, from the danger of large Mexican diversions, or interference over which it could have no control, while the water was flowing through Mexico, and from the danger of late summer shortages of supply in low water years. More than any other entity, the Imperial Irrigation District profited as a result of the Federal expenditures in the construction of the great storage and regulating reservoir at Lake Mead, the Imperial Dam and the All-American Canal. The water rights resulting from this tremendous expenditure being evidenced by contract, the Imperial Irrigation District is not now in a legal position to object to a finding that its rights are contract rights and are a part of a statutory and contractual allocation. The doctrine stated in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295, is clearly applicable here.

A conclusion that the rights of the California users mentioned above, being all who were actually diverting and using water at the time the Project Act became effective, are now contract rights, is entirely in conformity with the provisions of Article VIII of the Compact wherein it was provided that, after storage equivalent to 5 million acre feet or more had been provided from the Colorado River in the Lower Basin, the claims by appropriators or users of water in the Lower Basin should attach to the stored water. The whole pattern of the Project Act providing for the storage of water by the Secretary and the delivery of the same pursuant to contracts is in accord with an interpretation of Article VIII of the Compact as meaning that thereafter the rights in the lower Colorado River would be evidenced by contracts for stored water, and not otherwise.

All of these rights being rights for water stored by the Secretary would be, under the generally accepted pattern of Western water law and under the practice of the general Reclamation

Law, of equal priority with other storage contracts executed by the Secretary for uses in either of the States of Arizona or Nevada. It is true that the California users had agreed among themselves as to an intra-state priority. But there has been no agreement by the States of Arizona or Nevada, or the users therein, as to any priority on the part of California.

The fact that the Master recommended the protection of present perfected rights as prior rights seems to Nevada to go even further in protecting the California rights than he was entitled to go. It would seem that the only protection given to present perfected rights was that given by the Compact, and the Compact applies only as between the Upper and Lower Basins. But in any event, with the protection given by the Recommended Decree to present perfected rights as between the States of the Lower Basin, the California users are given the maximum of protection. The Master's provision for a pro-rata division of the water in short years does not trespass upon any legal rights that any of the California users might have.

The foregoing discussion applies particularly to the rights which might be claimed to have been present perfected rights as defined in the Compact. The right of the Metropolitan Water District is given a later priority than those heretofore mentioned by the Seven-Party Agreement. It is the right which, according to California's Brief herein (pp. 266–277), would suffer the greatest in years of water shortage under the Master's Recommended Decree. But certainly it is not a right which is entitled to claim any priority interstate as against contract rights created by the Secretary with Arizona or Nevada. The Metropolitan Water District water right could not conceivably have been a present perfected right at the time either of the execution of the Compact or at the effective date of the Project Act. It was a claimed right of the exact type which the Compact negotiators had been

attempting to prevent from establishing priority. A determination was finally made as to the points of diversion from the Colorado River and of the location of the aqueduct from the river over the mountains to the coastal regions at some date later than June 25, 1929, according to California's Brief (pp. 125–126). The first contract with Metropolitan Water District was dated April 24, 1930.[25]

In any event, the Metropolitan's right is purely a contract right depending upon the contract between it and the Secretary. The diversion is made from Parker Dam, a structure constructed by and controlled by the Secretary. The water supply is out of the stored water of Lake Mead and not elsewhere. The supply has all of the characteristics of true stored water in that Metropolitan Water District is given the right to accumulate unused water for later use. There is nothing in the Project Act, or in the pattern of water law, or the long continuing practices of the Bureau of Reclamation, that would give the Metropolitan Water District contract any priority over other secretarial contracts with users in the States of Arizona or Nevada. We mention again the universal rule that contracts for storage water out of any given reservoir stand on a parity.

It would certainly be absurd to state that the Metropolitan Water District, which is relegated to a low priority intra-state among the California users, should have some sort of high priority as against Arizona and Nevada users. But, that is exactly the position taken by California in her violent protestation against the Master's decision as he found (a) that the Metropolitan right did not fit within the definition of present perfected rights, and (b) that there should be proration of shortages in low water years.

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[25]Special Master's Ex. No. 4, Hoover Dam Documents, p. A499.

C. California's Repetitious Combination of Equitable Apportionment and Priority of Appropriation Invalid.

Another fundamental vice in the California argument is indicated by the strange and artificial phrase, endlessly repeated, that the foundation of her water rights is "equitable apportionment and priority of appropriation." Such a combination doctrine is utterly unknown in Western water law. Dividing the phrase into its two component parts, it is apparent that it is inconsistent on its face. The doctrine of appropriation as it grew up in the Western States, or the proposition that, as to water rights, the first in time is the first in right is, of course, so well defined and generally accepted as to be practically the "a, b, c," of Western water law. As mentioned by this Court,[26] and the Courts of practically every Western State, the doctrine of appropriation developed from the customs and usage of those who settled the arid west, first the miners and then the irrigators.

None of those people who thus, by their actions and customs, created the law of priority of appropriation ever heard, or even thought, of any doctrine of "equitable apportionment." In fact, the fundamental theory of the doctrine of priority of appropriation is the very antithesis of equitable apportionment. Under the appropriation doctrine, each user acquired the right to use and did use, when needed, all of the water necessary to fill his particular water right. He didn't share or apportion his water with anyone—equitably or otherwise. Of course this doctrine grew up on specific streams and in its adoption by the several States was only thought of as applying intra-state and in determining priorities of rights on specific streams or specific stream systems.

The principle of equitable apportionment, on the other hand,

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[26] *Wyoming* v. *Colorado*, 259 U.S. 419, 459 (1922).

is purely a creation of the so-called interstate-international law evolved in determining disputes between the sovereign States.[27] It did not arise from any custom or usages of miners or irrigators, or any other users. Nor does it in any way depend upon any first in time, first in right priorities for its existence or even its application.

True, this Court, in determining certain controversies over the division of the natural flow of interstate streams between states, each of whom have applied the appropriation doctrine intra-state, has considered these priorities in making an equitable apportionment. But each time this Court has been very careful to state that these priorities created under State law are given effect across State lines only as one element of equitable apportionment, and has made it very clear that they are not always controlling, and, as a matter of fact, in the actual decisions, they have not always been accepted as completely controlling. A portion of the many and diverse factors to be taken into consideration in an equitable apportionment suit are enumerated in *Nebraska* v. *Wyoming*, 325 U.S. 580, 618, along with the statement that the list is not complete or exhaustive. This Court said:

> "That does not mean that there must be a literal application of the priority rule. We stated in *Colorado* v. *Kansas*, *supra*, that in determining whether one State is 'using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted.' 320 U.S. p. 394. That case did not involve a controversy between two appropriation States. But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region

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[27] *Kansas* v. *Colorado*, 185 U.S. 125, 146–147 (1902).

may have been established on the basis of junior appropriations. So far as possible those established uses should be protected through strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

The oft-repeated statement throughout the California Brief that they have "rights under equitable apportionment and the appropriation doctrine" are complete misnomers, are of no value and tend only to mislead. If the California water users acquired any priorities intra-state, they acquired them as appropriators, and not otherwise. To what extent they may be increased, diminished, or altered, by the application of the doctrine of equitable apportionment will result, if at all, for the first time from the determination of this action.

Accordingly, clarity of thinking requires rejection of the phrase "equitable apportionment" in assessing the amount and character of the California rights at the time of the passage of the Project Act, and the extent and character of those rights as they now exist, after the construction of Hoover Dam and all of the other structures by which the United States has taken physical control of all of the waters of the main Colorado River from Lake Mead to the Mexican Boundary.

D. "Present Perfected Rights," a Unique Descriptive Phrase, is Strongly Applied in California's Favor.

Those who drafted the Compact used a very precise and unusual definition of the rights which were to be unimpaired thereby. In Article VIII, first sentence, it is stated:

> "Present perfected right to the beneficial use of waters of the Colorado River System are unimpaired by this compact."

This is a definition unique in water law. It is not one that has been customarily used in referring to water rights of any kind or variety. It must be assumed that in using this unique language, the authors of the Compact had a definite and precise purpose in mind. Elsewhere (even, in fact, in the succeeding sentence) reference is made to the rights of "appropriators" or "users." So that where the reference was to present perfected rights, a very clear and distinct description, we think that the meaning must be that which was ascribed to it by the Master in his Report (pp. 307–308). In other words, it did not cover claims which were only, in effect, paper rights. That is, where initial steps had been taken under State law to make appropriations, but which were so new that the works had not been completed and no water had been applied to beneficial consumptive use. Nor did it cover unused portions of large claimed rights, a part only of which actually had been applied to a beneficial consumptive use, such as was the case of the Imperial Valley claim.

So far as the Compact is concerned, there was not being guaranteed to California any greater water use than the total of three then existing uses. It can, of course, be argued as to whether California users had *any* rights in the waters of this navigable stream as against the United States as mentioned, *supra*, p. 33. It can also be argued, as was done strenuously by Arizona in the early phases of this case, as to the real extent and validity of the Imperial Valley rights under the physical conditions then

existing. That is, where the actual diversions of the Colorado River were taken into Mexico, a considerable amount of the water was used in that foreign nation, and then a part returned northerly across the border into the Imperial Valley.

But in any event, ignoring any and all questions as to their validity, the total of these rights, i.e., 2,944,560 acre feet is the *most* that California could claim as a then existing priority.

It should be noted that there is no indication that the amount of these then existing rights would be affected by the Master's Recommended Decree. In other words, the allegedly "prior" rights which California insists will be destroyed are rights other than those actually in being at the time of the execution of the Compact.

In the interim, between the execution of the Compact in 1922 and its effective date, June 25, 1929, first steps were taken toward making an appropriation of water for use by the Metropolitan Water District, consisting purely of primary surveys and of an initial paper appropriation under California law. At the time that the Project Act was passed, neither the right of the Metropolitan Water District, nor any other subsequent claims for California uses, were anything more than paper filings. No construction work was started on the Metropolitan Water District right until after the effective date of the Project Act. In fact, California argues in its Brief (pp. 125–126) that as late as 1930 consideration was still being given to a proposal to divert the Metropolitan Water District from a point on Lake Mead above Hoover Dam. The actual diversion point eventually chosen was at Parker Dam, many miles downstream from the Hoover Dam. In other words, the California argument concedes that, until a time subsequent to the effective date of the Project Act, the point of diversion and plan of conveyance for the Metropolitan Water District was still an uncertainty.

It has always been the position of the State of Nevada that the present perfected rights protected by the Compact were those in existence at the date of its execution. Obviously, these could be the only rights of which the negotiators of the Compact would have knowledge. It seems absurd to believe that they would be attempting to guarantee rights which might have later inception. The very purpose of the Compact was to protect the more slowly developing States against "grabs" of water by the rapidly developing States.

If the rights which are protected by the Compact and the Project Act are those "present perfected" as of the date of its execution on November 24, 1922, California had no other rights than those for Palo Verde, the Yuma Project and the then existing uses in the Imperial Irrigation District. The Master was of the opinion that the Compact could speak only of its effective date and that, since this was June 25, 1929, when President Hoover issued his proclamation, the present perfected rights are those existing on that date. As against California's claim, it would seem that this variation between 1922 and 1929 is not important. As above mentioned, no California rights had been created in that interim period except by initial paper filings. There were no additional or new actual uses which could come within the definition of present perfected rights. The claims of the Metropolitan Water District were still very definitely inchoate and unperfected.

Of course, this situation is the background which compelled California to argue (California's Brief, pp. 38, 57–58) concerning the doctrine of relation under which, in the Western States, it has been provided, either by statute or custom, that after a water right was initiated, its priority date relates back to the date of such initiation if the work of completing it has been diligently pursued to completion and application of the water to beneficial use. But that rule is wholly irrelevant here, where the specific description of present perfected rights was used in lieu of the

description of "appropriations" or "appropriators." The words are clear, precise and unambiguous and when that is accepted, much of the ambiguity and confusion ascribed to the Master's Report by California completely disappears.

E. A Finding as to Dependable Water Supply is Not Necessary and, in Fact, Cannot be Made.

California devotes a large portion of her Opening Brief (Part Five, pp. 232–277) to an argument which might be briefly summarized as a contention that unless there is a determination of the dependable water supply of the Colorado River there is no justiciable controversy. Nevada urges that this entire argument is fallacious from a number of points of view. As pointed out foregoing, the real *res* of this action is the body of stored water in Lake Mead. This water resulting from the construction by the United States of a great dam under the management and control of the Secretary has been contracted to various entities as has been described in detail.

For decades a controversy has raged, particularly between Arizona and California, as to the meaning, effect and validity of these contracts; and particularly as to their place in the distribution of Colorado River water among the three States of the Lower Basin. This is the justiciable controversy long recognized by all.

It does not in any way depend upon a finding as to the dependable supply. The controversy is there, regardless of the extent of the supply. And, as the Master pointed out, this expanding great Southwest area cannot progress unless the rights of the parties are determined.

As to the possibility of making a finding such as that requested by California, it would seem that obstacles are insurmountable. Nevada, confronted with the fact that both Arizona and California had introduced much evidence on water supply, endeavored

with the assistance of expert engineers to present some findings on this facet of the case in her Briefs before the Master.[28] The only conclusion that she could then reach was that a finding could be made prorating among the States six million acre feet so that California would get 4,400,000 acre feet of that water, and then in turn prorating the balance. The Master has arrived at a different but a quite similar conclusion.

His determination that the contract rights of the State are valid, that in times of shortage the supply will be prorated and that present perfected rights will be protected even across State lines is a very fair and reasonable solution of the problem. There are many reasons why a determination of the dependable supply cannot be made. No one can determine the future Upper Basin uses. The exact method of computing the contributions of the various States to the Mexican Treaty deliveries cannot be determined in absence of the Upper Basin States. The water supply record is for a very short period, having in mind the problem, and much of it undependable. The situation is entirely different from that confronting engineers desiring to make a water supply study for a proposed project. For there calculated risks can be taken. But any finding here which would endeavor to determine a water supply in perpetuity would be an impossible task. Any and all studies are just as good as the assumptions upon which they are based. And a determination of the proper assumptions to make for such a study, and their validity, would involve the Court in an endless task. We submit that the Master was correct in not attempting any such finding and that such a finding is entirely unnecessary.

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[28]Proposed Finding of Fact and Conclusions of Law, Vol. I, pp. 63–79, Brief, Vol. II, pp. 129–162, Answering Brief, pp. 70–81.

IV

COMMENTS ON UNITED STATES' BRIEF

In Exceptions I and II (United States Brief, Points I and II, pp. 7–21), the United States takes the position that the Secretary is authorized to make deductions for upstream tributary uses in Arizona and Nevada from the amounts to which these States are entitled to have delivered from storage in Lake Mead under their water service contracts with the United States.

More specifically, the United States takes the position that the Master's determination is erroneous in holding that the provisions of Article 7(d) of the Arizona contract[29] and the provision in Article 5(a) of the amended Nevada contract,[30] which charges tributary use in these states against the contract amounts to be delivered from storage in Lake Mead, are in violation of the Project Act and unenforceable.

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[29]Article 7(d) provides: The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

[30]Article 5(a) provides: Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial and other like purposes, but shall not be used for the generation of electric power.

The Master states three principal reasons why Article 7(d) of the Arizona contract and that provision in Article 5(a) of the amended Nevada contract charging tributary uses are in violation of the Project Act and are unenforceable (Report, p. 237):

(1) Since Section 5 of the Project Act[31] requires contracts for permanent service, the contract provisions referred to above would be in violation of this Section.

To illustrate, the Master uses as an example: Assume that annual delivery from Lake Mead aggregated the full contract allotment of 300,000 acre feet. If, thereafter, a consumptive use from the Virgin River System reduced the inflow into Lake Mead by 50,000 acre feet, the Secretary's obligation under the Nevada contract would be reduced by this amount. This would result in cancellation of deliveries to the junior-most Nevada users who had been receiving the last 50,000 acre feet under the contract. For these junior Nevada users, as the Master correctly points out, the contract cannot be regarded as one for permanent service and therefore it is violative of Section 5 of the Project Act.

The Master also points out (Report, pp. 239–240) that these provisions charging Arizona and Nevada for tributary uses above Lake Mead would "generate new causes of uncertainty . . ."; that the provisions charging Arizona and Nevada for depletions above Lake Mead "created this very uncertainty of supply that

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[31]The pertinent portions of Section 5 are: That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, * * *. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of Section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Hoover Dam and the Section 5 command were explicitly designed to avoid."

The Master finally points out (p. 240) that since Section 5 admittedly deals only with the mainstream, it must have intended to require permanent service in regard to mainstream deliveries regardless of consumption on the tributaries.

The United States argues that there is no inconsistency between these provisions and the "permanent service" requirement of Section 5 of the Project Act (p. 15, United States' Brief). The United States argues, using the Master's example, that if the use of the contract right for 300,000 acre feet preceded in time the upstream appropriations "there would not be permitted any diversion upstream that would interfere with the senior contract use, and thus there would be no occasion for any reduction of delivery under the contracts and no impairment of their permanence. The flaw in the United States' answer is that it completely overlooks the fact that the Secretary admittedly has no control over consumptive uses on the Virgin River or any other tributaries in Nevada, and has no control whatsoever on whether uses on the Virgin River System under State law shall be permitted or not permitted.

(2) The Master also points out (Report, p. 240) that these contract provisions also violate Section 18 of the Project Act[32] which provides in effect that State law shall govern water rights and priorities intra-state.

Using the same example regarding use on the Virgin River

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[32]Section 18 provides: Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

under the law of prior appropriations, the project would be junior to all users of the 300,000 acre feet. But the contract provisions, if enforced, would reverse this order of priority. The users of the last 50,000 acre feet of mainstream water under the Nevada contract would be deprived of water, while the Virgin River users would continue, despite the fact that the tributary users under State law were junior to the mainstream users. This, obviously, would be a flagrant violation of Section 18. The Master correctly points out that the Secretary has attempted, by the provisions in these contracts, to intervene within the States of Nevada and Arizona to dictate who shall receive water and in what order of priority. Moreover, in this attempt, as he points out, the Secretary has adopted a rule of priority exactly the reverse of the State rules; the contract provisions would displace senior downstream users for the benefit of junior upstream users.

The answer the United States makes (p. 18, United States' Brief) is to repeat that junior upstream diversions would not be permitted if 300,000 acre feet of Lake Mead was being used; a matter, we repeat, over which the Secretary has absolutely no control.

(3) In addition to violating Sections 5 and 18 of the Project Act, the Master cites a third reason why these contract provisions are invalid and unenforceable. Articles 7(d) and 5(a) are inconsistent with the Section 4(a) limitation on California's use of mainstream water, and would result in an allocation out of harmony with the California limitation, and, indeed, would defeat the basic purpose of the delivery contracts themselves (p. 241). How this would operate is explained fully in the Master's Report (pp. 241–247), and will not be repeated here. This is demonstrated clearly by another example used by the Master. He said (p. 242):

"The resulting incomplete allocation may be demonstrated

by the following example: Assume that the Secretary decided to release in a particular year enough mainstream water to permit consumption of 7.7 million acre-feet in the three states. Assume, also, that Arizona's diversions from the Little Colorado River depleted the flow into Lake Mead by .1 million acre-feet. Under the interstate apportionment established by the Section 4(a) limitation on California and the delivery contracts with Arizona and Nevada, of the first 7.5 million acre-feet of mainstream consumption, Arizona would be allocated 2.8 million acre-feet, California 4.4, and Nevada .3. Of the .2 million acre-feet constituting surplus, Arizona and California would be each allocated one-half. Thus to California would be apportioned a total consumption of 4.5 million acre-feet for the year in question. She could not consume more than this amount because of the Section 4(a) limitation, which is based on mainstream considerations only. To Nevada would be apportioned a total consumption of .3 million acre-feet, and she could not utilize more than this since that constitutes her full contractual allotment. To Arizona would be apportioned a total consumption of 2.9 million acre-feet. But if Article 7(d) of her contract were applied in this situation, the Secretary's delivery obligation of 2.9 million acre-feet would be reduced by the amount of the depletion of the flow into Lake Mead, and Arizona could consume only a total of 2.8 million acre-feet from the mainstream. Thus, although 7.7 million acre-feet were released for consumption within the three states for the year, only 7.6 million acre-feet could be utilized under the statutory and contractual limitations. 100,000 acre-feet of water released for consumption could not be used."

The United States makes no reply; it merely states that it does not agree with this conclusion. It suggests that the 100,000 acre feet of Little Colorado River depletion is a part of the total mainstream supply for allocation. The frailty of the suggestion of the United States is that it would do violence to the interpretation of Section 4(a) adopted by the Master, the interpretation

to which the United States itself agrees. The Master's interpretation of Section 4(a) limits California to 4.4 million acre feet, plus one-half the surplus from the *mainstream*. The Master's interpretation establishes a mainstream, not a system-wise method of accounting. The suggestion of the United States would import tributaries or system water into the Section 4(a) limitation. Articles 7(d) and 5(a) would defeat this mainstream allocation otherwise completely provided for in the contracts by introducing system considerations in a mainstream apportionment. These provisions are not in harmony with a mainstream apportionment and, as the Master points out, would leave some mainstream water undisposed of.

Essentially, the answer comes down to this: Was the Master correct in holding that Congress intended by Section 4(a) of the Project to confine mainstream water to water stored in Lake Mead and flowing in the mainstream below Hoover Dam, and that California is limited to 4,400,000 acre feet of the first 7,500,000 acre feet of mainstream water. If the Master was correct, it inevitably follows that he was correct in excluding tributary uses above Lake Mead.

Nevada respectfully submits that there is nothing in the Brief of the United States which seriously challenges the soundness and correctness of the Master's decision.

In addition, there are reasons other than those relied upon by the Master why his decision that Article 7(d) of the Arizona contract and the provision in Article 5(a) of the Nevada contract charging tributary uses are unenforceable, is proper and sound.

The legislative history of Section 4(a) of the Project Act demonstrated clearly that Congress intended that Nevada should have 300,000 acre feet of consumptive use of the mainstream. There is nothing in the legislative history even remotely suggesting that this amount should be reduced by tributary uses in Nevada above Lake Mead.

The legislative history of Section 4, which is reviewed by the Master in establishing that Congress intended that the first 7,500,000 acre feet to be allocated to the three Lower Basin States was mainstream water (Report, pp. 173–185), makes it abundantly clear also that the 300,000 acre feet to be allocated to Nevada from the mainstream was not to be diminished by any tributary uses in Nevada. In reviewing the legislative history, the Master said (Report, p. 174):

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. The very language of the Section—it refers to the Colorado River and not to the System—points in this direction. But more important, the second paragraph of Section 4(a) demonstrates that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in that Section among three states only: of the first 7.5 million acre-feet—4.4 to California, 2.8 to Arizona, and .3 to Nevada; the balance to California and Arizona equally. This intention is clearly stated in the legislative history."

Senator Pittman of Nevada made it perfectly clear that Section 4(a) of the Project Act was designed by Congress to apply only to the mainstream, and that Nevada's share of that water from the mainstream was 300,000 acre feet.

> "The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only . . . 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get . . ."[33]

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[33] 70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. p. 80.

This statement by Senator Pittman obviously reflected the understanding of Congress that of the first 7,500,000 acre feet of water in the mainstream, California would be entitled to 4,400,000, Arizona 2,800,000, and Nevada 300,000. Senator Pittman confirmed this when he concluded that:

> "Arizona today has practically allocated to it 2,800,000 acre feet of water in the main Colorado River."[34]

This is confirmed also by the recommendations of the Governors' Conference in 1927. Its proposed settlement was considered at length by the Senate in the debate on the fourth Swing-Johnson bill.

The Governors of the seven Colorado River States met in 1927 in an attempt to bring about the seven-state ratification of the Colorado River Compact. The Governors of the Upper Division recommended by a resolution adopted by them at that conference that out of the average annual delivery of water to be provided by those States at Lee Ferry under the Compact, there would be apportioned to Nevada 300,000 acre feet, to Arizona 3,000,000 and to California 4,200,000 acre feet. They further recommended that each Lower Basin State should have exclusive use of all water of the Colorado River tributaries within its boundaries above the place where that water emptied into the mainstream.[35] The division finally patterned upon by the Congress was that recommended by the Governors' Conference, except that California was raised to 4,400,000 acre feet and Arizona was reduced to 2,800,000 acre feet.

With respect to the Governors' Conference recommendation, as to tributary uses, Senator Hayden commented (80 Cong. Rec. 171):

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[34]70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. p. 82.

[35]70 Cong. Rec. 172, Ariz. Legis. Hist. 33–34. 69 Cong. Rec. 10259, Ariz. Legis. Hist. 14.

"The governors at Denver went on further and stated, in addition:

2. To Arizona, in addition to water apportioned in subdivision (b), 1,000,000 acre-feet of water to be supplied from the tributaries of the Colorado River flowing in said State, and to be diverted from said tributaries before the same empty into the main stream. Said 1,000,000 acre-feet shall not be subject to diminution by reason of any treaty with the States of Mexico, except in such proportion as the said 1,000,000 acre-feet shall bear to the entire apportionment in (1) and (2) of 8,500,000 acre-feet.

3. As to all water of the tributaries of the Colorado River emptying into the river below Lees Ferry not apportioned in paragraph (2) each of the states of the lower basin shall have the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty into the main stream, provided, the apportionment of the waters of such tributaries situated in more than one State shall be left to adjudication or apportionment between said States in such manner as may be determined upon by the States affected thereby.

That last provision referred particularly to the Virgin River, which was partly in Utah, partly in Arizona, and partly in Nevada, the only important tributary that is a stream of interstate character."

The foregoing is further affirmative evidence that tributaries uses in Nevada above Lake Mead are not to be deducted from the 300,000 acre feet allocated to Nevada from the mainstream.

We repeat, a careful study of the legislative history of Section 4(a) does not disclose even the most remote suggestion that Nevada's share of 300,000 acre feet from the mainstream should be reduced by tributary uses in Nevada.

Another reason was advanced in Nevada's Briefs before the Master (Reply Brief, pp. 10–11 and also in Nevada's Opening Brief herein, p. 48), why the provision in Article 5(a) of the

amended Nevada contract charging tributary uses is invalid and unenforceable. There is nothing in the Project Act that authorized, directed or permitted the Secretary to limit Nevada's allocation of water from Lake Mead by deducting therefrom tributary uses in Nevada. Nor could any act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed. It is fundamental that State officials do not have any power to surrender, abrogate, release or dispose of any of the rights of a sovereign State. Such acts would be *ultra vires*. Accordingly, from all aspects, the provision in Article 5(a) of the Nevada contract purporting to reduce Nevada's allocation of 300,000 acre feet from Lake Mead would be *ultra vires*, void and unenforceable.

One further point should be mentioned. Arizona, while agreeing with the United States that the Project Act constitutionally delegates to the Secretary the power to allocate mainstream water among the Lower Basin States, took the position before the Master that the second paragraph of Section 4(a) established a formula for the allocation of the water of the mainstream among the three Lower Basin States which the Secretary is required precisely to follow, and that those provisions in the water delivery contracts both in Arizona and Nevada, which deviated from the formula are void. Arizona's contention in this respect was rejected by the Master (Report, pp. 162–163).

Arizona excepted from the Master's ruling in this respect (Arizona Exception No. 7) and devotes Part III of its Brief (pp. 83–104) in support of its position. By Article 4(a), Arizona argues, Congress made an over-all allocation of the entire quantity of the mainstream of the Colorado River dealt with therein by establishing a formula under which the first 7,500,000 acre feet of that water should be divided in an amount not to exceed

4,400,000 to California, 2,800,000 to Arizona, and 300,000 acre feet to Nevada, and the surplus above 7,500,000 acre feet to California and Arizona equally, to which the water delivery contracts made by the Secretary are required to conform.

In the event this Court should concur in Arizona's view, this would provide an additional reason why that provision in Article 5(a) of the Nevada amended contract charging tributary uses is void and unenforceable.

The formula of Section 4(a) of the Project Act entitles Nevada to the delivery from Lake Mead for use in Nevada of 300,000 acre feet per annum. Under Article 5(a), however, there is to be subtracted from the 300,000 acre feet "all other water diverted for use within the State of Nevada from the Colorado River System." Obviously this does not conform to the Section 4(a) formula, and hence, if Arizona is correct, is beyond the authority of the Secretary and is unenforceable.

In Point IV, the United States excepts to the statement of the Master at page 210 of his Report that:

> "It should be noted that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior. On the contrary, the State of Nevada is free to determine who shall use the water, subject only to the Secretary's approval of the points of diversion."

and requests this Court to reject this statement.

This, likewise, was the subject of an exception by Nevada. Nevada requested that Paragraph II(B)(7) of the Recommended Decree be amended so that the phrase "mainstream water should be delivered to users in * * * Nevada only if contracts have been made by the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act for the delivery of all

such waters; * * *", conforms to the conclusion which the Master makes with respect to this contract on page 210 of his Report.

We believe that Nevada's argument in support of its exception in Nevada's Opening Brief (pp. 52–55) is a complete answer to the United States and will not be repeated here.

It may be added additionally that the major position of the United States, in excepting to the Master's statement on page 210, is that it is inconsistent with Article 5(a) of the Nevada contract providing that the United States shall annually deliver from storage in Lake Mead:

> "So much water, *including all other waters diverted for use within the State of Nevada from the Colorado River System*, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre feet each calendar year."

The United States says, at page 50:

> "The underscored language excludes from the agreement to deliver 'to the State' all other diversions for use within the State. Such exclusion preserves the Secretary's authority to contract with users in Nevada and precludes the possibility of an attempted waiver of the Section 5 requirement for contracts with all users."

If the Master is correct in holding that the underscored part of Article 5(a) is contrary to Section 5 of the Project Act and is unenforceable, and we submit that he clearly is correct (*supra*, pp. 50–59), then, of course, the argument of the United States is completely groundless.

The Nevada contract is entirely consistent with Section 5 of the Project Act. It is senseless to require additional subcontracts between each water user and the Secretary. This contract was drafted in the light of circumstances peculiar to Nevada. Existing

and future uses of Lake Mead water will be for industrial and municipal uses (Appendix I, Nevada's Opening Brief). It would be ridiculous to require individual and duplicate contracts with industrial and municipal users of Lake Mead water. There are not now and never will be any large irrigation projects such as there are in Arizona and California. It is logical and sensible that the water delivery contracts be with the State of Nevada, acting through its Colorado River Commission of Nevada. This Commission was created primarily for this purpose and is consistent with Section 5 of the Project Act. Specifically, NRS 538.160 authorizes the execution of a contract such as that involved in this action. Section NRS 538.170 authorizes the Commission to receive the water covered by the contract for the State of Nevada and to make necessary appropriations therefor, and NRS 538.180 authorizes the Commission to make all necessary leases, subleases, or contracts of sale of the water obtained through the contract with the United States (Appendix II, Nevada's Opening Brief).

The United States appears to be concerned about the use of Lake Mead water on Federal projects. In the event any Federal projects are authorized, which is extremely unlikely, it would be a simple matter indeed for the State of Nevada, acting through its Colorado River Commission of Nevada, to relinquish to the United States sufficient water for the Federal project or to contract directly with the irrigation district or company operating the project.

V

COMMENTS ON ARIZONA'S BRIEF

Arizona's Brief is divided into two parts. Part I deals with the "Controversy Among Arizona, California and Nevada with Respect to Mainstream Water," and Part II deals with the "Claims of the United States to Water." Inasmuch as Part I

supports the Master's Report and Recommended Decree in all the essential details, we are in general agreement with the position taken by Arizona, except as hereinafter noted.

We concur in Arizona's argument in Point I of Part II (pp. 32–57) that Congress, in enacting the Project Act, exercised its plenary power over navigable waters and allocated among Arizona, California and Nevada all available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead. If this is true, the principle of equitable apportionment and priority of apportionment is not applicable to the division of mainstream water among those States.

We concur generally with the Arizona argument in Point II of Part I (pp. 57–82) that the Project Act provides for the storage of mainstream water only and for its allocation among Arizona, California and Nevada. Arizona, however, argues that the Compact apportioned only mainstream water. The Master did not concur with Arizona's interpretation of the Compact and construed Article III(a) of the Compact as dealing with both the mainstream and tributaries; that Article III(a) deals with the Colorado River System which is defined in Article II(a) as including the entire mainstream and the tributaries (Report, pp. 142–151, 173). Nevada, in its Brief before the Master, concurred in the Master's view (Nevada's Answering Brief, pp. 28–40).

Nevada, however, makes no issue of the matter at this time. Whether this Court concludes that the Master was correct in construing Section 4(a) of the Project Act and the California Limitation Act as referring only to water stored in Lake Mead and flowing in the mainstream below Hoover Dam, or whether the Court concurs with Arizona's view that the Compact apportioned only mainstream water, the result so far as Nevada's rights are concerned would be the same. Nevada would still be

entitled under its contracts to an undiminished 300,000 acre feet of water from Lake Mead.

In Point III of its argument under Part II (pp. 83–105), Arizona, while agreeing with the Master that the Project Act constitutionally delegated to the Secretary the power to allocate mainstream water among the three Lower Basin States, argues that the second paragraph of Section 4(a) established a mandatory formula for the allocation which the Secretary is required precisely to follow in the water delivery contracts, and that those clauses in her water delivery contract which deviated from the formula are void.

Under this theory, one of the clauses in the Arizona contract which would be void is Article 7(f) which provides for the recognition by Arizona of the right of the United States and the State of Nevada to make a contract for the "use of 1/25 (one twenty-fifth) of any excess or surplus water available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III(f) and Article III(g) of the Colorado River Compact."

Nevada emphatically disagrees with Arizona's contention that Article III(f) is void, and submits that it is valid and enforceable. The Master effectively disposes of Arizona's contention in the following language (p. 163):

> "This argument is premised on the language in Section 5 that 'contracts respecting water for irrigation and domestic uses . . . shall conform to paragraph (a) of section 4 of this act.' The second paragraph, Arizona points out, is included within Section 4(a). But the second paragraph of Section 4(a) is plain in that it merely authorizes a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact.

> Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory. The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected."

Certainly Nevada is entitled to its equitable share of any excess or surplus available in the Lower Basin. This is specifically provided for by Article III(f) of the Compact. It provides:

> "(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963; if and when either Basin shall have reached its total beneficial consumptive use, as set out in paragraphs (a) and (b)."

If Arizona's contention is correct, and the excess or surplus is divided 50 percent to Arizona and 50 percent to California, Nevada would be deprived of its equitable share, contrary to the express terms of Article III(f) of the Compact. Nevada submits that Article 7(f) of the Arizona contract is valid and in full force and effect, consistent with the findings of the Master (Report, p. 207).

In the unlikely event that this Court should find Article 7(f) of the Arizona contract is void, then Nevada submits that that part of the Recommended Decree (Paragraph II(B)(2); Report, p. 347) permitting Nevada to contract with the United States for 4 percent of the excess or surplus should be retained irrespective of any provisions of the Arizona contract. Nevada's

right to an equitable share of the excess or surplus is not dependent upon any recognition or consent by Arizona in its contract or otherwise.

Part II of Arizona's Brief is an excellent argument in opposition to the views expressed by the Master with respect to the unrestricted right of the United States to reserve water for all Federal establishments. As Arizona correctly points out, the Master, relying basically on a single decision of this Court (*Winters* v. *U.S.*, 207 U.S. 564), which involved the reservation of water of a non-navigable stream for use on an Indian reservation created by treaty in the Territory of Montana, has concluded that the Federal Government has the unrestricted power to reserve water of both navigable and non-navigable streams for the benefit of all Federal establishments. Arizona points out, also, that the Master fails to recognize the distinction between the legal principles applicable to navigable waters and those which govern non-navigable streams. He fails to give effect to the well-established rule that when a State is admitted to the Union, dominion over its navigable water passes from the United States to the newly created State and that, thereafter, the Federal Government is without power to reserve the water of a navigable stream for use on Federal establishments, since its only authority over such water is that which is vested in it by the Commerce Clause and the treaty-making provisions of the Constitution (Arizona's Brief, pp. 117–118).

Nevada agrees fully with Arizona's presentation on this issue. It is one of far-reaching importance throughout the entire West.

CONCLUSION

Nevada submits that it is entitled to the beneficial consumptive use of 300,000 acre feet of water stored in Lake Mead under any theory which may be adopted by this Court. This is true whether it be determined that Section 4(a) of the Project Act related only to the mainstream, as the Master found, or to system water, as contended by California. Nevada's contract rights are valid whether Section 4(a) constitutes a statutory contractual allocation, as found by the Master, or whether the contracts were made under the general Reclamation Law. Likewise, Nevada's contracts are valid if that section constitutes a mandatory formula, as contended by Arizona. This is true also in the event this Court determines the case upon the basis of an equitable apportionment among the three mainstream Lower Basin States. It would be judicially proper to use the contracts made by the Secretary as a yardstick in arriving at an equitable apportionment.

This is the minimum amount to which Nevada is entitled. The Colorado River is literally the lifeblood of the Southern Nevada area and it is the controlling factor to sustain its expanding population growth. At least, so far as Nevada is concerned, uses for irrigation and navigation are relatively unimportant. Also, Nevada is unique in that it has no other source of water than Lake Mead. The two other mainstream Lower Basin States, particularly California, has alternative sources of water.

Nevada respectfully submits that there is nothing in the Briefs of the United States, Arizona, or California, that seriously challenges Nevada's right to an undiminished 300,000 acre feet of water from Lake Mead.

The allocation to Nevada proposed by the Master is fair and just and should be sustained.

Respectfully submitted,

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Dated August 7, 1961

APPENDIX I

SALINE WATER CONVERSION PROGRAM

At page 34 of Nevada's Opening Brief, there is described existing legislation implementing the saline water conversion program. Since then, S. 2156, "to expand and extend the saline water conversion program being conducted by the Secretary of the Interior" in the Senate, and H.R. 7916, in the House, were introduced on June 27, 1961, with administration approval. It will greatly expand this program.

In transmitting the bill to the President by letter dated June 22, 1961, Secretary of the Interior Udall said (Cong. Rec., June 27, 1961, p. 10540):

> "The results to date of this Department's saline water research and development activities under our basic authorization have in large part developed the technological advances that permit many communities in need of a dependable supply of fresh water to be interested now in the installation of conversion plants, if they could obtain the necessary financial assistance which we are recommending for your consideration. It is our opinion that the continuation of the program which this bill would authorize, should help significantly to make it possible to bring good water supplied to local communities on a basis that is economically feasible. It should also lessen the obstacle to the financing of the investment of substantial sums of money in conversion plants.
>
> ". . . although many technological problems remain to be solved, *results obtained from laboratory investigations give reliable indications that the objective of low cost converted water can be attained.* If we can reach our objectives, converted saline water may become an important source of supplemental water for many areas of the United States." (Emphasis added.)

Title I of the bill covers generally the expanded saline water research and development program. Section 8 of Title I removes expenditure ceilings and extends the time limit. As Secretary Udall points out, "It is impossible to predict in advance the rate of progress that might be achieved, or to predict the cost of solving a technological problem of this magnitude. The time and fiscal limits set by the Congress in 1952 and 1955 have proved to be inadequate. For a program that is probing in an unprecedented manner into the secrets of nature to develop an inexhaustible supply of economically competitive fresh water, it seems wise to allow adequate flexibility in the rate at which such a program shall advance. Congress has recognized, and by this legislation would reaffirm, the importance of this program. With each passing year, the program will be of much greater significance to mankind. It should be authorized to function until it has attained the objectives set forth by the Congress."

Title II repeats the 1958 law regarding demonstration projects but extends the duration of the program from seven years to fifteen years, removes the limitation on the appropriation, and authorizes the construction of an unspecified number of additional demonstration plants, including ones capable of producing not to exceed 50 million gallons of water per day.

Title III would authorize Federal financial assistance for the construction of conversion plants.

Title IV provides for grants to local governmental units or public or private utilities for that part of the investment necessary to reduce the price of water to a competitive price. It further provides for contracts with the borrower for Federal payments between the cost of converted water and a fair price for such water.

Title V directs the cooperation of the Secretary of Defense, the Secretary of State, and the heads of related agencies with the

Department of the Interior in the establishment of land based saline water conversion plants.

President Kennedy, in transmitting the bill to each House of Congress on June 26, 1961, strongly urged its passage. He said:

> "I know of no Federal activity that offers greater promise of making a major contribution to the ultimate economic well being of all mankind than this program." (Cong. Rec., June 27, 1961, p. 10540).

Senator Metcalf stated on the floor of the Senate on July 17, 1961, in commenting upon the pending legislation (Cong. Rec. p. A 5366):

> "We are on the threshold of a break-through in costs that will make saline water economically feasible, both here and abroad."

This expanded program is discussed in considerable detail in the testimony of C. F. MacGowan, Director of the Office of Saline Water, before the Subcommittee on Irrigation and Reclamation of the Interior and Insular Affairs Committee of the House of Representatives on July 17, 1961 (hearings not yet printed), and also in the testimony of Secretary Udall before the same Committee, which appears in the Congressional Record for July 17, 1961, p. A5366.

APPENDIX II

LEGISLATIVE HISTORY AND ANALYSIS OF AUTHORIZATIONS FOR CONSTRUCTION AND FINANCING OF FACILITIES TO PROVIDE WATER FOR SOUTHERN CALIFORNIA

The California Water Resources Development Bond Act (Cal. Stats., Ch. 1762; Water Code of California, Div. 6, Pt. 6, Ch. 8, Secs. 12930–12942), popularly known as the Burns-Porter Act and hereinafter referred to as the Bond Act, was submitted pursuant to Article XVI, Sec. 1 of the California Constitution to, and approved by, a vote of the people on November 8, 1960. This submission was required by Article XVI, Sec. 1 of the California Constitution for the reason that it involved incurring of a debt (bond issuance) in excess of the limitation of $300,000 set forth in the Constitution.

In its principal aspects, the Bond Act is a financing measure intended to make funds available for the construction of water facilities. As hereinafter mentioned, the Bond authorization is in the amount of $1,750,000,000, with a first priority on its use being established to construct designated facilities, among which are those required to make water available to Southern California.

Prior to the enactment of the Bond Act, certain of the facilities which are to be financed by that Act were authorized by Act of the Legislature. These, in effect, were reauthorized and more specifically described by the Bond Act.

In 1951 the Legislature authorized the Feather River and Sacramento-San Joaquin Delta Diversion Projects (Cal. Stats. 1951, Ch. 1441, amended Cal. Stats. 1956 (Ex. Sess.) Ch. 54, Cal. Stats. 1957, Ch. 1932 and Ch. 2539, Cal. Stats. 1959, Ch. 2043; Water Code of California, Div. 6, Pt. 3, Ch. 2, Sec. 11260).

As originally enacted in 1951, the Project included (a) Oroville Dam on the Feather River, with a capacity of 3,500,000

acre feet to be utilized for conservation, flood control, and power uses, (b) a power plant at the dam, (c) an afterbay dam and power plant, (d) a Delta Cross Channel, and (e) electrical transmission facilities. The Sacramento-San Joaquin Delta Diversion Project, as approved in 1951, included the Santa Clara-Alameda Diversion, the San Joaquin Valley-Southern California Diversion, and the Santa Barbara-Ventura Diversion. These "diversions" were conduits or aqueducts which would carry from the Delta water released from Oroville Dam and Reservoir and flowing in natural channels to the Delta, as well as unregulated water available in the Delta from other streams contributory to the Delta, to the areas of use. The Santa Clara-Alameda Diversion would conduct water to Bay counties south of San Francisco. The San Joaquin-Southern California Diversion would transport water to the central and southern portions of the San Joaquin Valley and across the Tehachapi Mountains to Southern California as far south as San Diego County. The Santa Barbara-Ventura Diversion would serve Santa Barbara and Ventura Counties as well as a portion of San Luis Obispo County. This latter aqueduct would be a branch of the San Joaquin Valley-Southern California facility, taking off from that aqueduct in the southern San Joaquin Valley.

In 1956 the original authorization was amended to make some changes in the project design and add some additional features. The principal modification, particularly as affecting the San Joaquin Valley and Southern California service areas, was the authorization as a part of the State project, the San Luis Reservoir in the vicinity of Los Banos in the San Joaquin Valley. This reservoir would be below the Delta and along the route of the San Joaquin Valley-Southern California aqueduct and would provide off-stream storage for unregulated winter flows available and to be diverted from the Delta.

The 1959 amendment generally approved, and more specifically described, the routing of the above mentioned aqueduct theretofore authorized, to carry water to the San Joaquin Valley and Southern California. All of the facilities described to this point have generally become known and described as the Feather River Project.

On June 3, 1960, Public Law 86–488, 74 Stat. 156, was approved by the President of the United States and authorized for construction, as a Federal project, the Federal San Luis Project in the San Joaquin Valley. This Project envisions use of the same reservoir, San Luis, as well as the same dam-site, contemplated for use in the State program. The Federal legislation provides that, upon agreement being reached with the State of California, the Secretary of the Interior is authorized to include in the San Luis Reservoir and the canal extending southward through the Federal service area, sufficient capacity to accommodate the State's needs with respect to the Feather River Project. (The Federal service area encompasses 500,000 acres of land on the west side of the San Joaquin Valley.) In other words, San Luis Reservoir and a portion of the aqueduct system theretofore authorized for construction by the State could, and undoubtedly will, be a Federally constructed facility to be jointly used by the Federal and State Governments. The State would contribute its share of the cost at the time of construction. Section 1(a) of the Federal San Luis legislation, *supra*, also provides that should the State elect not to have its share of the joint use facilities constructed when the Federal Government is prepared to proceed with its own construction, provision could be made, upon agreement by the State, for the initial construction of the dam and reservoir to be such as to permit future enlargement when the State desired and was able to proceed.

In 1959 the California Legislature approved the California

Water Plan (Cal. Stats. 1959, Ch. 2053; Water Code of California, Div. 6, Pt. 1.5, Secs. 10004–10007). This plan is a comprehensive plan for the development of all of the water resources of the State of California and includes the Feather River Project. The plan as described is described as "the guide for the orderly and coordinated control, protection, conservation, development, and utilization of the water resources of the State. This declaration does not constitute approval of specific projects or routes for transfer of water for construction by the State or for financial assistance by the State without further legislative action, nor shall this declaration be construed as a prohibition of the development of the water resources of the State by any entity." (Water Code of California, Sec. 10005.)

The last described statute which approved the California State Water Plan expressly states that its provisions do not repeal or modify any of the prior authorizations of projects (Water Code of California, Sec. 10006). Thus, the previous authorizations of the Feather River Project, *supra*, remained in effect and, indeed, were reinforced by that legislation.

In 1959, the California Legislature also created the California Water Fund (Cal. Stats. 1959, Ch. 140, Water Code of California, Div. 6, Pt. 6, Ch. 7, Secs. 12900–12915). This legislation dedicated, but did not appropriate, the funds therein, and all accruals, to the construction of water resource development works (Water Code of California, Secs. 12901(a), 12910, *supra*). Subsequently, the fund was appropriated for use in the construction of the Feather River Project by the Burns-Porter Act (Water Code of California, Sec. 12938, *supra*), as will be later discussed herein. The principal element of the California Water Fund is a portion of the funds which are derived from tidelands oil revenues. Water Code of California, Sec. 12912 (d), *supra*).

Since 1956 funds have been included in the annual budgets and appropriated by the California Legislature from the General Fund as well as the Investment Fund (predecessor to the California Water Fund), for the Feather River Project for preconstruction, construction, right-of-way acquisition, and railroad and highway relocation purposes.[1]

The Burns-Porter Act is the most significant legislation dealing with the construction of works to supply water to Southern California, as well as other areas of the State. As previously noted, it is essentially a financing Act and assures availability of $1,750,000,000 toward that construction. Of the $1,750,000,000, $130,000,000 is dedicated to the making of loans and grants for the construction of local projects which would not involve water for transport to Southern California, thus leaving $1,620,000,000 for construction of the Feather River Project. In discussing the Bond Act, reference will be made only to the Water Code sections. However, those sections are specifically designated in the Act itself. The significant, relevant sections will

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[1]Budget Act of 1956, Cal. Stats. 1956, Ch. 1.

Total for all relevant items	$9,350,000.00
Budget Act of 1957, Cal. Stats. 1957, Ch. 15.	
Total for all relevant items	25,190,000.00
Budget Act of 1958, Cal. Stats. 1959 (2nd Ex. Ord. Sess.), Ch. 1.	
Total for all relevant items	4,023,672.00
Budget Act of 1959, Cal. Stats. 1959, Ch. 1300.	
Total for all relevant items	71,396,709.00
Budget Act of 1960, Cal. Stats. 1960, Ch. 11.	
Total for all relevant items	39,810,243.00
Total for all items listed	$149,770,624.00

be discussed in seriatim as they appear in the Act, with cross references as required.

The object of the Act is set forth in Section 12931 as being to provide funds to assist in the construction of a State Water Resources Development System for the State of California. The System is described in the section as including the "State Water Facilities." No reference is made in the Bond Act to the Feather River Project by name. However, the definition of the State Water Facilities as contained in Sec. 12934(d) of the Bond Act includes all of the facilities which form the Feather River Project in its earlier authorization. In addition, the term includes the additions to the Feather River Project consisting of a North Bay aqueduct to transport water from the Delta to counties along Northern San Francisco Bay and a drainage system for the San Joaquin Valley.

Reference in the Bond Act to the State Water Facilities is interchangeable, for all practical purposes, with the Feather River Project, although by definition (Sec. 12934(d)(4)) the term includes small local projects for which loans and grants may be made by the State. The System envisioned by the Act also includes any additional works which may hereafter be authorized by the Legislature as a part of the State Central Valley Project or the California Water Plan. However, as it will be pointed out later with reference to Section 12938, the Bond funds are dedicated, first to the construction of the State Water Facilities (Feather River Project) and to loans and grants, in the amount of $130,000,000 for small local projects.

Section 12934(d) defines the term "State Water Facilities." Among those facilities are:

(1) Oroville Dam (Water Code Section 12934(d)(1)).

(2) "An aqueduct system which will provide for the transportation of water from a point, or points, at or near the

Sacramento-San Joaquin Delta to termini in the Counties of Marin, Alameda, Santa Clara, Santa Barbara, Los Angeles, and Riverside, and for delivery of water both at such termini and at canal-side points enroute for service in Solano, Napa, Sonoma, Marin, Alameda, Contra Costa, Santa Clara, San Benito, Santa Cruz, Fresno, Tulare, Kings, Kern, Los Angeles, Ventura, San Bernardino, Riverside, Orange, San Diego, San Luis Obispo, Monterey, and Santa Barbara Counties.

"Said aqueduct system shall consist of intake and diversion works, conduits, tunnels, siphons, pipe lines, dams, reservoirs, and pumping facilities, and shall be composed of . . . a reservoir near Los Banos in Merced County . . . a San Joaquin Valley-Southern California aqueduct extending to termini in the vicinity of Newhall, Los Angeles County and Perris, at Riverside County, and have a capacity of not less than 2,500 cubic feet per second at all points North of the northerly boundary of the City of Los Angeles in the Tehachapi Mountains in the vicinity of Quail Lake and a capacity of not less than 10,000 cubic feet per second at all points north of the initial off-stream storage reservoir (San Luis Reservoir); a Coastal aqueduct beginning in the San Joaquin Valley-Southern California aqueduct in the vicinity of Avenal, Kings County, and extending to a terminal at the Santa Maria River." (Water Code, Section 12933(d)(2)).

(3) Facilities for water conservation in and transfer of water across the Sacramento-San Joaquin Delta (Water Code, Section 12934(d)(4)).

Section 12935 authorizes the incurring of a debt in the amount of $1,750,000,000 for water development purposes, principally the State Water Facilities. Section 12936 authorizes the debt as a general obligation of the State of California.

Article XVI, Section 1, of the California Constitution provides

that, if the authorizing legislation for a debt exceeding the constitutional limitation describes the ways and means by which the debt is to be repaid, those ways and means may not be changed by the Act of the Legislature during the existence of the debt. Section 12937 describes the ways and means by which the bonds are to be repaid. It pledged the revenues of the project to the payment of the bonds and to the operation of the operation and maintenance costs of the State water system, as well as reimbursement for funds used from the California Water Fund. The Section also provides that contracts between the State and water users organizations may not be changed by Act of the Legislature during the life of the bonds.

Section 12938 appropriates and makes available, without further action by the Legislature, all the bond funds for the construction of the State Water Facilities which includes the facilities which will be constructed with loans and grants to local agencies for local projects. It dedicates $130,000,000 of the total authorization for such loans and grants.

The Section also provides that all monies in the California Water Fund, except to the extent that the Legislature, in any year, by legislative action diverts money available in the Fund in that year for any other purpose, are now appropriated for use in the construction of the State Water Facilities.

Any money available in the California Water Fund available at the time a construction cost is incurred must be used in lieu of bond funds for the construction of the State Water Facilities. To the extent that California Water Fund monies are available and so used, an equal amount of the Bond funds are released from dedication to the construction of the State Water Facilities and are rededicated to, and appropriated for, the construction of additional works in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen, and Klamath Rivers to augment supplies of

water in the Sacramento-San Joaquin Delta. It should be noted here that this provision assures funds for the construction of works which may be required to make up for deficiencies in the supply to be made available to Southern California from the Feather River Project. One cause for such a deficiency might be the operation of the "County of Origin Statute" (Water Code of California, Sections 10500, 10505), and the "Watershed Protection Statute" (Water Code of California, Section 11460) which purports to give a prior right to the counties and watersheds with respect to all water which originates therein. Thus, if there is a "recapture" on the part of the county or watershed of origin with respect to water which theretofore had been made available by the Feather River Project to Southern California, there would be funds available to initiate, and perhaps complete, construction of additional works necessary to make up for the deficiencies created in Southern California by such recapture.

The remaining sections of the Bond Act are those which deal with the mechanical means by which the bonds are to be issued and sold.

In addition to the funds which have been appropriated and expended in the past with respect to the Feather River Project, the California Department of Water Resources administratively, in this current year, has made $400,000 available to the United States for preconstruction activity with respect to the San Luis Reservoir. This was done in anticipation of the cooperative venture by the State and Federal Governments under the Federal San Luis legislation previously mentioned. When the Federal-State contract, as required by Public Law 86–488, *supra*, Sec. 2, is executed, it is anticipated that the State promptly will advance another $1,500,000 to the United States.

There can, and undoubtedly will, be understandable confusion by the reference in this document and the Bond Act to the terms

"State Water Resources Development System" and "State Water Facilities."

While the Bond Act was initiated and intended to finance principally the Feather River Project, it was necessary and, to some extent, desirable to provide for the financing of additional works in the future. In order to make the funds available for the Feather River Project as well as the other works specifically described in Section 12394(d) of the Bond Act and to give those funds a priority in their use, as well as those in the California Water Fund in connection with the Feather River Project, the term "State Water Facilities" is defined and used in the Act. The "State Water Resources Development System" is intended to be more incompassing and includes the State Water Facilities (Feather River Project) plus additional works which can be financed with surplus project revenues (Section 12937(b)(4)), if any, and with bond funds released from priority for use in the construction of the State Water Facilities as described above by virtue of the use of California Water Fund monies (Section 12938).

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant*

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants*

UNITED STATES OF AMERICA, *Intervener*

STATE OF NEVADA, *Intervener*

STATE OF NEW MEXICO, *Impleaded Defendant*

STATE OF UTAH, *Impleaded Defendant*

ANSWERING BRIEF FOR ARIZONA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

ANSWERING BRIEF FOR ARIZONA

California[1] alone, of the four parties who have filed opening briefs,[2] seeks rejection of the Special Master's

[1] Since the California defendants have filed a single consolidated Opening Brief they will be referred to collectively as "California" throughout this brief.

[2] Utah and New Mexico have not filed opening briefs.

Report virtually in its entirety. Nevada accepts it with only "minor" and "perfecting" exceptions (Nev. Op. Br. 9). The United States "in large part . . . supports the Special Master's Report as filed," reserving for an answering brief the right to "deal more directly with the principal issues in the case in which [they] support the report" (U. S. Op. Br. 6). Arizona moves the adoption of the Report and Recommended Decree with such modifications as are requested in her exceptions (Ariz. Op. Br. 2).

This answering brief therefore will be addressed primarily to the Opening Brief filed by California.[3]

THE CALIFORNIA BRIEF

Asserting that her security in an adequate water supply is seriously jeopardized, California responds to the Special Master's Report with asperity and hostility. This emotional approach has impelled California counsel to contend that the Special Master's findings and conclusions are, with but few exceptions, hopelessly wrong and that his recommendations, if adopted, would result in the disposition of this case on a basis which is entirely mistaken. The result is a brief which is permeated by a multitude of misstatements and fallacious positions. It would be impossible in brief compass to catalogue and expose each misstatement and every example of erroneous reasoning. Accordingly, we shall confine this brief to a treatment of only the more irresponsible and flagrant instances.

We are constrained to say at the outset, however, that the various devices employed by California—the selective

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[3] The issues between Arizona and the United States which are treated in the latter's Opening Brief are discussed after our consideration of the California brief (pp. 152-68, *infra*). Since the Opening Brief of the United States does not deal with the claims of the United States for federal establishments, we reserve for our reply brief such response as may be required by the discussion of these matters in the Answering Brief of the United States.

citation of parts of testimony taken out of context and the deletion of other parts; the exaggeration here and the suppression there of portions of documentary exhibits; the misreading and miswriting of the legislative history; the misstatements unsupported and often contradicted by the record; indeed, the misrepresentation and misconstruction of the Master's Report itself—combine to produce a brief designed to mislead rather than to inform.

The very crux of this case is the intent of Congress in the enactment of the Project Act. Despite the fact that this intent cannot be ascertained and understood without a thorough exploration of the voluminous legislative history of the Act and of the several Swing-Johnson bills considered by Congress preceding enactment of the statute, California's Opening Brief makes only cursory references to this vital material.[4] Even her treatment of such "legislative history" as she presents is a highly colored and fictionalized version of the facts. In the course of this brief we shall demonstrate that the California references to the legislative history of the Project Act misrepresent and distort the true legislative intent, the understanding of which is so essential to a correct construction of the Project Act and a proper determination of the basic issues presented by this case.

Four major fallacies underlie California's position:

First. That the Project Act does not abrogate but preserves principles of priority of appropriation and equitable apportionment and that these principles must be applied by the Court in the disposition of this case (Cal. Op. Br. 52-68, 138-94).

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[4] See Cal. Op. Br. 110-24, 132-37, 144-49, 159-62, 175-88 and 239.

Second. That the reference in §4(a) of the Project Act and in the California Limitation Act to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" means system water, *i.e.*, includes both main stream and tributary water (Cal. Op. Br. 69-137).

Third. That the Project Act does not authorize nor do the Secretary of the Interior's water delivery contracts effectuate a contractual allocation of water among Arizona, California and Nevada (Cal. Op. Br. 195-231).

Fourth. That the dependable future water supply is not only a relevant issue but one which the Court must resolve (Cal. Op. Br. 232-78).

We shall consider each of these fallacies in order in Points I through IV of this brief.

ARGUMENT

I

The Project Act does not preserve principles of prior appropriation and equitable apportionment, as California contends, but makes a statutory apportionment of water which renders these principles inapplicable.[5]

A. California's Position

California attacks as erroneous the Special Master's conclusion (Rep. 138) that "the doctrine of equitable apportionment, and the law of appropriation are . . . irrelevant

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[5] This point is directed principally to a refutation of Parts One and Three of California's Opening Brief, pages 52-68 and 138-94 thereof respectively. See also Cal. Op. Br. 25, 37-39, 46-47.

to the allocation'' among Arizona, California and Nevada of ''mainstream'' water as defined in the Report (Cal. Op. Br. 39, 45-47).[6] California asserts that the Master's conclusion conflicts with (1) this Court's holding in *Arizona* v. *California*, 283 U. S. 423, 464 (1931); (2) §§18, 14, 8 and 4 of the Project Act; (3) the legislative history of the Project Act and (4) the administrative, practical, and subsequent congressional construction of that Act (Cal. Op. Br. 53-54, 139-66). We shall discuss each of these contentions in order.

B. The Holding of *Arizona* v. *California*

California states that the Court's decision in *Arizona* v. *California, supra,* ''conclusively determined that the Project Act did not abrogate the principles of priority of appropriation and equitable apportionment'' (Cal. Op. Br. 139). The Court made no such determination.

The precise holding of the case was that the United States had the constitutional power to authorize in the Project Act the construction of Hoover Dam for the purpose of improving navigation of the Colorado River, a navigable stream, and that, therefore, contrary to one of Arizona's contentions at the time, the Secretary of the Interior was ''under no obligation to submit the plans and specifications to the State engineer for approval'', despite the fact that the dam and reservoir were to be located partly within the state. 283 U. S. at 451-52 (footnote omitted).

In rejecting Arizona's further contention—that ''the mere existence of the Act will invade quasi-sovereign rights of Arizona by preventing the State from exercising its right

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[6] Arizona does not concede that California ever acquired any valid appropriative rights to the water of the Colorado River (see Ariz. Op. Br. 33-35).

to prohibit or permit under its own laws the appropriation of unappropriated waters flowing within or on its borders", 283 U. S. at 458, all the Court held was that, *assuming* these "quasi-sovereign rights" in Arizona survived the Project Act, their alleged threatened invasion was not then so imminent and immediate as to warrant injunctive relief. As Justice Brandeis stated:

> "The claim strenuously urged is that the existence of the Act, and the threatened exercise of the authority to use the stored water pursuant to its terms, will prevent Arizona from exercising its right to control the making of further appropriations.
>
> * * * * * *
>
> "This contention cannot prevail because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions." 283 U. S. at 460, 462.

Accordingly, the bill of complaint was

> "dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of *any* rights already perfected or with the right of Arizona to make additional *legal* appropriations and to enjoy the same." 283 U. S. at 464.[7]

The Court noted that when the bill of complaint was filed construction of the dam had not been commenced and that years would elapse before the project was completed. Actually, it was not until February 1, 1935 (almost four years after the decision) that water was first impounded (Rep. 32-33). Clearly then, as of the date of decision (May 18, 1931), there was and could have been no "physical acts"

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[7] Unless otherwise indicated, italics appearing in quotations in this brief have been added for emphasis.

by the Secretary of the Interior interfering with rights, if any, in Arizona.

As the Court said:

> "The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. . . . There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions *above the dam* or with the enjoyment of water so appropriated. Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions *below the dam,* or limiting the enjoyment of rights so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion." 283 U. S. at 462-63 (footnote omitted).[8]

Lastly, but not of least importance, at the time of this decision Arizona had not ratified the Colorado River Compact and therefore, as the Court noted, was not bound by its terms. 283 U.S. at 462.

Whether or not claimed appropriations of water of the river would give rise to rights to water stored pursuant to the Project Act, which rights the Secretary of the Interior would be bound to respect, was a question clearly not before the Court and not decided. That is one of the basic questions here for adjudication. Nor did the Court have before it for decision the further "question, which must be answered in this litigation, of the extent of the Secretary's authority under the Project Act to control the allocation of water among the states" (Rep. 160).

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[8] The omitted passage in the quotation concerns §18 of the Project Act, which we discuss hereafter (pp. 8-11, *infra*).

The Master does not propose "to distinguish this Court's decision out of existence", as California charges (Cal. Op. Br. 143 note 6). Rather, from the precise holding of the case—that Congress had the constitutional power to enact the Project Act and thereby authorize construction of Hoover Dam as an aid to navigation—the Master validly draws the proper conclusion that "once the United States impounds the water and thereby obtains physical custody of it, the United States may control the allocation and use of unappropriated water so impounded" (Rep. 160-61). It is this necessary consequence of the decision in *Arizona* v. *California* which California strives to avoid by insistently asserting principles of equitable apportionment and priority of appropriation as the source and measure of water rights, which are, in fact, created and controlled exclusively by the Project Act.

C. Project Act §§ 18, 14, 8, and 4

California next argues that "Sections 18, 14, 8, and 4 plainly manifest Congress' intention to preserve existing western water law" (Cal. Op. Br. 145). The provisions, purposes and legislative evolution of these sections expose the lack of merit in this contention.

(1) Section 18

Section 18 does not preserve appropriative rights *interstate* or as against the United States. It merely disclaims any intention to interfere "with such rights as the States now have either to the waters *within their borders* or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters *within their borders,* except as modified by the Colorado River compact or other interstate agreement" (Ariz. Op. Br. Appendix B, pp. 25a-26a).

In no event can §18 be construed as applying to the *interstate* allocation of water stored pursuant to the Project Act. Once that water is impounded by the United States, it ceases to be water subject to the sovereign dominion of any state. Otherwise, its release and delivery from Lake Mead would be controlled by state law and policy instead of by contracts which the Secretary of the Interior is authorized by §5 of the Project Act to make and without which "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid. . . ." (Ariz. Op. Br. Appendix B, p. 15a).

California's assertion (Cal. Op. Br. 145-46) that §18 permits rights to water, interstate and intrastate, to be modified only by interstate agreement is wholly unsupported and is unsound. This is demonstrated by the provision of §8(b) which subordinates any interstate compact for allocation of stored water among the Lower Basin states, concluded subsequent to January 1, 1929, to water delivery contracts theretofore made by the Secretary pursuant to §5.

Although this Court in *Arizona* v. *California, supra* at 462, quoted the provisions of §18, it did not state or imply that the general language of that section controlled the specific language of §5. In view of the Court's holding that Congress has the constitutional power to impound the water of the river, it cannot be inferred that Arizona or any other state had the "right" to appropriate or to authorize the appropriation of that water and thereby to impinge upon the Secretary's authority to regulate and control the storage, delivery and use of the water pursuant to §5.

As the Court said in the later case of *Arizona* v. *California*, 298 U. S. 558, 569 (1936):

> "The Colorado River is a navigable stream of the United States. The privilege of the States through which it flows and their inhabitants to appro-

priate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation."

Finally, California asserts that the intent of §18 "to preserve existing law . . . is confirmed by the legislative history of that section" (Cal. Op. Br. 146). This so-called "legislative history" consists of a statement of Senator King,[9] wholly unrelated to §18, in which he questioned the constitutional power of the federal government to exercise dominion over navigable waters and to allocate their use. Senator King reflected views similar to those of some of his colleagues, but it is a fabrication of history for California to say that the "same view of Congress' power was repeated . . . by almost every member of Congress who had anything to do with the legislation" (Cal. Op. Br. 146 note 8).[10] It is also ironical that California now cites Senator King, who bitterly opposed the Swing-Johnson bills as providing for an interstate allocation of water in violation of state sovereignty, when California's Congressman Swing and Senator Johnson, the bills' authors, never denied this would be their effect, never attempted to modify those provisions which Senator King found obnoxious, but instead pushed the legislation through to final passage. Indeed, California's witnesses at the congressional hearings expressed the opinion that Congress had the constitutional power to do the very thing which California now says the Project Act never contemplated—*i.e.*, provide for an allocation of water among the states.[11] The one point on which there was no dissent in Congress was that the Swing-John-

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[9] Senator King was referring to Senator Hayden's proposed amendment to §4(a). 70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. 45-46.

[10] See discussion, pp. 33-44 and note 56, *infra*.

[11] See discussion, pp. 36-37, 41-43, *infra*.

son bills *did* provide for a federal allocation of water among the states.[12]

(2) Section 14

California further contends that "section 14 of the Project Act, incorporating section 8 of the Reclamation Act of 1902, likewise compels recognition of prior appropriation and equitable apportionment principles" (Cal. Op. Br. 147).[13]

Section 14 provides:

> "This Act shall be *deemed a supplement* to the reclamation law, which said reclamation law shall govern the *construction, operation, and management of the works* herein authorized, *except as otherwise herein provided.*"

The fact that the Project Act is to be deemed a "supplement to the reclamation law" does not mean that the Reclamation Act itself, or any specific section thereof, is *incorporated* into the Project Act.

Furthermore, §14 expressly limits the application of the Reclamation Act to "the construction, operation, and

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[12] See discussion, pp. 17-20, 33-47 and note 56, *infra.*

[13] Reclamation Act of 1902, §8, 32 Stat. 390, 43 U. S. C. §§372, 383 (1958). Section 8 provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

management of the works herein authorized. . . ." Even in this area, whenever the Reclamation Act conflicts with the Project Act, the latter controls, as is made clear by the clause "except as otherwise herein provided".

The Court, in *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U. S. 275, 291 (1958), interpreted §8 of the Reclamation Act as follows:

> "As we read §8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects."[14]

Section 14 does not provide that the right to receive water shall be governed by the Reclamation Act. That right must be obtained under the provisions of §5 by contract with the Secretary.

California asserts that the congressional intent to recognize in §14 prior appropriation and equitable apportionment principles "is confirmed by the legislative history of that section" (Cal. Op. Br. 147-48). The only "legislative history" referred to in this instance consists of statements of Messrs. Swing and Johnson made in connection with the third Swing-Johnson bill (Cal. Op. Br. 148-49 notes 2, 4). But when they expressed the views cited by California, their pending bills did not contain the provisions of §4(a) as finally enacted nor did they include the proviso later added to §5 that the Secretary's water deliv-

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[14] In *Ivanhoe*, counsel for Imperial Irrigation District in the case at bar unsuccessfully argued for appellees in this Court that "federal law leaves to state jurisdiction the capacity of irrigation districts to contract, and the control, appropriation, use, and distribution of water for irrigation purposes." 2 L. Ed. 2d 2124.

ery contracts "shall conform to paragraph (a) of section 4 of this Act".

The actual legislative history, which shows that Congress did not intend by the Project Act that the doctrine of appropriative rights should control the interstate allocation of Colorado River water in the Lower Basin, is discussed later (pp. 17-20, *infra*).

Ickes v. *Fox*, 300 U. S. 82 (1937), and *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), are cited by California as "conclusively" establishing that "contracts executed by the Secretary of the Interior pursuant to Section 5 of the Project Act, like other reclamation contracts, are merely a step in the acquisition of water rights which come into being by diligence in putting waters to beneficial use in accordance with the principles of priority of appropriation and equitable apportionment" (Cal. Op. Br. 150).

The issue in *Ickes* v. *Fox, supra*, was whether the Secretary of the Interior could require landowners in a reclamation project, as a condition to continuing to receive project water, to pay part of the cost of additional project works from which, it was alleged, they would receive no benefit. Upon the "undenied allegations of the bill" the Court found that the landowners had "fully discharged all their contractual obligations" (including payment in full of their repayment obligation under the original project) and consequently "that their water-rights have become vested; and that ownership is in them and not in the United States." 300 U. S. at 96.

Nebraska v. *Wyoming, supra*, presented the question whether the reclamation project rights should be decreed separately to the United States or included within the state allocations. There was not involved, as there is here, construction of statutory provisions such as §5 of the Project

Act governing administration of project water. The Court was careful to say:

> "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." 325 U. S. at 615.

California's attempt to extend the state law of prior appropriation to control the interstate allocation of the water of the Colorado River is incompatible with the allocation scheme envisaged by Congress in §§4(a) and 5 of the Project Act.

California excepts to the Master's holding that contracts for diversion of "mainstream" water executed under the reclamation laws *prior to* the Project Act meet the requirements of §5. She argues that such contracts could not have been made pursuant to a contractual allocation scheme not conceived nor authorized by Congress until years later (Cal. Op. Br. 153-58). But, although antedating the Project Act, these contracts are wholly within the allocation scheme established by the Act.

For example, although the Kunz contract was made in 1910, the Reservation Division of the Yuma Project in California, on which Kunz secured a water right, was recognized in California's Seven-Party Agreement as having a right subordinate only to the first priority of the Palo Verde Irrigation District (Cal. Op. Br. 154). The Seven-Party Agreement was executed at the request of the Secretary and fixed "the relative rights and priorities of those [California] defendants in the water available for use in California under the Colorado River Compact and the California Limitation Act" (Cal. Op. Br. A2). Thus, the Kunz contract is satisfied by water delivered within and from the apportionment made by §4(a) and pursuant to

the Secretary's contracts for the delivery of stored water to California agencies under §5.

Again, the "standard reclamation contracts" for deliveries of water to users in Arizona, made before and after enactment of the Project Act but prior to execution of Arizona's water delivery contract in 1944, are also compatible with the allocation scheme established by the Act. Under the Secretary's contract with Arizona, deliveries of water to Arizona users "shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisons . . . as may contract therefor with the Secretary, and as may qualify under the Reclamation Law. . . ." (Ariz. Op. Br. Appendix E, p. 39a). As the Master concluded:

> "This being the case, the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for the delivery to them of certain amounts of water out of the total amount allocated to Arizona. This is precisely what the Secretary has done in the contracts which are before us in this case." (Rep. 216)

The Arizona contract also provides in Article 7(*l*):

> "All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract."

(3) Sections 8(a) and (b) and 4(a)

California argues that if the Project Act "abrogated appropriations", then the word "appropriators" appearing in §§8(a) and (b) of the Project Act "is not only misused, it is misleading" (Cal. Op. Br. 158). But the

terms "all users and appropriators" appearing in §§8(a) and (b) were employed merely to insure that all persons claiming rights on any basis should be controlled by the Compact or any tri-state compact entered into pursuant to the Act. These provisions were inserted in the Project Act at the insistence of the Upper Basin,[15] which wanted assurance that the vast increase in use of Colorado River water which would follow construction of Hoover Dam would not obligate the Upper Basin to deliver to the Lower Basin more water than that specified in Article III of the Compact. Hence, these provisions neither confirmed nor conferred any rights, but simply subjected any and all claims of right to the Compact.

Section 4(a) provides that the limitation on California shall include "all water necessary for the supply of any rights which may now exist" (Ariz. Op. Br. Appendix B, p. 12a). From this California argues that "those rights must refer to interstate rights under equitable apportionment principles, including priority of appropriation, since no other basis for interstate rights was then recognized in the lower basin" (Cal. Op. Br. 158). This does not follow. Rather, this provision was included to prevent California from successfully asserting that she had rights of any kind, independent of the Project Act and surviving its enactment, by virtue of which she might seek to obtain water in addition to the maximum to which she was "irrevocably and unconditionally" restricted by §4(a) and her Limitation Act (Rep. 306-07).

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[15] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 96-99, 135-89, 196-219 (1926) (hereinafter cited as "*Hearings on H. R. 6251*").

D. Legislative History and Administrative Construction

(1) Legislative History

California's historiographers must have read a legislative history far different from that which we have read to sustain the California thesis that "the Project Act preserved priority of appropriation and equitable apportionment in the 'mainstream' and in every other part of the Colorado River System in the lower basin" (Cal. Op. Br. 159). The California brief in this particular instance cites only a few isolated statements culled out of the voluminous historical record. These few selections can hardly be dignified as "legislative history".

The only "history" before passage of the Project Act to which reference is made consists of one statement each of Congressman Swing, Senator Johnson and Senator King (Cal. Op. Br. 146-47, 148-49 notes 2 and 4). It is clear that Messrs. Swing and Johnson were not talking about the Project Act's effect on appropriative rights *interstate* but about its effect upon *intrastate* appropriations. Thus Mr. Swing stated that after "it [the Government] turns the water loose", an individual user within a state "will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use" (Cal. Op. Br. 148 note 2).[16] Similarly, Senator Johnson stated in effect that state law would govern intrastate appropriations and priorities in accordance with the Reclamation Act (Cal. Op. Br. 149 note 4).

On the other hand, the true legislative history shows overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation in the Lower Basin of the

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[16] Quoting from *Hearings on H.R. 9826 Before the House Committee on Rules*, 69th Cong., 2d Sess. 116 (1927).

doctrines of prior appropriation and equitable apportionment.

Thus, shortly after the signing of the Compact, in discussing the second Swing-Johnson bill, Congressman Swing expressed his views as to the combined effect of his bill, the Compact and the proposed dam, whether constructed by public or private agency, on whatever appropriative rights might then exist in the Lower Basin:

> "Mr. Raker [of California]. Is it your contention that if such a dam should be built by private individuals, with such reservoir capacity, that the rights of the appropriators farther down the stream would be lost; that is, their right for private appropriation and use would be lost and would have to depend upon the dam?
>
> "Mr. Swing. That is the clear purport of article 8 of the compact. . . .
>
> * * * * * *
>
> "Mr. Raker. Right in that connection, is it your contention, taking the private appropriations of the dam for Arizona and California and the appropriation for the Imperial irrigation district of California and the ordinary mean low flow of water, that this compact would take the right of those private appropriators away, under that compact, even if it was ratified by the seven States and approved by Congress?
>
> "Mr. Swing. I submit to your own judgment the meaning of the English language as set forth in article 8.
>
> "Mr. Raker. I did not put the question before as I did now.
>
> "Mr. Swing. As far as I am willing to go, it is this. It is the clear purport of the paragraph. It

> certainly is what it declares. I do not know how it could be avoided."[17]

Mr. Swing repeated these views in the Senate committee hearings on the pending legislation.[18]

Arthur P. Davis, Director of the Reclamation Service, expressed his understanding of Swing's statement as to the effect of the proposed dam:

> "The representative from Imperial Valley has testified that the district is willing to yield all claim to the low water flow in exchange for a right in the reservoir, and no doubt all irrigators served from the reservoir would do the same."[19]

In the 69th Congress, Mr. Swing again repeated that California was willing to give up her appropriative rights if storage were provided on the river by enactment of his bill:

> "In the interests of peace on the river, all it [California] asks is that it be afforded storage to take the place of its present rights in and to the natural flow of the river."[20]

Before the House Rules Committee in the 70th Congress it was suggested that only a low dam was needed for flood-control purposes. Mr. Swing disagreed:

> "California can not afford to support such a proposal, because under the Colorado River compact, California must surrender her present water rights

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[17] *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 1776-77 (1924) (hereinafter cited as "*Hearings on H.R. 2903*").

[18] *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation*, 68th Cong., 2d Sess. 30 (1924).

[19] *Id.* at 81.

[20] *Hearings on H.R. 9826 Before the House Committee on Rules*, 69th Cong., 2d Sess. 107 (1927).

to the natural flow of the river and look to storage instead.''[21]

Governor Dern of Utah insisted at the Senate hearings in the 70th Congress that state laws regulating the appropriation of water should remain inviolate. He opposed the pending Swing-Johnson bills because, he said:

> ''The pending bills propose an entirely new and revolutionary national policy, and completely reverse the former position of Congress with respect to the waters of western streams. Never before has Congress gone so far as to attempt to appropriate water without the consent of a State. The West has always heretofore seen to it that its sovereign rights were respected.''[22]

In the Senate debate during the first session of the 70th Congress, Senator Johnson was explaining the provisions, then in §5 of the bill, which would limit California to 4,600,000 acre-feet per annum. He apparently could not understand why some Senators still opposed the bill, since their insistence on further protection under the doctrine of prior appropriation would permit ''this water to continue to flow down to the sea for an indefinite period, to go to waste in the Gulf of California. . . .''[23] He concluded this point by saying:

> ''Ah, you will see in the days to come what will happen in that river if no protection be accorded those people and the appropriation law of the West be permitted to obtain. Then will be demonstrated the utter futility of the position that is now maintained by some.''[24]

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[21] *Hearings on Boulder Dam Before the House Committee on Rules,* 70th Cong., 1st Sess. 80 (1928).

[22] *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 144 (1928).

[23] 69 Cong. Rec. 7250 (1928).

[24] 69 Cong. Rec. 7251 (1928).

A major controversy over the Swing-Johnson bills arose from the fact that they would place full control over the water of the Colorado River in the hands of the federal government. It was generally recognized that the legislation would set up machinery to effect a federal allocation of water among the Lower Basin states in disregard of state laws governing the acquisition of water rights under the doctrine of prior appropriation (pp. 33-47, *infra*). It was this very fact—that the Project Act was intended to abrogate and in effect abrogated the interstate application of the doctrine of prior appropriation—which caused many members of Congress and others to oppose it so vehemently.

(2) Administrative Construction

California's claim that the Project Act has been administratively construed as not displacing the doctrine of prior appropriation is based largely upon excerpts from certain documents selected from about sixty papers constituting the "Offer of Proof" which California made in connection with her oral argument on the Draft Report and which was rejected by the Master (Rep. 248-53). In so ruling the Master said:

> "California contends that these papers, if admitted in evidence, would establish:
>
> "(1) That state and federal officials concerned with the administration of the Project Act construed Section 4(a) to be applicable to the tributaries as well as to the mainstream, as California contends . . . ;
>
> "(2) That the Secretary of the Interior had no intention of apportioning water when he entered into water delivery contracts with the several California defendants and with Arizona and Nevada.
>
> "Careful consideration of the Offer of Proof leads to the conclusion that the papers proffered do not establish either of these contentions.
>
> * * * * * *

> "My conclusion is that both Arizona and California have, with respect to the meaning of Section 4(a), taken various positions from time to time as their immediate interests dictated and that the Offer of Proof fails to show a consistent interpretation of the Act by either.
>
> "So far as United States government officials are concerned, the dominant note sounded in the proffered papers is the avowed refusal of these officials to take sides in the Arizona-California controversy. . . ." (Rep. 248, 252)

Despite this ruling of the Master, California refers to these excluded documents as if they had been admitted in evidence as competent, and she attributes to them a persuasiveness which the Master refused to acknowledge. An examination of those documents will demonstrate that the Master was right.

In addition to the materials rejected by the Special Master, California makes reference to a letter of the Acting Secretary of the Interior dated July 31, 1930, answering an inquiry as to whether or not the Palo Verde Irrigation District would need a water delivery contract.

All the Acting Secretary said in his letter of July 31, 1930 was: "If no stored water is required by the Palo Verde Irrigation District, no contract between that district and the United States will be required. The Acting Secretary concluded his letter: "If by any chance it should later develop that stored water is required, the matter can then receive further consideration."[25]

When it later developed that the District did require stored water, the matter was reconsidered and the Secretary's contract with the District, concluded under date of February 7, 1933, recited:

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[25] C 351 (Tr. 9929).

> "(4) Whereas the District is desirous of entering into a contract for the delivery to it of water from the Boulder Canyon Reservoir, and it is to the mutual interest of the parties hereto that such contract be executed *and the rights of the District in and to waters of the river be hereby defined.*" (Ariz. Op. Br. Appendix H, p. 60a)

The rights of the District in and to the waters of the river were thus defined by contract with the Secretary pursuant to Project Act §5, not under the law of prior appropriation, and the rights thus defined were to *stored* water, not to *natural flow.*

California refers to the fact that "at all times, however, users in Arizona, both with and without contracts, have ordered and received 'mainstream' water for consumptive use" (Cal. Op. Br. 164) (footnote omitted). Plate 3 to California's brief is said to illustrate that users in Arizona and California have received "mainstream" water with and without water delivery contracts (Cal. Op. Br. 164 note 8). The non-contract users (shown in red on Plate 3) are the City of Needles in California, which uses well water—not subject to delivery by the Secretary from Lake Mead; the South Gila Valley in the Gila Project in Arizona, which is also irrigated from wells; Yuma Indian Reservation lands in California, which are expressly recognized as having water rights in the Seven-Party Agreement[26]; and the Colorado River Indian Reservation in Arizona, which the Master has held does not require a water delivery contract (Rep. 312 note 3a). These water uses are neither inconsistent with nor violative of the contractual allocation scheme of the Project Act.

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[26] Cal. Op. Br. A3, A13-14.

California asserts that in 1935 Arizona sued the other six Colorado River Basin states for "a judicial apportionment among the states of the Colorado River basin of the unappropriated water of the river", *Arizona* v. *California*, 298 U. S. 558, 560 (1936), and thereby recognized that the Project Act had not nullified the application of the principles of equitable apportionment and priority of appropriation (Cal. Op. Br. 164-65 note 9). The Court there said:

> "The relief asked, and that which upon the facts alleged would alone be of benefit to Arizona, is a decree adjudicating to petitioners the 'unclouded . . . rights to the permanent use' of the water. Such a decree could not be framed without the adjudication of the superior rights asserted by the United States. The 'equitable share' of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of that water in aid and support of its project to control navigation, and *without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provisions as well of §5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary.*
>
> * * * * * *
>
> "*Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other.*" 298 U. S. at 571.[27]

Contrary to California's assertion that the Court's opinion did not suggest the possibility that the Project Act nullified

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[27] The suit was dismissed because the United States was not a party.

equitable apportionment and priority of appropriation, the foregoing excerpt shows that such a possibility and indeed probability was clearly anticipated by the Court.

E. Sections 5 and 8(b) of the Project Act

California's allegation that the "Master misconstrues and misapplies Sections 5 and 8(b) of the Project Act" (Cal. Op. Br. 166) is based upon the claim that water delivery contracts were not intended as a substitute for an interstate compact, in the absence of which the law of equitable apportionment and priority of appropriation controls the interstate disposition of the waters of the Colorado River system (Cal. Op. Br. 166-67).

At the outset, California agrees with the Master that §§1, 5 and 8(b) of the Project Act reserve "to the United States broad powers over the waters impounded in Lake Mead and delegate this power to the Secretary of the Interior, as agent of the United States" (Cal. Op. Br. 166, quoting from Rep. 152). But California fails to realize that the management and control of the reservoir and dam for the primary purposes of improvement of navigation, flood control and river regulation necessarily preclude the operation of these works and structures to meet demands for delivery of water at the times and in the quantities required to satisfy appropriative rights (Ariz. Op. Br. 41-42). As a practical matter, it would be impossible for the Secretary to satisfy prior appropriative rights and at the same time to exercise the authority and discretion, which California admits he has, "to administer the orderly storage and delivery of water" (Cal. Op. Br. 167).

(1) The Statutory Scheme of the Project Act

California emphasizes the last sentence of §5—

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

—and argues that, since this provision applies only to "stored waters", it must follow that "holders of pre-existing rights in natural flow available for consumptive use without Hoover Dam regulation do not need water delivery contracts" (Cal. Op. Br. 169-70).

California asserts that after construction of Hoover Dam pursuant to the Project Act there were two distinct and separate categories of Colorado River water: (1) that portion of the river which could have been used to satisfy prior rights in the unregulated flow and (2) stored water, *i.e.*, "water in excess of that which could have been used under prior rights from 'unregulated flow' " (Cal. Op. Br. 169 note 5). It is urged as a necessary corollary of this premise that the Secretary's authority under the Project Act is limited to the storage of only such water as is in excess of that which could have been used under prior rights in the unregulated flow. It is argued further that natural flow rights survived the enactment of the Project Act and the construction of Hoover Dam and that the Secretary's water delivery contracts recognize and provide for the satisfaction of such natural flow rights (Cal. Op. Br. 171-75).

This entire line of argument is refuted by the provisions of the Project Act itself. Section 1 expressly authorizes the Secretary of the Interior "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River" for "the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River. . . ." As the Master found, "Congress

realized that the dam authorized by the Project Act would impound substantially all the water of the mainstream" (Rep. 153) (footnote omitted). Manifestly, the authors of the Project Act intended that the entire flow of the river should be regulated and recognized that the natural flow inevitably would be destroyed.

The administrative practice does not accord with, but negates, California's position. No water users have demanded the release of water in accordance with or in satisfaction of prior appropriative rights (Ariz. Op. Br. 46). If there were any such appropriative rights, they have been abandoned. That Hoover Dam and Lake Mead have continually been operated and that water delivery contracts have consistently been formulated without regard to appropriative rights is persuasive evidence of administrative recognition that the Project Act established a contractual allocation scheme wholly unrelated to and superseding the law of prior appropriation.

The clause in the Secretary's water delivery contract with Palo Verde Irrigation District, which California quotes only in part (Cal. Op. Br. 171), reads as follows:

> "(6) The United States shall, *from storage available in the Boulder Canyon Reservoir,* deliver to the District each year at a point in the Colorado River immediately above the District's point of diversion known as Blythe Intake (or as relocated within two miles of the present intake) so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (*subject to availability thereof for use in California under the Colorado River Compact and*

> *the Boulder Canyon Project Act*)." (Ariz. Op. Br. Appendix H, pp. 60a-61a)

There then follow the intrastate allotments among the California water users as fixed in the Seven-Party Agreement.

Article (6) is preceded by Article (4), which provides:

> "(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water *from Boulder Canyon Reservoir,* and it is to the mutual interest of the parties hereto that such contract be executed and *the rights of the District in and to waters of the river be hereby defined.*" (Ariz. Op. Br. Appendix H, p. 60a)

Articles (4) and (6) of the Palo Verde contract, taken together, demonstrate that the District agreed to look to stored water as the exclusive source of supply for the satisfaction of its rights to the delivery of water as defined in the contract.

The Secretary's water delivery contracts with all the California agencies make it self-evident that:

> (1) Only stored water is dealt with.
>
> (2) The deliveries are to be made in accordance with the intrastate *contractual* priorities in stored water established by the Seven-Party Agreement, not the *appropriative* priorities, if any, in the natural flow of the river.
>
> (3) The deliveries are to be of water available for use in California under the Compact and Project Act, not water available under the doctrine of prior appropriation.

The phrase "including all other water diverted for use of the District from the Colorado River" in the Palo Verde contract and language of like import in the contracts of other California defendant agencies were not intended to

provide for the satisfaction of any prior appropriative natural flow rights. Had this been the intention, explicit provisions accomplishing that purpose would have been employed.

The Project Act contemplates release of stored water for purposes other than irrigation and domestic use. It was also recognized that there might be water in the stream released for, but not diverted by, users other than the Palo Verde District. The phrase "including all other water diverted for use of the District from the Colorado River" was inserted in the Palo Verde contract (and the other California water delivery contracts) to make certain that all Colorado River water diverted by the District, whether consisting solely of water released for delivery by the United States at the diversion point specified in the Palo Verde contract or made up in part of water released for other purposes or diverted by the District at other diversion points, should be charged to the District under its contract. This is consistent with the requirement of Project Act §5:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Thus the very terms of the California contracts are inconsistent with the California theory that the contracts recognize prior appropriative rights.[28]

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[28] California draws an invalid analogy between a water delivery contract under the Project Act and "a permit or a license to appropriate" (Cal. Op. Br. 174). We agree that an *appropriative* right "is created and preserved by exercising due diligence in putting water to beneficial use, not by a piece of paper. . . ." But a *contractual* right is founded upon contract; and the water delivery contracts required by Congress as a prerequisite to the delivery of Lake Mead water are not mere "pieces of paper" nor are they in any sense "permits or licenses to appropriate" water. They are genuine muniments of title without which no one is entitled to the delivery or use of stored water and with which the contracting party is entitled to water irrespective of prior beneficial use.

(2) Legislative History of §5

In support of the hypothesis that §5 of the Project Act is not a source of authority for the interstate allocation of water (Cal. Op. Br. 168), California refers to a so-called "legislative history" of §5. Once again, California's historiographers misread and miswrite history.

To be sure, while the Swing-Johnson bills were pending, Secretary of the Interior Work recommended that the water to be stored should be administered by means of water delivery contracts (Cal. Op. Br. 176).[29] Subsequently, a committee print of H.R. 6251, considered by the House Committee on February 5, 1926, incorporated for the first time the provision:

> "Sec. 5. That the said Secretary is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof. . . ."[30]

Section 5 in this committee print also provided:

> "Contracts respecting water for domestic uses may be for permanent service *but subject to rights of prior appropriators.*"[31]

California makes no mention of this latter sentence or of the fact that the italicized phrase was subsequently deleted in the House committee on April 16, 1926 at the suggestion

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[29] Arizona does not agree with the repeated assertions of California to the effect that Congress intended the proposed water delivery contracts to be "patterned after ordinary reclamation contracts". However, the point is not material because, while these assertions are not a fair reading of Secretary Work's various communications, subsequent congressional action destroys any significance they might otherwise have had.

[30] *Hearings on H.R. 6251,* at 11.

[31] *Id.* at 12. The same language appeared in the companion bill, S. 3331, introduced in the Senate by Senator Johnson on February 27, 1926. Ariz. Legis. Hist. 4-5.

of the Upper Basin group.[32] The expunging of the phrase "but subject to rights of prior appropriators" was a specific rejection of the principle that appropriative rights should survive the Project Act and be recognized and satisfied by the Secretary's water delivery contracts.

To make clear that water rights should be founded upon contracts rather than upon appropriations, there was added, simultaneously with the striking of the clause preserving appropriative rights, the last sentence of §5:

> "No person shall have or be entitled to have the use *for any purpose* of the water stored as aforesaid except by contract made as herein stated."[33]

California next quotes Delph Carpenter to the effect that this last sentence was proposed by the Upper Basin states so that no use of water might occur from the utilization of the proposed dam which could later be said to be independent of the Compact and to create rights adverse to the Upper Basin states. She emphasizes Mr. Carpenter's statement that:

> "It [the Compact] has nothing to do with the interstate relations between Arizona and California." (Cal. Op. Br. 179)[34]

Much has been omitted from California's version of Mr. Carpenter's testimony which makes clear his recognition that §5, even as it then stood,[35] authorized the Secretary

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[33] *Hearings on H.R. 6251,* at 115.

[33] *Ibid.*

[34] Quoting from *id.* at 163. The California quotation would indicate that "It" referred to the Project Act.

[35] Section 5 did not then contain, as it did when enacted, the clause:

> "Contracts respecting water for irrigation and domestic uses shall . . . conform to paragraph (a) of Section 4 of this Act."

Nor did §4(a) then contain either the California limitation provisions or those relating to the tri-state compact.

to contract for the delivery of stored water regardless of any alleged prior appropriative rights. For example, in response to the suggestion of Congressman Hayden that "should this bill pass, the water will be first applied to a beneficial use in California, and when the time comes for development in Arizona, my State may have no water", Mr. Carpenter stated:

> "It is also true that, under this bill, *the Secretary of the Interior could contract with water users in the State of Arizona for the use of water or power without let or hindrance,* except that the party contracting with the United States would agree that his particular claim should be subordinate to the Colorado River compact, *not subordinate to the rights of the State of California*—simply subordinate to the rights of the upper States as defined in the compact."[36]

This, we believe, is what Mr. Carpenter really meant when he said (as quoted by California):

> "In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water." (Cal. Op. Br. 179)

That is to say, the Compact made only an *inter-basin* apportionment and left the Lower Basin states free to contract with the Secretary for stored water on a basis of equality and regardless of prior appropriative rights.

Indeed, Mr. Carpenter was so understood by Mr. Swing, author of the pending House bill. This is shown by the statement he made immediately after the above-quoted Carpenter testimony, which California has omitted from her quotation of that testimony:

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[36] *Hearings on H.R. 6251,* at 162-63, Ariz. Legis. Hist. 9.

> "The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California."[37]

California also disregards the following legislative history of §5, which further shows the definite understanding of Congress that that section empowered the Secretary of the Interior to make a contractual allocation of water among the Lower Basin states.

In May, 1928, when the fourth Swing-Johnson bill, H. R. 5773, was debated in the House, the effect of §5 was discussed at length. Mr. Douglas of Arizona stated in opposition to the bill:

> "The bill further provides for congressional amendments of State water codes. Further than that, it vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam.
>
> "The compact phase of the measure could be adequately taken care of by a resolution or an act providing for ratification. I point out to Members of the House that there are two very distinct and separable portions of the bill, the first providing for the construction of the project, and the second dealing with allocation of waters as between States."[38]

Mr. Colton of Utah asserted that §5 placed full control over the Colorado River in the United States and he challenged the constitutional power of Congress to do this:

> "So that when you say that the Government of the United States owns and controls waters within that state, can not you see that you strike at the very

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[37] *Hearings on H.R. 6251,* at 163, Ariz. Legis. Hist. 10.

[38] 69 Cong. Rec. 9623 (1928).

> basis of our industrial life? You are saying that you are going to take it away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below."[39]

Quoting the exact provisions of §5, Mr. Colton commented:

> "If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I can not understand the English language; and, gentlemen, that is exactly what we are objecting to. . . ."[40]

Mr. Colton later responded to remarks made by Congressman Taylor of Colorado, one of the leading advocates of the bill:

> "This undertakes to turn over the right to impound these waters, and section 5 provides that the Secretary of the Interior may arrange to distribute or deliver the water lower down the river and also under the canal that is provided for in this bill. That being true, we declare in effect that the water may be allocated by the Secretary of the Interior, and we declare further that the water may be controlled by him. That means that the Congress and the executive department are now embarking upon the policy of controlling, distributing, and allocating the waters of this river."[41]

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[39] 69 Cong. Rec. 9648 (1928).

[40] 69 Cong. Rec. 9649 (1928).

[41] 69 Cong. Rec. 9778 (1928). At the time that this debate took place, the §5 requirement that contracts "shall conform to paragraph (a) of Section 4 of this Act" had not yet been inserted therein. Ariz. Legis. Hist. 73-74.

It is impossible to reconcile this legislative history with the California contention that "section 5 . . . was not a delegation of power to the Secretary to make interstate allocations of water by water delivery contracts. . . ." (Cal. Op. Br. 189)

California also boldly asserts that throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) one of the major areas of agreement by proponents and opponents alike was that "Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished" (Cal. Op. Br. 181).

The legislative history is directly to the contrary. It unequivocally discloses that one of the major areas of *disagreement* between proponents and opponents of the bills was whether Congress had the constitutional authority to make such an interstate allocation of water. We repeat, no one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states. The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states. On the other hand, the defenders of the bills argued vigorously for their constitutionality.

During committee hearings in the House in the 68th Congress a matter of principal concern was the power of Congress to deal with the water to be controlled by the proposed dam. L. Ward Bannister, a Denver attorney and recognized authority in the field of water law, testified:

> "Mr. Bannister. Although I think there is a fair question as to the fact of navigability I should say that the Federal Government, if it wishes to, may

exercise all the power it wants to in order to protect navigation.

"Mr. Raker [of California]. Now, what would that be? Just tell the committee.

"Mr. Bannister. That would be power, for instance, to establish locks on the river for the movement of vessels at the lower end of the river; it would also be the power, I should say, to prevent waters being withdrawn from the river by any of the States for irrigation, if the effe . would be to injure navigation.

* * * * * * *

"Mr. Raker. Well, before we start in to do any thing, let us see if the Federal Government has that right.

"Mr. Bannister. Well, I have already stated that, if this stream is navigable—and that is your present assumption—then the Federal Government may do anything on that stream necessary to promote navigability; in other words, it may require the release of all waters from the upper States and the lower States both."[42]

In the course of these hearings, much time was devoted to seeking a method of protecting the Upper Basin states in the absence of seven-state ratification of the Compact. William J. Carr, a California attorney representing the Boulder Dam Association, suggested that conditions should be attached to the use of water in the Lower Basin:

". . . But take the regulated flow of the river below the dam; that water will be diverted almost entirely, at least in canals that will be built by the Government, *and there will have to be some appropriate contractual arrangement before that water is put to beneficial use there and a water right is cre-*

[42] *Hearings on H. R. 2903,* at 180-81.

ated, and it would be perfectly proper in the bill to provide the conditions under which any right should be created.

* * * * * *

"Mr. Swing. *May I paraphrase your idea this way? Your position is that Congress has a right to put a limitation upon any person who seeks to benefit by the works which it constructs under this act?*

"Mr. Carr. *Yes.*"[43]

Ottamar Hamele, Chief Counsel for the Bureau of Reclamation, stated his opinion that Congress not only could apportion water between the Upper and Lower Basins, but also could apportion the water allocated to the Lower Basin among Arizona, California and Nevada. He suggested that the following sentence be added to §8 of the pending bill:

> "That every contract made under this act involving any right to the use of water from the development provided for herein shall be made subject to the provisions of the Colorado River compact negotiated at Santa Fe, New Mexico, dated November 24, 1922, and on file with the Department of State."

Mr. Hamele then testified:

> "Mr. Hayden. Then, if it is possible by the language that you have suggested to effect an apportionment between the upper and lower basins without the approval of the compact, *is it also within the power of the Congress to apportion the waters allocated to the lower basin by the compact between the States of Arizona, Colorado, and Nevada by a similar limitation?*
>
> "Mr. Hamele. *I think it is.*"[44]

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[43] *Id.* at 567, 571.
[44] *Id.* at 881-82.

During the hearings on S. 727, the companion bill to H.R. 2903, Senator McNary elicited the following testimony from Mr. Childers, attorney for Imperial Irrigation District:

> "The Chairman. *Yes. Under a certain section of this bill, as I recall it, the Secretary of the Interior could allocate these waters among the different States for the purpose of irrigation.*
>
> "Mr. Childers. *I think that is true.*"[45]

Evolution of a plan for protection of the Upper Basin and development of the formula for apportionment of water among the Lower Basin states continued in the 69th Congress during discussions of the third Swing-Johnson bill. Its proponents asserted the constitutional power of the federal government to take control and dispose of the water of the river. This was vigorously challenged by the measure's opponents, particularly Senator (then Congressman) Hayden of Arizona and Congressman Leatherwood of Utah. But no one denied that the bill, as it was developing, was designed to allocate water among the Lower Basin states.

Mr. Hayden objected that the bill would vest control of the water in the federal government:

> "Mr. Hayden. . . . I doubt very much whether Representatives in Congress from the arid West, where the doctrine of riparian rights does not and has never prevailed, will be in any hurry to accept the theory of this bill that Congress can make appropriations of water; that Congress, without the consent of the State, can take water for beneficial use for power or irrigation or other purposes.
>
> "Mr. Leatherwood. Without the consent of the State?

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[45] *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation*, 68th Cong., 2d Sess. 155 (1924).

"Mr. Hayden. Not only without the consent of the State but utterly ignoring the State, *yet such are the terms of this bill.* It represents the first attempt to pass legislation by Congress whereby the Federal Government is assumed to have that power."[46]

That this would be the effect of the measure was also recognized by Congressman Leatherwood and Charles P. Squires, a member of the Colorado River Commission of Nevada:

"Mr. Leatherwood. Do you realize that this bill practically nationalizes the river?

"Mr. Squires. Yes, sir.

"Mr. Leatherwood. Do you favor that?

"Mr. Squires. We are perfectly willing that the project shall be under the control of the Federal Government.

"Mr. Leatherwood. Do you favor the policy outlined in this bill of the Government going ahead and doing that by ignoring the several States and their rights?

"Mr. Squires. I favor the Government building the dam."[47]

S. G. Hopkins, Colorado River Commissioner of Wyoming, stated his opinion that Congress could take control of the water and would do so under the proposed bill:

"We found that if the Government constructs this dam for the purpose of flood control, and that is ostensibly the primary purpose of the act, and then incidentally the waters are used for the purpose of generating power and irrigation, that the court would be pretty likely to sustain the act.

* * * * * *

[46] *Hearings on H. R. 6251*, at 16. Mr. Hayden expressed the same views in the Minority Report on H. R. 9826. H. R. Rep. No. 1657, 69th Cong., 2d Sess. (pt. 3) 1 (1927).

[47] *Hearings on H. R. 6251*, at 43.

"... If the Government constructs this reservoir you have only to go to the Government and obtain your water contracts and irrigate your land."[48]

The majority of the House Committee stated in favorably reporting out H.R. 9826:

> *"All rights respecting water or power under the project are, under the terms of the bill, to be disposed of by contract by the Government.* It is not reasonable to assume that the Government will do anything of an unfair or prejudicial nature to Arizona."[49]

The fourth Swing-Johnson bills were introduced in the 70th Congress and again there was no dispute that they would vest control of the river in the federal government and depart from the doctrine of prior appropriation.

Congressman Arentz of Nevada was very plain in stating his views:

> "There must be a definite statement in this bill; *if there cannot be a State compact arrived at among the lower-basin States—there must be a statement in this bill of an allocation among the lower-basin States. What else can you do?*"[50]

Governor Dern of Utah again opposed the legislation:

> "The Swing and Johnson bills propose an entirely new and revolutionary national policy.
>
> * * * * * *
>
> "The theory advanced by attorneys for the Bureau of Reclamation, and embraced in the Swing and Johnson bills, that Congress has the power to

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[48] *Id.* at 106, 108.

[49] H. R. Rep. No. 1657, 69th Cong., 2d Sess. 11 (1926).

[50] *Hearings on H. R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 51 (1928) (hereinafter referred to as "*Hearings on H. R. 5773*").

allocate and apportion the waters of any Western river among the States, regardless of their will, is abhorrent to our whole plan of government. It proceeds from the vicious bureaucratic hypothesis that in all the Western States the United States, and not the States, owns and may dispose of the waters of any stream, and that Congress at any time may wholly remove the control of such waters from the States, as is attempted in this bill; and that the States exercise their control by mere sufferance.

* * * * * *

"*Under the Johnson bill the essence of the compact idea is almost removed, and the Federal Government is given outright authority to divide the water of the river.* That the division is to be made according to the terms of the Colorado River compact is a mere incident. *The scheme is Federal division of the water, and the compact is no longer a compact but merely a formula.* If Congress at this session can divide the river according to this formula, then a future Congress, again succumbing to the pressure of intensive propaganda, may amend the law and divide the river according to some other formula without consulting the States at all."[51]

On the other hand, Mr. Childers, attorney for Imperial Irrigation District, appeared before the House Committee in support of the legislation and testified that he believed Congress could and should provide for an allocation of water in the Lower Basin:

"It is somewhat doubtful if a compact respecting these questions, solemnly approved by the legislatures of the several States and by the Congress, would of itself be so effective as a means of allocating and administering the allocation of water as an act of the Congress. Compacts for this purpose

[51] *Id.* at 208-09, 215.

have not been adjudicated, just how rights will be affected are not known, and the question of State and Federal control has not been settled."[52]

Francis C. Wilson, appearing before the Senate Committee as a representative of the Governor of New Mexico, testified:

"Senator Hayden. But unless there were some direct constitutional question involved, wherein authority had been conferred upon the Congress, such apportionment could not be made.

"Mr. Wilson. No; it could not be made. In other words, in this connection as I see it the Congress is passing a law which has to do with the regulation of the Colorado River for the betterment of commerce, to make it more navigable. Incident to that power the Congress can take jurisdiction as I view it over the water of the Colorado River to the extent necessary to execute that authority. *If it is important to the execution of that authority that there should be some allocation between the States of the water, I think the Congress could so act in this connection.*"[53]

The favorable report of the majority of the Senate Committee, *submitted by Senator Johnson,* stated in part:

"Here finally is presented a unified plan for protecting those entitled to protection, *for the allocation among the States desiring that allocation of the waters of a great river to which all are entitled,* for the elimination of intolerable conditions by which a fertile and productive part of the United States is dependent for its very life upon water which flows through Mexican territory, and finally for converting

[52] *Id.* at 444.

[53] *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 194 (1928).

> into a great national asset a wasteful and destructive agency, and by its control reclaiming for homes for Americans, land now arid and worthless.''[54]

During the Senate debate on the bill in the First Session of the 70th Congress, Senator Smoot of Utah epitomized the views of the opposition when he said:

> "The bill is predicated upon the assumption that the Federal Government has very much greater rights in the Colorado River and older streams generally in the country than has ever been recognized by any judicial tribunal. *Indeed, the theory upon which this bill must be upheld, if it is upheld at all, is that the Federal Government is sovereign over the Colorado River, and that Congress may determine how the waters of the Colorado should be divided between the States.*''[55]

The development of the requirement of the California Limitation Act and the change from an allocation by secretarial contract to the imposition of a mandatory formula for allocation created by the interaction of §§4(a), 5 and 8(b), which took place during the Senate debates in the Second Session of the 70th Congress, has been fully reviewed in our opening brief (Ariz. Op. Br. 38-46, 83-99).

These excerpts from the legislative history, although extensive, are but a few of the many which could be quoted upon this point.[56] All demonstrate a clear recognition that

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[54] S. Rep. No. 592, 70th Cong., 1st Sess. 7 (1928).

[55] 69 Cong. Rec. 7538 (1928).

[56] See, for example:

Hearings on H. R. 6251, at 15, 17, 19, 65, 72-73, 99-101, 105, 143, 159-60, 188-89.

69 Cong. Rec. 9648-49, 9653, 9764-65 (1928).

Hearings on H. R. 5773, at 45, 50-51, 56-59, 81-82, 120, 123, 128, 206-08, 212-13, 215, 228, 296, 298-99, 307-08, 335, 337-39, 343, 415-16, 418-20, 438-39, 443-46.

H. R. Rep. No. 918, 70 Cong., 1st Sess. 8, 22-23 (1928); see *id.*

the Swing-Johnson bills, if enacted, would impose complete federal control over the water of the Colorado River in the Lower Basin and would provide for a federal allocation of that water among the Lower Basin states. The major controversy was whether Congress had constitutional power to accomplish this purpose. This question was not settled until the decision in *Arizona* v. *California,* 283 U. S. 423 (1931), which sustained the constitutionality of the Project Act.

In view of this overwhelming historical evidence, there is no justification for California's assertion that

> "... one of the major areas of legislative agreement expressed throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) by proponents and opponents of the measure alike [was that]: Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished." (Cal. Op. Br. 181)

(3) Senators Quoted by the Special Master

California takes issue with the Special Master because he relies on certain statements made by Senators Hayden and Pittman and a colloquy between Senators Walsh and Johnson, which California calls "confused" (Cal. Op. Br. 182-88).

(pt. 2) *passim* (Minority Report).

Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation, 70 Cong., 1st Sess. 39-40, 53, 64-67, 105-07, 120-21, 127, 144, 147-48, 152-54, 159-62, 194, 222-23, 264, 302-11, 329-30, 338-39, 363, 365, 374, 432-35, 440-53 (1928).

S. Rep. No. 592, 70 Cong., 1st Sess. 7, 11-12, 15-16 (1928); see *id.* (pt. 2) *passim* (Minority Report).

See also Arizona's Legislative History for excerpts from the Senate debate in the 70th Congress.

The colloquy between Senators Walsh and Johnson (quoted at Rep. 156-58) is far from "confused". The question under discussion was whether the Secretary of the Interior would be required to recognize the appropriative rights, if any, of the City of Los Angeles. Senator Johnson, with obvious reluctance, finally conceded that under the pending bill the federal government, acting through the Secretary, could dispose of the stored water without regard to appropriative rights:

> "Mr. Walsh of Montana. If the city of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation or an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that it must yield up that amount of water to the city of Los Angeles?
>
> "Mr. Johnson. I rather think so, just exactly as if it were a perfected right for irrigation purposes.
>
> "Mr. Walsh of Montana. Yes; but I always understood that the interest that stores the water has a right superior to prior appropriations that do not store.
>
> "Mr. Johnson. Possibly so. What is the point?
>
> "Mr. Walsh of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.
>
> "Mr. Johnson. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.
>
> "Mr. Walsh of Montana. A contract with whom?
>
> "Mr. Johnson. With those who utilize and take and appropriate the water.
>
> "Mr. Walsh of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

"Mr. Johnson. Yes; under the terms of this bill."[57]

Here is a clear and unconfused declaration by one of the bill's sponsors that it would wipe out appropriative rights and that the only way anyone could get any water was under a contract with the Secretary.[58]

California accuses the Master of quoting Senator Hayden out of context and asserts that in the Hayden-King exchange,[59] from which the Master quoted (Rep. 155), Senator Hayden was in fact referring to a "mandatory tri-state compact", which was then a part of his amendment (Cal. Op. Br. 183-86). Senator Hayden's assertion, which California improperly construes as stating "only that the *mandatory* tri-state compact would make an apportionment", was in fact made by him in response to Senator King's contention that, before Congress would be justified in appropriating funds for construction of Hoover Dam, the bill should expressly provide for a judicial determination of all water rights. Senator Hayden declared that his amendment was intended merely to provide for an interstate apportionment of water and that the determination of individual rights intrastate would be left to the state courts.

California's claim (Cal. Op. Br. 186-87) that the Master quotes Senator Pittman (Rep. 155) out of context is also without foundation. Senator Bratton had objected to

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[57] 70 Cong. Rec. 168 (1928), Ariz. Legis. Hist. 40-41.

[58] The other sponsor of the bill, Congressman Swing, expressed similar views (see pp. 18-20, *supra*).

[59] The extent of California's misrepresentation of the meaning of this exchange in stating that the Special Master "quotes the ambiguity and omits the clarification" (Cal. Op. Br. 186) can only be appreciated by reading the remarks of Senators King and Hayden in full. The text appears at 70 Cong. Rec. 168-69 (1928), Ariz. Legis. Hist. 44-46.

imposing a tri-state compact on the states. Senator Pittman expressed disagreement and pointed out that the states had been unable to agree on a division of water, so that it became the "duty of the United States Senate to settle this matter. . . ."[60] There can be no doubt as to Senator Pittman's understanding, since he repeatedly stated that the bill was making an interstate apportionment of water (Ariz. Op. Br. 93-97). Even after the tri-state compact provision proposed by Senator Hayden had been amended to make it permissive rather than mandatory, Senator Pittman observed:

> "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that."[61]

Undoubtedly, he recognized that the Phipps amendment to §5, which required all contracts for water for irrigation and domestic use to "conform to paragraph (a) of section 4 of this Act", would require all secretarial contracts to be for the quantities specified in §4(a).

(4) Section 8(b)

California also disputes the Master's construction of §8(b). He concluded:

> "The intention to exert authority over the allocation and distribution of water stored in Lake Mead can likewise be derived from Section 8(b) of the Act. That section contemplates that Arizona, California and Nevada, or any two of them, might negotiate a compact for the equitable division of Colorado River water but provides that such a

[60] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 130.

[61] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 131.

> compact shall be subject to water delivery contracts made by the Secretary of the Interior prior to congressional approval of such compact." (Rep. 151)[62]

California argues that this interpretation is wrong because the Master's construction of §5 is wrong (Cal. Op. Br. 188-91). California's §5 argument has already been disposed of (pp. 25-47, *supra*).

California further contends that any §8(b) compact would have related only to power or the price (not allocation) of water. Cited in support of this position is a letter of Secretary Wilbur dated May 9, 1930 to Governor Phillips of Arizona.[63] Far from supporting California's position, however, the letter reflects the Secretary's recognition that contracts made by him under §5, whether for power or the delivery of water, would have precedence over any interstate compact concluded after January 1, 1929 with respect either to power or the apportionment of water. Arizona had objected to power contracts which had been executed by the Secretary before the termination of pending negotiations between California and Arizona looking toward an interstate compact "covering power questions as well as water" (Cal. Op. Br. 190-91 note 6). The Secretary responded in his letter of May 9, 1930 that before signing these power contracts the Department of the Interior had waited "until the states had had an opportunity under section 8(b) to compact on or before January 1, 1929, as the law allows . . ."; and he added that the Department had delayed action until April 28, 1930 "in the earnest hope that the states would be able to work out their problems. . . ." In short, realizing that his contracts would have priority over any interstate compact entered into after

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[62] Arizona's construction of §8(b) appears at Ariz. Op. Br. 83-88.

[63] C 1835 (Tr. 12,256).

January 1, 1929, the Secretary deferred making such contracts until he felt that he could not justify further delay.

Moreover, it is ridiculous to contend, as California does (Cal. Op. Br. 175), that Congress would impose upon the Secretary the obligation of securing contracts which would provide revenue adequate to repay the cost of the project and then turn right about and authorize the states to compact as to power and the price of water.

The language of §8(b) is plain. It provides authority for the three states, or any two of them, to compact "... for the equitable division of the benefits, including power, arising from the use of water...." This means *all* benefits, including the use of water, subject to the condition that any such compact concluded after January 1, 1929 would be subordinate to all contracts theretofore made by the Secretary under §5.

California concludes its argument on this point by saying:

> "If proponents of section 8(b) had attributed to the proviso of that section the interpretation which the Master derives, its legislative history would have been marked by hot debates about the inclusion of this language of section 8(b). In fact, the record on section 8(b) is singularized by relative silence." (Cal. Op. Br. 191) (footnotes omitted)

But the legislative history of this section[64] discloses that, once again, California is wrong on all points: (1) The record is not silent on this section, (2) the proponents did attribute to it the interpretation derived by the Master and (3) despite the fact that they did so, the legislative history is not marked by hot debates on the subject.

The underlying principle of §8(b) was first suggested in the 69th Congress by Charles P. Squires, a Nevada

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[64] Ariz. Legis. Hist. 133-43.

Colorado River Commissioner, representing the Governor of that state. H.R. 6251, the bill then pending before the House Committee, provided in §8(a):

> "That the United States, in managing and operating the dam, canals, and other works herein authorized, including the delivery of water for the generation of power, irrigation, or other uses, shall observe and be subject to and controlled by the Colorado River Compact as signed at Santa Fe, New Mexico, on November 24, 1922 and particularly described in section 13 herein.[65]

Mr. Squires proposed an amendment to this section with the following explanation:

> "I would respectfully suggest to your committee that a clause be added to the committee print bill now under consideration, directing that the Secretary of the Interior, in the allocation of rights, shall make such allocation in accordance with the terms of a compact now in process of negotiation between the States of Arizona, California, and Nevada, provided such a compact shall be negotiated and ratified by the legislatures of said three States and consent thereto be given by Congress on or before March 4, 1927.
>
> "Such a clause, permitting Arizona, California, and Nevada to proceed with the orderly and peaceful solution of their own problems, *but leaving the Secretary of the Interior free to act under the terms of the bill as now drawn in case no agreement is arrived at,* may be added, substantially as follows:
>
> "Page 9, section 8(a), line 7, add, following the word 'herein':

[65] *Hearings on H. R. 6251,* at 3, Ariz. Legis. Hist. 133.

'and by the terms of a compact between the States of Arizona, California, and Nevada for the division of the benefits accruing to said three States, under said Colorado River compact, provided such a compact between said three States shall be negotiated and ratified by the legislatures thereof and consent thereto be given by Congress on or before March 4, 1927.' "[66]

Mr. Squires further explained the purpose of his proposal in answer to questions of Congressman Hayden:

"Mr. Hayden. We are willing to concede that whatever time may be necessary should run to perfect the plan of the original Colorado River compact, but you would set a time limit within which Arizona shall come to an agreement with California and Nevada. Does that appeal to you as entirely fair?

"Mr. Squires. Yes, sir; because there is a year in which to carry it out, and if then it can not be carried out, I suppose we would have to abandon that idea.

"Mr. Hayden. Why not put the same time limit on the approval of the Colorado River compact itself?

"Mr. Squires. This practically does it, I think, because a tri-State compact, which would be an agreement between the three States, would I assume, be predicated upon the terms of the seven-States Colorado River compact.

"Mr. Hayden. *If Congress can legislate after the time limit has expired, what is the necessity of any agreement at all?*

"Mr. Squires. *I think the necessity for action demands that there be legislation.*

"Mr. Hayden. *Regardless of whether the States agree or not?*

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[66] *Hearings on H. R. 6251*, at 39, Ariz. Legis. Hist. 134-35.

"Mr. Squires. *I think so.* I think we are leaving the door wide open with an invitation to Arizona to come with us, and it is our desire and hope that that will be done."[67]

H. R. 6251 was later replaced by H.R. 9826 and a committee print of April 14, 1926 contained the Nevada proposal in §8(d).[68]

When Senator Hayden directed attention to this provision, Delph Carpenter of Colorado testified:

"Mr. Hayden. I desire to inquire as to the desirability of fixing a time limit, such as March 4, 1927, within which the State of Arizona must agree?

"Mr. Carpenter. I have been fearful that the section would be misconstrued in the very manner that you suggest. I think it is the intent of the framers of the amendment that the compact when entered into and approved by Congress should be controlling upon the works herein authorized, *but*

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[67] *Hearings on H. R. 6251,* at 41.

[68] "Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation delivery and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, for the equitable division of the benefits including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before March 4, 1927; and the terms of any such compact concluded between said States and approved and consented to by Congress after said dates; Provided, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under Section 5 hereof prior to the date of such approval and consent by Congress." *Hearings on H. R. 6251,* at 117-18.

they wish to fix a reasonable time within which to arrive at a compact to deal with the waters with perfect freedom, knowing that if the Secretary of the Interior enters into contracts for disposition of water and power to be generated, that any compact between the three States would confront those contracts, and the three lower States might be put in a position of recognizing those contracts irrespective of their effect upon any one State. It was the thought of the framers of the amendment to stay the hand of the Secretary of the Interior in any such contracts for such a time as may be necessary for the three lower States to conclude a compact. That is the reason for inclusion of the date.''[69]

And so the proponents of §8(b) made it perfectly clear that it was their intention to allow the states complete freedom until January 1, 1929 to make a division of the water by compact different from that specified in §4(a), but that after that date the hand of the Secretary to contract pursuant to the division among the states approved in §4(a) should no longer be stayed. If, after January 1, 1929, the states should compact for an allocation of water differing from that approved in §4(a), any such compact should be subject to prior contracts made by the Secretary pursuant to the authority and direction of §§5 and 4(a) (Ariz. Op. Br. 85-86). After enactment of the Project Act, the Secretary of the Interior, as we have seen, construed §8(b) in precisely the same way (see pp. 48-49, *supra*).

F. Section 6 of the Project Act

The Special Master has held (Rep. 308-11) that the only appropriative rights in the Lower Basin which survived the Project Act are the "present perfected rights" referred to in §6:

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[69] *Hearings on H. R. 6251,* at 204, Ariz. Legis. Hist. 140-41.

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and *satisfaction of present perfected rights in pursuance of Article VIII* of said Colorado River compact; and third, for power."[70]

The Master has construed §6 as preserving whatever rights to main stream water were perfected in Arizona, California and Nevada when the Project Act became effective on June 25, 1929.

California takes issue with this construction as too narrow, contending that principles of prior appropriation survived the Project Act and govern all interstate rights in the Lower Basin whether acquired before or after June 25, 1929 (Cal. Op. Br. 217-21). In effect, California reargues her basic position regarding the survival of appropriative rights, with which we have dealt previously (pp. 8-53, *supra*).

Arizona disagrees with the Master's construction of §6, and even more so with California's position. As we stated in our opening brief:

> "It is our view that §6 of the Project Act does not recognize or confirm any rights within the Lower Basin at all. Section 6 merely directs that the facili-

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[70] Article VIII of the Compact provides:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then *claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.*
>
> "*All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.*"

> ties authorized by §1 shall satisfy the requirements of Article VIII of the Compact—that claims of rights by appropriators and users in the Lower Basin against appropriators and users in the Upper Basin shall attach to and be satisfied from water stored in the Lower Basin. The only portion of Article VIII of the Compact which provides for 'satisfaction' of present perfected rights is the second sentence of the first paragraph and this provision is clearly limited to the satisfaction of perfected rights basin versus basin." (Ariz. Op. Br. 47-48)

After a review of the circumstances existing when the Compact was negotiated, the conclusion was reached that:

> "Thus by the device of preserving perfected rights *basin versus basin* until storage was available, protection was afforded main stream Lower Basin users. After storage was provided as contemplated by Article VIII of the Compact, the first sentence of Article VIII had served its purpose and had no further effect." (Ariz. Op. Br. 49)

Further reflection and analysis of this question, including consideration of the arguments advanced by California, has served only to strengthen our belief in the correctness of this conclusion.

Indeed, as we have previously noted (pp. 18-20, *supra*), Mr. Swing, co-sponsor of the Project Act, expressed these very same views shortly after the Compact was signed.[71]

California repeats her misstatement, based upon a distorted version of testimony by Delph Carpenter, that §6 of the Project Act was inserted at the instance of the

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[71] See also the testimony of Judge Davis, the Compact Commissioner from New Mexico. *Hearings on H. R. 2903*, at 1769-70.

Upper Basin and was not intended "to affect rights of Arizona and California *inter sese*" (Cal. Op. Br. 219; and see 177-81). Actually, in discussing the provisions of §6 that the dam and reservoir should be used, among other purposes, for "satisfaction of present perfected rights," Mr Carpenter stated:

> "Mr. Carpenter. In lines 1 and 2 the words 'and satisfaction of present perfected rights in pursuance or Article VIII of said Colorado River compact' were inserted by the upper basin States for the reason that the paragraph as drawn did not affirmatively recognize the obligation imposed by Article VIII of the compact to take care of present perfected rights, drawing water from the river below the dam. Article VIII provides that when a reservoir of 5,000,000 acre-feet or more has been constructed in the canyon for the benefit of the lower basin those perfected rights shall look to the reservoir for their supply. We would be sure that there be no question about that. The lake under consideration should perform that duty, along with other duties.
>
> "Mr. Hudspeth. In other words, the lands in the Imperial Valley shall look to this reservoir for their supply of water."[72]

The fact that the portion of §6 referring to "present perfected rights" originated with the Upper Basin is further proof that it was intended to preserve such rights only basin versus basin, until storage was provided, for the Upper Basin had no concern with, nor interest in, the preservation of perfected rights interstate in the Lower Basin.

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[72] *Hearings on H. R. 6251,* at 167. The testimony of Mr. Carpenter quoted at 177-81 of California's Opening Brief referred to §5 not §6 of the Project Act, despite the fact that California, in her argument as to the meaning of §6, at page 219 of her Opening Brief, refers back to pages 177-81 as though Carpenter's testimony in fact concerned the meaning and purpose of §6.

The foregoing provides cogent evidence that §6 of the Project Act was not intended to confirm rights within the Lower Basin nor to preserve any such rights beyond the time when storage capacity, as contemplated by Article VIII of the Compact, was provided. Therefore, there are no "present perfected rights" in Lower Basin main stream water today which have survived the construction of Hoover Dam and the creation of Lake Mead.

G. Summary

To summarize: None of the grounds advanced by California—neither the provisions of the Project Act, nor its legislative history, nor its administrative, practical, or subsequent congressional construction—supports the California position that the Project Act confirmed and did not abrogate the doctrine of prior appropriation and principles of equitable apportionment. To the contrary, these very sources establish the intent of Congress, absent an interstate compact, to make a statutory allocation of water among Arizona, California and Nevada, which, as the Master correctly found, renders the doctrine of equitable apportionment and the law of prior appropriation irrelevant to the decision of this case (Rep. 138).

II

The interpretation of the limitation on California is not controlled by the meaning of the Compact, as California contends, but by the intent of Congress as manifested in the Project Act and its legislative history.[73]

A. The Basic Question

The basic question involved in the construction of the California limitation is:

> Whether the references in §4(a) of the Project Act and in the Limitation Act to [1] "the waters apportioned to the lower basin States" by Article III(a) of the Compact and [2] "excess or surplus waters unapportioned" by the Compact mean main stream water only or include both main stream and Lower Basin tributary water

B. California's Approach to the Question

California's position before the Master regarding these clauses was ambivalent and inconsistent (Rep. 180 note 40). She insisted that the first phrase—"the waters apportioned to the lower basin States" by Article III(a) of the Compact—must be construed in the Compact sense, *i. e.*, as referring to the same water as that to which the Compact referred. The Compact, she said as she does now, referred

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[73] This point is directed principally to a refutation of Part Two of California's Opening Brief, pages 69-137.

Arizona contends that Congress correctly interpreted Article III of the Compact as referring solely to main stream water (see Ariz. Op. Br. 72-81). But for purposes of this argument only, we shall assume that California's construction of Article III(a) of the Compact is correct.

to *system* water (main stream and tributaries).[74] But with respect to the second clause—"excess or surplus waters unapportioned" by the Compact—California took quite a different view. She argued:

> "Resolution of this issue does not turn on whether the negotiators of the compact intended to classify the waters specified in Article III(b) as 'apportioned.' Rather the issue is whether Congress intended to exclude California from participation in Article III(b) water. *The true question is what Congress* (and the California legislature in complying 'with the conditions respecting limitation' in the Project Act) *intended in 1928, not what the negotiators of the compact intended in 1922.*"[75]

The Master has sustained this California position with respect to III(b) water. He holds that, literally construed, the words "excess or surplus waters unapportioned" by the Compact would exclude California from any share in the water referred to in Article III(b) of the Compact, which he properly holds is "apportioned" water in the Compact sense. But, accepting California's reading of the legislative history of §4(a), the Master concludes that Congress did not intend to exclude California from a share in surplus water in excess of the first 7.5 million acre-feet of main stream water in the Lower Basin in any one year. Therefore, giving effect to the congressional intent that "unapportioned" water should include Article III (b) water, the Master recommends that California be decreed the right to share equally with Arizona in the 1,000,000 acre-

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[74] Article II(a) of the Compact defines the Colorado River System as "that portion of the Colorado River and its tributaries within the United States of America".

[75] Brief of the California Defendants before the Special Master, A2-5.

feet apportioned by Article III(b) of the Compact (Rep. 194-200).[76]

Arizona's concession that the Master's construction of the §4(a) phrase, "excess or surplus waters unapportioned" by the Compact, is sound has rendered the Article III(b) question academic (Ariz. Op. Br. 82). However, it is significant that California has contended successfully before the Master that simply because §4(a) refers to the Compact it does not at all follow that "the meaning of the Compact controls" and that " 'Compact' means Compact" (Cal. Op. Br. 70, 133-37). Indeed, in her Opening Brief California does not hesitate to argue for what she claims is a "sensible" reading of the Compact when a literal interpretation operates to her disadvantage (Cal. Op. Br. 93).

In dealing with the interpretation of clause [1]—"waters apportioned to the lower basin States" by Article III(a) of the Compact—California furloughs her historiographers and puts her literalists in command. She has bottomed her position upon an over-simplified and purely theoretical equation:

> Project Act = Compact = System water (main stream + tributary)

Or in terms of an equally over-simplified and theoretical syllogism:

> Congress in §4(a) employed the phrase "waters apportioned to the lower basin States" by Article III(a) of the Compact.

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[76] Having thus persuaded the Master, California now contends that a "literal reading" of the phrase also achieves the same result (Cal. Op. Br. 73-74). California modifies her position as to clause [2] in order to make it consistent with her position as to clause [1].

> Article III(a) of the Compact apportioned water of the Colorado River system.
>
> *Ergo,* Congress employed this phrase in §4(a) to mean water of the Colorado River system.

Entirely left out of the equation and the syllogism is this vital factor: What did the phrase really mean in the vocabulary of Congress—*what water was Congress talking about?* California pays little or no attention to the extensive legislative history of §4(a), which led the Master to conclude:

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only." (Rep. 174)

California's unrealistic and myopic approach to the problem of interpretation vitiates all of her discussion of it. Although she accepts the Master's construction of the Compact as dealing with system water, she would have the Court reject his conclusion that in formulating the limitation on California Congress intended to and did deal with main stream water only (Cal. Op. Br. 80, *et seq.*).

C. Legislative History

The legislative history shows conclusively that in formulating the California limitation both Congress as a body and the congressional representatives of California in particular understood and agreed that "paragraph (a) of Article III of the Colorado River compact" meant and referred to main stream water only.

California purports to rely on this legislative history, but actually pays only lip-service to it (Cal. Op. Br. 118-24) and ignores the many instances in which the intent of Congress to deal only with main stream water in the Project

Act was clearly and repeatedly expressed (see Ariz. Op. Br. 60-67).

Indeed, California's only comment upon the statements of Senators Pittman, Hayden and Johnson, made during the debate on §4(a) and relied upon by the Special Master as showing they were talking about main stream water only (Rep. 174-80), is that Senators Pittman and Hayden were "confused" and that Senator Johnson's statements "were not always consistent" (Cal. Op. Br. 122-23).

The Pittman-Hayden confusion, if any, concerned the relationship between Article III(a) and (d) as used in the Compact (Rep. 188-90). They were certainly not "confused" regarding the meaning of §4(a) of the Project Act, as their discussion of its provisions on the Senate floor demonstrates beyond dispute. Senator Johnson was equally clear that §4(a) dealt with main stream water only.

Immediately before the Hayden amendment to §4(a) was put to a vote in the Senate, Senators Johnson and Hayden debated how any Mexican treaty burden should be shared between Arizona and California. They both displayed a clear and definite understanding that §4(a) dealt with main stream water only and that the California limitation of 4,400,000 acre-feet and the Arizona allocation of 2,800,000 acre-feet refer to main stream water only:

> "Mr. Johnson. All right. Now, in the division of water that the Senate saw fit to impose yesterday Arizona had 2,800,000 acre-feet, and 3,500,000 acre-feet from the Gila, did it not?
>
> "Mr. Hayden. Correct.
>
> "Mr. Johnson. Making 6,300,000 acre-feet. California was given, with its claims and its perfected rights, 4,400,000 acre-feet. That is correct, is it not? All right. Now, you wish to deduct from the burden that is imposed by water that goes to Mexico, first, 3,500,000 acre-feet, do you not?

"Mr. Hayden. I do.

"Mr. Johnson. Then you wish to put upon California and Arizona—one of them having then 2,800,000 acre-feet and the other 4,400,000 acre-feet remaining—the burden in equal shares, do you not?

"Mr. Hayden. I do.

"Mr. Johnson. All right. That is just what I wanted to demonstrate.

"Mr. Hayden. The Senator is unwilling to do that?

"Mr. Johnson. Of course I am unwilling to do that.

* * * * * *

"Mr. Johnson. Let us say, just by way of example, that 2,000,000 acre-feet would be utilized by Mexico. I am unable to say how much it would be; but a while ago some Senator upon the floor used that as an example—that 2,000,000 acre-feet might be ultimately allotted to Mexico. Under your plan, then, 1,000,000 acre-feet would have to be borne by California and 1,000,000 acre-feet by Arizona, would it not?

"Mr. Hayden. Yes.

"Mr. Johnson. That would leave, then, for California, 3,400,000 acre-feet.

"Mr. Hayden. And for Arizona, *in the main stream,* 1,800,000.

"Mr. Johnson. *Yes; with 3,500,000 added thereto from the Gila.*"[77]

In the foregoing exchange, Senators Johnson and Hayden were discussing §4(a) as it had been altered by the "perfecting amendment" of Senator Phipps, which added the words "paragraph (a) of Article III".[78] Contrary to California's contention, Senator Phipps did not intend, nor did Senators Johnson and Hayden understand,

[77] 70 Cong. Rec. 468 (1928).

[78] 70 Cong. Rec. 459 (1928).

that the Phipps' amendment would have the effect of making §4(a) refer to system water rather than to main stream water only. Shortly before perfecting his amendment, Senator Phipps clearly indicated his understanding that the limitation on California applied only to water sent down the river from the Upper Basin, *i.e.*, main stream water:

> "Just in a word, I wish to state that my understanding of the effect of the pending amendment is that under it or under a 7-State compact, the upper States would be compelled to send down 7,500,000 acre-feet [*sic*] of water in 10 years; or, to put it the other way, they would have for their own uses 7,500,000 acre-feet annually. If the 7-State compact is entered into, it settles that question so far as the upper basin States are concerned.
>
> "If we enact this legislation without providing for a 6-State compact, the discussions and the differences between the lower basin States may continue indefinitely and the upper basin States have no assurance that they are going to be protected in what they conceive to be their rights. The language of the amendment providing for a 6-State compact has incorporated in it the engagement upon the part of California that she will not take for her consumptive use more than 4,600,000 acre-feet—or now 4,400,000 acre-feet—of water out of the estimate 7,500,000 acre-feet annual flow."[79]

In an effort to create the impression that Senator Phipps must have understood that the §4(a) references to Article III(a) of the Compact "embraced both the main stream and the tributaries in the lower basin," California also wrenches out of context a colloquy between Senators Hayden and Phipps and emphasizes the following statement of Senator Phipps:

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[79] 70 Cong. Rec. 390 (1928).

> "'. . . But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.'" (Cal. Op. Br. 121)[80]

The Congressional Record establishes, however, that in so stating, Senator Phipps was referring only to Gila River water *which reached the main stream,* since he was under the misapprehension that the La Rue engineering report, which had been submitted to Congress, indicated that a million acre-feet of Gila River water entered the main stream of the Colorado River annually and that Arizona was claiming the right to the exclusive use of this water even after it had reached the main stream. Senator Hayden immediately corrected this misapprehension and made it clear that the million acre-feet discussed by La Rue was not an existing supply, but an anticipated return flow which would occur only if large quantities of Colorado River water were used to irrigate lands in the lower Gila Valley, and that Arizona was making no claim to Gila River water once it became part of the main stream supply.[81]

Thereafter, the Hayden amendment, containing the clause giving Arizona exclusive use of the Gila within her boundaries, was accepted by Senator Phipps as an amendment to his amendment.[82] Thus, in making the statement emphasized by California, Senator Phipps was not at all expressing the view that the proposed limitation on California related to tributaries as well as to the main stream. To the contrary, he was in effect saying that California should be entitled to use within its limitation any water *in the main stream,* regardless of its source.

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[80] Quoting from 70 Cong. Rec. 335 (1928).

[81] 70 Cong. Rec. 335-36 (1928).

[82] 70 Cong. Rec. 472 (1928).

We have fully reviewed (Ariz. Op. Br. 61-67) the Senate debates in the 70th Congress, all of which support the Master's conclusion that the §4(a) phrase, "waters apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact", was intended to mean water of the main stream only. If supplemental proof were needed, however, it may be found in the record of the hearings on the fourth Swing-Johnson bills before the House and Senate Committees.

T. A. Panter of Los Angeles, presented by Congressman Swing as a witness in support of the bill, testified:

> "Mr. Panter. I said that the compact allocates seven and one-half million acre-feet of water to the lower basin directly.
>
> "Mr. Douglas. *At Lees Ferry.*
>
> "Mr. Panter. *At Lees Ferry.* In addition to this amount Arizona has contended that there is 2,000,000 acre-feet of water *coming down* that is unallocated, or that the upper basin will not use. Now, if that is split, just assuming for example that there is a 50-50 split on that, it would bring a million acre-feet down so far as the California intakes."[83]

Just as it did in the Senate,[84] the proposal of the Upper Basin Governors formed the basis for discussions in the House Committee hearings as to the division of water among the Lower Basin states. Francis C. Wilson of New Mexico testified as the representative of the Governor of that state that he had attended the Governors' Conference of 1927 and that he was among those who formulated the recommendation that:

> "Of the average annual delivery of water to be provided by the States of the upper basin *at Lees*

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[83] *Hearings on H.R. 5773*, at 275.

[84] See Ariz. Op. Br. 62-66.

Ferry under the terms of the Colorado River compact, to the State of Nevada, 300,000 acre-feet; to the State of Arizona, 3,000,000 acre-feet; to the State of California, 4,200,000 acre-feet."[85]

Reference was also made in these Committee hearings to a letter written by Mr. Wilson to Congressman Tilson in which he stated:

> "Arizona accepted the suggestion of the governors as regards the division of water *from the main stream* to the extent that those waters are underwritten in the compact by the upper-basin States *at Lees Ferry*. . . ."[86]

Charles Childers, attorney for Imperial Irrigation District, testified as to the basis for California's demand for 4,600,000 acre-feet and stated that California could not accept the Governors' recommendation. He continued:

> "In this statement we are not considering possible surplus water *from the upper basin over and above that allocated by the compact.* It is only in the hope that some water, above the compact allocation, *will flow from the upper basin,* that California made its proposal of approximately 4,600,000 acre-feet as the minimum she could accept. There may be some surplus water, and there may not be, so in all of these discussions we are ignoring surplus water *from the upper basin.*"[87]

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[85] *Hearings on H.R. 5773,* at 292.

[86] *Id.* at 298. For the full text of the Governors' recommendation, see Ariz. Legis. Hist. 158-59.

[87] *Hearings on H.R. 5773,* at 391.

D. Significance of California's Position

Why, in the face of the legislative history, does California seek a "literal" reading of the §4(a) phrase "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact", while at the same time she accepts the congressional non-literal use of the phrase "excess or surplus waters unapportioned" by the Compact? The Master readily comprehended her reasons and motives. He described them thus (Rep. 177-78):

> "The crux of her case lies in the view that the Project Act adopts and applies the Compact method of accounting. Thus California would total all uses of System water in the Lower Basin until the sum of 7,500,000 has been reached, after which she would assign all remaining uses to 'excess or surplus waters unapportioned by said compact.' There being no tributaries in California, the effect of this thesis is, of course, to exhaust the 7,500,000 apportionment with the help of tributary uses outside of California and to leave a large supply of mainstream water which California shares as 'surplus.' The effect of California's accounting system is disclosed in Part XII of her Proposed Findings and Conclusions. The California position is there revealed as follows:
>
> 1. Art. III(a) of the Compact apportioned 7,500,000 acre-feet of uses to the Lower Basin;
>
> 2. Congress limited California to not more than 4,400,000 acre-feet of uses from this apportionment;
>
> 3. California is using all of the 4,400,000 acre-feet;
>
> 4. Thus, 3,100,000 acre-feet of uses remain for other Lower Basin states out of the III(a) apportionment;
>
> 5. The 3,100,000 acre-feet of uses are exhausted in other states, as follows:

(1) Gila River	1,750,000
(2) Other tributaries	200,000
(3) Mainstream, other than California	1,150,000
Total	3,100,000;

6. Any water remaining in the *mainstream* in excess of 5,550,000 acre-feet (4,400,000 for California and 1,150,00 [*sic*] for others) is surplus, of which California may take as much as one-half.

"Under this hypothesis California argues that she is privileged to take as surplus up to 978,000 acre-feet from the mainstream in addition to taking 4,400,000 acre-feet, also from the mainstream, out of what she interprets to be the Article III(a) System apportionment. *The effect of this argument is to give California 5,378,000 acre-feet out of the first 7,500,000 acre-feet available from the mainstream, leaving only 2,122,000 acre-feet for Arizona and Nevada.*" (Rep. 177-78) (footnote omitted; italics the Master's)

That this result was never intended by Congress is clear, and the Master so found. "Nothing", he says,

"in the words or the legislative history of Section 4(a) lends countenance to this hypothesis. The second paragraph of Section 4(a) contemplates that Arizona could receive 2,800,000 acre-feet of the 7,500,000 acre-feet *in addition* to the exclusive use of the Gila River within her boundaries. Under the California hypothesis, over one-half of Arizona's 2,800,000 acre-feet is used up by appropriations on the Gila.

"After the prolonged dispute between Arizona and California, which was uniformly described as a difference over whether California should be lim-

> ited to 4,200,000 or 4,600,000 out of the first 7,500,000 acre-feet of mainstream water, it would be remarkable indeed to discover at this late date that Congress intended *to give California up to 5,378,000 acre-feet of the first 7,500,000 acre-feet of mainstream water and to assure Arizona of only 1,822,000 acre-feet.*" (Rep. 179-80) (footnote omitted; first italics the Master's)

While California insists that her position is "Compact means Compact", her claims to water which she labels "excess or surplus waters unapportioned by the Compact" belie this assertion.

Concededly, California is limited by §4(a) of the Project Act to the "aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River" of 4.4 million acre-feet

> "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

Article III(a) of the Colorado River Compact provides:

> "There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin . . . the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum . . ."

California's studies of "safe annual yield" are predicated on the assumption that uses in the Upper Basin will not exceed 6,500,000 acre-feet during any one year. The difference of 1,000,000 acre-feet constitutes a part of the "dependable water supply" for the Lower Basin in the California computation of "safe annual yield" (Cal. Op. Br. 251 note 5).

However, under a literal reading of the Compact, which California urges, this 1,000,000 acre-feet is not "excess or surplus water unapportioned by the Compact", but is water apportioned to the Upper Basin. It would follow, were the Act read literally, that under the provisions of §4(a) and the Limitation Act, California has excluded herself irrevocably and unconditionally from the use of any of this water. Consequently under §§4(a) and 5 of the Project Act, the Secretary could not contract to deliver for use in California any portion of this water, for to do so would violate the plain terms of the California limitation, construed in the literal Compact sense.

Nor, if the Compact is literally incorporated into the Project Act, as California contends, could she presently acquire any firm right to any part of the 1,000,000 acre-feet per annum referred to in Article III(b) of the Compact, for under a literal construction of the Compact this water is also "apportioned" water (Rep. 180 note 40, 194; and see Compact Article III(f)). Hence, California would have no share in the uses specified in Article III(b).

Lastly, if California's pressure for a literal construction is yielded to, she cannot presently acquire a firm right to any part of the "excess or surplus waters unapportioned" by the Compact. This is because under Article III(f):

> "Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made . . . at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)."

Literally and technically, the Secretary of the Interior has no authority to contract now with California agencies for

the delivery of any portion of the "excess or surplus water unapportioned" by the Compact, because his contracts "shall be for permanent service" (Project Act §5). The Secretary cannot create, nor can California acquire, any vested contractual water right which is thus subject to divestment in the future.

Each of the foregoing results follows, it should be noted, whether the apportionment of water made by the Compact is an apportionment of system water or of main stream water only.

Thus, under a literal construction of the Compact terminology used in the Project Act, California is precluded from any share of (1) water apportioned to but unused by the Upper Basin, (2) water apportioned to the Lower Basin by Article III(b) of the Compact and (3) excess or surplus water unapportioned by the Compact. Therefore, it is only in the event that §4(a) of the Project Act is construed, as the Master properly construes it, in the light of the congressional intent as manifested in the other provisions, the purposes and legislative history of the statute that California is entitled to use water in excess of 4.4 million acre-feet of the water apportioned to the Lower Basin by Article III(a) of the Compact.

E. California's Attack on the Master's Construction of §4(a)

The Master observed that a literal reading of §4(a) "would authorize Arizona, California and Nevada to enter into a compact for the division among themselves of all the Lower Basin system water, including water being used by New Mexico and Utah" (Rep. 171); and that "it is preposterous to suggest that such a result would have been accomplished with the active support of Senator Bratton of New Mexico, one of the principal architects of Section 4(a)" (Rep. 175) (footnote omitted).

To this California responds that "New Mexico and Utah would not and could not be excluded from the use of any water by any compact among Arizona, California and Nevada" to which the states of New Mexico and Utah were not parties; and that "Senator Bratton must have believed —correctly—that clauses (1) and (2) of the tri-state compact to which New Mexico was not a party could not affect her rights" (Cal. Op. Br. 86-87) (footnote omitted).

This implies that Senator (now judge) Bratton was playing a crafty political game. The tri-state agreement envisaged in §4(a) was proposed, together with the California limitation, as an equitable settlement of the long-lasting dispute regarding the division of Lower Basin main stream water. Indeed, this controversy threatened to block *in limine* the authorization of the project which California so urgently desired. Yet California would now attribute to Senator Bratton, when he was strongly urging the acceptance of this compromise, a mental reservation that, although in terms it would "literally" deprive his state of New Mexico of a share in system water, in legal effect it could not do so; and hence he would support advance congressional approval of the proposed tri-state compact by the lip service of his vote. Moreover, the California contention necessarily assumes that Congress would solemnly approve in advance a tri-state compact which, if made, would have no validity or utility, since it purported to apportion among the three compacting states tributary water in which two non-compacting states had vested interests.

The same specious argument is advanced by California (Cal. Op. Br. 91) in response to the Master's further observation that, if read literally, §4(a) would "prohibit the states of the Upper Basin from utilizing any of the water unapportioned by the . . . Compact" (Rep. 171).

This time the same political chicanery is attributed to senators of the Upper Division states, men of the stature of King and Smoot of Utah, Kendrick of Wyoming and Phipps of Colorado, all of whom, as representatives of the Upper Division, were anxious to have the Lower Basin controversy settled and settled if possible by interstate compact. Yet California would impute to them also the purpose to authorize a futile and invalid compact.

Finally, the California position implies that the states of the Upper Basin and New Mexico and Utah (as to their Lower Basin uses) would willingly approve in advance a tri-state compact which would create a cloud upon their rights to participate in a further apportionment of water as contemplated by Article III(f) of the Compact.

California argues further that, in any event, the quantity of water from which Utah and New Mexico would have been excluded under a literal interpretation of §4(a) is "insignificant" (Cal. Op. Br. 90). But water in any amount, however small, is never regarded in the arid West as "insignificant". Indeed, uses on Lower Basin tributaries were considered so significant as to warrant extensive litigation in this very case. Utah claimed the right to an annual consumptive use on tributaries of 125,000 acre-feet[88] and New Mexico 111,700 acre-feet[89] or a total of 236,700 acre-feet annually. This is more than the combined annual quantities which Nevada, New Mexico and Utah would receive under California's proposed decree (Cal. Op. Br. 22-23).[90]

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[88] Utah's Proposed Finding of Fact 19a.

[89] New Mexico's Proposed Finding of Fact 31.

[90] Although the Master found that there is no justiciable controversy as to any of these tributaries except the Gila River system, he so held only because present uses were not questioned and the claims for possible future uses were not yet ripe for decision (Rep. 321-24).

In discussing the tri-state compact provisions of §4(a) California makes several misstatements (Cal. Op. Br. 85-90). It is not true that the California limitation was required only in the event of Arizona's failure to ratify the Compact; nor is it true, as California proclaims with emphasis, that: "It was *never* contemplated that the tri-state compact and the limitation on California would coexist" (Cal. Op. Br. 89) (italics California's). The California limitation was required if seven states (including Arizona) failed to ratify the Compact *within six months after June 25, 1929* (Project Act §4(a)(2), Ariz. Op. Br. Appendix B, p. 12a). The very fact that the tri-state agreement proposed by §4(a) was to apportion 2.8 million acre-feet to Arizona and .3 million to Nevada out of the 7.5 million acre-feet referred to, shows plainly that the California limitation and the tri-state compact were to coexist and that, as the Master says, the two "are clearly correlative and contemplate allocation of all the available water among the three states" (Rep. 170, 174-75). That the two cannot be regarded separately is clear from the California argument that they can be so regarded: She says that the California limitation is not a "grant" and hence the tri-state agreement of itself would have made no disposition of the 4.4 million acre-feet or of the surplus water referred to in the California limitation. From this California concludes that there would be a residue of 4.4 million acre-feet of Article III(a) water and one-half of the "excess or surplus" available for use in California, New Mexico and Utah (Cal. Op. Br. 89). That this result was never intended by Congress is indubitable. No one ever thought or intended that New Mexico and Utah would share in the water to the use of which California would be limited.

California next represents that:

> "Article 7(g) [of the Arizona contract] constitutes an important administrative construction by the Secretary as well as a practical construction by Arizona that the lower basin rights of New Mexico and Utah are relevant to, and unimpaired by, the Project Act." (Cal. Op. Br. 90)

That this statement is erroneous is demonstrated by the provisions of Article 10 of the Arizona contract, which expressly disclaim any interpretation whatever by the Secretary or by Arizona of the Compact or the Project Act.[91]

Secretary of the Interior Ickes at the time the Arizona contract was executed stated the purpose of Article 10:

> "Secondly, Article 10 was purposely designed to prevent Arizona, or any other state, from contending that the proposed contract, or any provision of the proposed contract, resolves any issue on the amounts of waters which are apportioned or unapportioned by the compact and the amounts of apportioned or unapportioned water available to the respective states under the compact and the act. It expressly reserves for future judicial determination any issue involving

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[91] Article 10 states:

"Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III(a) of the Colorado River Compact; (3) what part, if any, is within Article III(b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River System; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III(a) of the Colorado River Compact between the Upper Basin and the Lower Basin."

> the intent, effect, meaning and interpretation of the compact and act. The language of Article 10 is plain and unequivocal and adequately reserves all questions of interpretation of the compact and the act."[92]

Finally, as the Master pointed out, "Section 4(a), if read literally, would prohibit California from consuming water from the Colorado River in excess of 4,400,000 acre-feet of consumptive uses per annum until consumptive uses throughout the Colorado River Basin totaled 16,000,000 acre-feet per annum" (Rep. 172). This is because California is limited by §4(a) to not more than 4.4 million acre-feet per annum plus "not more than one-half of surplus waters unapportioned by the Colorado River Compact". Literally construed, Compact Article III(a) and (b) apportions a total of 16,000,000 acre-feet (7,500,000 to each Basin and an additional 1,000,000 to the Lower Basin).

California tries to escape from this *cul de sac* of literalism by claiming that the literal construction of §4(a), if adhered to, would require California to allow water to go to waste if it were not used by those who have a prior or superior right thereto. But this is an argument against, not for, literal construction. It actually points up the absurdity resulting from California's literal interpretation. At this juncture, California abandons her "Compact means Compact" position and advocates, as her only possible answer to the Master's holding, that §4(a) be given a "sensible" rather than a literal construction. She urges:

> "The problems which the Master poses need not exist. By a *sensible* reading, the 'excess or surplus waters unapportioned by said compact' referenced in the limitation means all consumptive use from system

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[92] WILBUR & ELY, THE HOOVER DAM DOCUMENTS A508 (1948).

water in the lower basin over and above 7.5 million acre-feet per annum of consumptive use." (Cal. Op. Br. 93)

Arguing further for the system-wide accounting, which California claims a literal construction of §4(a) would entail, California says the Master is wrong in holding that the explicit provisions of clause (3) of the second paragraph of §4(a), which assure to Arizona "the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State", militate against such a literal construction. California's attempted refutation of the Master is frivolous. In the teeth of this plain and simple language, California insists that the Gila and its tributaries were included in Arizona's apportionment of 2.8 million acre-feet. She says the Master's holding that clause (3) assures Arizona the use of the Gila system "in addition" to Arizona's 2.8 million acre-foot apportionment is, in effect, an amendment of §4(a) by the Master. California contends that he has converted the "'and" introducing clause (3) into "in addition" (Cal. Op. Br. 94). In other words, "(1) and (2) and (3)" are not the same as "(3) in addition to (1) and (2)". To merely state the proposition is to refute it.

The senatorial debates cited by the Master show unmistakably the congressional intent that tributary uses in Arizona should not be deducted from Arizona's main stream allocation of 2.8 million acre-feet (Rep. 179 note 38). In this way, Congress sought to resolve the controversy arising from California's claim, asserted then as it is re-asserted now, that the Gila and its tributaries had been included in the water apportioned by the Compact. This explains why the Gila system in Arizona was singled out

from the other Lower Basin tributaries of the Colorado for special and explicit treatment in §4(a).[93]

Invoking the maxim, *expressio unius exclusio alterius*, California contends that at any rate Lower Basin tributaries other than the Gila are literally included in the §4(a) apportionment (Cal. Op. Br. 95). But here again literalism must give way to realism: the reality with which Congress dealt and intended to deal, as revealed so plainly in the legislative history, was water of the main stream of the Colorado River stored in Lake Mead and released or available for use below Hoover Dam.

California points to the 1939 Act of the Arizona Legislature which approved a proposed tri-state compact containing a clause to the effect that "in addition to" 2.8 million acre-feet of Article III(a) water and one-half of surplus, Arizona should have exclusive use of the Gila within her boundaries. California finds it significant that the Act provided for approval of the contemplated tri-state compact by Congress—an approval which, she argues, would not have been necessary if the exclusion of the Gila from the Arizona apportionment of 2.8 million acre-feet had been intended by the §4(a) tri-state compact which Congress had approved in advance (Cal. Op. Br. 95-96).

The answer is simple: The proposed tri-state agreement set forth in the 1939 statute contained many provisions not included in the tri-state compact approved in

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[93] The Gila and its tributaries were also expressly exempted from use to satisfy the Mexican treaty obligation by subsection (4) of the second paragraph of §4(a) to allay Arizona's fears, which had up to then prevented her ratification of the Compact, that the Gila system would be subjected by the Compact to the Mexican treaty obligation, under the systemwide allocation attributed to the Compact by California. See pp. 62-63, *supra;* 70 Cong. Rec. 466 (1928).

advance by §4(a)[94]; hence congressional ratification of its terms was required. The subsequent 1941 legislation which passed the Arizona Senate but failed in the House did not in terms require further consent of Congress (Cal. Op. Br. 96) because its provisions conformed precisely to those approved in advance in §4(a) of the Project Act.[95]

In attacking the Master's conclusion that Congress intended §4(a) to relate solely to water in Lake Mead and in the main stream below Lake Mead within the United States, California would create the impression that only two words in §4(a)—"Colorado River"—constitute the whole foundation for the Master's conclusion (Cal. Op. Br. 100-01). Important and significant as they are, the Master does not "seize upon" "only two words" in §4(a), "out of the entire statutory language" to support his conclusion. Earlier in his Report he analyzes in detail the provisions of §§1, 5, 6 and 8 and concludes that these sections clearly express the intent of Congress to deal in the Project Act with "the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead" (Rep. 151) (footnote omitted).

To be sure, in construing the California limitation, the Master refers to the very language of §4(a), pointing out that "it refers to the Colorado River and not to the System. . . ." But in the very next sentence he states:

> "*But more important,* the second paragraph of Section 4(a) demonstrates that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with

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[94] *E.g.*, Article I stating purposes, Article II defining terms, Article IV making Arizona's ratification of the Colorado River Compact conditional upon approval of the proposed tri-state compact by Congress, California and Nevada. C 1322 for iden. (Tr. 11,436).

[95] C 1323 for iden. (Tr. 11,436).

> in that Section among three states only: of the first 7.5 million acre-feet—4.4 to California, 2.8 to Arizona, and .3 to Nevada; the balance to California and Arizona equally." (Rep. 174)

The Master then verifies this interpretation of the statutory language by reference to the legislative history (Rep. 174), discussed previously (Ariz. Op. Br. 61-67; pp. 62-67, *supra*).

California finds inconsistency in the Master's conclusion that the §4(a) references to the Compact are employed otherwise than in the Compact sense and urges that other references to that instrument in §§6, 8, 12, 13 and 19 are employed in the Compact sense (Cal. Op. Br. 102). There is good reason for the distinction. These last mentioned sections were intended to preserve inviolate the Compact's *interbasin* apportionment. They have nothing whatever to do with the Lower Basin *interstate* apportionment established by §4(a).

Nor is there inconsistency between the Project Act and the Compact, as California claims (Cal. Op. Br. 104-05). There can be no inconsistency between these two instruments which deal with two different subject matters and are designed to accomplish two different ends. Thus the Compact made only an *interbasin* allocation of water. The Project Act is concerned with an *interstate* allocation of water in the Lower Basin. The fact, if it be a fact,[96] that Congress in the Project Act used Compact terminology in a sense different from that of the Compact's negotiators does not render the two instruments inconsistent or contradictory.

California also questions the Master's holding that "the water to a portion of which California is limited by Section 4(a) is that part of the mainstream which consists of Lake

[96] Arizona does not agree with the Master's construction of the Compact (see Ariz. Op. Br. 72-81).

Mead and the River below" (Rep. 183). It is argued that the Master is wrong because plans to divert river water above Lake Mead for use in Arizona and California have been considered both before passage of the Project Act and from time to time afterwards down to the present day; and California questions that Congress would have restricted the operation of Project Act §§4(a) and 5 to Lake Mead and below in view of these contemplated diversions above Lake Mead (Cal. Op. Br. 124-27).

To this there are several answers. Congress has exercised its dominant servitude over all water in the main stream, whether that water is delivered at Lee Ferry or constitutes inflow which reaches the main stream between Lake Mead and Lee Ferry; hence any diversion and use of water from the main stream between Lee Ferry and Lake Mead, if made without the consent of Congress, would by necessary implication violate the Project Act (see pp. 156-58, *infra*).

Moreover, the Project Act authorized the Secretary of the Interior "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River . . . adequate to create a storage reservoir . . . and a main canal," and it specified that the dam site was to be either "at Black Canyon or Boulder Canyon" (Project Act §1). The California limitation includes "all uses under contracts made under the provisions of this Act" (§4(a)), and the Secretary is authorized "to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon" (§5). The authority conferred on the Secretary by Congress, as the Master observed, specifically applies "only to water in Lake Mead and to water released therefrom. Also Sections 6 and 8 of the Project Act apply in terms to water controlled by the United States by means of Hoover Dam" (Rep. 183).

It is a fact that Senator Cameron of Arizona opposed Black Canyon and Boulder Canyon as alternative sites for the proposed dam and reservoir and urged the adoption of a high dam at Bridge Canyon (Cal. Op. Br. 124-25). But Congress rejected this suggestion when it enacted the Project Act. In so doing Congress fully realized that no projects for the diversion of water from the main stream above the authorized dam and reservoir could be made without congressional approval and consent. This is of course true of the proposed Marble Canyon diversion, which California pretends to view with such alarm.

Therefore, although diversions above the optional dam sites specified by the Project Act were favored by some when the bill was pending enactment, since Congress in enacting the Project Act appropriated the water supply let down from the Upper Basin to improve navigation and for related purposes, including the generation of power to finance the project, Congress assumed no risk in restricting the Project Act interstate apportionment to water in Lake Mead and in the main stream below.

As a final argument in support of the claim that the congressional reference to the Article III(a) apportionment must be construed literally in the Compact sense, California says the terms of the California limitation set forth in §4(a) of the Project Act constituted "an offer to California", which she "accepted . . . by enacting the limitation" and by ratifying the Compact, and that this "offer" and "acceptance" "established a statutory compact" (Cal. Op. Br. 128-37). California further states that this was an offer to the seven basin states to enter into an agreement, which did not become effective until accepted by those states. "Each state," California argues, "had to interpret the offer in order to decide whether to accept it" (Cal. Op. Br. 130).

The terms of the §4(a) limitation do not constitute a contractual offer but a condition precedent laid down by Congress for the effectiveness of the Project Act. "The meaning of the condition is necessarily determined by the congressional intent, just as the interpretation of other provisions of the statute is governed by such intent" (Rep. 181).

It is not the subjective construction put upon the terms of the limitation, whether by California or any of the six "beneficiary" states, which governs; it is the meaning of the words used in the historical and legislative context in which Congress employed them that is determinative. Otherwise, there would be as many individual "statutory compacts" as there are individual state interpretations of the alleged "offer" made by §4(a). Since California and Arizona differ radically as to the meaning of the "offer", there would be at least two "statutory compacts", *i.e.*, the United States-California compact and the United States-Arizona compact.

Moreover, the United States asserts that "the Project Act was made dependent on a modification of the Compact and California's adoption of a Limitation Act accepting a 4,400,000 acre-foot limitation on its use of the initial 7,500,000 acre-feet of mainstream water available annually for the Lower Basin" (U. S. Op. Br. 10). This construction of the §4(a) "offer" directly contradicts California's interpretation of the very same "offer". It is obvious that adoption of the California theory of the "consensual nature of the limitation" would lead inevitably into a morass of utter confusion.

Further, the legislative history—the hearings before the Senate and House Committees on the various Swing-Johnson bills and the debates in the House and Senate upon those

measures—conclusively establish that it was main stream and main stream water only that Congress was dealing with in the California limitation (see Ariz. Op. Br. 61-67; pp. 62-67, *supra*).

III

Contrary to California's contention, the Secretary's water delivery contracts reflect an administrative recognition that the Project Act established a formula for the interstate allocation of main stream water to which the contracts should conform.[97]

A. The Contractual Pattern

The Secretary's water delivery contracts simply cannot be read objectively without observing that they were drawn in an effort to conform with the formula or allocation scheme established by §§4(a) and 5 of the Project Act. From what source has the Secretary derived the quantities of water specified in his contracts other than these provisions of the statute? What other origin is there for the "maximum of 2,800,000 acre-feet" specified in the Arizona contract? Or the "total quantity not to exceed . . . 300,000 . . . acre-feet" in the Nevada supplemental contract? Or the 4,400,000 acre-feet constituting the first four intrastate priorities recited in each of the contracts with California agencies? Surely it cannot be mere coincidence that the total of 3.1 million acre-feet contracted for in the Arizona and Nevada contracts, together with the 4.4 million acre-feet constituting the first four priorities specified in the California contracts, equals precisely the aggregate of 7.5 million acre-feet dealt with in §4(a). Nor can it be merely

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[97] This point is directed principally to a refutation of Part Four of California's Opening Brief, pages 195-231.

by chance that the Arizona contract provides for delivery of one-half of surplus, even though the contract purports to recognize rights of Nevada, New Mexico and Utah in that surplus.[98]

Despite all this California insists that she does not perceive in the water delivery contracts the reflection of any allocation scheme whatever.

B. California's Analysis of the Contracts

California would have the Court infer from the fact that the Secretary did not write out "the major elements of [the] . . . scheme on paper, in one place, formally promulgated" that the scheme itself does not exist (Cal. Op. Br. 196). There is nothing in the Project Act requiring the Secretary to commit the allocation scheme to writing in one instrument. Nor does the fact that his general regulations do not make an apportionment of water indicate "his lack of authority to make an interstate allocation for consumptive use" (Cal. Op. Br. 198). It was not the intent of Congress that the Secretary effectuate its allocation scheme by regulation but by contract. The Secretary's regulations recognize this and indeed implement the allocation scheme of the Project Act. They specifically provide that:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to Paragraph a of Section 4 of the Boulder Canyon Project Act."[99]

Thus the Secretary's general regulations incorporate by reference the formula established by §4(a).

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[98] See Ariz. Op. Br. 99-104.

[99] General Regulations Governing Contracts for the Storage of Water in Boulder Canyon Reservoir, and the Delivery Thereof §4, Ariz. Op. Br. Appendix D, p. 29a.

From the fact that §5 contains detailed specifications governing the Secretary's contracts for electrical energy, but does not similarly spell out the details of his contracts for the storage and delivery of water, California argues that, while the Secretary was empowered to make an interstate apportionment of power, he was not authorized to make an interstate allocation of water (Cal. Op. Br. 196-200). But §5, by providing that

> "Contracts respecting water for irrigation and domestic uses shall . . . conform to paragraph (a) of Section 4 of this Act"

subjected the Secretary's water delivery contracts to the formula of §4(a) and thereby established standards for his guidance in making those contracts.

No such formula for the allocation of electrical energy is to be found in the Project Act elsewhere than in §5. Hence it is that §5 provides:

> "General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, *and in making such contracts the following shall govern. . . .*" [100]

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[100] By excising portions from the quotation of §5 California creates the misleading impression that the first paragraph of that section applies only to the Secretary's authority to promulgate regulations governing his water delivery contracts—which California says are "permissive"—and does not apply to his electrical energy regulations, which California says are mandatory. The first paragraph applies in express terms to *both* species of regulations:

> "The secretary . . . is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, *and generation of electrical energy and delivery at the switch board to States. . . .*"

The italicized provisions have been deleted in the California version (Cal. Op. Br. 197).

Then follow in subsections (a) through (d) the detailed provisions that power contracts are required to contain.

California seems to argue that because each one of the Secretary's several water delivery contracts, considered separately, does not purport to make a complete apportionment of water among the three Lower Basin states, no interstate allocation of water is effectuated by all the contracts taken together (Cal. Op. Br. 200). But the interstate allocation made by the statute is put into effect by the contracts *collectively*. Each contract makes the delivery of the quantity of water specified in it "subject to availability thereof for use in . . . [the contracting state or agency] under the Colorado River Compact and the Boulder Canyon Project Act", *i.e.*, subject to its availability under the §4 (a) formula (*e.g.*, Palo Verde Irrigation District Contract Article 6, Ariz. Op. Br. Appendix H, pp. 60a-61a).

Concededly, the water delivery contracts which the Secretary has made do not conform precisely with the formula prescribed by the Project Act. The Master holds that exact conformity with the apportionment proposed by Congress is not required—that substantial compliance is enough (Rep. 162-63). This gives rise to one of Arizona's differences with the Master. We contend that insofar as the contracts do not conform to the formula they are outside the Secretary's delegated authority and are void (Ariz. Op. Br. 83-105).

But it is a far different thing and fallacious to conclude, as California does, that because the Secretary's contracts do not precisely conform to the statutory allocation, the allocation scheme itself is non-existent (Cal. Op. Br. 200-06). Following this reasoning, there would be no congressional standard for the administrative supplementation of any statute which could not be defeated simply by the failure of

the administrator to comply with the standard prescribed. In short, one does not look to the contracts to see if the formula exists; one looks to the formula to see if the contracts are valid.

Thus, the Master properly determines the validity of the provisions of the Arizona and Nevada contracts by applying to them the Project Act authorization for the interstate allocation of water, as he construes it. Having found that the allocation proposed by Congress is not mandatory in the sense that it requires precise contractual conformity (Rep. 162-63), he upholds those contractual departures which he regards as unsubstantial (Rep. 202). On the other hand, when he finds that provisions of the Arizona and Nevada contracts violate the mandatory requirements of Congress, *e.g.*, that they shall be for permanent service (§5), he refuses to sustain their validity (Rep. 237-47).

California points to her own water delivery contracts as proof that no allocation scheme exists. Thus she states that the California contracts provide for the delivery "of the aggregate quantity of water sufficient to satisfy 5,362,000 acre-feet of consumptive use annually . . ."—they do not require delivery "to California [of] 4.4 million acre-feet of consumptive use and one-half of any excess or surplus waters from the 'mainstream' " (Cal. Op. Br. 203). However, the intrastate priorities fixed by the Seven-Party Agreement and incorporated into each California contract show on their face a recognition of, and an attempt to conform to, that integral part of the allocation scheme constituted by the California limitation prescribed by §4(a). The composition of the aggregate of 5,362,000 acre-feet contracted for in the California contracts and the way in which that aggregate is divided among those intrastate priorities is set forth in the Appendix to California's Opening Brief:

Priority No.[101]	Agency and Description	Annual Quantity in Acre-feet (Beneficial Consumptive Use)	
1	Palo Verde Irrigation District—104,500 acres in and adjoining existing district		
2	Yuma Project (California division)—not exceeding 25,000 acres		
3	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal	3,850,000	4,400,000
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa		
4	Metropolitan Water District and/or City of Los Angeles	550,000	
5	(a) Metropolitan Water District and/or City of Los Angeles	550,000	
	(b) City and/or County of San Diego	112,000	
6	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal	300,000	
	(b) Palo Verde Irrigation District — 16,000 acres of adjoining mesa		
		5,362,000	
7	Agricultural use in the Colorado River Basin in California, as designated in Map 23000, U. S. Bureau of Reclamation	All remaining water available for use in California	

The total of the first four priorities is exactly 4,400,000 acre-feet. The total of priorities numbered 4 and 5(a) is 1,100,000 acre-feet. Since these two priorities are in favor of the same agency, Metropolitan Water District "and/or" City of Los Angeles, the question naturally arises: Why was the total of 1,100,000 acre-feet split into two distinct priorities of 550,000 acre-feet each? And why was the first

[101] Cal. Op. Br. A3 (footnotes omitted).

[102] Our addition.

priority given precedence over the second? The reason is self-evident: The first four priorities totaling 4.4 million acre-feet (including the first priority of 550,000 acre-feet to Metropolitan Water District "and/or" City of Los Angeles) are to be satisfied out of the 4.4 million acre-feet dealt with in §4(a) of the Project Act, and the balance of the total of 5,362,000 acre-feet, or 962,000 acre-feet, is to be satisfied out of the surplus dealt with in §4(a) as part of the California limitation.

As the Master said:

> "These contracts mean that the Secretary is required to apportion to California users, in accordance with the system of priorities stated in all of the California contracts, 4.4 million acre-feet of the first 7.5 million acre-feet of consumptive use of water from the mainstream in one year, plus one-half of any additional uses apportioned in that year, until a maximum of 5,362,000 acre-feet per annum is consumed in California." (Rep. 222)

And he added:

> "The 5,362,000 acre-feet for which California users have contracted must be satisfied as follows: 4,400,000 acre-feet out of the first 7,500,000 acre-feet; and 962,000 acre-feet out of surplus." (Rep. 224 note 85)

Thus, the California contracts fit into the general allocation scheme even more completely than do the contracts with Arizona and Nevada.[103]

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[103] California also seeks to avoid this contractual conformity with the allocation scheme by contending that the annual quantity of 5,362,000 acre-feet "includes water sufficient to supply Indians, who neither have nor need contracts . . . and non-Indians, on the Reservation Division of the Yuma Project in California, who hold only individual water right applications . . .; it does not include water for the other federal reservations in California" (Cal.

California next asserts that the circumstances surrounding the execution of the water delivery contracts belie the existence of an allocation scheme. It is said, first, that prior to the Metropolitan Water District contract (the first water delivery contract executed pursuant to the Project Act) Secretary of the Interior Wilbur "disclaimed any intention to deal with the allocation of lower basin waters" (Cal. Op. Br. 204) (footnote omitted).[104] California seeks to create the impression that this "disclaimer" was connected with the Metropolitan contract,[105] although the fact is to the contrary. The "disclaimer" is a telegram dated September 27, 1929 from Secretary Wilbur in response to a message from one Van Norden that he was then conferring in Los Angeles in an endeavor to get agreement between Arizona and California on a tri-state compact for the apportionment of Lower Basin water. It was in this connection that Secretary Wilbur responded:

> "We have endeavored to keep out of all controversy regarding allocation lower water basin (*sic*). Do not consider this our field. . . ."

In other words, the Secretary discreetly refused to intervene in any discussions looking toward a division of water by tri-state compact.

Op. Br. 203). The only federal use of Colorado River water within California at the time of the Seven-Party Agreement and the California water delivery contracts was that of the Yuma Indian Reservation, which is recognized and covered by the second priority of the Seven-Party Agreement, which priority also covers non-Indian uses on the Reservation Division of the Yuma Project (see p. 23, *supra*).

[104] California relies on her Exhibit 7553 for iden. (Tr. 2760). This is one of the documents included in California's Offer of Proof, which the Master rejected (Rep. 248-53).

[105] A 38 (Tr. 251).

Subsequent Secretaries of the Interior maintained a similar position of neutrality. They did not, as California asserts, disclaim "any intention to deal with the allocation of lower basin waters" (Cal. Op. Br. 204). In concluding water delivery contracts with California public agencies and with Nevada and Arizona, the Secretaries undertook to effectuate the allocation scheme of the Project Act. In every instance the allocation of water among the contractees was made subject to the legal "availability thereof for use . . . under the Colorado River Compact and the Boulder Canyon Project Act" (*e.g.*, Palo Verde Irrigation District Contract Article 6, Ariz. Op. Br. Appendix H, pp. 60a-61a). In this way successive Secretaries made their water delivery contracts without favoring any party in the continuing controversy as to the proper construction of the Compact and the Project Act.[106]

California also refers (Cal. Op. Br. 205) to the fact that the regulations promulgated by Secretary Wilbur in 1933 authorizing a water delivery contract with Arizona said nothing about excess or surplus and that these regulations were later revoked by Secretary Ickes. However, as we have previously noted (p. 86, *supra*), the Project Act did not intend the interstate allocation to be effectuated by the Secretary's regulations but by his *contracts*. While §4(a) made an interstate allocation of water, there was no right to the delivery of water without a contract pursuant to §5.

California next calls attention to the first Nevada contract of 1942, calling for the delivery of up to 100,000 acre-feet of water per annum and asks: "Did this forever

[106] This is how the Special Master read the documents cited by California (Cal. Op. Br. 204 notes 1, 2), which were included in her rejected Offer of Proof.

fix the proportion in which Nevada could share 'mainstream' water?" (Cal. Op. Br. 205) We respond: Although the Secretary's contracts may not exceed the maximum allocation specified by §4(a) in the case of a particular state, nothing requires the Secretary to operate on an "all at once or nothing" basis or prevents him from entering into a contract for a portion of the maximum allocation, as he did in the case of the first Nevada contract. In fact, the first Nevada contract expressly provided in Article 5(a) that "the right of the State to contract for the delivery to it from storage in Lake Mead of additional water is not limited by this contract" (Ariz. Op. Br. Appendix F, p. 46a).

Along the same line, California argues that, while annual delivery of an aggregate of 5,362,000 acre-feet is called for by the contracts with California agencies, the contracts do not themselves add up to that figure, which includes the right of the Yuma Project for which "no contract has ever been written". But California concedes that the Yuma Project is recognized in the contracts as "entitled to a second California priority" (Cal. Op. Br. 205). This priority is for water "for beneficial use not exceeding a gross area of 25,000 acres of land located in said project in California", and it is to be satisfied out of the aggregate of "3,850,000 acre-feet of water per annum" allotted to the first three priorities of the Seven-Party Agreement (*e. g.*, Palo Verde Irrigation District Contract Article 6, Ariz. Op. Br. Appendix H, p. 61a).

As we have said earlier, all the water delivery contracts are uniformly subject to the legal availability, under the Compact and the Project Act, of the water contracted for. This means that should it develop that the Secretary has contracted for either more or less water

than authorized, his contracts by their very terms are to that extent violative of the Project Act.[107] Whether or not this has in fact occurred depends on how this Court construes the Project Act.

California takes issue with the Master's conclusion that "the contractual allocation scheme also determines each state's apportionment in the event of insufficient mainstream water to supply 7.5 million acre-feet of consumptive use in one year. In such event, the allocation scheme requires each state to share the burden of the shortage ratably" (Rep. 233). California denies that if there is a contractual allocation scheme, it controls this issue, or, if it does control, "that it adopts any principles other than those of priority and equitable apportionment" (Cal. Op. Br. 211).

While it is true that in providing for the allocation of water in §4(a) Congress did not expressly take shortages

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[107] For example, the Assistant Chief Counsel for the Bureau of Reclamation, in a memorandum dated January 29, 1944 addressed to the Solicitor of the Department of the Interior, analysed Secretary Wilbur's contracts with California agencies and concluded:

> "It will be noted that the first four priorities total 4,400,000 acre feet, the exact amount California agreed by act of its legislature to accept from the water apportioned to the lower basin by Article III(a) of the compact. The total of the fifth and sixth priorities is 962,000 acre feet which obviously must come out of the 'one-half of any excess or surplus unapportioned by said compact'.
>
> "I have no satisfactory explanation for the reasons which prompted Secretary Wilbur to execute contracts for 962,000 acre feet of water in excess of 4,400,000 acre feet, the amount California is limited to by its act of 1929. It is abundantly clear, however, by the terms of the contracts, and the priority tables which are a part of those contracts, that the Secretary is required to deliver only 4,400,000 acre feet to California, and that he can deliver the excess 962,000 acre feet only from excess or surplus waters unapportioned by the compact after Arizona and Nevada have had delivered to them the apportioned water to which they are entitled under the compact." C 7603 for iden., part of the California Offer of Proof.

into account, it is nevertheless implicit in the basic purpose to make an equitable division of water among the three Lower Basin states that Congress intended shortages to be borne by those states ratably.[108]

Congress specified what it considered to be an equitable division of the first 7,500,000 acre-feet per annum available for use in the Lower Basin: Not more than 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona and 300,000 acre-feet to Nevada. Congress made no express provision for the division of water among the three states should less than 7,500,000 acre-feet be available in any one year. But in the absence of any provision to the contrary, Congress must be presumed to have intended that a lesser quantity than 7,500,000 acre-feet should be divided among the states in the same proportions as those which it specified for the division of the 7,500,000 acre-feet. Hence, in prorating shortages, the Master is merely carrying out the equitable division of water which Congress must be presumed to have intended.

C. Prior Appropriation Not the Basis of Water Delivery Contracts

In concluding this point, it should be emphasized that not one of the water delivery contracts contains internal evidence that it was drawn in recognition of or in an attempt to satisfy any appropriative right. The deliveries of water contracted for are not related in any respect to

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[108] If a literal construction of §4(a) of the Project Act is mandatory, as California on occasion contends, such a construction would logically require the conclusion that California bears all shortages. Section 4(a) limits California to the use of "not to exceed" 4,400,000 acre-feet annually and "not to exceed" one-half of the surplus. Arizona and Nevada are each given, respectively, a firm 2,800,000 and 300,000 acre-feet of water annually "for exclusive use in perpetuity" and Arizona is given the firm right to use "annually one half of the excess or surplus waters . . . ."

appropriative rights. The quantities to be delivered are clearly derived from the allocation scheme set forth in §4(a) of the Project Act. The Secretary of the Interior on the one hand, and the contracting states and agencies, on the other, freely and repeatedly entered into contracts which by their very terms bear the impress of the statutory pattern for the interstate allocation of water.[109]

There is no evidence in the record nor is there a single fact which the Court may judicially notice which gives the slightest indication that releases from Lake Mead have ever been made with a view to the satisfaction of prior appropriative rights. The record is clear that no water user, whether in California or in any other state, has sought the release of stored water to satisfy his alleged appropriative rights. No state and no public agency of a state has asserted such a right. For his part, the Secretary has never considered it either necessary or proper to ascertain any claims of right asserted on the basis of prior appropriation in determining the quantity of water which he will deliver to or within the states of the Lower Basin.[110]

A more conclusive administrative and practical construction of a statute could hardly be found.

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[109] As California says: "No one has suggested that the California agencies, during the period 1930-1934 when the contracts were executed, entered into those contracts involuntarily" (Cal. Op. Br. 196 note 4).

[110] See Ariz. Op. Br. 46.

IV

Contrary to California's contentions, it is neither relevant nor necessary to determine water supply.[111]

A. California's Attempt to Disguise the Issue

California, after nine years of litigation, confronted with the Master's Report and Recommended Decree which reject all her major claims, now questions the jurisdiction of the Court to hear and determine the controversy.[112] California would accomplish the grotesque result of a dismissal for want of jurisdiction by injecting a false issue into the case and then insisting that the Court's jurisdiction depends upon the determination of that issue (Cal. Op. Br. 235).

The California position seems to be that no controversy over water rights is justiciable unless there is not enough water physically present in the stream to satisfy the claims asserted against it and that here the water supply available to the Lower Basin is presently sufficient to satisfy all such claims. California further asserts that the only way in which it can be demonstrated that the future water supply available to the Lower Basin will be less than the claims asserted against it is by ascertaining the rate and extent by which the increased uses in the Upper Basin will

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[111] This point is directed to a refutation of Part Five of California's Opening Brief, pages 232-78.

[112] California raised no question as to jurisdiction until August 31, 1960, after the conclusion of oral argument on the comments of the parties to the Master's Draft Report. She then made a motion to reopen the trial for the taking of additional evidence relating to future water supply and at the conclusion of her statement in support of the motion suggested for the first time that if there is sufficient dependable supply to satisfy the demands of all the Lower Basin states it is "impossible . . . to find a justiciable case or controversy" (Cal. Op. Br. A61).

deplete the supply available to the Lower Basin. Accordingly, it is contended that in the absence of a determination of the rate and extent of Upper Basin uses there is nothing to show the existence of a justiciable controversy (Cal. Op. Br. 240).

California refers to the Master's conclusion that there is nothing to show that the Upper Basin depletion will exceed 4.8 million acre-feet per annum and that "existing California uses are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed" (Rep. 115). She argues that, if these conclusions of the Master are correct, they negative the existence of a justiciable controversy, because they amount to a determination that the quantity of water available to the Lower Basin will always exceed the demands made against it (Cal. Op. Br. 240).

It is further contended by California that the Master's holding that the Compact merely places a ceiling on appropriative rights and is otherwise irrelevant to the issues in this litigation renders this case non-justiciable (Cal. Op. Br. 240), since this precludes a determination of the rights of the Upper Basin to deplete the flow of the stream and that in the absence of such a determination it cannot be shown that Lower Basin claims will exceed the Lower Basin water supply.[113]

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[113] If, as California claims, the "classic test of a justiciable controversy over water rights" is that there is not enough water to satisfy the claims asserted against it and that test is applicable to the present litigation, then a finding that at some future date, perhaps one hundred years hence, the water supply will not be adequate to satisfy all Lower Basin claims would not meet the test and an adjudication of the claims asserted by the parties to this case must be postponed until such time as the available supply proves insufficient to satisfy them.

B. The Real and Justiciable Issue: The Legal Availability of Water

Even assuming that the "classic test of a justiciable controversy over water rights" is that there is not enough water to satisfy all claims made against the available water supply, the justiciability of the case at bar is not to be determined by application of this test. The "classic test" has been laid down and applied in litigation between states over water rights in interstate streams, when the claims of the contending states were required to be determined by the application of principles of equitable apportionment. But, as the Special Master notes, "this case involves a statutory, not an equitable, apportionment and that statutory apportionment applies irrespective of supply" (Rep. 100). We are not here concerned with standards of justiciability governing equitable apportionment cases. As the Master clearly demonstates, the claims of Arizona, California and Nevada in this litigation are governed by the Project Act, the Limitation Act and the water delivery contracts, and the doctrine of equitable apportionment is irrelevant to the determination of these claims (Rep. 100, 138).

The basic issues are stated by the United States in its petition for intervention, which presents a case in the nature of interpleader, over which this Court has exercised jurisdiction in the past. *Texas* v. *Florida,* 306 U. S. 398 (1939). The United States alleges in Paragraph XX of its petition:

> "The contracts which the Secretary of the Interior entered into as set forth in the preceding paragraphs XV through XIX provide for the delivery annually of 8,462,000 acre-feet of water stored at Hoover Dam. Contained in each of the contracts is a provision that the delivery of water by the United States will be from available storage, all to be in accordance with the Colorado River Compact and the Boulder Canyon Project Act. Because of the incorporation in these

> contracts of the limitations and provisions of the Boulder Canyon Project Act and the Colorado River Compact, it is essential that the United States know the proper interpretation of those provisions of the Act last mentioned and the Compact which are in dispute between the parties. As more particularly alleged in paragraphs XXXI through XXXIX below, Arizona and the defendants are in controversy as to the meaning of the limiting provisions of the Boulder Canyon Project Act and the Colorado River Compact, and the United States is therefore uncertain as to how much water it may properly deliver annually under the aforesaid contracts."[114]

There is thus a present clash of interests between the parties which constitutes a "case or controversy", as defined by this Court. *Evers* v. *Dwyer,* 358 U. S. 202 (1958); *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227 (1937).

The Special Master's Report carefully reviews the "compelling reasons which justify an adjudication of the various claims presented in this case to the water flowing in the Colorado River" (Rep. 130; see Rep. 129-35). He demonstrates that the physical presence of water in the Lower Basin does not make it available for use in Arizona, absent a determination of her legal right to utilize that water; and that without such an adjudication of her rights, Arizona is for all practical purposes as effectively pre-

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[114] The prayer of the petition is in part:

"WHEREFORE, the United States of America respectfully prays this Court

"(1) To adjudge and declare the validity of the treaties and international conventions, compacts, laws, contracts and federal documents to which reference has been made throughout this Petition and the pleadings of the parties;

"(2) To interpret, construe, and resolve the conflicts which have arisen among the parties to this proceeding in connection with the laws, contracts, and documents referred to above. . . ."

cluded from further utilization of this resource as if it were being entirely diverted for use in California. In short, a refusal to determine Arizona's rights would be equivalent to a decision in favor of California (Rep. 133-35). This situation exists regardless of the amount of the depletions in the Upper Basin and irrespective of the water supply available for use in the Lower Basin. The reasoning of the Special Master is unanswerable and California makes no effort to answer it. Instead, she seeks to escape the conclusions which it compels by resort to a test applied in equitable apportionment cases but irrelevant to this litigation, governed by a statutory apportionment.

C. Irrelevance of Future Water Supply to the Question of Congressional Intent

California contends that a prediction in this year 1961 of future water supply in the year 2060 is essential to determine the intent of Congress in the year 1928 in enacting the Project Act and in imposing the perpetual limitation on California's use of water. She argues that Congress never intended to deprive the California defendants, and particularly the Metropolitan Water District, which serves the City of Los Angeles and the surrounding vicinity, of sufficient water to meet their needs (Cal. Op. Br. 236-39).

However, the Master held:

> "... But the supply of water which will actually be available in the future for any state or any project does not provide the slightest insight into the intention of Congress when it passed the act in 1928. Obviously the relevant factor in determining Congressional intention is the supply of mainstream water which Congress thought would be available at the time it enacted the Project Act, not the supply which will in fact be available after 1960. ..." (Rep. 101)

California cites an isolated statement by Senator Hayden to the effect that, under the "set-up" which California's Senator Johnson had described to the Senate, the Project Act provided that "a million acre-feet may be used in the vicinity of Los Angeles...." California adds: "This Congressional purpose the Master would frustrate" (Cal. Op. Br. 238).

However, the complete Senate discussion of California's claimed water rights and demands, of which the Hayden excerpt is an isolated part, and particularly the extensive inventory of these asserted rights and needs which Senator Johnson presented to the Senate, compels the conclusion that California fully realized in 1928 that the maximum of 4,400,000 acre-feet per annum stipulated in the California limitation would leave her with less main stream water than she claimed was necessary to satisfy her asserted ultimate requirements and that she deliberately assumed the calculated risk that there would be enough surplus water to supply the deficiency.

Senator Johnson prefaced his list of California's water rights and needs with the urgent request that, in dividing water among the Lower Basin states, Congress should:

> "Give to Arizona all the water that it is within the realm of possibility that Arizona may use; but do not take from the State of California, which is practically using it to-day, and which within a brief period will put infinitely more water to use, the rights that are hers, through an unjust or an unfair division of that water."[115]

Even though Senator Johnson admitted that California's then existing uses aggregated only 2,159,100 acre-feet[116] per

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[115] 70 Cong. Rec. 234 (1928).

[116] *Ibid.*

Arizona's Reply (par. 28) to the California Answer (par. 28 (b)) did not, as California states, "concede that appropriators in

annum, he then proceeded to state claims of right based on paper filings and the need for future uses as follows:

Areas		Acre-Feet Per Annum[117]	
Imperial Valley		3,115,000	including existing-uses of 2,159,100
Yuma Project		64,500	
Palo Verde Valley		234,000	
City of Los Angeles		1,095,000	
		4,508,700	
Coachella Valley	72,000 acres		
Palo Verde Mesa	18,000 "		
Chucawala	44,000 "		
	134,000 acres	582,800[118]	
		5,091,500	
Claimed for waste in Imperial Valley		918,000	

California beneficially consumed at least 2,900,000 acre-feet annually" from the natural or unregulated flow of the main stream prior to June 25, 1929 (Cal. Op. Br. 262). The averments of the Arizona Reply are nothing more than argumentative allegations that as of June 25, 1929 there were in operation California projects capable of serving 473,500 acres which, if irrigated, would under existing conditions deplete the flow of the stream by about 2,902,000 acre-feet per annum. It is further alleged that any appropriative rights in California were merged in the California water delivery contracts and controlled by the Compact, the Project Act and the Limitation Act. These allegations cannot properly be construed as conceding the extent either of beneficial consumptive uses in California or of established rights in the natural flow in California, whether acquired by appropriation or otherwise.

Moreover, as the Special Master held in denying Arizona's motion to amend its pleadings (so as, among other things, to insert in her Reply a denial of the above allegations in the California Answer):

> "In a litigation of this character it would be strange to hold the parties strictly to their pleadings. See *Kansas* v. *Colorado,* 185 U. S. 125 (1902). . . ."

Clearly the Master considered the issue as to the existence and extent of water rights as of June 25, 1929 to be open for trial and decision (see Recommended Decree, Article VI, Rep. 359).

[117] 70 Cong. Rec. 236 (1928).

[118] 134,000 acres times 4.4 acre-feet per acre asserted by Senator Johnson as the volume of water necessary per acre.

Senator Johnson then proceeded to claim "a total aggregate now appropriated and with rights fully established of 6,009,500 acre-feet per year".[119]

Referring to California's position at the Governors' Conference of 1927, Senator Johnson stated:

> "When California offered to make a compact on a basis of 4,600,000 acre-feet per year plus one-half of the surplus excess and allocated water, it was well recognized that California would be perhaps one and one-half million acre-feet short of its requirements unless a large amount of the surplus water should be available. *In other words, California was willing to take a chance on obtaining surplus water and on the further chance that Arizona would not use the water allocated to her. She would, indeed, be surrendering established rights and substituting therefor simply a chance to obtain water.*"[120]

When California accepted the congressional compromise lowering the limitation provision from 4,600,000 acre-feet to 4,400,000, she did so knowing full well that she was increasing her risk. It is against this background that Senator Johnson's remarks, made near the close of the debate on this phase of the Project Act, emerge in their true significance:

> "I say to the gentlemen from Arizona, 'You say that California shall have but 4,200,000 acre-feet.' We say, and the testimony of Mr. Francis Wilson is the best upon that subject, that the irreducible minimum of the State of California is 4,600,000 feet. You say to us, 'You must bind your people for all time in the future never to go beyond it by this amendment.' The amendment does not divide the

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[119] 70 Cong. Rec. 237 (1928).

[120] 70 Cong. Rec. 237 (1928).

> water between Arizona and California. It fixes a maximum amount beyond which California can not go. I say to the gentlemen from Arizona, though I think it is a wicked amendment, though I think it is an amendment that harnesses the State of California and its people as they never should be harnessed in the days to come, though I believe it to be an injustice against those who reside in California and in its southern part to-day and those who may reside there in the future—I say to you that if 200,000 acre-feet of water will settle this controversy with them, whatever the wrong, whatever the injustice, whatever may be the yoke that is put upon our people, I will take that as a compromise and a settlement of the differences that exist."[121]

It is also clear that the maximum quantity fixed by the California limitation was not designed by Congress to insure the City of Los Angeles or any particular area of the State of California of ample water to supply its alleged ultimate needs.

Senator Hayden categorically denied the validity of the alleged appropriation for Los Angeles of 1,095,000 acre-feet per year stated by Senator Johnson.[122] He also questioned that Los Angeles would require such an amount of water:

> "I shall concede every figure that the Senator from California [Mr. Johnson] has placed in the Record with respect to irrigation uses in California; every figure of that kind may be conceded; but I do not concede that the City of Los Angeles and the municipalities in Southern California who are asking for 1,095,000 acre-feet of water, need that much water or will need it for a hundred years."[123]

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[121] 70 Cong. Rec. 385 (1928), Ariz. Legis. Hist. 92.

[122] 70 Cong. Rec. 239 (1928).

[123] 70 Cong. Rec. 383 (1928).

This is undoubtedly the same "million acre-feet" the use of which California asserts that Senator Hayden and Congress assured to the "vicinity of Los Angeles" in the Project Act.

That no such assurance was intended or given becomes even clearer from the discussion of Los Angeles' alleged rights. Senator Walsh of Montana stated he understood it to be

> "the contention of the Senator from California [Mr. Johnson] that the hands of the Government are tied; that if we shall erect a dam there at all we shall have to give enough water out of that dam to the city of Los Angeles to satisfy its appropriation." [124]

But Senator Hayden answered:

> "But I am quite sure, if I understood correctly the Senator from California, that he qualified that statement by saying that, after all, the Secretary of the Interior could allow the City of Los Angeles to have such quantity of water as might be determined by contract.
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> * * * * * *
>
> "So far as the other States of the Colorado River Basin are concerned, *whatever use is made of the water by the State of California within the limits allowed to that State* by interstate agreement they have no concern whatever. The other States are not interested as to whether it is used for one purpose or another. The Colorado River compact itself recognizes that domestic use is the highest use. Congress will approve the Colorado River compact if this bill is passed. *Therefore the Secretary of the Interior will naturally decide as between applicants, one who desires to use the water for potable purposes*

[124] 70 Cong. Rec. 169 (1928).

> *in the city and another who desires to use it for irrigation, if there is not enough water to go around, that the city shall have the preference.*
>
> "Mr. Phipps. It seems to me that the division of the available water between the States through mutual understanding and agreement will settle this question, and there will be no difficulty in allotting it to the various applicants who may desire to use it."[125]

The fact that the City of Los Angeles, like all other users of water from the Colorado River in the State of California, was to satisfy its needs out of the State's apportionment under the Project Act was not only thus recognized by the Senate, but also by the California defendants themselves in the Seven-Party Agreement.

California quotes the Master:

> " 'Obviously the relevant factor in determining Congressional intention is the supply of mainstream water which Congress thought would be available at the time it enacted the Project Act, not the supply which will in fact be available after 1960.' " (Cal. Op. Br. 236, quoting from Rep. 101)

She proceeds to attack this conclusion by quoting a remark made by Senator Hayden in the course of debate to the effect that "under the set up to which the senior Senator from California has so often referred there will be available at Boulder Dam on the average about nine and one-half million acre-feet of water. . . ." Senator Hayden then roughly outlines the uses this amount will permit in the Lower Basin (Cal. Op. Br. 237). California says this demonstrates that the "supply at the site of Hoover Dam, of which Senator Hayden spoke, is very close to the determinations of flow at Hoover Dam by expert witnesses whose testimony the Master rejects" (Cal. Op. Br. 237).

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[125] 70 Cong. Rec. 169 (1928).

California again misrepresents the record. Senator Hayden's remarks, read in full,[126] clearly show that he was speaking in generalities of a *net* supply of water available to users, whereas the California estimates relate to *gross* inflow to Lake Mead. These remarks by a single Senator, made argumentatively in debate, stating his views as to probable useable supply, California construes as a congressional finding of fact as to future water supply in the Lower Basin. The argument scarcely warrants the dignity of an answer.

California then characterizes the Sibert Board 1928 Report[127] as "the most authoritative report relating to water supply before Congress when the Project Act was passed" (Cal. Op. Br. 239 note 3). But that report was not even regarded as reliable, much less authoritative, by many Congressmen, particularly Representative Swing, co-author of the Project Act. He criticized the "spirit of extreme conservatism that is manifest throughout the report" and its conclusions as "pessimistic . . . regarding water supply." He called its calculations of flows at Black Canyon "extreme" and "about 25 per cent lower than the indications of 26 years' measurement"; and he characterized the "low period" adopted by the board as "mythical". He complained that the board, "in addition to its extreme assumptions of low water, adds another assumption by concluding that rapid irrigation development is to be expected in the upper basin". Congressman Swing considered far more reliable the findings of the Colorado River Commission. He concluded "that the

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[126] 70 Cong. Rec. 464-65 (1928).

[127] C 202 (Tr. 7714) found in SM 4 for iden. (Tr. 255); 70 Cong. Rec. 280-85 (1928); H. R. Doc. No. 446, 70 Cong., 2d Sess. (1928).

'ultraconservative' findings of the Sibert Board will in all probability never be realized''.[128]

The conclusions of the Sibert Board were certainly not accepted by Senators Hayden,[129] Oddie (Nevada)[130] or Ashurst.[131] Senator Bratton also criticized the Sibert Report.[132]

The Special Master correctly presents the situation prevailing at the time the Project Act was enacted when he says:

> ''And, for all of the uncertainty over the actual supply of water in the Colorado River, one thing that is clear is that the estimates of supply in 1928 were uniformly and substantially larger than even the most optimistic estimates made today.'' (Rep. 101-02) (footnote omitted)

It was on the basis of these estimates and California's own appraisal of her then existing and potential water requirements that she acceded to the limitation upon her use of water imposed by the Project Act and confirmed by the Limitation Act (pp. 103-04, *supra*).

California in effect accuses the Master of failing ''to present the appropriate data'' as to the 1928 estimates of supply, thereby concealing, she says, ''what is, if the Master is correct, one of the century's most astonishing paradoxes''. She adds:

> ''Yet that act [the Project Act] generated an 'allocation scheme' under which most of the water which the Boulder Canyon Project makes available for

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[128] 70 Cong. Rec. 620 (1928).

[129] 70 Cong. Rec. 464-66 (1928).

[130] 70 Cong. Rec. 265 (1928).

[131] 70 Cong. Rec. 287 (1928).

[132] 70 Cong. Rec. 330-31 (1928).

use, over and above natural flow rights satisfied before Hoover Dam was built, goes to Arizona." (Cal. Op. Br. 239)

This statement is wholly unwarranted. Prior to the passage of the Project Act, California was admittedly diverting no more than 2,159,100 acre-feet per annum of Colorado River water (pp. 103-04, *supra*) and in many years exhausted the low flow of the river which at times was insufficient to irrigate the acreage then in cultivation. California desired to provide a water supply for the Los Angeles area and vicinity, but recognized that this could not be done in the absence of storage. She also realized that she could not enlarge the acreage then being irrigated from the Colorado River unless the flow was regulated.

Contrary to California's claim that most of the benefits under the Boulder Canyon Project Act accrue to Arizona, actually the bulk of these advantages have been conferred on California. The Project Act provided her with a previously unavailable water supply for the area now served by Metropolitan Water District and for Coachella Valley. Since construction of Hoover Dam she has been relieved of the annually recurring threat of floods in Imperial Valley and other areas; she has been provided with the All-American Canal which eliminated the international complications arising from the location of the old canal in Mexico; she has been provided with a supply of silt-free stored water in lieu of an undependable silt-laden natural flow; and she has been enabled to develop a great industrial economy from the use of billions of kilowatt hours of hydroelectric energy which has been made available to her at one of the lowest rates prevailing in the United States.

We can perceive no "paradox" in California's sponsorship and persistent pressure for passage of the Swing-

Johnson bills through four Congresses until the proposed legislation was finally enacted as the Project Act, which conferred upon her all these rich and lasting benefits.[133]

D. The Impossibility of a Reliable Determination of Water Supply

California states, directly contrary to the record, that "the experts were in close agreement as to the permanently dependable supply which will be available to the lower basin" (Cal. Op. Br. 245). She further states that the Master rejects these expert opinions and that he attempts to discredit the science of hydrology. She quotes him only in part as follows:

> "The science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question." (Rep. 103)

Neither California's assertion of harmony among the experts nor her characterization of the Master's holding is correct, as will be demonstrated immediately hereafter. To begin with, the actual holding of the Master as to the effectiveness of hydrology is:

> "The evidence in this case simply does not permit a prediction of future Lower Basin supply with that refined degree of accuracy necessary to show whether existing California uses can be satisfied from the percentage of future supply apportioned to California. On the contrary, the mass of evidence which has been presented shows only that the science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question." (Rep. 103)

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[133] See S. Rep. No. 592, 70th Cong., 1st Sess. 8, 16-27 (1928).

The Master did not discredit the science of hydrology nor did he hold that it was of no utility in planning projects. He merely concluded that in the unique situation presented here the application of established hydrological techniques would not permit a prediction of future water supply sufficiently accurate to be of any utility in this case.

California relies upon what she terms "standard techniques understood by all hydrologists and used in planning all great projects" (Cal. Op. Br. 242), which are stated to be set out in detail in California's Proposed Findings, part V (Cal. Op. Br. 244 note 1). California asserts that by these techniques it is possible to determine future water supply and that this Court has done so from far less satisfactory hydrological data in *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945), and *Wyoming* v. *Colorado,* 259 U. S. 419 (1922) (Cal. Op. Br. 242 and note 12).

Neither of these cases involved a situation like that presented here. Each one was an equitable apportionment case; neither one involved a statutory apportionment nor a "flexible formula" authorized by act of Congress for the allocation of varying supplies of water, as the Master found is established by the Project Act and the Secretary's water delivery contracts (Rep. 100-01). Nor was there involved in those cases an interbasin compact governing the delivery and release requirements of the upper reaches of the stream in favor of users of water in the lower. Furthermore, the water supply determinations in both of those cases were based upon then existing conditions and not upon conjecture as to hypothetical upstream depletions which might or might not occur at some unknown future date.

Acceptance of California's studies as to future water supply requires an assumption that the Secretary will accept and employ the criteria used in these studies or that the Court by its decree will direct him to do so, thereby

invading the province of Congress—the exclusive source of his authority. It also necessitates the assumption that suitable reservoir sites are available in the Upper Basin; that Congress will provide the effective storage capacity hypothesized by California's experts; that uses of water in the Upper Basin will result in a uniform depletion of the flow of the Colorado River of 6.5 million acre-feet each and every year; and that releases of water from the Upper Basin will not be less than 7.5 million acre-feet in any year, despite the flexibility accorded the Upper Basin under the delivery requirement of Article III(d) of the Compact.

Since there is a close interrelation between the inapplicability of the so-called "standard techniques", which California asserts are "used continuously by hydrologists" (Cal. Op. Br. 243-44), and California's claim that "the experts were in close agreement" (Cal. Op. Br. 245), we shall consider both of these together.

(1) California's Procedure (a)

> "Selection of a representative long-term period of stream flow including at least one complete climatological cycle of wet years and dry years, the dry period being the most severe and critical of record."[134]

There was a wide divergence of opinion among the expert witnesses as to whether the concept of climatological cycles had any value and, if cycles were to be used, which one should be selected.

California witness Leopold stated:

> "There is no such thing in hydrologic data as a clearly repeating cycle . . . . If there were cycles

[134] California's Proposed Finding 5A: 102, p. V-4.

one could use them for forecasting but since there are not cycles this is an impossibility."[135]

Arizona witness Erickson testified:

"Q. I would like to ask you this: whether on a river in which the annual flow varies, as it does on the Colorado River, as it has over the past 50 years, do you think it is possible to predict for the future, within, say half a million acre feet, what the average annual water supply is going to be over the next 50 years?

"A. No, sir; I don't believe so."[136]

California's witness Riter testified to the difficulties he and his colleagues had experienced in attempting to predict future run-off of the Colorado by the "cycle" method. Said he:

"I have been studying the Colorado River for a good many years. In 1929 I made some operational studies for Lake Mead. We thought we had the answer. Lake Mead was put into operation in 1935. In 1940 we had the horrible experience of a 10-year drought, 1931 to 1940. That gave us a new critical period to study; so we recalculated again in 1940 on the basis of a new critical period.

"In 1950 we studied the river again. At that time the 1931 to 1940 period was still controlling as a drought cycle. Now comes along 1958. We studied the river again in 1958, and we find that we now have a 27-year drought cycle, from 1930 to 1956; so that experiences like this keep a hydrologist very humble. *It makes him realize that he cannot predict.* He has to use all the information he can and then try to project himself into the future."[137]

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[135] Tr. 21,474.

[136] Tr. 18,747.

[137] Tr. 21,338-39.

In selecting a cycle for use in making studies of the Colorado River there was complete lack of agreement among the expert witnesses as to what the proper cycle should be. California's Stetson "selected the cycle 1909 through 1956".[138] Riter "included the period 1914 through 1956, inclusive".[139] California's Leopold "would surely choose the 61-year record" if he "were to make a water supply analysis on the Colorado at Lee Ferry".[140] Witness Hill used "various periods".[141] Arizona witness Erickson stated, "You take a different period, you get a different answer."[142]

In view of the obvious differences in flows for different periods and the divergence of opinion as to what is "a representative long-term period of stream flow"—a disagreement which existed even among California's own witnesses—it is impossible to justify California's statement that

> "the experts agree on all hydrologic factors within a few percentage points." (Cal. Op. Br. 243)

(2) California's Procedure (b)

> "Ascertainment of the maximum active reservoir capacity, surface and underground, which may be expected to be available to regulate the long-term flow."[143]

Patently, any "finding of fact" as to the amount of effective storage which will be available in the Upper Basin

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[138] Tr. 11,705.

[139] Tr. 21,275.

[140] Tr. 21,470.

[141] Tr. 22,182; and see C 5583 (Tr. 21,792).

[142] Tr. 18,698.

[143] California's Proposed Finding 5A: 102, p. V-4.

many years hence must necessarily rest upon sheer speculation and unproved hypothesis.[144]

That there is no reliable evidence as to the probable amount of future effective storage is demonstrated by the widely divergent assumptions made by the experts as to future Upper Basin effective storage:

> California witness Stetson—25,000,000 acre-feet to 52,000,000 acre-feet;[145]
> California witness Riter—31,000,000 acre-feet;[146]
> California witness Hill—21,000,000 acre-feet to 27,000,000 acre-feet.[147]
> Arizona witness Erickson—25,000,000 acre-feet; 35,000,000 acre-feet; 43,000,000 acre-feet and 45,000,000 acre-feet.[148]

Despite this wide variance in the testimony of the experts California assumes an Upper Basin effective storage equivalent to 25,000,000 acre-feet at Lee Ferry (Cal. Op. Br. 244 note 2).

The further unreliability of the California studies respecting reservoir capacities is demonstrated by the fact that such studies completely ignore (1) main stream reservoir capacity now existing in the Lower Basin, namely, that created by Davis and Parker Dams; (2) potential Lower

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[144] The depletion which will result from all the structures existing, authorized and planned will approximate only 4,800,000 acre-feet per annum in the Upper Basin. S. REP. No. 128, 84th Cong., 1st Sess. 4 (1955). How much of this capacity may be then available through structures not yet planned and authorized cannot be the subject of proof at this time.

[145] C 2205A (Tr. 11,731) and C 2206A (Tr. 11,737).

[146] Tr. 21,275-78, 21,282-85, 21,[illegible].

[147] Tr. 21,744, 21,755-59, 22,137.

[148] A 352-54 and A 359-61 (Tr. 18,097); A 366 (Tr. 18,097); A 355-57 (Tr. 18,097) and A 362-64 (Tr. 18,097).

Basin reservoirs, *e.g.*, those which would be provided by Bridge and Marble Dams; and (3) the fact that existing reservoir capacities will be reduced by future accumulations of silt. Despite the fact that California Procedure (b) requires the ascertainment of the capacities of underground as well as surface reservoirs, California's studies do not consider: (1) the existence or effectiveness of groundwater storage in the Upper Basin; and (2) the effect of main stream groundwater reservoirs on main stream water supply in the Lower Basin.

(3) California's Procedure (c)

"Estimation of the extent to which the water supply may be depleted by up-stream uses."[149]

It is impossible at this time to make a reliable estimate of future depletions in the Upper Basin since the rate and extent of development in the Upper Basin depend upon future physical, economic and political considerations, all of which are of an uncertain nature. Before any reliable estimate may be made it is necessary to ascertain and consider all related physical facts and in some fashion to predict future economic conditions as well as to prophesy feasibility determinations by future Secretaries of the Interior and what, if any, enabling legislation will be enacted by future Congresses. Before such an estimate could be arrived at, it would be necessary to obtain engineering and other expert studies and reports as to acreage, soil, elevation, topography, hydrology, crop requirements and a host of other related facts. Prophecies as to future economic conditions and future actions by government officials and Congresses certainly can form no basis for any reliable appraisal. Moreover, a determination of Upper Basin

[149] California's Proposed Finding 5A: 102, p. V-4.

depletions cannot be made without a resolution of the rights and delivery obligations of the Upper Basin states under the Colorado River Compact—a determination which cannot be made in their absence (see Rep. 145).

The California estimate of Upper Basin depletions is based upon three assumptions: (1) an assumed undepleted stream flow for an arbitrarily selected period; (2) an assumed Upper Basin delivery requirement at Lee Ferry; and (3) an arbitrarily assumed effective storage capacity. The resulting quantity which California labels as "upper basin depletion" is the amount of water which would be *available* for depletion by the Upper Basin if the foregoing assumptions were valid. This *contrived* Upper Basin depletion figure is wholly unrelated to the future physical, economic and political factors, which necessarily will govern the amount of *actual* Upper Basin depletion.

California asserts that "all storage capacity existing or authorized for construction in the upper basin at the time of trial would provide the equivalent of 25,000,000 acre-feet of storage capacity effective at Lee Ferry" (Cal. Op. Br. 244 note 2). This figure is arrived at by reference[150] to existing and authorized projects including those "authorized" by the Colorado River Storage Project Act.[151]

On the basis of this assumed storage capacity, California then arbitrarily makes the further assumption of an Upper Basin depletion of 6,500,000 acre-feet per annum. In so doing, she ignores the fact that the Report of the Senate Committee,[152] which studied the Colorado River

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[150] C 2203, 2203A (Tr. 11,720). And see California's Proposed Finding of Fact 5C: 103(4), p. V-13.

[151] 70 Stat. 105 (1956), 43 U. S. C. §§620-620*o* (1958).

[152] S. Rep. No. 128, 84th Cong., 1st Sess. 4 (1955); see also H. R. Rep. No. 1087, 84th Cong., 1st Sess. 6 (1955).

Storage Project and potential reservoir construction in the Upper Basin, determined that future Upper Basin consumptive use will not exceed 4,800,000 acre-feet per annum (Rep. 112), even if all projects in all categories listed in the Storage Project Act were to be constructed.

It follows that unless additional works not within the contemplation of the Colorado River Storage Project Act are authorized and constructed to achieve California's assumed depletion of 6,500,000 acre-feet per annum, there will be 1,700,000 acre-feet of water descending to the Lower Basin which is not taken into account in California's studies.

Contrary to California's assertion that there was uniformity in the techniques employed and results achieved, the facts are that the various experts used different reservoir operation criteria, made different assumptions as to the delivery obligations, employed varying stream flow figures and arrived at the widely divergent estimates of 5.7, 6.2, 6.4, 6.5, 6.8, 7.2, 7.3, and 7.5 million acre-feet per annum of hypothetical Upper Basin depletion.[153]

(4) California's Procedure (d)

> "Calculation, through reservoir operation and routing studies, of the extent to which the available reservoir capacity (Item b), had it existed throughout the selected period of study (Item a), would have been capable of regulating the available flow during that period into an equal annual discharge, taking into account reservoir evaporation losses and upstream uses."[154]

Since, as we have seen, the requirements of procedures (a) and (b) cannot be met, it follows that procedure (d) has

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[153] C 5572A for iden.

[154] California Proposed Finding 5A: 102, p. V-4.

no utility. Furthermore, before this procedure can be useful, the criteria employed in any reservoir operation or routing study must either be accepted by the Secretary or their use be imposed upon him by the Court.

The California objective of equal quantities of water available for discharge and use each and every year is neither desirable of accomplishment nor possible of achievement. Obviously, varying economic, political, climatic and other conditions will result in varying water needs and any attempt to cast water uses into an inflexible mold is unrealistic and impracticable.[155]

(5) California's Procedure (e)

> "Calculation of the accruals and losses between the points of discharge from the reservoir and the points of diversion to arrive at a net quantity available for beneficial consumptive use on a permanent basis."[156]

Here again there is great divergence of opinion among the experts. A composite tabulation of the most pessimistic expert opinion respecting gains and losses below Lee Ferry, when compared with a tabulation of the most optimistic opinion on this subject, produces results varying from a net loss of 1,325,000 acre-feet per annum to a net gain of 165,000 acre-feet per annum or a total difference of 1,490,000 acre-feet per annum. The tabulation follows:

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[155] C 271 (Tr. 6127) and C 355 (Tr. 8726) clearly demonstrate that there is no uniformity of annual use even by established and stable projects although large quantities of surplus water are available.

[156] California Proposed Finding 5A: 102, p. V-5.

Range in Estimated Gains and Losses in Main Stream Lee Ferry to International Boundary[157]

1 Line No.	2	3	4
	Losses	**Greatest Loss Acre-feet**	**Least Loss Acre-feet**
1	Evaporation, Lake Mead	700,000	360,000
2	Useable spills, Hoover Dam	500,000	0
3	Evaporation from reservoirs below Hoover Dam	300,000	300,000
4	Channel losses below Hoover Dam	600,000	300,000
5	Regulatory waste	200,000	0
6	Total Losses	2,300,000	960,000
	Gains	**Least Gain Acre-feet**	**Greatest Gain Acre-feet**
7	Lee Ferry to Lake Mead	900,000	950,000
8	Hoover Dam to Gila River	75,000	75,000
9	Inflow from Gila	0	100,000
10	Total Gains	975,000	1,125,000
	Net	**Loss Acre-feet**	**Gain Acre-feet**
11	Difference between line 10 and line 6	1,325,000	165,000
	Difference		**Range Acre-feet**
12	Sum of columns 3 & 4 line 11		1,490,000

[157] Record References and Explanation

	Col. 3	Col. 4
1	A 351 Lines 1 and 1A (Tr. 18,097)	C 2209A (Tr. 11,753)
2	A 354 (Tr. 18,097)	C 2209A (Tr. 11,753)
3	C 2211 (Tr. 11,755)	A 366 Line 7 (Tr. 18,097)
4	C 2213 (Tr. 11,764) (later corrected at Tr. 18,657, 18,719, 21,836; California Proposed Finding 5E: 102(4))	A 366 Line 9 minus Lines 10a and 10b (Tr. 18,097)
5	C 2216A Line 12 (Tr. 11,825; 11,765-66)	Tr. 18,309-10; 18,098-99

E. The Alleged Concurrence of Stetson and Erickson as to Future Water Supply

As support for the claim that future main stream supply in the Lower Basin is readily determinable, California relies heavily upon a study made by California's witness Stetson and one of the several analyses of the Stetson study made by Arizona's expert Erickson. The Stetson study estimated that future Lower Basin main stream supply will be 6,175,000 acre-feet per annum.[158] The Erickson analysis referred to by California put the figure at 6,100,000 acre-feet per annum.[159] On this basis, California asserts that the "experts were in close agreement as to the permanent dependable supply which will be available to the lower basin" (Cal. Op. Br. 245; see Cal. Op. Br. 245 notes 3 and 4 and table accompanying plates 7 and 8 of Cal. Op. Br.).

The Master, however, was not deceived by this seeming close agreement between the two calculations. He says:

> "The apparent concurrence of the Arizona and California witnesses is deceptive, however. Far from supporting California's position, these studies demonstrate that predictions of future supply are necessarily based on so many significant but unknowable

	Col. 3	Col. 4
6	Sum of Lines 1 through 5	
7	Tr. 21,283	C 2216A Line 4 (Tr. 11,825) A 366 Line 4 (Tr. 18,097)
8	C 2216A Line 8 (Tr. 11,825)	A 366 Line 8 (Tr. 18,097)
9	C 2216A Line 10 (Tr. 11,825)	
10	Sum of Lines 7 through 9	

[158] C 2216A (Tr. 11,825), as corrected at Tr. 21,836 and California's Proposed Finding 5E: 102(10).

[159] Tr. 18,903-15.

factors that they cannot be accurate enough to be helpful in this case." (Rep. 110)

Actually, Arizona did not present a study of future water supply, as such, since she contended it was irrelevant. Nor did Erickson make an independent study of future water supply. At the request of Arizona's counsel, he made an analysis of Stetson's study by taking Stetson's basic figures as a starting point and applying to them only one of several differing interpretations of the Upper Basin's obligation to release water to the Lower Basin under the Compact.[160] In this way he was able to parallel the Stetson study and to demonstrate the unreliability of Stetson's conclusions.

On cross-examination by California counsel in response to hypothetical questions based on assumptions which Erickson never accepted as sound and which he indeed questioned,[161] Erickson roughly calculated other and widely variant water supply figures.[162] However, all that this cross-examination demonstrated, as the Master remarked at the time and as California's counsel agreed, was "that, on these other assumptions, you will get a reduced net useable supply for the Lower Basin by a substantial amount."[163]

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[160] The Compact interpretation was supplied Erickson by counsel. Contrary to California's assertion (Cal. Op. Br. 245-46 note 4), this interpretation of the Compact was not "later disclaimed" by Arizona's counsel. It never was espoused by Arizona as other than one *possible* interpretation of the Compact, useful only to demonstrate how the obligation of the Upper Basin varied with a varying interpretation of the Compact, and how this in turn changed the estimates of supply available to the Lower Basin (Tr. 18,009-19).

[161] Tr. 18,009-13, 18,597-98.

[162] Tr. 18,801-19, 18,913-14.

[163] Tr. 18,819-20.

The Master's Report epitomizes Erickson's testimony:

> "The very great significance of each of these assumptions to the prediction of future supply is demonstrated by the Erickson study itself. The study on which California relies, which shows the future Lower Basin mainstream supply to be 6,100,000 acre-feet per annum, is only one of a series prepared by Mr. Erickson. His other studies varied certain of the assumptions, such as Upper Basin storage and the interpretation of Article III(c) of the Colorado River Compact. One of these other studies showed future supply to be 6,500,000 acre-feet per annum; another showed it to be 7,400,000 acre-feet per annum. And none of the Erickson studies assumed an Upper Basin depletion at Lee Ferry of less than 6,200,000 acre-feet per annum despite a maximum depletion to date of only 2,200,000 acre-feet and the Senate Committee prediction of less than 4,800,000 acre-feet." (Rep. 112-13) (footnotes omitted)

California's Opening Brief sets forth in an appendix a table purporting to show by a comparison of the Erickson and Stetson testimony that they were in substantial agreement regarding the amounts of gains and losses to the Colorado River from Lee Ferry to the International Boundary (Cal. Op. Br. A46). However, California neglects to advise the Court of the fact that the figures tabulated in the Erickson column are taken from his answers to hypothetical questions put to him on cross-examination by California counsel and the additional fact that, when not circumscribed by these California hypotheses, Erickson on direct examination made estimates regarding these gains and losses which were substantially different from Stetson's forecasts.

There are set forth immediately below in tabular form the gains and losses as testified to by Stetson and by Erickson on direct examination and on cross-examination on the basis of California's hypotheses:

Line	Losses	Erickson Direct[164]	Erickson Cross based on Cal. Hypotheses[165]	Stetson[166]
1	Evaporation from Lake Mead	450,000	700,000	650,000
2	Uncontrollable spills at Hoover Dam	0	500,000	300,000
3	Evaporation for reservoirs, Hoover Dam to Mexican boundary	300,000	300,000	300,000
4	Channel losses, net of channel salvage, Hoover Dam to Mexican boundary	300,000	300,000	600,000[167]
5	Regulating waste (excess arrivals in limitrophe section)	75,000	75,000	200,000
6	Total losses	1,125,000	1,875,000	2,050,000
	Gains			
7	Net gain—Lee Ferry to Lake Mead	950,000	950,000	950,000
8	Bill Williams and miscellaneous inflow below Hoover Dam	75,000	75,000	75,000
9	Total gains	1,025,000	1,025,000	1,025,000
10	Net losses over gains between Lee Ferry and international boundary	100,000	850,000	1,025,000
11	Difference between Erickson and Stetson: 925,000 acre-feet per year, *i.e.*, Stetson's estimated net losses are more than ten times greater than those of Erickson.			

Arizona does not vouch for the validity or reliability of any of the foregoing estimates. We agree with the Master's conclusion that prophecies as to future water supply are irrelevant to the issues and that in the circumstances of this case it is not possible to arrive at a determination of future water supply which is of sufficient

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[164] A 366 (Tr. 18,097).

[165] Tr. 18,914-15.

[166] C 2216A (Tr. 11,825).

[167] Corrected to this figure at Tr. 18,657, 18,719, 21,836.

reliability to be of any utility (Rep. 102-13). The above comparative table is intended solely to demonstrate that the Erickson and Stetson estimates of gains and losses to the stream below Lee Ferry are not in close agreement, as claimed by California, but differ by 925,000 acre-feet per year.

F. The Colorado River Storage Project and the Bureau of Reclamation 1960 Power Memorandum

Attempting to buttress her prophecy of extensive future Upper Basin uses, California asserts that "project plans are in being for enough projects in the upper basin to use far more than its maximum apportionment" (Cal. Op. Br. 252) (footnote omitted). But California herself has criticized the report,[168] which is relied upon for this exaggeration, as "essentially a catalogue of potential projects" and as lacking in "factors and data which govern the engineering and financial feasibility of the proposed projects".[169]

California refers specifically to the Colorado River Storage Project Act of 1956.[170] She states:

> "Section 2 of that act . . . provides that the Secretary shall give a number of named participating reclamation projects 'priority to completion,' such projects being the first beneficiaries of the water and power made available by the reservoirs authorized by section 1." (Cal. Op. Br. 252)

But that section does not so provide, as is clear from the full text:

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[168] H. R. Doc. No. 419, 80th Cong., 1st Sess. (1947).

[169] *Id.* at *51-52.*

[170] 70 Stat. 105, 43 U. S. C. §§620-620*o* (1958).

> "In carrying out further investigations of projects under the Federal reclamation laws in the Upper Colorado River Basin, the Secretary shall give priority to completion of *planning reports* on . . . [twenty-five named] participating projects."[171]

Moreover, it is significant that Congress enacted the Colorado River Storage Project Act on the authoritative estimate of the Senate Committee which studied the project "that future Upper Basin consumptive use will not exceed 4,800,000 acre-feet per annum . . . even if the extensive storage capacity envisaged but not as yet authorized for the Upper Basin were eventually constructed" (Rep. 112) (footnote omitted). The Senate Committee Report added:

> "'This would leave an unused apportionment of 2.7 million acre-feet of the 7.5 million acre-feet apportioned to the Upper Basin to meet any contingencies arising out of litigation over varying interpretations of the [Colorado River] compact. *In the circumstances, the continuity of the water supply for the Lower Basin would be assured.*"[172]

California's assertion that the Senate in 1961 enacted a bill "after the Master filed his Report, which will increase upper basin depletions by about 360,000 acre-feet" per annum (Cal. Op. Br. 253) (footnote omitted) is misleading. The reference is to the San Juan-Chama-Navajo Project—one of those approved by the Colorado River Storage Project Act of 1956—and the amount of its depletion is

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[171] 70 Stat. 106 (1956), 43 U. S. C. §620a (1958).

[172] S. REP. No. 128, 84 Cong., 1st Sess. 4 (1955). See also H. R. REP. No. 1087, 84 Cong., 1st Sess. 5 (1955).

accounted for and included in the over-all depletion of 4.8 million acre-feet determined by the Senate Committee.[173]

There is substantial agreement that these projects—to the extent that they may be found to be feasible—will not be completed until 75 to 100 years hence and that even then maximum depletion in the Upper Basin will not exceed 4,800,000 acre-feet per annum (Rep. 111-12).

Next, California refers to a 1960 Bureau of Reclamation memorandum, evidently completed after the hearings and while the case was *sub judice* before the Special Master.[174] This document is represented to be "a preview of what the Master anticipates, a determination of the total amount of water to be released by the Secretary from Lake Mead" and as "the latest and most authoritative statement of how the Bureau of Reclamation intends to operate the river" (Cal. Op. Br. 259-60). The document is no such thing.

The true character of the memorandum is shown by its introduction which states:

> "*This memorandum has been prepared to determine and support an average power rate for the Colorado River Storage Project and Participating Projects.* Project costs, generation and sales, Bureau of Reclamation policy and other factors affecting power rates, when approved will be incorporated and summarized in a revision of the Financial and Economic Analysis Report of the Colorado River Storage Project and Participating Projects. *Only factors influencing and relating to costs, cost analysis, power*

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[173] *Hearings on S. 500 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs,* 84th Cong., 1st Sess. 58 (1955).

[174] Bureau of Reclamation, Regional Office, Region 4, U. S. Dept. of the Interior, Financial and Power Rate Analysis, Colorado River Storage Project and Participating Projects (September 1960).

revenues and repayment are covered in this memorandum."[175]

The fact that the memorandum is related solely to power production is demonstrated by the foregoing quotation and also by the following statement made in the body of the memorandum:

> "Operation studies to determine the hydroelectric energy and capacity potential of the power facilities were based on the water supply previously discussed. Two types of operation studies were made, one to determine the rate of filling of project reservoirs and the energy generation resulting from required releases during the filling period and one to determine the expected reservoir release and energy generation subsequent to the initial filling process."[176]

In short, the memorandum is an analysis of the power potential of the initial units of the Colorado River Storage Project and Lake Mead. It is not and does not purport to be a study of an available water supply for irrigation, domestic or municipal use. As the Court will appreciate, there is a vast difference between the procedures followed in the operation and management of a dam and reservoir solely for power production and those which are applied to supply water for irrigation and domestic use.

California relies on this memorandum, prepared solely to determine potential power production, and uses its computations as the basis of her forecast that by the year 1975 the Metropolitan Water District will be short of water by some 674,000 acre-feet (Cal. Op. Br. 260; and see Table 6).

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[175] *Id.* at 1.

[176] *Id.* at 6.

This claimed shortage entirely ignores the fact that it is accomplished by the withholding in Glen Canyon and Lake Mead reservoirs for power purposes of large quantities of water which will at no time during the period ending in 1975 be less than 40,000,000 acre-feet. Likewise, California's claimed shortage in the year 2006, when it is prophesied that there will be no water at all for Metropolitan, ignores the fact that the storage withheld in these reservoirs for power purposes will at no time during the period ending in 2006 be less than 30,000,000 acre-feet. Also overlooked by California is the fact that these power studies show that water in addition to the quantities specified above will be withheld for power purposes at all times in Blue Mesa, Morrow Point, Crystal, Flaming Gorge and Navajo reservoirs in the Upper Basin.

California's calculations, employing the regional power memorandum as support for her predictions of water shortages, also assume without justification that the Upper Basin reservoirs will withhold for power purposes water needed for Lower Basin domestic and agricultural uses in direct violation of Article III(e) of the Compact which provides:

> "The States of the Upper Division shall not withhold water, and the States of the Lower Basin shall not require the delivery of water which cannot reasonably be applied to domestic and agricultural uses."

Obviously, claimed shortages which are attributable to a regimen of the stream designed to furnish power rather than to supply water are without validity, since they assume the violation of those provisions of the Compact and Project Act which expressly subordinate uses for power purposes to the use and consumption of Colorado River water for

irrigation and domestic purposes (Compact Article IV(b), Ariz. Op. Br. Appendix A, p. 5a; Project Act §6, Ariz. Op. Br. Appendix B, p. 18a).

G. California's Assumption that Science Will Stand Still

California excludes from her consideration altogether any progress whatever over the next century in the science of water development, conservation and management. Her miserific vision of future water supply assumes that the science of hydrology will stand completely still—despite the fact that even now unprecedented achievements in that field have progressed far beyond nascency. Indeed, the record in this very case discloses that extensive studies and investigations are progressing in fields such as:

1. Water shed management to increase runoff.[177]
2. Improvement of irrigation practices.[178]
3. Weather modification.[179]
4. Demineralization of saline water.[180]
5. Channelization procedures.[181]
6. Control of evaporation from free water surface through the use of monomolecular films or other methods.[182]
7. Control of phreatophytic vegetation.[183]

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[177] Tr. 2047, 2096-2104, 2786, 10,412-13.

[178] Tr. 18,412.

[179] Tr. 2887-89.

[180] Tr. 2885-86.

[181] Tr. 1433, 1435, 12,200-01, 12,213-14, 18,092, 18,896-97, 21,131-32; A 366 (Tr. 18,097).

[182] Tr. 18,410-11, 18,473-75, 18,478.

[183] Tr. 1446-48, 2784-85, 2877-78, 2908-10.

It is impossible to predict what progress will be made in these fields during the next one hundred years, but significant advances in any of them undoubtedly will result in substantial increases in the water supply available for use in the Lower Basin.

H. California's Unfounded Claim of Dire Calamity

California's entire water supply argument is a carefully contrived claim of dire calamity and great disaster to her existing development and economy. Her repeatedly claimed requirements of 5,378,000 acre-feet are greatly inflated. While she speaks in terms of "existing needs" and "present development" and implies that ruin is just around the corner if the Special Master's Recommended Decree is adopted, the truth is that the "existing needs" and "present requirements" actually include domestic and industrial uses for a population of more than 13,000,000 within the Metropolitan Water District, or an increase of approximately 80 per cent over the present population of 7,329,012,[184] as well as more than 900,000 acre-feet of water annually for the irrigation of more than 175,000 acres of new land which is not now and never has been in cultivation.[185]

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[184] Metropolitan Water District of Southern California, 22 ANN. REP. 5 (1960); Tr. 9830, Tr. 9832-33. Local water supply of 1,220,000 (Tr. 9830) acre-feet per annum plus Metropolitan Contract entitlement of 1,212,000 acre-feet per annum aggregate 2,432,000 acre-feet, which at the rate of 162 gallons per capita per day (Tr. 9832-33) will supply the needs of a population of more than 13,000,000.

[185]

Area	New Acreage	Rate of Use ac-ft/ac/yr	New Use ac-ft/yr
Palo Verde Irr. Dist.....	31,000	4.0	124,000
Yuma Proj. Res. Div.....	7,400	3.5	25,900
All-American Canal Project	137,000	5.5	753,500
Total	175,400	—	903,400

In addition, she includes in her "present uses" approximately 1,000,000 acre-feet of water which Imperial is wasting by runoff each year into the Salton Sea.

The Special Master recognized that if the existing situation of abundant water supply in the Lower Basin is changed and water becomes scarce, present wasteful practices must be replaced by more efficient methods. The notable example of waste to which the Master refers is the "very large unused runoff each year into the Salton Sea" (Rep. 103 note 25). According to the evidence the measured inflow into the Salton Sea from the Imperial Irrigation District alone averaged approximately 1,225,000 acre-feet per annum for the last five years (1951-1955) covered

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All figures are derived from Cal. Op. Br. Table 1. Arizona, of course, does not concede the accuracy of these figures.

California's claim that she must have 5.5 acre-feet per acre for the All-American Canal Projects, even after making use of reasonable conservation practices, is wholly unrealistic and grossly inflated. This is true because:

1. No recognition is given to effective precipitation of 0.15 feet per year (Tr. 18,387-95).

2. The "requirements" presuppose a "salt content" of 1.25 tons per acre-foot (t.a.f.) (C 283, Tr. 8204). The average for the 16-year period ending in March, 1958 was only 1.02 t.a.f. (A 422, Tr. 19,571), and in the future will not exceed 1.09 t.a.f. (A 372, Tr. 18,139).

3. There is an assumed leaching requirement of 22% founded on 1.25 t.a.f., although based upon past, present or future conditions, it is 10% or less (Tr. 19,413-27, 19,504-05).

4. It is physically impossible to pass through the average soils of Imperial Valley more than 9% of the water applied (Tr. 19,420-24; A 436, Tr. 22,026; *Drainage Investigation in Imperial Valley, California, 1941-51:* Soil Conservation Service Technical Publication 120, September 1959, pp. 29, 31, 48, 49).

5. Seepage losses from the distribution system may be reduced by 90% by lining portions of the system (Tr. 18,157-61).

by the evidence.[186] No claim of leaching requirements nor any other theory can obscure the fact that the Salton Sea is the product of inefficient water uses and gross waste. It is not realistic to assume that such a shameful waste of a precious commodity will continue to be tolerated if and when it results in shortages which can be eliminated by the conservation of water to satisfy California's actual needs.

If California continues to permit such wasteful practices in times of scarce supply, any "dire calamity" which may result cannot properly be assigned to the disposition of this case recommended by the Special Master. Responsibility for such consequences must be attributed to those in California who sanction an internal division of her share

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6. Approximately 75% of the All-American Canal losses below Pilot Knob could be recovered by pumping (Tr. 18,229-37).

7. Unnecessary seepage loss and waste for system regulation in excess of that occurring in the period 1955-1957 is included (A 426, Tr. 19,594; C 275, Tr. 8210).

8. An amazing 100,000 acre-feet per year to satisfy domestic uses of a static population of approximately 63,000 persons is included (A 426 (Tr. 19,594); California Proposed Finding 4C: 106).

The record does not contain a determination by a disinterested agency of what the needs of these projects will be if reasonable water conservation practices are employed. Hence, for purposes of reply, California's figure of 5.5 acre-feet per acre is necessarily used. The large amount of water involved in even fractional reductions of this use factor becomes apparent when it is recalled that the claim is for water for 661,000 acres of land.

The record discloses that much of the new land intended by California for subjugation and irrigated farming is of questionable economic value—some of it is approximately 90-95% sand. Experiments to determine its adaptability to farming demonstrated that in one instance 70 acre-feet of water per acre per annum were needed and that the average used was 40 acre-feet. The testimony led the Master to remark: "You mean [they] used water and mixed a little sand with it" (Tr. 18,737-38).

[186] C 242 (Tr. 7991), C 243 (Tr. 7994), A 408 (Tr. 19,409).

of Colorado River water which spells the "doomsday for Metropolitan" (Cal. Op. Br. 261), while permitting approximately one million acre-feet of water to be wasted annually into the Salton Sea.

California assumes that, because Arizona did not submit proposed findings on this subject, Arizona concedes the validity of the California arguments that the leaching requirements of Imperial Irrigation District necessitate this waste in order to prevent accumulation of salts and that farm efficiency in Imperial is among the highest. She professes surprise at the Master's reference (Rep. 103 note 25) to the matter (Cal. Op. Br. 276).

Arizona did not propose findings of fact regarding California's wasteful water practices because, as she expressly stated in her Answering Brief before the Master (pp. 73-81), such matters are not material to any issue in this case. Arizona presented evidence of California's wasteful practices only because California insisted, as she continues to insist, that her alleged water requirements, which include large quantities of waste, justify her proposed decree. Only California's persistence in maintaining that her claimed requirements demonstrate the unsoundness of the Master's conclusions caused him to point out in his Report that these alleged requirements are inflated by the inclusion of waste and to reject California's attempted justification of this waste:

> "It is impossible to determine exactly how much more efficiently water will be used if the present condition of abundance turns into one of shortage, but it is clear that savings will be such that California's existing uses could be satisfied *by sustantially less* water than is presently diverted." (Rep. 103 note 25)

The prediction of doom for Metropolitan is also predicated on the assumption that the Colorado River is and

will continue to be the only source of water supply for the District. This is not the fact.

The annual reports of Metropolitan show that in the fiscal year 1960 almost three-fourths of the water used in the Metropolitan area came from sources other than the Colorado River.[187] The California evidence establishes that on a long-time average basis the local water resources and the Owens Valley Aqueduct are capable of an annual yield of 1,220,000 acre-feet.[188] This quantity is sufficient to supply a population of over 6,700,000, based upon Metropolitan's evidence that per capita use within the District in 1970 will be 162 gallons per day.[189]

In addition, on November 4, 1960, Metropolitan executed a contract with the State of California[190] providing for delivery of 1,500,000 acre-feet of water per annum from northern California sources, a part of a much larger quantity planned for delivery to Metropolitan under the California Water Plan.[191] Under the terms of this contract the first delivery of water (110,400 acre-feet) from the Feather River Development and Diversion Project will occur in 1972; thereafter annual deliveries will be gradually increased until 1991 when Metropolitan will receive 1,500,000 acre-feet annually.[192]

Thus in 1991 there will be 2,720,000 (1,220,000 plus 1,500,000) acre-feet available to Metropolitan from sources

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[187] Metropolitan Water District of Southern California, 22 ANN. REP. 43 (1960).

[188] Tr. 9830.

[189] Tr. 9832-33.

[190] A certified copy of the contract has been filed with this brief.

[191] Metropolitan Water District of Southern California, 22 ANN. REP. 70 (1960).

[192] Paragraph B 6(a) and Table A on p. 6/1.

other than the Colorado River, which is sufficient to serve 15,000,000 persons on the basis of 162 gallons per capita per day.

In the foregoing discussion no consideration is given to agricultural use of water in the Metropolitan area. 380,941 acres were irrigated in 1955.[193] It is conceded by Metropolitan that acreage now devoted to agricultural uses will progressively go out of cultivation and will be used for urban development, with the result that water now used for agriculture will be available for municipal purposes.[194]

California asserts that Metropolitan diversions have increased substantially since the trial to "nearly" 900,000 acre-feet in 1960 (Cal. Op. Br. A36). It is impossible to ascertain how much of this increase is for bona fide municipal use. California witnesses admitted at the trial that, in addition to agricultural uses in the Metropolitan area, substantial amounts of Colorado River water diverted by Metropolitan were being released for percolation to the underground to replenish groundwater supplies or act as a barrier to further infiltration of salt.[195]

In our foregoing analysis of California's claims of "dire calamity" and "doomsday" for Metropolitan, no consideration has been given to desalting of ocean and other saline water as a source of supply.

Congress has enacted a Saline Water Act[196] for the specific purpose of conserving and increasing the water resources of the nation and specifically to "provide for the development of practicable low-cost means of producing from sea water, or from other saline waters, water of a

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[193] C 527 (Tr. 9395).

[194] Tr. 9800-03, Tr. 9832-34.

[195] Tr. 9549, 9626-27.

[196] 66 Stat. 328 (1952), 42 U. S. C. §§1951-58g (1958).

quality suitable for agriculture, industrial, municipal, and other beneficial consumptive uses".[197] The Assistant Secretary of the Interior in charge of this program reported to Congress in 1959 as follows:

> "Progress in the field of lower cost conversion or desalting of saline waters has been such that we can state that the prospects are excellent."[198]

Desalinization plants are presently in operation not only in the United States but throughout the world, either on an experimental basis or actually supplying potable water to areas in which fresh water is in short supply.

This source of an unlimited supply of water is physically available to California but is geographically inaccessible to Arizona.

It is abundantly clear from the foregoing that California's water supply future, contrary to her doleful cries, is bright indeed.

I. Arizona's Critical Needs

As we have seen, the California protestation that unless she receives 5,378,000 acre-feet of Colorado River water each and every year she will be visited with disaster is without substance. Equally without foundation are the California insinuations (Cal. Op. Br. 276-77, 292) that Arizona's

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[197] 66 Stat. 328 (1952), 42 U. S. C. §1951 (1958).

[198] *Senate Select Committee on National Water Resources, Saline Water Conversion, Committee Print No. 26*, 86th Cong., 1st Sess. V (1959). In the same communication the Assistant Secretary indicated that "if the people of California fail to authorize the proposed $1.75 billion bond issue to inaugurate the $12 billion California water plan, which is a distinct possibility, widespread use of converted sea water can be expected in Southern California in the immediate future." *Id.* at VII.

needs for additional Colorado River water are neither immediate nor necessary for the preservation of Arizona's present development and going economy. The truth is that the whole purpose and justification of the proposed Central Arizona Project is to rescue and preserve an existing Arizona development and a present economy which is now and has been for some time faced with extinction. Already thousands of once fertile and productive acres in Central Arizona have been returned to the desert due to the failing water resources of that area and ultimately between 375,000 and 425,000 acres of agricultural lands in central Arizona must go out of cultivation if the local water supply is not supplemented by Colorado River water (see Ariz. Op. Br. 21-23, 190-92). Use of Colorado River water in central Arizona through the facilities of the proposed Central Arizona Project will provide an irrigation supply solely for lands with an agricultural history and no new lands not previously cultivated are to be placed in production through the use of Colorado River water. As stated in the Report and Findings on the Central Arizona Project filed with the Secretary of the Interior by the Bureau of Reclamation:

> "It has been shown previously that the central Arizona project is essentially *a rescue project* designed to eliminate the threat of a serious disruption of the area's economy. This threat is the result of a serious overdraft upon the groundwater supply and failure to drain harmful salts from the area. It has been shown also that the whole of the potential supply, including Colorado River water, will be adequate only for those lands presently irrigated and those in the area irrigated in the past but now idle."[199]

California makes an impassioned plea for projects which were rushed to completion in the face of known Arizona

[199] A 71, p. 118 (Tr. 310).

shortages and for new acreages which have never been in cultivation. At the same time California brushes aside the conceded actual shortages in the central Arizona area with the assertion that under her proposed decree "Arizona will receive only 80,000 acre-feet per annum less than the full ultimate requirements of her existing main stream projects" (Cal. Op. Br. 22). However, California's testimony showed that in the Gila Basin in Arizona there was 3,093,141 acre-feet of agricultural consumptive use in 1953[200] and she concedes that the long-term supply available to meet this use is only 1,715,000 acre-feet per annum. She thus recognizes an ultimate annual shortage of 1,378,141 acre-feet (Cal. Op. Br. 22).[201]

J. Metropolitan's Alleged Equitable Claims

California also argues that the Metropolitan Water District was required to and did underwrite approximately one-third of the cost of the Government's investment in Hoover Dam as a consideration for getting its water delivery contract; that in pursuance of this requirement Metropolitan has paid large sums to the United States and that in reliance on her water delivery contract and interpretations of the Compact and Project Act, which California claims were substantially the same interpretations as were "then" asserted by Arizona, additional large sums have been expended on projects for the utilization of Colorado River water. California concludes that in view of these circumstances the allocation of water proposed by the Special Master, and which California insists would destroy the water rights of the Metropolitan Water District, is inequita-

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[200] Tr. 10,638; C 1514A sheet 3 (Tr. 10,638).

[201] According to Arizona's testimony the shortage is materially higher. Tr. 19,198, A 397 (Tr. 18,494).

ble and violative of the principles of "fair play" (Cal. Op. Br. 266-71).

Metropolitan was not required to, nor did it, "underwrite" any portion of the costs of Hoover Dam. Metropolitan contracted to pay at a very favorable rate for approximately 36 per cent of the power output of Hoover Dam only after it had unsuccessfully attempted to obtain 50% of such power.[202]

It is recognized that the Boulder Canyon Project Adjustment Act [203] worked some price changes. However, the bargain which Metropolitan received from her share of this eagerly sought after power is illustrated by the facts disclosed in Metropolitan's Annual Report for its Fiscal Year 1960, to which California refers in her Opening Brief (Cal. Op. Br. 270 note 1). The Report (p. 24) shows that Metropolitan paid 1.8 mills per kilowatt hour for 1,239,926,326 kilowatt hours of energy generated at Hoover Dam and that 264,323,912 kilowatt hours of energy generated at Parker Dam cost Metropolitan 1.373 mills per kilowatt hour. The Report also shows that Metropolitan purchased from other sources 49,299,179 kilowatt hours of

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[202] When the Secretary of the Interior, on September 10, 1929 issued invitations for applications to purchase "Boulder" power, 27 applications were submitted: the three principal applicants were the City of Los Angeles, the Southern California Edison Company and the Metropolitan Water District. Each of the first two asked for the entire output of Hoover Dam which it was then assumed would be 3,600,000,000 kilowatt hours. The Metropolitan Water District asked for approximately one-half that amount and the State of Nevada asked for one-third of it. The total of the applications was for well over three times the amount of power which it was then considered would be available. Negotiations to resolve the problem of allocating power among the conflicting applications resulted in Metropolitan being awarded approximately 36% of the firm power output with first call upon all unused firm and secondary power developed at Hoover Dam up to the Metropolitan requirement for pumping into and in the Aqueduct. WILBUR & ELY, THE HOOVER DAM CONTRACTS 17-24 (1933).

[203] 54 Stat. 774 (1940), 43 U. S. C. §§618-618p (1958).

steam-generated, off-peak energy at a cost of 6.016 mills per kilowatt hour.

Equally without foundation is the California assertion that Metropolitan expended large sums in reliance upon Compact and Project Act interpretations which were substantially in agreement with the Arizona construction of those instruments (Cal. Op. Br. 270). Although California does not in this portion of her brief identify the interpretations referred to, it is assumed that they are the same so often stated and referred to in California's Opening Brief: namely, that the water dealt with in the Compact and the Project Act is system rather than main stream water and that the 2,800,000 acre-feet per annum for Arizona is not main stream water only but consists of main stream and tributary water. California was at all times well aware that the Project Act and Limitation Act dealt only with main stream water in Lake Mead. Senator Hiram Johnson had no doubt that the water supply with which Congress was dealing in §4(a) of the Project Act was main stream water nor did any other Senator (see pp. 62-67, *supra*; Ariz. Op. Br. 61-67).

In 1930, Ralph L. Griswell, then Colorado River Agent, Department of Water and Power, Los Angeles, California (formerly President, Los Angeles City Council) stated:

> "Whether Arizona approves the Colorado River Compact or whether she does not approve it, *under the terms of the Boulder Canyon Project Act she will receive 2,800,000 acre feet and one-half of the unapportioned water from the main stream of the Colorado River and all the waters of her tributary streams.* . . . This leaves only one point in controversy, the title to the 1,000,000 acre feet of water set up in paragraph B of Article III."[204]

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[204] Griswell, *Colorado River Development and Related Problems*, 148 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 18-19 (1930).

Colonel William J. Donovan's report of the conferences held in February 1930, in an effort to work out a tri-state compact between Arizona, California and Nevada regarding a division of Lower Basin water discloses clearly that Arizona then contended for 2,800,000 acre-feet per annum of main stream water plus half of surplus, without any diminution by reason of her tributary uses and that California distinctly so understood. Arizona's position, as stated in these conferences, was consistent with that asserted by her in earlier conferences with California in March, 1929.[205]

In this connection, California makes no mention of the 1939 and 1941 bills introduced into the Arizona legislature to which we have previously referred (pp. 79-80, *supra*), in which a firm claim was asserted to 2,800,000 acre-feet per annum of main stream water on behalf of Arizona.

A clear recognition by the Secretary of the Interior that his water delivery contracts dealt with main stream water is shown by his account of developments subsequent to enactment of the Project Act:

> "Fourth, the Department has promulgated regulations designed to assure a water supply to Arizona. These regulations are included as an appendix in this volume. They outline the form of a Hoover Dam water-delivery contract which the United States will enter into with Arizona upon certain conditions. Briefly, the contract calls for the delivery of 2,800,000 acre-feet annually, in return for which Arizona undertakes to make no interference with the diversions by other Government contractors. This quantity of water is adequate for all of the Arizona projects below Hoover Dam, and is without prejudice to

[205] 72 Cong. Rec. 11,770-72, 11,778-81 (1930).

> the power of the parties to contract in the future for delivery of additional water required . . . *Arizona is thus offered an assurance of 2,800,000 acre-feet of main-stream water,* and given an opportunity to look to the United States rather than to an agreement with the other States for a delivery of that quantity of water, in return for an agreement not to interfere with diversions by her sister States."[206]

Certainly, California could not very well have misunderstood Senator Hayden's assertion of Arizona's position in 1949 made in response to Senator Downey of California:

> "Senator Downey. Mr. Chairman, in view of that very bitter statement that I think is totally uncalled for and that I very much resent, on which specific act does the Senator base that statement? What specific act?
>
> "Senator Hayden. The assertion, for example, that the State of California could count in the waters of the Gila River as a part of the lower basin waters to which they might lay claim. That is perfectly idiotic. There is not a thing like it in the record. It never was in the mind of Senator Hiram Johnson. It never was in the mind of Sam Shortridge. It never was in the mind of any Senator that any such cockeyed idea could ever be advanced, and yet it has since been seriously advanced by California over and over again."[207]

California's efforts to embrace the doctrine of "fair play" come with peculiar ill grace from a sovereign state which, having gained vast benefits by reason of her "unconditional and irrevocable" agreement made by solemn act of

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[206] WILBUR & ELY, THE HOOVER DAM CONTRACTS 41-42 (1933).

[207] *Hearings on S. 75 and S. J. Res. 4 Before the Senate Committee on Interior and Insular Affairs,* 81st Cong., 1st Sess. 743 (1949).

her legislature, resorts to every device which ingenious minds can conjure to evade the bargain which she made.

V

California's suggested modifications of the Recommended Decree should be rejected.[208]

A. The Suggestion that Injunctive Relief Is Not Appropriate

California objects (Cal. Op. Br. 284-87) to Article II of the Recommended Decree (Rep. 346-53), which enjoins the United States from operating regulatory structures and from releasing water under its control except in accordance with the priorities stated and the interstate allocations set forth in the Decree. She also objects to Article III of the Recommended Decree (Rep. 353-54), which enjoins the states and public agencies which are parties to the suit from interfering with the United States in its management of structures and in its releases and deliveries of water in conformity with Article II of the Decree and also enjoins the states and agencies from diverting or consuming or permitting the diversion or consumption of water in violation of the proposed Decree.[209]

California first argues that this suit is declaratory in nature and that the joinder of equitable relief with declar-

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[208] This point is directed to a refutation of Part Six of California's Opening Brief, pages 279-91 thereof.

[209] Arizona excepts (A Exc. 35) only to those provisions of Article III of the Recommended Decree which enjoin her from "permitting the interference" with the performance by the United States of Article II. Arizona's exception is grounded on the fact that those provisions apparently would transfer to her duties which the Secretary is required to perform under the Project Act and his water delivery contracts and on the further fact that the authority of Arizona to prevent the interference, diversions and uses referred to is questionable.

atory relief is inappropriate. Even if California were correct (and she is not) in contending that the present action is solely declaratory in nature, she would be wrong in her conclusion. The federal courts have expressly held that it is proper and appropriate to combine injunctive with declaratory relief. *United States Galvanizing & Plating Equipment Corp.* v. *Hanson-Van Winkle-Munning Co.*, 104 F. 2d 856, 861 (4th Cir. 1939); *National Hairdressers' & Cosmetologists' Ass'n, Inc.* v. *Philad Co.*, 41 F. Supp. 701 (D. Del. 1941), *aff'd*, 129 F. 2d 1020 (3d Cir. 1942); see Declaratory Judgment Act, 28 U. S. C. §§2201-02 (1958); 6 MOORE'S FEDERAL PRACTICE 3047 (2d Ed. 1953).

The injunctive provisions of Article III of the Recommended Decree are also criticized as unwarranted, since, it is claimed, wrongful conduct on the part of the California defendants would be physically impossible. If that is the fact, these injunctive provisions constitute no bar against any acts of the California defendants and it is difficult to understand their concern. But it is, of course, easy to conceive of numerous instances in which it would be possible for the California defendants, if they so desired, to violate the provisions of the Decree, either by interference with the activities of the United States or by themselves diverting or consuming water to which they are not entitled under the Decree.

California next argues that her agencies should not be subjected to an injunction, since they "expressly declare" that they "will not knowingly violate any provisions of the Decree of this Court" (Cal. Op. Br. 285). The fact that a defendant disclaims an intention to violate an injunction should not prevent the entry of an injunctive decree. *Wyoming* v. *Colorado*, 298 U. S. 573 (1936), does not hold otherwise. There an injunction against Colorado had been entered in an earlier suit. *Wyoming* v. *Colorado*, 259 U. S.

419 (1922). In the later suit, Wyoming sought an injunction against Colorado "enforcing adherence to that decree". 298 U. S. at 575. The alleged violations of the earlier decree were discontinued by Colorado while the case was *sub judice* and this, coupled with the assurance of Colorado counsel that they would not be resumed, rendered it unnecessary for the Court to grant Wyoming injunctive relief *in addition* to that provided for in the original decree.

The situation is far different here. California has made and persists in making claims to water of the Colorado River system, including Arizona's tributaries. These claims have cast a cloud upon Arizona's right to such water and have had the practical effect of preventing congressional authorization of the Central Arizona Project. If upheld, the claims would deprive Arizona of water indispensable to the maintenance of her existing economy. This case is not, therefore, merely "declaratory in nature" (Cal. Op. Br. 284). Indeed, it is a case of immediate danger of irreparable harm, warranting the injunctive intervention of the Court.

Finally, California objects to the application of the injunctive provisions to the California agencies which are parties to the case as "unfairly subjecting those agencies to an injunction which does not apply to their counterparts in Arizona and Nevada" (Cal. Op. Br. 286). The answer is, of course, obvious. The California agencies are parties to the litigation. Those in Arizona and Nevada are not.

B. The Suggestion That Jurisdiction Be Retained Over Possible Future Controversies

California urges the Court to retain jurisdiction to adjudicate "controversies" between "mainstream" users and "tributary" users, which the Master holds are not presently justiciable (Rep. 318-21), "if, as, and when they become justiciable" (Cal. Op. Br. 288). In other words,

California suggests that under the guise of permitting the parties to apply at the foot of the decree for further relief, the Court should assume jurisdiction prospectively of any "new suit" by California against Arizona involving a possible future controversy which is not now justiciable (Cal. Op. Br. 287-88). Such a procedure would deprive of all meaning the constitutional limitation of the Court's jurisdiction to the decision of "cases or controversies".

This procedure would also be contrary to the practice of this Court. For example, in *Arizona* v. *California*, 283 U. S. 423, 464 (1931), the Court, although expressly recognizing the possibility of future litigation between the parties over water of the Colorado River, declined to retain jurisdiction because there was not at the time of suit a justiciable controversy. The Court dismissed the action "without prejudice to an application for relief" in the future. The retention of jurisdiction would have been improper there, as it would be here, since in each case the anticipated future dispute presented no presently justiciable controversy.

C. The Suggestion That Underground Uses Be Included in the Decree

California urges that the definition of "consumptive use" in the Recommended Decree be enlarged to include not only diversions from the stream but "all related ground water" uses as well (Cal. Op. Br. 289-90). Application of such a definition would not be feasible. The basic difficulty lies in defining "related ground water". We submit to the Court, as we did to the Master, that it is preferable to define "consumptive use", as the Recommended Decree defines it—"diversions from the stream less . . . return flow" (Rep. 345)—and to reserve for determination by the Secretary of the Interior, with the aid of his hydrologists,

whether in a particular case the use of underground water constitutes a "diversion" within the meaning of the decree.[210]

D. The Suggestion that Holders of Natural Flow Rights Are Entitled to Water Delivery Contracts

California requests (Cal. Op. Br. 290-91) that the Recommended Decree be amended to require the issuance of contracts to holders of natural flow rights pre-existing enactment of the Project Act. However, the language suggested (Cal. Op. Br. 291) as an addition to Article II (B) (7) of the Recommended Decree (Rep. 349) goes far beyond this goal. The sweeping language proposed by California appears to have been designed to effectuate her thesis that appropriative rights recognized under state law are controlling in the determination of rights to, and the distribution of, main stream water in Lake Mead and below. This California thesis was rejected by the Special Master; we have dealt with it at length in both this brief and in Arizona's Opening Brief (pp. 8-53, *supra;* Ariz. Op. Br. 40-46). Further discussion of this California contention is not warranted.

Moreover, insofar as the language suggested by California as an addition to Article II (B) (7) of the Recommended Decree would require the issuance of contracts to holders of "present perfected rights" as defined by the Master, it is superfluous. Article I (G) and (H) of the Recommended Decree (Rep. 346) defines "present perfected rights" existing under state law as of the effective

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[210] See the transcript of Conference before the Special Master on the Recommended Decree, August 19, 1960, pp. 8-14.

date of the Project Act. Article II (B) (5) and (6) (Rep. 348-49) gives priority to such rights in times of shortage, and Article VI (Rep. 359) makes provision for determining the existence and extent of "present perfected rights". Thus, the Decree recommended by the Special Master makes provision for holders of "present perfected rights". It provides that such holders shall be entitled to the delivery of water by the Secretary of the Interior in satisfaction of their rights and to preferences in the order of their priorities in times of shortage. The Decree implicitly requires that the Secretary do whatever is necessary to effectuate the delivery of water in satisfaction of "present perfected rights", including the execution of additional water delivery contracts, if necessary.

Brief reference is made by California to riparian rights which she says "may be senior to the appropriative rights recognized in the existing California water delivery contracts" (Cal. Op. Br. 290). If this be true, it poses no particular problem since the Master's definition of present perfected rights is broad enough to cover all uses which come within that definition, whether made under the law of prior appropriation or the riparian rights doctrine.

Likewise irrelevant is the California reference to claimed reliance by California users (unnamed and unspecified) on the language of the Acting Secretary of the Interior used in his correspondence with the Palo Verde District prior to the execution of the water delivery contract with that District. Whether or not others in California chose to rely on this opinion, even though the District to whom it was addressed did not, is of no moment. Those users who qualify as holders of "present perfected rights" are entitled to receive water under the Recommended Decree without any further showing and regardless of their reliance or lack of

reliance on claimed secretarial construction of the Project Act.[211]

VI

Contrary to the contention of the United States, the Secretary of the Interior is not authorized in allocating water from Lake Mead among Lower Basin main stream states to deduct the amount of upstream consumptive uses in Arizona and Nevada of water which would otherwise flow into Lake Mead.[212]

The United States argues that the Special Master erred in holding invalid Article 7(d) of the Arizona water delivery contract and Article 5(a) of the amended Nevada water delivery contract, which require that deliveries of water to Arizona and Nevada from Lake Mead or below shall be diminished to the extent that uses in those states above Lake Mead lessen the flow into Lake Mead.

The United States asserts that:

> ". . . under a proper construction of the Boulder Canyon Project Act, the Secretary is required to consider uses in Arizona and Nevada from the mainstream above Lake Mead and from tributaries entering the mainstream between Lee Ferry and Lake Mead. Thus we would include in the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act not only waters impounded in Lake Mead, but also all water

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[211] Arizona does not agree with the Master's interpretation of the phrase "present perfected rights" in §6 of the Project Act. Her construction of the phrase is discussed at Ariz. Op. Br. 46-55 and pp. 53-57, *supra*.

[212] This point is directed to a refutation of Points I and II of the Opening Brief of the United States, pages 7-21 thereof.

which would have reached the mainstream above Hoover Dam except for consumptive uses in Arizona and Nevada." (U. S. Op. Br. 9)

However, the Special Master concluded that the water to be distributed among the three Lower Basin main stream states pursuant to the Project Act is limited to main stream water available for consumptive use from Lake Mead and below Hoover Dam. Accordingly, the Master's Recommended Decree provides for an apportionment only of main stream water in Lake Mead and below. The United States contends, to the contrary, for an apportionment of system water which includes the amount of water which Lower Basin tributaries would have contributed to storage in Lake Mead if there had been no uses in Arizona or Nevada on the tributaries above Lake Mead.

The United States, in this instance, misconceives the meaning and intent of the Project Act. As we have seen, the provisions and legislative history of the Project Act make manifest the intent of Congress to provide only for a division of main stream water without taking into account Lower Basin tributaries or the use of tributary water before its entry into the main stream (Rep. 173-80; Ariz. Op. Br. 57-67). It is enough simply to note once again that Congress dealt with and made provision only for water stored in Lake Mead. There is no indication that Congress intended to exercise control over the water of Lower Basin tributaries.

Congress was well aware that uses on Lower Basin tributaries above Lake Mead, while not large in quantity, were numerous and of long-standing not only in Arizona and Nevada but also in New Mexico and Utah.[213] There is nothing to indicate that Congress had any thought of wip-

[213] A 45, p. 31 (Tr. 254).

ing out these uses by exercise of its dominion over the main stream. Nor is there any indication that Congress intended to empower the Secretary to deduct from any state's apportionment of Lake Mead water the amount by which the state's tributary uses above Lake Mead deplete the flow into Lake Mead, whether on the theory that this tributary water is a part of the Lake Mead supply to which the Secretary must look in order to discharge his responsibilities with respect to his contractual allocation of water stored in Lake Mead or on any other hypothesis.

In an effort to sustain all the provisions of the Secretary's water delivery contracts, the United States contends for a construction of the Project Act which would cause numerous complications and which is fundamentally at odds with the interpretation of §4(a) for which the United States elsewhere contends.

Thus the United States ignores the fact that the waters of these tributaries flow in and are used in New Mexico and Utah. If, as the United States argues, the contribution which these streams might otherwise make to Lake Mead storage must be regarded as a part of "the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act", there is no justification for ignoring the depletions of main stream supply caused by uses on these tributaries in New Mexico and Utah, and the quantities of water represented by these depletions in Utah and New Mexico must in some fashion be included in "the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act" (U. S. Op. Br. 9). This poses a difficult problem indeed, since tributary water consumed in New Mexico and Utah never reaches Lake Mead and since neither New Mexico nor Utah receives any Lake Mead storage from

which the depletions of storage occasioned by such uses may be subtracted.

Far from solving this problem, Article 7(g) and (b) of the Arizona water delivery contract (Ariz. Op. Br. Appendix E, pp. 37a-38a) serves only to complicate it. Paragraph (g) states that Arizona "recognizes" the rights of New Mexico and Utah to an equitable share in two categories of water: (1) water apportioned by the Colorado River Compact to the Lower Basin and (2) water unapportioned by the Compact. Paragraph (b) provides for the deduction from Arizona's share of excess or surplus water unapportioned by the Compact of such quantities as may be the equitable shares of New Mexico and Utah in water unapportioned by the Compact. Enforcement of these provisions would require determination of what water is apportioned and what water is unapportioned by the Compact, ascertainment of the equitable shares of New Mexico and Utah in each category of water, and determination of the extent to which uses on the tributaries in these states fall within each category. The resolution of these questions is obviously unrelated to the Secretary's authority over water stored in Lake Mead. Some of them cannot be decided at all in the absence of the Upper Basin states.

Further complications are created by the fact that water of the Gila River and its tributaries flows through and is used in New Mexico. Although the United States agrees that the water of this tributary forms no part of the water to be distributed to the Lower Basin main stream states pursuant to § 4(a) of the Project Act, yet presumably the water of the Gila River within New Mexico constitutes a part of the supply under the concept of system water apportionment which paragraph (g) of Article 7 of Arizona's water delivery contract seems to envisage.

The labyrinth into which the theory of the United States —that water in Lower Basin tributaries above Lake Mead is included in the water to be distributed to the Lower Basin main stream states—leads, emphasizes the wisdom of the congressional decision to provide for the apportionment of main stream water only and the soundness of the Master's construction of the Project Act as limited in its application to this water.

The same reasoning by which the Master rejects as unsound the California contention that the water dealt with by the Project and Limitation Acts includes water of Lower Basin tributaries also demonstrates that the water used on the tributaries above Hoover Dam does not constitute a part of "the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act". The failure of Congress to make provision with respect to the entitlements of New Mexico and Utah in tributary water within their boundaries cannot be reconciled with either the California argument or the position of the United States.

The United States contends that the purpose of Congress in enacting the Project Act would be frustrated if some of the states could avoid the Act's allocations by taking the water prior to its entry into Lake Mead, and hence that the provisions of Articles 7(d) and 5(a) of the Arizona and Nevada contracts are necessary to carry out the objectives of the Project Act (U. S. Op. Br. 10). But, so far as water of Lower Basin tributaries above Lake Mead is concerned, the argument begs the question by assuming that it was the congressional intent that Lower Basin tributaries above Lake Mead should constitute a part of the water supply covered by the Project Act allocations. As we have seen, the congressional intent was to provide for the allocation of main stream water only.

Nor are these provisions of the Arizona and Nevada contracts necesary to prevent frustration of the purpose of the Project Act by diversions from the main stream above Lake Mead.

Although, as the Special Master concludes, Congress did not intend the water of the tributaries above Lake Mead to be a part of the water distributed to the Lower Basin main stream states pursuant to §4 (a) of the Project Act, it is nevertheless clear that to the extent that inflow from these tributaries reaches the main stream, Congress regarded that inflow as a part of the water to be allocated pursuant to §4(a) of the Project Act. Over all Lower Basin main stream water, whether it be water at Lee Ferry or tributary inflow entering the main stream between Lee Ferry and Lake Mead, Congress has exercised its dominant servitude under the Commerce Clause, and any interference therewith would be in violation of the Project Act. See *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940). Appropriate remedies are at hand to prevent or abate such violations. Nevertheless, the Secretary is without authority to override the command of Congress by sanctioning such violations provided that the resulting depletions of Lake Mead storage are offset against the state's contract entitlement.

In attacking the Master's conclusion that Articles 7(d) of the Arizona contract and 5(a) of the amended Nevada contract (Ariz. Op. Br. Appendix G, p. 56a) are "contrary to the command of Section 5 of the Project Act that contracts respecting water for irrigation and domestic use shall be for permanent service" (Rep. 237), the United States argues that "the flaw . . . is the assumption that upstream uses under new appropriations would cut into deliveries under existing contracts" (U. S. Op. Br. 16). The United

States appears to regard a contract right to Lake Mead storage as being in the nature of an appropriative right with a priority date as of the date of the contract. The Government argues from this that Arizona may insure permanent service for the Arizona holders of contract rights by refusing to permit "new" appropriations upstream which would be junior in priority date to the contract rights (U. S. Op. Br. 16).

This argument assumes that tributary uses under appropriative rights, which have priorities senior to contract rights to Lake Mead storage, will aggregate precisely the same quantity each year, regardless of the amount of tributary flow and other variable conditions, such as acreage in cultivation, volume of water available in storage reservoirs, local rainfall and economic conditions. The exact synchronization of contract rights and uses with tributary rights and uses, which the United States contends would insure permanent service under the Secretary's water delivery contracts, is obviously unattainable under the variable conditions affecting the uses of water in this arid region. Moreover, the argument entirely ignores depletions resulting from tributary uses in New Mexico and Utah which, under the United States concept of system water allocation, would include water apportioned to the three Lower Basin main stream states. Certainly Arizona and Nevada are powerless to control or prevent uses in New Mexico and Utah, whether by "new" appropriations or otherwise, or to insure permanent service to their contract users undiminished by uses in New Mexico or Utah.

The contention of the United States that the Master is in error in concluding that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract violate §18 of the Project Act is supported by a reiteration of the United States claim that the Master improperly construes

these contract provisions as requiring that rights to the delivery of water under contract be terminated by later upstream appropriations (U. S. Op. Br. 17-18). The choice, which the United States asserts rests with the states of Arizona and Nevada (U. S. Op. Br. 17), is more illusory than real. Clearly it was not contemplated by Congress when it included §18 in the Project Act that any such "choice" be forced upon Arizona or Nevada.

As we understand it, the United States contends that it is entirely up to Arizona whether or not she permits "new" uses on the tributaries which deplete the supply otherwise available in Lake Mead for delivery to Arizona under her contract. The United States concludes, in view of this asserted choice, that Article 7(d) of the Arizona contract does not contravene §18 of the Project Act, which provides that nothing in the Act

> "shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or interstate agreement."

We perceive no connection between the premise which the United States asserts and the conclusion which it draws. The evident purpose of §18 was to insure that nothing in the Act or any water delivery contract should override the then existing rights of the states in at least the tributary streams within their borders, or should prevent the states from controlling the use of such water through whatever policies or laws each state might consider appropriate, subject to the provisions of the Colorado River Compact or any interstate agreement. Obviously, the control by the states of the water of their tributaries within their boundaries

is impaired if a right to use that water may be awarded only if the rights of other users within the state to Lake Mead storage are correspondingly reduced or terminated.

This argument of the United States reads into Article 7(d) of the Arizona contract a choice not justified by its plain terms and one which would operate to interfere with the rights of the state to control the use of the water of its tributary streams, contrary to the command of §18.

The Master's conclusion that these provisions of the Arizona and Nevada water delivery contracts "result in an allocation of mainstream water totally out of harmony with the limitation on California contained in Section 4(a)" (Rep. 237), and the reasoning by which he demonstrates that the enforcement of these provisions would result in water in storage which could not be used under the statutory and contractual limitations (Rep. 242-43) are briefly disposed of by the United States in its contention that the water apportioned to the Lower Basin main stream states pursuant to §4(a) of the Project Act is system water, rather than main stream water, and includes the water in tributaries above Lake Mead (U. S. Op. Br. 19-20). We have previously demonstrated that this concept is contrary to the intent of Congress as evidenced by the legislative history and the provisions of the Project Act.

Finally, the United States seeks to answer the Master's criticism that these provisions of the water delivery contracts and the views of the United States in support of their validity attempt to equate consumptive use measured by diversions less returns with depletion of the flow into Lake Mead (Rep. 243-44). The United States argues the appropriateness and fairness of charging Arizona and New Mexico for tributary uses only to the extent that they deplete Lake Mead storage and contends that a computa-

tion of the amount by which these tributary uses deplete the flow into Lake Mead is possible through the application of "concepts and standards which receive rather general acceptance in the engineering profession today" (U. S. Op. Br. 21).

All of this misses the point made by the Special Master: That the Project Act directs that accountability for the water apportioned pursuant to the Act shall be measured in terms of consumptive use (diversions less returns) and not in terms of depletion at a given point. If, as the United States claims, the water apportioned pursuant to the Project Act includes the water of the Lower Basin tributaries above Lake Mead, then the use of such water cannot, consistently with the provisions of the Project Act, be measured other than in terms of diversions less returns. The very fact that the water apportioned pursuant to the Project Act must be measured in terms of diversions less returns is itself an indication that tributary water was not within the contemplation of Congress; for, as the United States points out, if the states are to be charged with consumptive use on the tributaries, then they must be charged with use of a greater quantity of water than that by which such uses deplete the supply in Lake Mead. If Congress had intended to include tributary uses, it would have specified that such uses be measured in terms of depletion of the flow into Lake Mead and that the consumptive use measurement of diversions less returns specified in the Project Act should not apply to these tributary uses.

VII

Contrary to the contention of the United States, the Secretary of the Interior does not have uncontrolled discretion to create or determine priorities among intrastate users of Colorado River water.[214]

So far as the uses of Colorado River water within Arizona are concerned, the questions of who has the authority to determine (1) what particular projects or users within the state shall be entitled to the delivery and use of the state's apportionment of that water and (2) how much a particular project or user may receive out of the state's apportionment appear to have been settled by the water delivery contract between the Secretary of the Interior and Arizona.

Article 7(*l*) of the Arizona contract directs that:

> "Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. . . ."

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[214] This point is directed to a refutation of Point III of the Opening Brief of the United States, pages 21-47 thereof.

The United States has entered into water delivery contracts directly with various users in Arizona as thus contemplated by the Arizona contract. Although the Special Master refused to pass on the question as to the amount of water which these users are entitled to receive under their particular contracts or "to determine the right of any reclamation project or other user to receive water as against competing users in the same state" (Rep. 218-19), his Report does consider the validity of all contracts between the Secretary and Arizona users entered into prior to the completion of the trial of this case (Rep. 210-21). He holds that, with one minor exception, all these contracts are authorized by the Project Act and are valid (Rep. 218).

Construing Article 7(*l*) of the Secretary's contract with the State of Arizona, the Master finds that it "obligates him [the Secretary] to deliver a certain quantity of water for use within the state, but this contract leaves it to the Secretary to decide with which users within Arizona he will contract for the delivery of all or part of Arizona's allotment" (Rep. 216). The Master rejects Arizona's contention that the Secretary is confined to contracting with the State of Arizona and that it is for the state to decide which projects will share in the state's allotment of water; he concludes that under the Arizona contract "the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for delivery to them of certain amounts of water out of the total amount allocated to Arizona" (Rep. 216).

Arizona agrees with the Special Master that these water delivery contracts with individual projects and users in Arizona are valid and she has not excepted to the foregoing construction by the Special Master of the contract between the Secretary and the State of Arizona. Accordingly, we

shall not undertake an analysis of what the Project Act provides, independently of contractual arrangements with the states or with users within a state, with respect to the authority to determine what projects or users shall receive Colorado River water or to decide how much a particular project or user shall receive.

However, the Arizona contract is silent on the power to fix relative priorities among Arizona intrastate users and, contrary to the position of the United States, we deny that the Secretary has full or indeed any authority to fix and determine relative priorities among such users.

We agree that Congress has full dominion and control under the Commerce Clause over the water stored by authority of the Project Act. But what Congress has done depends not upon the existence of its power, but upon the extent to which it elected to exercise that power in the Project Act. Consideration of the provisions of the Project Act and the intent of Congress establishes that, other than specifying preferences among different kinds of uses in §6 of the statute, Congress did not contemplate that there should be any preferences in the use of the water stored pursuant to the authority of the Act but rather intended that all contracts for the use of stored water for irrigation and domestic purposes should be on a parity. Section 6 of the Project Act directs:

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power."

Except for these directions there is no provision or implication in the Project Act that different users shall

have different kinds of rights in the water stored in Lake Mead. The Special Master has found and the United States and Arizona agree that, as to the allocation among the states, no preferences or priorities exist and that, if and when they occur, shortages shall be borne ratably by the Lower Basin main stream states (Rep. 306).[215] The same considerations which led the Master to conclude that the Project Act envisions a ratable sharing of water between the states in the event of shortage impels the conclusion that Congress contemplated that ratable sharing among the users within a state should also obtain in times of shortage.

The fact that the Secretary and the California agencies with the consent and approval of the Division of Water Resources of California have agreed by contract for priority of uses among California users does not mean, as the United States appears to argue, that such priorities among California users result solely from the acts of the Secretary or rest entirely within his discretion or that the Project Act authorizes him to impose priorities among users within a state even though the state and its users do not consent thereto. The fact that the Project Act does not expressly direct that there may be preferences among users of the water stored in Lake Mead and does not authorize the Secretary to impose such preferences constitutes no impediment to a voluntary arrangement between the Secretary on the one hand and the state and its users on the other whereby the state's allocation is to be distributed in the order of the priorities agreed upon.

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[215] The Master has, of course, construed the "present perfected rights" clause of §6 of the Project Act to grant priority to holders of such rights as he defines them.

Nor do the provisions of the Reclamation[216] and Federal Power[217] Acts or the construction placed on those Acts by the Court aid in determining this question. These statutes were enacted to accomplish very different objectives from those intended by the Project Act and were designed to govern circumstances widely variant from those dealt with by that Act. Whatever the proper construction of the Reclamation and Federal Power Acts may be, they cannot be the vehicle for reading into the Project Act a purpose to authorize the Secretary of the Interior to impose, according to his uncontrolled discretion, preferences to the use of water contrary to the congressional intent that all uses of stored water for irrigation and domestic purposes shall be on a parity and that the principle of ratability shall govern if and when the supply of water is not sufficient to satisfy in full the entitlements of all users under their water delivery contracts.

VIII

The contention of the United States respecting water which it claims will be salvaged in the development of federal wildlife refuges is unsound.[218]

The United States asserts:

> "With respect to the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge, both on the mainstream of the Colorado River, the

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[216] Reclamation Act of 1902, 32 Stat. 388 (codified in scattered sections of 43 U. S. C.).

[217] Federal Power Act, 41 Stat. 1063 (1920), as amended, 16 U. S. C. §§791a-825r (1958).

[218] This point is directed to a refutation of Point V of the Opening Brief of the United States, pages 51-53 thereof.

> United States proved that the change in and control of the vegetation which will be effected by the development of these refuge areas will result in water consumption less than that which presently occurs in the overflow and undeveloped areas where the refuges are presently located." (U. S. Op. Br. 51-52)

The evidence proffered by the United States to support these claims was insubstantial; at least it did not convince the Special Master, for he did not adopt the relevant findings of fact proposed by the Government.

The modification of the Recommended Decree requested by the United States is to the effect that any water which it salvages may be used on federal wildlife refuges without regard to the priority date decreed for the respective refuge areas. The theory urged by the United States is that salvaged water belongs to the salvager. The water which the United States claims it will salvage will not consist of any of the water apportioned to the Lower Basin main stream states but will represent what otherwise would constitute losses to the supply which the Master's Recommended Decree directs shall be treated as diminution of supply (Rep. 313).

Under these circumstances it would not be proper to charge the use by the United States of salvaged water against the apportionment of the state in which the use occurs. While it might be thought that this would be of benefit to Arizona and to other states in which the use of salvaged water takes place, we are disturbed by the thought that the salvaged water doctrine is applicable to the situation which exists on the Colorado River in the Lower Basin, and we seriously question the wisdom and propriety of applying that principle in this case.

The situation at bar is not comparable to that which was before the Court in the cases cited by the United States in support of its argument under this point (U. S. Op. Br. 52). Here, the United States has exercised its dominion over the entire reach of the stream extending from Lee Ferry to the International Boundary and it has constructed great works to control, regulate and distribute the water of that portion of the river. It has also provided for the allocation of water among the states to be measured in terms of diversions less returns (Rep. 345). If the Court adopts the salvaged water concept urged by the United States, each state or user in the Lower Basin could contend that it should be charged, not in terms of diversions less returns, but for some lesser portion of its diversions based on expert opinion as to how much of the water diverted is salvaged by the use to which it is put and what portion of the water so diverted would have been lost if the user had not diverted it.

The principles applicable to salvaged water appear to run counter to the whole scheme of water allocation and accountability for uses against that allocation envisaged by the Project Act. We submit that a modification of the Recommended Decree which would depart from the measurement of diversions less returns and would incorporate into the Decree principles of water salvage not recognized or contemplated by the Project Act is not warranted.

CONCLUSION

The Report and Recommended Decree of the Special Master should be adopted by the Court, with the modifications requested by Arizona.

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STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Answering Brief of the California Defendants to the Exceptions and Opening Briefs of the United States, Arizona, and Nevada

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ANSWERING BRIEF OF THE CALIFORNIA DEFENDANTS TO THE EXCEPTIONS AND OPENING BRIEFS OF THE UNITED STATES, ARIZONA, AND NEVADA

AUGUST 14, 1961

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ANSWERING BRIEF

This consolidated answering brief of all eight California defendants in response to the opening briefs of the United States, Arizona, and Nevada is filed in accordance with the notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961.[1]

SUMMARY OF THE ARGUMENT

The Master's severance of the Compact from the limitation on California found in the Project Act and the Limitation Act, together with his proration of the shortage which this severance creates, produces this incredible result: Even if the lower basin enjoys the use of the full quantities aggregating 8.5 million acre-feet under Article III(a) and III(b) of the Compact, and Mexico is satisfied from surplus without invasion of that quantity, California would receive only 3.8 million acre-feet—not even the 4.4 million acre-feet to which the first part of the limitation on California refers.[2]

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[1]In this brief, "Rep. 103" refers to page 103 of the Master's Report; "Rep. app. No. 2" refers to appendix number 2; "Rep. app. 416" refers to page 416 which is in the appendixes. "Op. Br." without a date refers to opening briefs before this Court, filed May 22, 1961.

In 1959, the parties simultaneously submitted to the Special Master proposed findings of fact, conclusions of law, and supporting briefs, and subsequently, simultaneous answering and rebuttal briefs. These are occasionally cited in the course of this brief.

[2]The first paragraph of § 4(a) of the Project Act (45 Stat. 1058 (1928), 43 U.S.C. § 617c(a) (1958), Rep. app. 381-82) required, as an alternative condition to the effectiveness of the act, that California, by legislation, agree to limit its annual consumptive use of Colorado River water to 4.4 million acre-feet of the "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" plus one half of

None of the three briefs which we are here answering deal with the incongruity of this result. Two of the briefs—those of Arizona and Nevada—purport to advance arguments to support the Master's decision, in addition to supporting those states' exceptions. All three briefs fail to disclose that the errors in the Master's Report which each party attacks are in fact essential to his result.

In Part One of this brief we consider the relationship of the limitation on California to the Colorado River Compact, and the consequence of the Master's severing these two inseparable documents. Restricting California to 3.8 million acre-feet instead of to the 4.4 million acre-feet plus one half of "excess or surplus" which the limitation expressly specifies results from two distinct parts of the Master's decision: (1) severance of the Compact from the limitation and relation of the latter to "mainstream" waters (Lake Mead and below), and (2) substitution of parity for priority in allocating the inevitable shortage which that severance creates.

In parts Two, Three, and Four we address ourselves to specific arguments presented in the respective briefs of the United States, Arizona, and Nevada. Each such part of our brief is divided into three sections, dealing respectively with positions in the opening briefs relating to (1) the severance of the Compact from the limitation, (2) the destruction of priorities of existing projects, and (3) miscellaneous matters, if any.

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any "excess or surplus waters unapportioned by said compact"; those uses are "always to be subject to the terms of said compact." The California Limitation Act (CAL. STATS. 1929, ch. 16, p. 38 (Rep. app. No. 4) accepted that offer substantially *in haec verba.*

The Severance Issue

Both Arizona and Nevada in specific terms contradict the Master's conclusion that the Compact may be severed from the limitation. Arizona arrives at an equally untenable alternative conclusion by rewriting the Compact to delete the Compact's express application to lower basin tributary uses, an argument which the Master rejects. Contradicted by the Compact negotiators' reports which Arizona placed in evidence, by the legislative history of the Project Act, and by a decision of this Court,[3] Arizona's surgery produces a compact the operation of which is physically impossible.

Nevada argues that the documents constituting the law of the river are inseparable, and that the Compact applies to the entire river system, but avoids any attempt to reconcile those two sound propositions with the conclusion reached by the Special Master which Nevada says she supports. The United States avoids discussion of the Compact's construction or the severability of Compact and Project Act but resists the Master's conclusions which severance of the Compact from the limitation necessarily produces: truncation of the river at Lake Mead and separation of Lake Mead from its water supply.

The Priority Issue

The United States recognizes two essential premises: that the water supply to Lake Mead must be given effective protection, and that priorities above Lake Mead and priorities below Lake Mead must—to some extent at least—be recognized and integrated. We agree with the United States as far as its argument goes,

[3]Arizona v. California, 292 U.S. 341, 358 (1934).

but disagree with the tortuous route by which the United States seems to arrive in the vicinity of a correct result.

Arizona's argument that the construction of reservoirs which regulate the natural flow of the main stream destroys appropriative priorities is refuted, among other things, expressly by her own evidence and by necessary implication from this Court's decision in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). Preexisting rights which could be satisfied from the natural flow without the conservation and regulation afforded by the reservoir are always protected. Arizona's argument that the Compact (which, she says, has only interbasin effect) destroyed intrabasin priorities within the lower basin leads only to the nihilistic conclusion that the Compact destroyed interstate water rights in the lower basin and left nothing to take their place. Arizona attempts to save the constitutionality of the Master's "contractual allocation scheme" by finding a mandatory statutory allocation in the abortive tri-state compact set forth in the second paragraph of section 4(a) of the Project Act, which no state has ratified. This produces a result more favorable to California than the Master's proposed decision, but attributes to Congress an indefensibly devious design to invite the states to accept by compact a statutory solution which is now imposed as the command of Congress although no state has ratified it. As the Master points out, both the language of the second paragraph of section 4(a) and its legislative history defeat the mandatory statutory allocation which Arizona urges.

Nevada erroneously contends that the Master's proposed decision can be sustained upon equitable apportionment principles. The Master's allocation, which abrogates the priorities of existing projects in California in favor of new projects in Arizona and Nevada, violates equitable apportionment principles which are well established in the interstate decisions of this Court. *E.g.*, *Nebraska v. Wyoming,* 325 U.S. 589, 617-18 (1945).

PART ONE

THE CONSEQUENCES OF THE PROPOSALS ENDORSED BY ARIZONA, NEVADA, AND THE UNITED STATES

ARGUMENT

PART ONE

THE CONSEQUENCES OF THE PROPOSALS ENDORSED BY ARIZONA, NEVADA, AND THE UNITED STATES

§ I. THE SUBJECT IGNORED BY OUR ADVERSARIES: THE DISTORTION OF CONGRESS' AGREEMENT WITH CALIFORNIA ESTABLISHED BY THE LIMITATION ACT

Before dealing separately with the opening briefs of the United States, Arizona, and Nevada (parts Two, Three, and Four of this brief, respectively), it is important to recognize that throughout their arguments, both before the Special Master and now before this Court, runs a common theme. They offer arguments which, if accepted, would produce the following ultimate result despite their basic differences with the Master in the methods of reaching that result:

California in 1929 accepted an express agreement offered by Congress[1] which limited this state to the

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[1]The agreement which Congress offered to California (Project Act § 4(a), Rep. app. 381-82) and which California accepted (Calif. Limitation Act, Rep. app. 397), imposed a limitation upon the aggregate of California's (1) "uses under contracts made under the provisions of this Act" and (2) preexisting appropriative "rights which may now exist." The expression, "rights which may now exist," also appears in Article III(a) of the Compact *(infra)*. The quantitative limitation "shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

Article III(a) of the Compact provides (Rep. app. 373):

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower

annual consumption of 4.4 million acre-feet plus one half of "excess or surplus" and which conversely recognized our right to use water up to those limits.[2] The proposed decision would permit California to receive only *3.8 million acre-feet* even if the lower basin water supply were sufficient to sustain all of the Compact allocations in full, plus all Mexican Treaty requirements and all losses of every description.

The demonstration is simple.

Let us assume that the supply physically available in the lower basin, including the tributaries,[3] is adequate to sustain all of the following requirements:

Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article II(a) defines the "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America" (Rep. app. 372).

[2]California's appropriative rights, in 1929, were already in excess of 4.4 million acre-feet (Calif. Op. Br. 12 n.5). The limitation was demanded of us because of the universal recognition that California's appropriations could and would rise much higher whenever Hoover Dam should regulate the river's flow (Rep. 165). California proved appropriations as of 1929 of projects then using water capable of satisfaction from the unregulated flow of the river, to the extent of approximately 4.5 million acre-feet per year (Calif. Op. Br. 12 n.5). In addition, the appropriations underlying Metropolitan Water District's aqueduct, aggregating 1,212,000 acre-feet per year, were being diligently and vigorously prosecuted; more than $1,600,000 had theretofore been spent on design and preliminaries to construction of the MWD aqueduct (*id.* at A29). The limitation was accepted in consideration of the passage of the Project Act, as § 4(a) of that act recites. Arizona's 1944 water delivery contract, ratified by the Arizona Legislature (Act of Feb. 24, 1944. ARIZ. LAWS 1944, ch. 4, p. 419, in evidence as Ariz. Ex. 11, Tr. 228), in article 7(h) recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water for beneficial consumptive use up to this limitation (Rep. app. 402). All of the California water delivery contracts had been executed prior to 1944. (Rep. 28.)

[3]The uses on the tributaries are included in the Compact account-

(1) 8.5 million acre-feet of consumptive use throughout the lower basin, which thus includes the full 7.5 million acre-feet apportioned to that basin by Article III(a), as well as the full 1 million acre-feet of additional consumptive use permitted by Article III(b)[4] of the Compact; plus

(2) 1.5 million acre-feet of scheduled deliveries at the Mexican boundary in full discharge of the Mexican Water Treaty guarantee;[5] plus

(3) all evaporation and other losses, whatever those losses may be.[6]

If the Compact were thus fully served, the lower basin allocation of 8.5 million acre-feet of consumptive

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ing (Rep. 142-44), although excluded from the Master's limitation accounting (Rep. 173).

"[T]he plain words of the Compact permit only one interpretation—that Article III(a), (b), (c), (f) and (g) deal with both the mainstream and the tributaries." (Rep. 142.)

"The various arguments of Arizona fail before this unmistakable language of the Compact. The historical fact that the Upper Basin was primarily concerned with the mainstream will not nullify language of the Compact that subjugates both mainstream and tributaries to its rule." (Rep. 143.)

[4]Article III(b) of the Compact provides (Rep. app. 373):

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum."

[5]Treaty With Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, art. 10(a), 59 Stat. 1237, T.S. No. 994 (effective Nov. 8, 1945); quoted in Sp. M. Ex. 4 for iden., Tr. 255 (WILBUR & ELY, HOOVER DAM DOCUMENTS, 1948 ed.), at A851.

For the purpose of this analysis, it does not matter where the 1.5 million acre-feet for Mexico comes from, whether out of the upper basin or out of the waters which the lower basin tributaries contribute to the main stream after sustaining the consumptive uses made by projects located along those tributaries.

[6]These losses are diminutions of supply, not beneficial consumptive uses within the meaning of either the Compact (Rep. 144, 147-49) or the Limitation Act (Rep. 187, 313).

use (item 1 above) would include about 2 million acre-feet of consumptive use on lower basin tributaries,[7] and

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[7]The 2 million acre-foot figure for lower basin tributary uses represents the minimum contemplated by the Compact negotiators and by Congress. See, *e.g.*, Ariz. Ex. 49 (Tr. 257) (statement by Judge Sloan of Arizona, legal adviser to the Arizona Compact negotiator), at A69:

> "It may be of interest to know why the figures of 7,500,000 acre-feet for the upper basin and 8,500,000 acre-feet for the lower basin were reached. It grew out of the proposition made by the upper basin that there should be a fifty-fifty division of rights to the use of the water of the river between the upper and lower basins which should include the flow of the Gila, and the insistence of Mr. Norviel, commissioner from Arizona, that no fifty-fifty basis of division would be equitable unless the measurement should be at Lee's Ferry. As a compromise the known requirements of the two basins were to be taken as the basis of allotment with a definite quantity added as a margin of safety. The known requirements of the upper basin being placed at 6,500,000 acre-feet, a million acre-feet of margin gave the upper basin an allotment of 7,500,000 acre-feet. The known future requirements of the lower basin from the Colorado river proper were estimated at 5,100,000 acre-feet. To this, when the total possible consumptive use of 2,350,000 acre-feet from the Gila and its tributaries are added, gives a total of 7,450,000 acre-feet. In addition to this, upon the insistence of Mr. Norviel, 1,000,000 acre-feet was added as a margin of safety, bringing the total allotment for the lower basin up to 8,500,000 acre-feet."

Compare Calif. Exs. 26 (Tr. 4,972), 1302 (Tr. 11,442), 1371 for iden. (Tr. 11,436), and 1377 for iden. (Tr. 11,436); Calif. Op. Br. 20. See Calif. Findings and Conclusions, parts V-G and V-H, pp. V-35 through 48, showing the safe annual yield from the Gila River system in Arizona and New Mexico of 1,750,000 acre-feet per annum; part V-1, p. V-49 (see also Calif. Finding 4F:102, p. IV-55), re other lower basin tributary systems (Little Colorado, Virgin, Kanab Creek, and Bill Williams river systems) showing a safe annual yield of 200,000 acre-feet per annum.

Arizona's present pleadings establish substantially the same figure for consumptive use on the Gila. She alleged (Ariz. Reply, par. 8, p. 17), that these uses, measured by depletion of the main stream, were 960,000 acre-feet in 1929 and 1,170,000 in 1953, but if measured as diversions less returns the quantity would be greater by more than 1,000,000 acre-feet (Complaint, par. XXII, p. 26). The Master held: "Thus whether the limits fixed by Article III(a) and (b) have been reached or exceeded is to be determined by measuring the amount of each Basin's total appropriations through the formula, diversions less return flows" (Rep. 148).

consequently not more than 6.5 million acre-feet would be available for use from the main Colorado River in the lower basin within the "embargo" or "ceiling on appropriations" imposed by Article III(a) and (b) of the Compact.[8] Out of this 6.5 million acre-feet of consumptive use, the Master's recommended decree would allocate California only 44/75 (Rep. 347-48), or 3.8 million acre-feet. Arizona now endorses this ratio.[9]

The effect of the Master's formula, even when applied to a year in which the lower basin's supply is adequate for all components of the Compact in the lower basin, after satisfaction of the treaty requirements, is to repudiate every element of the bargain Congress exacted of California in the limitation. Thus:

(1) It denies California the right to use 4.4 million acre-feet even though the system supply available to the lower basin sustains much more than the 7.5 million

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"[F]or Compact purposes, the accounting is made at the point of diversion" (Rep. 196). He applies the same rule in his limitation accounting (Rep. 313). Arizona's opening brief (p. 105) now says: "Arizona agrees with the Master's conclusion that the § 4(a) apportionment, including the California limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225)."

[8]"This apportionment is accomplished by establishing a ceiling on the quantity of water which may be appropriated in each Basin as against the other. Although Article III(a) and (b) is not expressed in terms of appropriative rights, this is the purport of that Article" (Rep. 140).

"....The Compact puts an embargo upon the acquisition of appropriative rights in excess of the limits set by Article III(a) and (b). The first call upon any remaining water goes to supply Mexico." (Rep. 196.)

Whether the III(a) apportionment is called a reservation in perpetuity, or a ceiling on appropriations, does not matter for the purpose of this analysis. *Cf.* Calif. Op. Br. 250; Ariz. Exception 1, pp. 3-4.

[9]Ariz. Op. Br. 105.

acre-feet of consumptive use apportioned to it by Article III(a) of the Compact;

(2) It denies California all participation in the million acre-feet of "III(b) water"[10] referred to in the Compact, even though the full 8.5 million of uses were supplied, and makes that million acre-feet available for use only in the other lower basin states. This occurs despite the Master's holding that the waters encompassed by Article III(b) are in the category of "excess or surplus," in which California may share one half (Rep. 196-97), a determination which Arizona now concedes is correct;[1]

(3) It curtails the supply to California's "rights which may now exist" in favor of junior projects in other states whose uses account for the "increase of use" referred to in Article III(b) (Rep. app. 373), notwithstanding (i) the assurance in Article III(a) that that apportionment encompasses "rights which may now exist" (*ibid.*) (the same recognition of "rights which may now exist" appears in the first paragraph of the Project Act's limitation on California) (Rep. app. 382), (ii) the assurance in Article III(c) of the Compact[2]

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[10]We use "III(a) water" and "III(b) water" to refer to the quantities of water required to satisfy the beneficial consumptive use (diversions less returns to the river) specified in Article III(a) and (b), respectively, of the Colorado River Compact. In terms of the flow at any point the aggregate quantity of "III(a) water" and "III(b) water" is always greater than 8.5 million acre-feet.

[1]Ariz. Op. Br. 82. The Master limits the effect of this holding to the main stream supply in excess of that required to sustain 7.5 million acre-feet of consumptive use from the main stream (Rep. 196, 200).

[2]Article III(c) of the Compact provides (Rep. app. 373):

"(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System,

that the Mexican burden must first be satisfied out of waters surplus to the *aggregate* of the quantities specified in III(a) and III(b), and that only in the event of a deficiency in such surplus and in III(b) water should uses of the III(a) apportionment be curtailed, and (iii) the physical existence of such a system surplus in quantity sufficient to supply the full Mexican burden without any curtailment whatever of use of the full III(a) and (b) allocations.[3]

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such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)."

Article III(d) of the Compact provides (Rep. app. 373):

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

[3]Curtailment of California's use of III(a) water in consequence of the Mexican burden at a time when III(b) water is available is incongruous for another reason. In Arizona's brief in Arizona v. California, 283 U.S. 423 (1931), she said of Article III(b) (correctly we think) at 34 (reprinted in Calif. Ex. 2043, pp. 2-3 (Tr. 12,379)):

".... Paragraph (b) does not *apportion in perpetuity,* as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of 'surplus' waters, and surplus waters are defined not as surplus over quantities 'apportioned,' but as surplus over quantities '*specified* in paragraphs (a) and (b).' Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs

Thus, even upon this hypothesis of water so abundant as to sustain the Compact allocation, California's limitation ceiling—after subjection to proration—on the interpretation of the Master and Arizona would not be 4.4 million acre-feet plus one half of surplus: rather, it would not exceed 3.8 million acre-feet of consumptive use altogether, and, unfortunately, California's half of the waters over and above 7.5 million acre-feet would not exist at all.[3a]

(b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c)."

This is another way of saying that III(b) uses must be curtailed before lower basin III(a) uses are reduced, if the satisfaction of the Mexican burden requires the reduction of the lower basin's consumptive use below 8.5 million acre-feet.

Arizona now says that all of the III(b) water is in the main stream, implying that it is geographically so identified by the Compact (Ariz. Op. Br. 81). If so, it is physically vulnerable to the Mexican Treaty demand. Arizona's geographical identification is approximately correct, but for the wrong reason. The correct reason is that (1) the "increase of use" referred to in Article III(b) commences after the lower basin is required to account, basinwide, for the 7.5 million acre-feet of use referred to in Article III(a); (2) the III(a) accounting is required to include the water to supply all "rights which may now exist" in 1929; (3) the rights (and uses thereunder) on the tributaries in 1929 approximated 2 million acre-feet, exhausting the safe annual yield of the Gila, plus 200,000 acre-feet on other tributaries. Uses on the main stream have already accounted for the margin of 5.5 million in the III(a) apportionment. Therefore, uses in the lower basin which "increase" its aggregate basinwide consumptive use above 7.5 million are main stream uses junior to 5.5 million acre-feet of consumptive use on the main stream. This "increase," under principles of equitable apportionment, would be sacrificed to satisfy the Mexican burden before sacrificing the 1929 "rights which may now exist," or indeed any other senior rights.

[3a]The following table illustrates the difference in result between the Master's allocation and that which we think is correct, if the

The legal drouth thus created in the main stream in the midst of physical plenty in the system is visited most acutely upon the Metropolitan Water District—every drop of its water supply, on the theory of the Master and Arizona, would be beyond the pale,[4] outside the III(a) and (b) ceiling of the Compact, subject to extinction whenever the Compact ceiling is enforced.

By contrast, Arizona's brief accurately quotes debates in which Senators spoke of California's "irreducible minimum" (Ariz. Op. Br. 93, 94), and a difference of only 400,000 acre-feet between California's claim to 4,600,000 acre-feet and Arizona's concession to California of 4,200,000 acre-feet, finally resulting in a compromise giving California 4,400,000 acre-feet, plus one

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Compact allocations are fully served. It illustrates the allocation of consumptive uses available to the lower basin, assuming enforcement of the Compact "ceilings," and a supply adequate to sustain uses up to those "ceilings" (an aggregate of 8.5 million acre-feet of consumptive use, of which 2 million is used on the tributaries and 6.5 million on the main stream):

	Total	To Calif.	To all other lower basin states		
			Total	Main stream	Tributaries
On the Master's interpretation	8.5	3.8*	4.7	2.7	2
On California's interpretation	8.5	4.9**	3.6***	1.6	2

*44/75 of 6.5 million (8.5 million minus 2 million on tributaries)
**4.4 million plus ½ of the lower basin's consumptive use in excess of 7.5 million (8.5 minus 7.5)
***3.1 million apportioned by Article III(a) plus ½ of the lower basin consumptive use in excess of 7.5 million (8.5 minus 7.5)

[4]The Metropolitan Water District's Colorado River Aqueduct is the source of most of the water required for the municipal and industrial needs of 7,000,000 southern Californians. (Calif. Op. Br. A27-28.) Its rights are junior to 3,850,000 acre-feet of agricultural rights established before the aqueduct came into existence (*id.* at A3; Calif. Ex. 1811, Tr. 12,244), as well as to minor quantities for Indian reservations in California.

half of the excess or surplus (*id.* at 93-96). Here is Senator Hayden's explanation of the intended effect of the limitation:[5]

> "The bill itself provides that a million acre-feet may be used in the vicinity of Los Angeles, and some three and one-half million acre-feet through the all-American canal to irrigate the Imperial Valley. Then there is another half million acre-feet which may be used in the vicinity of Yuma and the Paloverde Valley . . . ."

This totals 5 million acre-feet of expected California consumptive use from the flow at the site of Hoover Dam, which Senator Hayden said was about 9.5 million.[6]

The allocation we would receive under the Master's recommended decree is less than Arizona spokesmen have conceded to be ours beyond all controversy. Governor Osborn of Arizona stated the concession in 1943, addressing the Arizona Legislature on the subject of Arizona's 1944 contract and Compact ratification:[7]

> "Now, of course, we would like to take from California some of that 4,400,000 acre feet of

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[5]70 CONG. REC. 464 (1928). See Calif. Op. Br. 236-37 for the remainder of the quotation and footnotes explaining the figures.

[6]*Ibid.* Compare Hayden's flow of 9.5 million at the site of Hoover Dam with that required for full service of the Compact and treaty: 1.5 million for the treaty, 6.5 million for consumptive use from the main stream to serve the III(a) and (b) ceilings, more than 1 million for losses in excess of the tributary inflow, a total of 9 million plus. For the calculation of these losses, see Calif. Op. Br., plate 7 and accompanying notes.

[7]Letter of March 25, 1943, from Governor Sidney P. Osborn to Hon. Dan E. Garvey, Arizona Secretary of State, printed in ARIZ. LAWS 1943, at 231. The Governor reiterated substantially the same views in a message to the Arizona Legislature the following year in presenting the Arizona contract for ratification. Ariz. Senate Journal, 16th Legis., 1st Spec. Sess. 1944, at 16.

water. But neither unrecognized filings against it, nor wishful thinking on our part can accomplish that. Nothing can accomplish it. The Federal Government, having expended tens of millions of dollars of the people's money to provide irrigation and power facilities for the use of this water in one state, will not wipe out that investment and divert that water to another state. Arizona cannot compel that any more than we can turn back the pages of history. The time has long since passed when Arizona could obtain the water which California has already put to beneficial use."

With that explanation Arizona's Legislature ratified the Compact and her proposed contract. The contract recites that "present perfected rights to the beneficial use of waters of the Colorado River *system* are unimpaired by this contract" (art. 7(*l*), Rep. app. 403; emphasis added), and that it is without prejudice to the contention of any state as to "what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system" (art. 10(5), Rep. app. 405).

§ II. THE TWO BASIC SOURCES OF ERROR: (A) SEVERANCE OF THE PROJECT ACT FROM THE COMPACT, AND (B) DISREGARD OF RULES OF PRIORITY WHICH BOTH THE COMPACT AND THE PROJECT ACT RESPECTED

The bizarre result—converting a 4.4 million acre-foot limitation into a 3.8 million acre-foot maximum—is created by the combined effect of two basic elements of the Master's "contractual allocation scheme": (1) The creation of a shortage in "Article III(a)" waters by divorcing the limitation from the Colorado River Compact,

and (2) the proration of that shortage, imposing 44/75 of it upon California. (Arizona and Nevada agree with his result, but they disagree with the premise that the Compact can be severed from the limitation: See parts Three and Four of this brief.)

A. The Issue of Severance of the Compact From the Limitation

The creation of an automatic shortage by the Master's formula is achieved as follows:

The limitation which is stated in the first paragraph of section 4(a) identifies specifically the resource which California may consume—4.4 million acre-feet per year of the 7.5 million acre-feet of consumptive use apportioned by Article III(a) of the Colorado River Compact, plus one half of the excess or surplus waters unapportioned by that Compact—and, on the other hand, the resource from which California is precluded and which only the other lower basin states may appropriate: 3.1 million acre-feet of the 7.5 million acre-feet of consumptive use apportioned by Article III(a), plus the other half of the excess or surplus.

This is the issue: Are the consumptive uses which are made out of the tributaries in the states which those tributaries traverse chargeable against the 3.1 million acre-feet and the one half of excess or surplus from which California is precluded?

We say "Yes." The 7.5 million acre-feet against which both California and the other states assert these claims is identified by the reference in section 4(a) of the Project Act and the reciprocal provisions of the California Limitation Act to Article III(a) of the Compact. Article III(a) of the Compact, as the Master

correctly holds, encompasses the tributaries as well as the main stream (Rep. 142-44, 173). The necessary result is that the quantities which the states other than California may claim from the main stream within the lower basin's "ceiling" are reduced to the extent of their uses on the tributaries.

The Master says "No." The other states may claim all of the 3.1 million acre-feet and all of the one half of excess or surplus from the waters released from Lake Mead, undiminished by their uses upon the tributaries (including as a "tributary" the main stream above Lake Mead): The limitation's reference to Article III(a) of the Compact is "inappropriate" (Rep. 173),[1] and is therefore excised. The reference to Article III(a) means "the water stored in Lake Mead and flowing in the mainstream below Hoover Dam" (Rep. 173).

Manifestly, if the Compact requires accounting for uses on the tributaries against the lower basin's III(a) ceiling of 7.5 million acre-feet, the lower basin states cannot claim against the upper basin (which is their major source of supply) the whole 7.5 million acre-feet out of the main stream as within that ceiling. Thus, if the limitation on California and the secretarial contracts effectuate an allocation of 7.5 million acre-feet from Lake Mead and below, this allocation exceeds the Compact "ceiling" or "embargo" (Rep. 140, 196). Since

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[1]The United States says that depletions on tributaries and the main stream above Lake Mead are deductible from "allocations" to Arizona and Nevada from the "mainstream," but does not deduct the uses on other tributaries, *e.g.*, the Gila (U.S. Op. Br. 7-21). Arizona and Nevada agree with the Master's result. (See parts Three and Four of this brief.)

the Secretary is required by statute[2] to operate Lake Mead (and each of the dams above Lake Mead) in conformity with the Compact, shortage in the allocations made by the Master's "contractual allocation scheme" is automatic and certain whenever the Secretary restricts either the inflow to, or releases from, Lake Mead to enforce the Compact "ceiling."[3]

Put another way, water to supply 7.5 million acre-feet of consumptive use from Lake Mead and below can only be found if it is assumed that the Compact ceiling on lower basin appropriations will never be enforced. If the Compact is enforced, the Master's formula produces a built-in shortage.[3a] His formula presupposes (1) that the act of Congress that gave consent to the Compact simultaneously created this anomalous result; and (2) that the California Legislature in 1929, after passage of the Project Act, ratified these two inconsistencies,[4] and agreed that California's rights might be reduced, not to 4.4 million acre-feet, but to 44/75 of a quantity which could never be as great as 7.5 million acre-feet if the Compact is enforced.

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[2]Project Act §§ 8(a) (Rep. app. 389) and 13(b) (Rep. app. 393); Colorado River Storage Project Act of 1956, §§ 7 and 14, 70 Stat. 109, 110, 43 U.S.C. §§ 620f, 620m (1958).

[3]The proposed decree would permit Arizona to divert for the Central Arizona Project any quantity it pleased between Lake Mead and Lee Ferry, without accounting for it against Arizona's allocation; if the diversion is made there, the shortage is to that extent deepened.

[3a]Arizona agrees that the Compact controls main stream supply legally available in the lower basin. Ariz. Op. Br. 26.

[4]Ariz. Ex. 12 (Tr. 230), Act of Jan. 10, 1929, CAL. STATS. 1929, ch. 1, p. 1 (ratifying Colorado River Compact as a seven-state agreement); Ariz. Ex. 13 (Tr. 230), Act of March 4, 1929, CAL. STATS. 1929, ch. 15, p. 37 (ratifying Compact as six-state agreement); Ariz. Ex. 14 (Tr. 232), Act of March 4, 1929, CAL. STATS. 1929, ch. 16, p. 38 (California Limitation Act).

Arizona and Nevada apparently recognize that the limitation and the Colorado River Compact must somehow be harmonized.[5] Arizona suggests a method for harmonizing them, in an argument sometimes identified as an alternative ground to sustain the Master's conclusions.

The Arizona alternative would write lower basin tributaries out of the Compact instead of writing the Compact out of the limitation. Arizona insists that it makes little difference which alternative is selected. This is a major error.

The Master's decision and the Arizona alternative argument are contradictory in almost every essential respect. Arizona arrives at a limitation which refers to a "mainstream" from Lee Ferry to Mexico.[6] The Secretary's physical control of the main stream beginning at Lake Mead and an allocation based on that control by means of Lake Mead water delivery contracts cannot physically apply to a main stream which begins at Lee Ferry 275 miles above Lake Mead.

The effect of the Master's construction of the limitation is to defeat every rational purpose to be served by the Limitation Act. California could use any quantity of water diverted between Lee Ferry and Lake Mead, in addition to quantities specified in the limitation. Arizona could use any quantity from the same source without regard to any "contractual allocation." Plans for such diversions by both California and Ari-

[5]"The Master construes the Compact as a separate and independent document wholly apart from and without reference to the Project Act (Rep. 138-51). In this we believe he is in error." Ariz. Op. Br. 67.

Nevada makes essentially the same argument (Nev. Op. Br. 35-36) but apparently fails to recognize that the Master does not harmonize these two documents.

[6]Ariz. Op. Br. 72-81.

zona were under active study when the Project Act was under consideration, as Congress well knew. (Calif. Op. Br. 124-27 and plate 2.)

The Master's decision and the Arizona alternative argument have in common, however, the failure to recognize the purpose and the proper motive of both the Colorado River Compact ar . the limitation accepted by California for including lower basin tributaries.

1. *The Upper Basin's Interest in the Inclusion of Lower Basin Tributaries in the Compact Accounting*

Manifestly the upper basin states have never had any hope or expectation of using water from lower basin tributaries. The Compact, however, was negotiated in the recognition that supplying water to Mexico was an obligation of both basins.

Article III(c) provides (Rep. app. 373):

> "If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, [1] such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b) [of Article III]; and [2] if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d) [of Article III]."

The inclusion of the lower basin tributaries in the Compact accounting serves two important and rational purposes for the upper basin, as our bracketed numbers indicate (see upper basin views quoted *infra* at 99-100):

[1] The quantity of consumptive uses on lower basin tributaries affects the quantity of "surplus" water, if any, in the system over and above the aggregate of the quantities specified in Article III(a) and (b). Article III(c) requires that "surplus" water be first yielded to supply Mexico. [2] The quantity of consumptive uses on lower basin tributaries affects the determination of whether there is any "deficiency" in the "surplus" to supply Mexico, and, if so, whether that "deficiency" is being "equally borne" by the upper and lower basins, as Article III(c) also requires.[1]

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[1]The relationship of the lower basin tributaries to the Colorado River Compact was carefully explained by Arizona herself on p. 33 of her brief in Arizona v. California, 283 U.S. 423 (1931) (reproduced in Appendixes to Calif. Answer to Ariz. Bill of Complaint, app. 28 (pp. 386-99), at 398):

> "This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt."

These two points can be illustrated by one example: Assume that the supply from the main stream and tributaries will sustain 8.5 million acre-feet of consumptive use in the lower basin after satisfaction of the full Mexican Treaty burden:

a. If the lower basin tributaries are included in the Compact allocations, there is no deficiency in the lower basin allocation after satisfaction of the Mexican burden; the treaty requirement has been met out of "surplus." Hence, the lower basin cannot call upon the upper states to deliver additional water at Lee Ferry.

b. If the lower basin tributaries which support 2 million acre-feet of consumptive uses are excluded from the Compact allocations, the remaining lower basin main stream supply will sustain only 6.5 million acre-feet (8.5 million acre-feet minus 2 million acre-feet) of the lower basin's 8.5 million acre-foot allocation under Article III(a) and (b). The deficiency thus created is exactly equal to the measure of the lower basin tributary uses (2 million acre-feet) which are excluded from the accounting. Hence the lower basin can call upon the upper states to deliver additional water at Lee Ferry so that the burden of the deficiency is borne equally under the provisions of Article III(c).[2]

2. *California's Interest in the Inclusion of Lower Basin Tributaries in the Limitation Accounting*

Our interest may most simply be illustrated by the same example given above; 8.5 million acre-feet of con-

[2]The exact measure of that additional delivery at Lee Ferry depends upon (1) the extent of Article III(a) uses in the upper basin (*i.e.*, the deficiency in the upper basin allocation) and (2) certain questions of interpretation of the meaning of "deficiency" and "equally borne" in Article III(c). We do not probe these questions here.

sumptive use throughout the lower basin, of which 2 million acre-feet is from tributaries and 6.5 million acre-feet is from the main stream:

a. If the lower basin tributaries are included in the limitation accounting:

(1) Our 4.4 million acre-feet out of the first 7.5 million acre-feet is assured because there is no shortage even if the main stream supply should be reduced to 5.5 million acre-feet (this is the residue of the III(a) apportionment after deducting therefrom 2 million acre-feet of uses on the tributaries), or 1 million acre-feet below the Compact ceiling of 6.5 million acre-feet on main stream uses.

(2) There is excess or surplus in half of which California may share whenever the main stream supply exceeds 5.5 million acre-feet. One million acre-feet of "excess or surplus," *i.e.*, the million acre-feet referred to in Article III(b), exists within the Compact ceiling of 6.5 million acre-feet on main stream uses.

b. If the lower basin tributaries are excluded from the limitation accounting:

(1) Our 4.4 million acre-feet is subject to reduction if proration is adopted because the main stream supply within the Compact ceiling (which encompasses 2 million acre-feet of uses on the tributaries) is only 6.5 million acre-feet per annum. The problem of shortage in "Article III(a) waters" faces California unless the main stream supply is 7.5 million acre-feet[3] which ex-

[3]The Lee Ferry flow necessary to sustain 7.5 million acre-feet of consumptive use in Arizona, California, and Nevada from the main river must exceed 10 million acre-feet, because more than 2.5 million acre-feet of the Lee Ferry flow cannot be used in the United States. 1.5 million must be passed on to Mexico. In addition, losses below Lee Ferry exceed tributary inflow below

ceeds the Compact III(a) and (b) ceiling by 1 million acre-feet of "surplus."

(2) There can be no excess or surplus, of which we may take one half, unless the main stream supply exceeds the Compact ceiling (6.5 million acre-feet) by more than 1 million acre-feet.

Thus, in effect, the inclusion of lower basin tributaries in the limitation accounting insulates *pro tanto* our rights from being cut back to supply the Mexican Treaty requirement, just as the inclusion of those tributaries in the Compact insulates *pro tanto* the upper basin's Compact apportionment from the impact of the treaty. In each instance the inclusion of tributaries is both rational and fair.

3. *The Irrational Consequences of Severing Compact From Limitation*

Arizona and Nevada, in asserting that the Compact and limitation must be harmonized, at least concede the necessity of avoiding a construction which is incredible in terms of statutory construction and incredible in terms of result.

a. In terms of statutory construction

Under the Master's construction which severs Compact from limitation this result is accomplished in terms of the agreement which California accepted: California is limited to the annual consumption of

> "four million four hundred thousand acre-feet of the waters apportioned to the lower basin States

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that point by about 1 million acre-feet, and if water to supplant those losses is not furnished at Lee Ferry, downstream consumptive use must be curtailed to do so. Calif. Op. Br. plate 7 and accompanying notes. The historic excess of losses over inflow is substantially greater than 1 million acre-feet. For historic inflow, see Rep. 119-23. For historic losses, see Rep. 124-25.

by paragraph (a) of Article III of the *Colorado River compact,* plus not more than one-half of any excess or surplus waters unapportioned by *said compact,* such uses always to be subject to the terms of *said compact.*"

We have italicized three references to the Colorado River Compact in the course of the 53 quoted words. Whether appropriate or inappropriate, those three references—"Colorado River compact" and "said compact" (twice)—must mean the same thing. The Master, however, arrives at the incredible result that "Colorado River compact" and "said compact" are inappropriate references to the Compact in the first two instances, but not in the third instance. "Such uses"—*i.e.,* all California uses of "III(a)" and "excess or surplus"—are subject to the terms of "said compact," and in the third instance this means the systemwide Colorado River Compact. Section 8(a) of the Project Act[4] leaves no room for doubt, and nothing in the Master's proposed decision purports to relieve California or the lower basin of the restrictions of the Compact.

b. In terms of result

The terms of the limitation which we quote above are the operative part of the limitation. If the Compact includes lower basin tributaries, as the Master

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[4]Section 8(a) of the Project Act provides (Rep. app. 389): "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."

says, the lower basin rights against the upper basin are diminished by uses on the lower basin tributaries. The lower basin cannot demand from the upper basin water consumed under the Compact allocation from lower basin tributaries.

Under the Master's decision "Compact" means "Compact" in the limitation when the result is to restrict the lower basin, and hence restrict California as a participant in the lower basin's right. "Compact" is an inappropriate reference when the effect would be to make California's right coextensive with the lower basin right. The result, as we have seen, coupled with the destruction of priorities, is that California cannot possibly approach 4.4 million acre-feet which the limitation specifies even though the lower basin's Compact right is fully supplied with the full 8.5 million acre-feet which III(a) and (b) specify.

Arizona's obligation to account for her tributary uses in the allocation of the Mexican burden is inseparable from her reliance upon a contract which, by state and federal statutes, is subject to the Compact,[5] as well as from her asserted ratification of the Colorado River Compact itself. If she effectively ratified that agreement, she assumed its burdens. Among its burdens is the "plain" mandate "that Article III(a), (b), (c), (f) and (g) deal with both the mainstream and the tributaries" (Rep. 142). That obligation runs to all six of the other states, including California. The Compact was not altered by enactment of the Project Act or the Limitation Act. The effect of rewriting either the Limitation Act as the Master proposes or the Compact

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[5]Project Act § 8(a), Rep. app. 389; ARIZ. LAWS 1944, ch. 4, p. 419 (Ariz. Ex. 11 (Tr. 228)), ratifying Ariz. 1944 contract; see also art. 13 of that contract, Rep. app. 406.

as Arizona proposes, to exclude the tributaries, would amount to unjustifiable judicial legislation,[6] and would abrogate the bargain of the Limitation Act. But if that is done with respect to "III(a) water in the Project Act sense" (Rep. 149), then it must be done with respect to III(a) water in the "Compact sense" *(ibid.)*, and vice versa.

B. The Issue of Priorities in the Event of Shortage

If the supply which is available from Lake Mead in any given year is inadequate to sustain 4.4 million acre-feet of consumptive use in California, plus the main stream claims of Arizona and Nevada within the Compact ceiling, how is the burden of the shortage to be borne?

The Master says that shortages are to be borne pro rata, in ratios which assume that the 4.4 million acre-feet which California may use, and the 3.1 million from which she is precluded, were all intended to be used from the main stream, on a basis of parity,[7] except for the protection of "present perfected" rights which must not be impaired (but these rights are nevertheless included in his allocation ratios with exactly the same weight as the claims for projects not yet built or authorized).[8] (Rep. 305-12.)

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[6]"It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." United States v. Great Northern Ry., 343 U.S. 562, 575 (1952). See also United States v. Calamaro, 354 U.S. 351, 357 (1957); Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930).

[7]Rep. 305-14. He derives this ratio, however, not from § 4(a) of the Project Act, which he declines to treat as a mandatory allocation formula (Rep. 162-63, 202), but from a "contractual allocation scheme" of the Secretary which substantially but not precisely followed the pattern suggested in § 4(a) for an interstate compact never consummated (Rep. 221-24).

[8]Arizona alleged that 1.7 million acre-feet of the main stream

California says that the burden of shortages is to be borne in accord with the principles of equitable apportionment, applied interstate, whether the competing claims are rooted in state law or in federal contracts, and that the primary elements of equitable apportionment are (i) interstate priorities of appropriation and (ii) the principle that existing uses which support a going economy are not to be destroyed.

The United States position is ambiguous on this point, conceding the existence of priorities as between projects above and below Hoover Dam, asserting that some of the priority attributes of appropriations attach to federal water contracts, insisting on the Government's right to determine intrastate priorities of its contract holders, but stopping short of recognition of interstate priorities. (U.S. Op. Br. 16-17, 21-47.)

Arizona endorses the principle of proration[9] except for her insistence that her projects' priorities as against Indian reservations survived the enactment of the Project Act.[10] Nevada endorses the Master's scheme but concedes, in discussing the legislative history of the Project Act, that the Senators—

> "unquestionably believed that they were taking effective action on the amount of water which California would have as a *prior right* and thus guaran-

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water she claimed (2.8 million) was "not being presently used and consumed in Arizona." (See Complaint, par. XVII, p. 21; Ariz. Reply, par. 8, pp. 16-17.)

[9]Ariz. Op. Br. 105. However, Arizona finds a mandatory proration formula in § 4(a) of the Project Act (*id.* at 83-99), contrary to the Master (Rep. 162-63). She says that if the act did not lay down such a mandatory formula, the authorization for contracts in § 5 lacks necessary constitutional directions to the Secretary (Ariz. Op. Br. 88-89, 99).

[10]Ariz. Op. Br. 181.

tee [*sic*] the allocation of the balance available to the other two States." (Nev. Op. Br. 42. Emphasis added.)

§ III. WATER SUPPLY

In our opening brief (pp. 232-61), we stated the reasons why we believe that the dependable supply of the main stream will not support, on a permanent basis, as much as 6 million acre-feet annually of consumptive use—some 500,000 acre-feet less than the Compact's ceiling on main stream appropriations (*supra* pp. 8-11).

The other parties do not, in their opening briefs, expressly meet this major problem of the determination of the dependable water supply; however, their arguments, significantly, assume the existence of shortage.

Nevada, for example, asserts that her allocation under the Master's formula should not be reduced to supply "present perfected rights" in the other states. Nevada further asserts that, in the alternative, the decree should provide that her allocation should never be reduced below a minimum of 250,000 acre-feet. (Nev. Op. Br. 56-58.) Arizona also contends that "present perfected rights" should not be accorded interstate protection and, in the alternative, argues that such rights are to be measured as of November 24, 1922, rather than as of June 25, 1929 (Ariz. Op. Br. 46-56), so that (she apparently assumes) the quantity of such rights in California would be smaller. The United States contends that the Master's proposed invalidation of the deduction clauses in the Arizona and Nevada water delivery contracts (reducing their deliveries of Lake Mead water because of upstream consumptive uses) will have an "adverse effect upon California's estab-

lished projects" which "ought not to be imposed in the absence of a clear requirement therefor" in the Project Act or its legislative history (U.S. Op. Br. 21).

All of these arguments would be of no practical consequence if the Master's assumption of an abundant water supply into the indefinite future were correct. This paradox suggests that each of these parties is in fact concerned that the supply may indeed be less than 7.5 million acre-feet—a possibility that becomes a certainty whenever the Compact ceiling of 6.5 million acre-feet on main stream consumptive uses is enforced, and that becomes an even bleaker prospect when the main stream supply shrinks to its permanently dependable regimen which will sustain less than 6 million acre-feet annually of consumptive use. The result to California of the Master's proposed "mainstream" allocation, in the face of this inadequate dependable supply, is detailed in our opening brief (pp. 261-77).

PART TWO

ANSWER TO THE UNITED STATES OPENING BRIEF

PART TWO

ANSWER TO THE UNITED STATES OPENING BRIEF

§ I. THE SEVERANCE ISSUE: THE UNITED STATES POSITION IS IRRECONCILABLE WITH THE MASTER'S CONCLUSIONS

The major premise for the Master's construction of the limitation on California and for his "contractual allocation scheme" is that Congress intended the Project Act, particularly sections 4(a) and 5, to apply only to those waters of the Colorado River which could be delivered from Lake Mead and the main stream below Hoover Dam (Rep. 173-74, 183-84). From this premise, the Master reasons that Congress truncated the main stream of the Colorado River at Lake Mead and excluded all tributaries in the lower basin as well as the main stream above Lake Mead, which is redefined as a "tributary." Upon the same reasoning, the Master concludes that uses in Arizona and Nevada above Lake Mead cannot be taken into account by the Secretary of the Interior as deductions in deliveries from Lake Mead in each state. (Rep. 246-47.)

The United States disagrees with the Master's premise and his conclusions that follow. Congress, it argues, did not limit the application of the Project Act to waters physically controlled by Hoover Dam (U.S. Op. Br. 12):

> "[The Master's analysis] . . . appears to attribute to Congress a disregard for anything which might

happen above the reservoir to frustrate or partially to frustrate the purposes of the dam."

Consequently, the United States apparently argues that the Project Act did not truncate the main stream at Lake Mead. We say "apparently" because the United States does not explicitly state its own definition of "mainstream," and its references to the waters to which section 4(a) refers are not consistent.[1]

The United States likewise asserts that various consumptive uses of water above Lake Mead, both on the main stream and the tributaries, must be taken into account (U.S. Op. Br. 20):

> "This is necessary to achieve Congress' purpose to impound and regulate 'substantially all the mainstream water' and to accomplish the interstate allocation established by the Section 4(a) limitation on California and the delivery contracts with Nevada and Arizona. We urge the Court to adopt this view."

The United States thus attacks major premises of the Master's Report: his construction of the limitation and his contractual allocation scheme which, he declares,

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[1]For example, the United States says it agrees with the Master that "the waters contemplated by Congress in enactment of Section 4(a) of the Project Act are mainstream waters" (U.S. Op. Br. 11), but its statement is found in a section of the United States brief devoted to proving that the Master errs by defining "mainstream" to exclude consideration of all waters above Lake Mead. In answer to the Master's conclusion that depletions of the flow, for instance, of the Little Colorado River into Lake Mead are excluded from the purview of the Project Act, the United States says: "We suggest that the 100,000 acre-feet of Little Colorado depletions is part of the total mainstream supply available for allocation. . . ." (U.S. Op. Br. 20.)

would founder upon the premises then and now asserted by the Government. The Master said:

> "Articles 7(d) and 5(a) [of the Arizona and Nevada contracts, respectively, which the United States asserts are valid] are inconsistent with the Section 4(a) limitation on California's use of mainstream water, and indeed, defeat the basic purpose of the delivery contracts themselves; namely, to provide for the allocation in fixed proportions among Arizona, California and Nevada of all the mainstream water released for use in the United States." (Rep. 241; bracketed material added.)[2]

> "[T]he United States' suggestion [requiring accountability for uses above Lake Mead under articles 7(d) and 5(a) of the Arizona and Nevada contracts, respectively] would violate the interpretation of Section 4(a) proposed in this Report, an interpretation to which the United States herself agrees. Thus Section 4(a) limits California to 4.4 plus half of surplus out of the total consumptive use of water diverted from the *mainstream;* it establishes a mainstream, not a system-wide, method of accounting. But the United States' suggestion would import tributary considerations into the Section 4(a) limitation. . . . " (Rep. 244, emphasis in original; bracketed material added.)

We agree with the United States that Congress did not build the great dam and reservoir at Black Canyon without regard to the right of the United States or the water users served to protect the water supply. How-

[2]See also Rep. 183, 185.

ever, the United States has deliberately postponed its major brief on these issues for its answering brief to be filed August 14, 1961. (U.S. Op. Br. 6.) Accordingly, we reserve our further response.

§ II. THE PRIORITY ISSUE: THE RESULT FOR WHICH THE UNITED STATES PROPERLY ARGUES CAN BE ACHIEVED ONLY BY FULL RECOGNITION OF EQUITABLE APPORTIONMENT PRINCIPLES

The United States accepts the premise that the application of principles of priority in a contest between water users above and those below Lake Mead is necessary to protect the Lake Mead water supply and to accord protection to established projects (U.S. Op. Br. 16-17, 21). We agree. But the same necessity compels full recognition of priorities between water users below Lake Mead. The acceptance of the initial premise inevitably leads to that very conclusion.

The United States argument reaches substantially the destination urged by California, but by a route indefensibly tortuous. California argues that the Project Act preserved—within the ceiling established by the limitation—the principles of equitable apportionment and priority of appropriation preexisting that act. Those principles, developed over a period of more than 100 years, clearly define the rights of water users *inter sese* when shortages in water supply occur. Their application requires no semantic exercise, no dubious inferences, and raises no constitutional difficulties. The United States, however, insisting that equitable apportionment was destroyed below Hoover Dam and that rights in water impounded by Lake Mead depend solely upon secretarial water delivery contracts, finds it neces-

sary by implication, inference, and other interpretive techniques to mold water delivery contracts into instruments having the effect of recreating equitable apportionment.

The legislative history and contemporaneous construction of section 5 of the Project Act conclusively demonstrate that the water delivery contracts contemplated by that section were to be executed with water users in the pattern previously established under other provisions of the reclamation law. (See Calif. Op. Br. 175-77.) Nevada has accurately pointed out that the "historical pattern followed under the general Reclamation Law has, of course, been one in which the Secretary has contracted for the delivery of specific quantities of water to the various entities who would be entitled to divert and use them." (Nev. Op. Br. 41.) The Government characterizes such contracts as "definitive contracts for the delivery of specified quantities for specific projects." (U.S. Op. Br. 17.) Such contracts are neither patents nor grants. They evidence the consent of the United States to the initiation of a right of which beneficial use is expressly made "the basis, the measure, and the limit"[3] as under any other appropriation.

If Congress intended secretarial water delivery contracts to be the sole basis of rights to water impounded by Hoover Dam, its choice of language in section 4(a) of the Project Act is incomprehensible. In establishing, as alternative conditions to the effectiveness of the Project Act, seven-state ratification of the Colorado River Compact or six-state ratification of the

[3]Reclamation Act of 1902, § 8, 32 Stat. 390, 43 U.S.C. § 372 (1958).

Compact plus the enactment of the California Limitation Act, Congress declared in section 4(a):

> "[N]o water rights shall be claimed or *initiated* hereunder, and no steps shall be taken by the United States or *by others to initiate or perfect* any claims to the use of water pertinent to such works or structures unless and until . . . ." (Emphasis added.)

The words "initiate" and "perfect" used in connection with "water rights" are words of art which refer to successive steps in acquiring appropriative rights: The term "initiate" refers to the act of filing a notice of appropriation; the term "perfect" relates to the completion of works and (in some instances) the application of water to land. The two steps, in the nature of things, are usually separated by a considerable lapse of time—often many years. Those words cannot refer to a right both initiated and perfected simultaneously in one step by the Secretary's signing a water delivery contract. Moreover, how could "others" than the United States have "initiated" and "perfected" a federal water delivery contract?

The Nevada and Arizona contracts on which the Master and the United States rely in discovering an interstate contractual allocation scheme do not fit that pattern. They do not purport to do so. The United States says that they are documents "designed primarily to allocate waters for use within those States." (U.S. Op. Br. 17.) Manifestly, they are not contracts "for the storage of water in said reservoir and for the delivery thereof at such points on the river as may be agreed on" authorized by section 5 of the Project Act. As "allocations" they are *ultra vires:* Water "alloca-

tion" contracts with states are not contemplated by the Project Act at all. Congress did not delegate power to the Secretary to make interstate allocations of waters of the Colorado River, and the Secretary did not purport to exercise any such power.[3a]

A. The United States Correctly Recognizes (1) That the Purposes of the Boulder Canyon Project Act Would Be Frustrated in the Absence of Protection to Rights to Water Which Supplies Lake Mead and (2) That the Priority Principle Is Essential to That Protection

The Master's decree would allocate among Arizona, California, and Nevada pro rata shares of the water that the Secretary of the Interior may make available for consumptive use from whatever water may happen to reach Lake Mead. The United States attacks two basic aspects of the Master's proposed decision in points I and II of its opening brief (pp. 7-21): (1) the Master's definition of "mainstream" and the limitation of his adjudication to a segment of the main Colorado River in the lower basin; (2) the Master's invalidation of the provisions of the secretarial contracts which provide deductions on account of Arizona and Nevada uses above Lake Mead. The United States objections are well taken.

The United States properly recognizes that neither Congress nor the California Legislature disregarded either the water or the water rights above Lake Mead. The United States likewise recognizes that the Master's

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[3a]The United States confines itself to a statement of its conclusion that secretarial contracts with Arizona and Nevada are interstate allocations. The conclusion cannot be sustained. However, the Government apparently defers its argument in support of this conclusion to a later brief (U.S. Op. Br. 6), and we accordingly defer our reply.

invitation to protect the rights of downstream users and the water supply of Lake Mead by future equitable apportionment suits is entirely unrealistic (U.S. Op. Br. 21):

> "Any problems in administration of the 7(d) and 5(a) contract provisions (Report, p. 246) [the provisions of the Arizona and Nevada contracts invalidated by the Master] would be relatively slight in comparison with the complications which might well be involved in case of suit by California to protect itself against 'undue depletions on the tributaries and the mainstream above Lake Mead * * * .' (Report, p. 247.)[4]
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> "The adverse effect upon California's established projects of the ruling with respect to the Article 7(d) and 5(a) contract provisions ought not to be imposed in the absence of a clear requirement therefor in the controlling statute or its legislative history. We believe no such requirement exists." (Bracketed material added.)

The vice in the Master's scheme is not its application of equitable apportionment and priority in the rights above Lake Mead. Indeed, there is no discoverable difference among the Master, the United States, and California in respect of those rights. The Master's error

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[4] (Footnote ours.) What the United States calls "complications" might better be described as impossibilities. The Master foresees a suit by California, based on appropriations by California projects, to prevent water from being intercepted before it reaches Lake Mead. If such a suit were successful, however, the priorities would precipitate like silt from the water when it reached the storage reservoir, under the Master's scheme, for 31/75 of that water by the terms of the recommended decree would go to Arizona and Nevada, defendants in the hypothetical suit, irrespective of the priorities of their water users. See Calif. Op. Br. 228-31.

is in substituting parity for priority as the basic characteristic of water rights from Lake Mead to Mexico.

The United States perceives the Master's error and takes the first essential steps to remedy it when it correctly maintains that priorities attach both to water rights above Lake Mead and to water rights from Lake Mead to Mexico. In attacking the Master's invalidation of the deduction clauses in the Arizona and Nevada contracts,[5] the United States asserts (U.S. Op. Br. 16):

> "If the contract rights preceded in time the upstream appropriations, the Special Master recognizes (Report, p. 241) that under the law of both States the contract rights would be senior. Thus there would not be permitted any diversion upstream that would interfere with the senior contract use and thus there would be no occasion for any reduction of deliveries under the contracts and no impairment of their permanence. If, on the other hand, new upstream appropriations should precede the execution of contracts for the full allocations to these States, then the Secretary would be authorized to refuse to enter into contracts for the full allotments. Although this would reduce the quantity of water which the Secretary would contract to deliver, it would not affect the permanency of contracts already made."[6]

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[5]The Master gives three reasons for invalidating these deduction clauses: (1) They offend the requirement of § 5 of the Project Act that contracts "shall be for permanent service," (2) they violate § 18 of the Project Act (which the Master says compels recognition of intrastate priorities), and (3) they result in an allocation "totally out of harmony" with the limitation on California. Rep. 237-47.

[6]See also U.S. Op. Br. 4.

These points are implicit in the United States argument:

(1) Appropriative priorities attach to and control rights in the Colorado River system above Lake Mead. The Special Master and California both agree.

(2) Priorities attach to "definitive contracts for the delivery of specific quantities [of water] for specific projects" (U.S. Op. Br. 17), although they do not attach to en bloc contractual "allocations" to states.[7] Apparently, in the United States view, these are not appropriative priorities, but priorities arising on "the execution of contracts." (*Id.* at 16.) We agree with the result urged by the United States but not with its rationale.

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[7]The United States recognizes that there is a sharp distinction between such "definitive contracts" (that is, contracts which comply with the provisions of § 5 of the Project Act for the delivery of water stored in Lake Mead) and contracts like the contract executed by the Secretary with the State of Arizona; to the former the United States attributes the characteristics of water rights, to the latter the United States does not.

Accord, opening statement of Mr. Warner for the United States (Tr. 12,429): "We think that under the Boulder Canyon Project Act the contracts made in conformity to Section 4(a) for delivery of specified quantities to particular projects or districts are the equivalent, for this purpose at least, of valid appropriations for such projects and districts of the navigable waters of the Colorado River, subject only to the exercise by the United States of the navigation servitude and such reservations ahead of the contracts as may have been made and preserved.

"We do think, however, that the Nevada and Arizona contracts do not have this effect, at least to the extent of requiring the United States to pay compensation to anyone if, in pursuance to their constitutional powers a portion of the waters with which those contracts are concerned not previously appropriated to a specific purpose is applied to a proper Federal purpose within either of those States. . . ."

We agree that the latter category of contracts bears no resemblance to water rights. We disagree, however, that those contracts are interstate allocations.

(3) Priorities to the use of water above Lake Mead and to the use of water from Lake Mead and below, whatever the basis of the rights, must necessarily be integrated into a common schedule of priorities. We agree.[8]

The United States explicit and implicit acceptance of these propositions should lead to one, and only one, conclusion: The priority principle (based either on appropriation or on contract) is the fundamental ingredient of water rights of users who face each other across the river as well as those of users who are neighbors on the same bank. But apparently the United States

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[8]A century of experience has demonstrated the practical wisdom of the priority principle, which does not depend on the label attached to the appropriator's piece of paper or the identity of the sovereign issuing that paper. The principle has been applied in a contest between the holder of a state permit to appropriate water and the holder of a prior federal water delivery contract executed under the Warren Act. In Ramshorn Ditch Co. v. United States, 269 Fed. 80 (8th Cir. 1920), the United States was defending its right to dispose of seepage or return flow water from Pathfinder reservoir in Wyoming by Warren Act contract with users in Nebraska against a Nebraska ditch company which asserted rights under a later Nebraska appropriation. The United States prevailed on alternative grounds: (1) The seepage water not abandoned belonged under the law of Nebraska to the United States as the original appropriator and (2) the Warren Act contract and initiation of deliveries under it antedated the ditch company's appropriation. With respect to the second ground, the court said (*id.* at 88):

> "We are also of the opinion that by virtue of the so-called Warren Act, approved February 21, 1911 (36 Stat. 925 [Comp. St §§ 4738-4740]), and the Nebraska act of April 10, 1911 (Laws 1911, c. 151), apparently passed in aid of the Warren Act, that the contract between appellee and the Tri-State Land Company for the delivery of the water in controversy after the completion of the necessary ditches and controlling works was a valid contract, and gave appellant the right to furnish water for the irrigation of lands under the Farmers' or Tri-State ditch. The date of the contract August 20, 1912, and the furnishing of water thereunder July, 1914, are all prior to September 22, 1916, the date of the permit to the Ramshorn Ditch Company."

does not take the jump at which its argument runs. It injects one dubious and unexplained assertion in footnote 10 on page 30:

> "These contracts[8a] made no provision as to relative priority. *Presumably, then, the rule of ratability would apply as between them* except as the Project Act requirement for satisfaction of 'present perfected rights' establishes a different order." (Emphasis added.)

The United States hint that the chasm between its premises and the Master's conclusions can be closed by some species of presumption whose basis is unexplained[9] founders on impossibility: If priority exists between users above and users below Lake Mead, there must be priority *inter sese* among water users (appropriators or contractees) below Lake Mead. There *cannot* be priority as between contractees below Lake Mead and appropriators above Lake Mead but proration between contractees with respect to each other below Lake Mead. An example will suffice to give the reason:

Suppose that *A, B,* and *C* are water users with rights to 100,000 acre-feet each, initiated in 1945, 1950, and 1955, respectively. *A* and *C* are served by water delivery contracts of 1945 and 1955 below Lake Mead.

[8a] (Footnote ours.) The United States refers to "contracts with a water users association and four irrigation districts in Arizona." U.S. Op. Br. 30.

[9] Some of the "definitive contracts" with water users specify priority; some specify proration. (U.S. Op. Br. 29-34.) We fail to see the basis of any presumption, or even inference, that silence is the equivalent of proration even when wholly intrastate problems are concerned. A fortiori, where interstate rights are involved, we think that silence is merely silence, and the result of silence is to leave undisturbed the principles of priority, absent any specific modification thereof.

B, intervening in time, has an appropriation with 1950 priority above Lake Mead. Now comes a shortage, and only 200,000 acre-feet of water is available to serve the rights of *A*, *B*, and *C*, aggregating 300,000 acre-feet.

Who goes short?

We find it impossible to say, under the mutually contradictory rules suggested by the United States.

Surely not *A*. He has priority over *B*.

Surely not *B*. He is upstream and senior to *C*, and there is enough water by hypothesis to satisfy both himself and *A* who is senior to *B*.

Surely not *C*, if the United States hint is taken seriously, because *C* is on a parity with *A*, and *A* has a full supply.

We do not believe that the United States seriously suggests that Congress or the Secretary of the Interior intended to impose this unworkable system of water rights upon users of water below Hoover Dam.

Moreover, all of the considerations which have historically made the principle of first in time, first in right, universally applicable to appropriations apply also to contracts, assuming *arguendo* that contracts entirely displaced appropriations and were the exclusive source of water rights. The integrity of contracts "for 'permanent service'" requires the same result. If "permanent service" in section 5 on this hypothesis means anything, it means that the United States, having sold a water right to *A*, cannot sell the same water right to *C*. Although *C*, after the fact, might argue for proration in order to find water for himself out of a

supply adequate only to sustain *A*, it is an argument that *C* cannot very well win. The Secretary, by adopting the same principle, can indefinitely dilute *C's* rights (as well as *A's*) by executing further contracts with *D*, *E*, *F*, *et al.* This is impermanent service.

The priority principle stems first of all from practical necessity in the arid West—the universal recognition that proration of shortages destroys the value of the resource for everyone. (Calif. Op. Br. 54-60.)

With the elimination of footnote 10, the United States reaches a sound result but by an indefensibly devious route. The United States creates its own labyrinth by its insistence that Congress intended to delegate to the Secretary of the Interior power to allocate interstate water rights by contracts like these with the states of Arizona and Nevada. We think it clear that Congress did not intend anything of the sort. Hence we turn to our next inquiry to show that the rationale of the United States argument about the basis of water rights is unsound. The power to allocate water rights was not delegated to the Secretary, and the Secretary never purported to exercise such power.

B. Congress Did Not Delegate to the Secretary of the Interior Substantially Unlimited Power To Control Rights to "Mainstream" Water

In proposing that intrastate priorities (and, by inference, principles of equitable apportionment) were supplanted on the Colorado by congressional delegation of unlimited discretion to the Secretary of the Interior, the United States abandons the language of the Project Act, distorts the function of section 8 of the Reclamation Act of 1902, and suggests a concept of secre-

tarial power which we think is both fundamentally in error and capable of far-reaching and mischievous consequences. The United States arguments are made in the course of a section of its brief attacking a determination of the Special Master which is not dispositive of any issue in this case: "'[S]tate law governs intrastate rights and priorities to water diverted from the Colorado River.' (Rept. 216, 303.)"[1]

Over one half of the United States brief (pp. 21-47) is nominally devoted to wresting the word "state" from Article II(C)(1) of the recommended decree and substituting the word "applicable" in its stead, so that the United States would be enjoined from releasing water for "any use or user in violation of *applicable* [not state] law" (U.S. Op. Br. 23-24). The modification sought is no more than a semantic quibble: It is a matter of insignificant moment, if indeed it makes any difference at all, whether the label affixed is "state law," "federal law adopting state law," or "applicable law."[2] But the United States makes broad assertions to reach a result which would otherwise be innocuous.

The United States implies that there is here presented a contest between state and federal powers and

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[1]Quoted in U.S. Op. Br. 22.

[2]For 75 years, a theoretical argument has been carried on about whether western appropriative rights arise under an original title created under state law by acts of appropriation or under a federal grant found in the Desert Land Act, 19 Stat. 377 (1877), as amended, 43 U.S.C. §§ 321-39 (1958), and related legislation. There are a number of cases where the choice of theory might affect the result, but the case has not yet arisen where it necessarily does so. *Compare* Howell v. Johnson, 89 Fed. 556 (C.C. D. Mont. 1898) (interstate recognition of appropriations on federal law theory), *with* Willey v. Decker, 11 Wyo. 496, 73 Pac. 210 (1903) (interstate recognition of appropriations on state law theory).

that the Court is called upon to resolve that conflict by its choice of federal or state law.[3] The United States misidentifies the contest. California does not contend that state law, as such, controls the disposition of the waters impounded in Lake Mead. The power which we challenge is the power the United States argues was delegated to the Secretary of the Interior. The United States argues that Congress delegated to the Secretary virtually unlimited power to dispose of the waters impounded by Hoover Dam.[4] We contend that Congress, in the Project Act and the reclamation laws of which it is an integral part, gave the Secretary specific directions controlling his disposition of the waters impounded by Hoover Dam. Among those directions is the command of section 8 of the Reclamation Act, incorporated into the Project Act—a federal command—that the Secretary must proceed in conformity with state law, and that "beneficial use shall be the basis, the measure, and the limit of the right." The Master's proposed "contractual allocation scheme" of perpetual allocations irrespective of use ignores these directions.

The United States suggests that an interpretation of the Project Act to require the Secretary to conform to state law intrastate creates a federal-state conflict on constitutional grounds. No such constitutional question

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[3]See U.S. Op. Br. 36-40. The United States appears to suggest that there is some significant, though unidentified, conflict between priority principles embodied in state law (which the Secretary was commanded to follow by § 8 of the Reclamation Act of 1902) and the federal powers exercised in the Project Act. The conflict is illusory. Moreover, the suggestion ignores the salient fact that the Project Act and most, if not all, of the water delivery contracts executed pursuant to it were written with fastidious regard for avoiding any possible federal-state conflict.

[4]U.S. Op. Br. 25-27.

is presented.[5] The only constitutional question which could be reached is created by the United States interpretation of the Project Act as a delegation to the Secretary of substantially unlimited power to control the disposition of water and water rights.

Nothing in the terms of the Project Act, its legislative history and constitutional background, or its administrative construction lends support to the United States contentions.

1. *The United States Misconstrues Section 5*

a. Language of section 5

The United States argument is nominally based upon the terms of section 5 of the Project Act (U.S. Op. Br. 26-27). But the contentions it makes are primarily inferences the United States draws from language not found in the Project Act at all. The United States thus discusses the powers delegated by Congress to the Secretary in terms of his control of "project water supply" and "project operation." The United States supplies no comprehensible definitions for its new vocabulary;[6] the use of these coined terms obscures the United

[5]The United States appears to argue that the United States under the Constitution has unlimited power to control and dispose of water rights to water impounded by Hoover Dam; that Congress exercised that power in the Project Act and delegated all of its power to the Secretary; any restriction upon the powers of the Secretary is an unwarranted interference with the powers of the United States. The premises are wrong. It is entirely unnecessary to decide the constitutional limits of the United States to control water rights. Congress very clearly did not press its powers to constitutional limits in the Project Act (Arizona v. California, 298 U.S. 558, 570 (1936), discussed in Calif. Op. Br. 142 n.4). Moreover Congress did not purport to delegate any such unrestricted power to the Secretary of the Interior.

[6]The term "project water supply" is a label for peculiarly flexible concepts. Sometimes the United States describes "project water supply" as the "mainstream waters available in the Lower

States analysis. Whatever meaning the United States may assign to its phrases, it is apparent that Congress' intent in the Project Act cannot be divined by an exegesis of words that Congress did not use.

The principal difficulty with the United States rationale is that Congress not only wrote section 5, but sections 14 and 18 of the Project Act as well. In the latter sections, Congress made clear that the "applicable" law controlling the disposition of water rights and controlling the Secretary was founded on the principles of priority of appropriation and equitable apportionment.[7]

b. Constitutional background and legislative history of section 5

The constitutional background and legislative history of the Project Act refute the United States contention that Congress intended to delegate authority to the Secretary of the Interior to make either an interstate or intrastate allocation of the waters of the Colorado River. The constitutional climate prevailing during the 1920's was directly opposed to the Government's conten-

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Basin" (U.S. Op. Br. 4); "substantially all the water of the mainstream" (*id.* at 10); and elsewhere as "the total mainstream supply available for allocation" of which "the 100,000 acre-feet of Little Colorado depletions is [a] part" (*id.* at 20). The meaning the United States ascribes to its term "project operation" is equally uncertain. The United States sometimes appears to suggest that all works and projects in the lower basin (past, present, and prospective) depending upon "project water supply," are one project—the Boulder Canyon Project—and distinctions between projects are thus obliterated. Elsewhere the United States recognizes, correctly, that the several projects and water uses below Lake Mead are not in any sense "one project," a point this Court has clearly recognized. See United States v. Arizona, 295 U.S. 174, 185-87 (1935); *cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 737-39 (1950). See U.S. Op. Br. 17, 25 n.6, 43.

[7]See discussion of §§ 14 and 18 *infra* at 62-75.

tions. (See Calif. Op. Br. 179 n.8, 181-82, 183, 186.)

To sustain its construction of section 5 of the Project Act, the United States relies upon remarks of two opponents of the bill denouncing it as an unwarranted assertion of federal power and upon an asserted failure of the proponents of the measure to protest their adversaries' statements. Following a quotation from the remarks of Mr. Colton of Utah, the United States comments: "The proponents of the bill made no response to this interpretation," (U.S. Op. Br. 27 n.8.)

Even if the United States comment were accurate, the inference it draws would be unfounded. Views expressed by opponents of an act are not persuasive legislative history.[8]

In fact, however, this United States comment is inaccurate. Mr. Colton's charges which the United States takes as a guide to construction were refuted by Mr. White of Colorado, a proponent of the bill[9] (and,

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[8]See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951), per Mr. Justice Douglas: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

In Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), the Court quoted with approval the foregoing statement from *Schwegmann* and restated the basis for the rule (350 U.S. at 288 n.22): "An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill."

[9]Mr. White was a member of the committee which considered the fourth Swing-Johnson bill (*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess., pt. 1, at II (1928)) and which reported favorably on the bill. H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1 (1928). He spoke in favor of the bill (69 CONG. REC. 9781) and voted against a motion to recommit, which would have defeated it (*id.* at 9989). He voted for the bill as amended by the Senate, which became the Project Act (70 CONG. REC. 837).

in effect, by Mr. Colton himself), in the following colloquy which occurred between the two quotations of Mr. Colton which are selected by the United States (69 CONG. REC. 9648-49):

> "Mr. COLTON. Congress can not allocate water. . . .
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> ". . . .
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> "Mr. WHITE of Colorado. A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.
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> "Mr. COLTON. I think they have not that power.
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> "Mr. WHITE of Colorado. *There is no attempt to do anything of that kind by this bill.* On the contrary, the bill expressly provides for a compact among six States, and the only State that has shown the slightest tendency to stay out of the compact is Arizona. Now, how can that affect a State that is not a member of the compact?
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> "Mr. COLTON. It can not." (Emphasis added,)

Shortly before the quoted exchange between Mr. Colton and Mr. White, similar assertions by Mr. Colton were denied by Mr. Bankhead[1] who also favored the

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[1] "Mr. COLTON. . . . You are saying that you are going to take it [control] away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.

fourth Swing-Johnson bill.[2]

Mr. Swing of California, the House author, responded as follows to Mr. Douglas' long and detailed speech,[3] from which the United States extracts a few lines (69 CONG. REC. 9635):

> "I only wish I had the time to go fully into each and every one of the contentions made by the gentleman from Arizona [Mr. Douglas].[4] They ought to be answered. They can be answered. They have been answered in the investigations made of the project and in the hearings held on this bill. No project has ever been presented to Congress which has been so thoroughly studied."

As Mr. Swing pointed out, the very contentions made by Mr. Douglas on the floor of the House had been challenged and thoroughly refuted in detailed hearings held on the bill; hostile Congressmen denounced the bill in hearings, debates, and lengthy filibusters on many grounds, including interference with states' rights. The charges had been and continued to be repeatedly denied by those favoring the bill.

"Mr. BANKHEAD. As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter." 69 CONG. REC. 9648 (1928).

[2]Mr. Bankhead supported the measure and voted for the bill, 70 CONG. REC. 837 (1928).

[3]Mr. Douglas' full speech appears at 69 CONG. REC. 9623-35.

[4](Footnote ours.) H.R. Res. 208, 70th Cong., 1st Sess. (1928), had limited general debate on the Swing-Johnson bill (H.R. 5773) to eight hours, to be divided equally between opponents and proponents of the bill (69 CONG. REC. 9486, 9490), and part of the time of the proponents had expired (*id.* at 9491-99, 9506-09, 9510-13).

For example, Representative Swing had earlier given a conclusive answer to the United States contention concerning intrastate rights:[5]

> "[The water user] . . . will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use. There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State. As a matter of fact, the reclamation law is adopted by section 13 [section 14 as enacted] of this bill, and section 8 of the reclamation act says that what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.
>
> "If the water is used in Arizona, the water right must be acquired under the laws of Arizona; if in Nevada, under the laws of Nevada; if in California, under the laws of California."

At the time Mr. Swing made this statement, the first paragraph of section 5 of the bill as reported by the House Committee on Irrigation and Reclamation[6] was substantially identical with the first paragraph of section 5 of the act (Rep. app. 384).

It is unlikely that any member of the House took seriously Mr. Douglas' diatribe. For example, Mr. Douglas charged (69 CONG. REC. 9627):

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[5]*Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess., pt. 3, at 116 (1927). *Accord,* Mr. Swing's statement in *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 56-57 (1928) (reproduced in Calif. Ex. 1804 (Tr. 12,237), at 2-4).

[6]H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 31 (Dec. 22, 1926); Calif. Ex. 2053 for iden. (Tr. 11,177) at 19.

> "[The bill] . . . vests in the Secretary of the Interior complete control over the waters of the Colorado in and below Boulder Dam. In doing that . . . there will be erected upon the ruins of the rights of States a great tyrannical, socialistic bureaucracy. Democracy will be in its throes of death."

The proponents of the bill did not directly respond to this interpretation. Would the United States therefore argue that the Secretary's power is intended to be coextensive with that of a "tyrannical, socialistic bureaucracy"?

Fears expressed by opponents of the measure in the House were echoed in the Senate. The charge that the bill gave control of water rights to the Secretary of the Interior was repeatedly answered by the proponents of the measure. Senator King offered an amendment, accepted as part of the bill, which became section 18 of the Project Act,[7] preserving state law as the foundation of water rights. Senator King's views, stoutly opposing federal control of water rights, were well known to the Senate.[8]

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[7] 70 CONG. REC. 593 (Dec. 14, 1928). Section 18 provides: "Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement." Section 18 is discussed *infra* pp. 70-75.

[8] For example, eight days before Senator King offered § 18, he told the Senate, 70 CONG. REC. 169: "If the Senator [Hayden] means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes."

Senator King voted for the bill. 70 CONG. REC. 603 (1928).

Senator Hayden, at all times denying that Congress had the power to allocate the waters of the Colorado River, attacked the bill as an attempted assertion of unwarranted federal power; Senator Borah of Idaho totally rejected Senator Hayden's characterization of the bill.[9]

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[9]"Mr. HAYDEN. . . . We look upon the passage of the bill as an assault upon the sovereignty of the State of Arizona. It could be based upon no other theory than that Congress has the right to apportion the waters of the Colorado River *and its tributaries* in accordance with a certain document, regardless of the wishes of the State of California. It seeks to impose the terms of the Colorado River compact upon the State of Arizona without the consent of that State. Therefore we resist it. . . . [W]e feel justified in opposing the passage of any proposed legislation that in any manner may seek to divide the waters of the Colorado River, in which the State of Arizona has an interest, without the consent of that State.

"Mr. BORAH. Mr. President, I do not desire to argue the question, but lest I may be misunderstood in the future—because this question is likely to come back here in another form with reference to some other bill—when I shall vote for this bill I shall vote for it upon the supposition that a mere act of Congress can not take away any rights of the State of Arizona." 70 CONG. REC. 390-91 (1928). (Emphasis added.) Senator Borah voted for the bill. *Id.* at 603 (1928).

Later, during the same colloquy with Senator Hayden, Senator Borah said, *id.* at 391-92: "I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial use in other States, she might lose her rights. She would not lose them, however, by reason of this legislation, but by reason of the acts of appropriation."

Senator Borah amplified his remarks shortly thereafter, *id.* at 392: "Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it away from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legislation in the sense that the acts carrying it out would result in appropriations by others. *It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.*" (Emphasis added.)

c. Administrative construction

The United States contends that administrative practice establishes that the rule of ratability, not the principle of priority, applies to the rights intrastate of federal contractees *inter sese,* absent express contractual provisions to the contrary. The United States argument, if we understand it, is this: Administrative practice on the Colorado River, as evidenced by secretarial water delivery contracts, has been to disregard state law and to treat "applicable federal law" as controlling. There is no "applicable federal law" dictating how shortages shall be borne among "mainstream" contractees *inter sese,* except the water delivery contracts themselves. Provisions for ratability frequently appear in federal water delivery contracts with water users in a particular project. (U.S. Op. Br. 30-34.) Contracts containing no provisions relating to how shortages shall be borne "presumably [apply] the rule of ratability," says the Government in footnote 10, page 30.

Both the United States premises and its conclusions are unsound.[1]

The "applicable federal law" contains express provisions about how shortages are borne. The Boulder Canyon Project Act and the Reclamation Act of 1902 of which it is a part adopt state law with respect to intrastate water rights, and this, in turn, in the absence of express statutory or contractual provisions to the contrary, establishes priority as the basic characteristic of water rights.

The Reclamation Act was designed by Congress to

[1]See discussion *supra* pp. 42-46.

insure priorities for each individual reclamation project initiated under that law.[2] Since its enactment in 1902,

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[2]Congress recognized that priorities were necessary to insure the integrity of the water right for each project. Representative Mondell of Wyoming, the House manager for the bill which became the Reclamation Act of 1902, explictly told the House (35 CONG. REC. 6678 (1902)):

"Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws. This section also clearly recognizes the rule of prior appropriation which prevails in the arid region and, what is highly important, specifies the character of the water right which is provided for under the provisions of the act."

See also Calif. Rebuttal Brief (filed with the Special Master, June 30, 1959) at 65-72 for a fuller discussion of the legislative history of § 8.

In the same vein, the United States argued in Kansas v. Colorado, 206 U.S. 46, 74 (1906), the principles of the riparian doctrine, which include proration, "would have the result of preventing the reclamation and cultivation of public arid lands and defeat the policy of the Government with respect thereto and would obstruct the administration of the so-called Reclamation Act of June 17, 1902." The Government told the Court that priority of appropriation, applied interstate, was the only appropriate doctrine to apply in that dispute (*id.* at 74-75):

"When, therefore, a dispute arises in respect to the waters of an interstate stream, such as involved in the present proceeding, the question to be determined is, What rule of law shall be applied, and what tribunal has the power to enforce the rule? The Government contends that this court has the power to find, apply and to enforce the proper rule. That it should find the same outside of the law of either State, not within the common law doctrine of riparian rights, strict or modified, but within the maxim *salus populi est suprema lex.* The rule to be applied should be one capable of enforcement and uniform application in both States. The rule which meets the requirements is not 'water runs; let it run'; but that 'water irrigates; let it irrigate.' In other words, that such waters may be appropriated and used . . . subject, also, to the limitation that priority of time of appropriation determines priority of right, irrespective of state lines."

It is apparent that Congress' effort to reclaim the public lands would be severely hampered if each federal reclamation project were required to prorate its water supply in times of shortage with junior users on a particular stream system, many of which are nonfederal projects against which the Secretary has no effective protection except the priority acquired pursuant to §§ 8 or 7 of the act.

each individual reclamation project throughout the West has acquired a priority under state law vis-a-vis other projects on that same stream system. The contracts executed with the appropriate entity representing the water users on a particular project or a division thereof (see, *e.g.*, Rep. 211-14), of course, make no reference to relative priorities as between that project and others, because such priorities have been established among them under the principle of priority embodied in state law in accordance with the directive of section 8. We would not expect the Government (at least the Secretary of the Interior) to seriously contend that the projects on other stream systems where the Government has complied with state law are on a parity with one another because the water delivery contracts serving those projects say nothing about relative inter-project priorities. Such a contention could never be sustained.

Moreover the United States inaccurately describes the administrative practice on the Colorado River. The United States suggests that water right application contracts with individual non-Indian landowners in the Reservation Division of the Yuma Project demonstrate the Secretary's practice to prorate shortages among "mainstream" federal contractees. It quotes from a water right application contract which provides an "equitable proportionate share * * * of the water actually available at the time for all of the area being watered from the same source of supply, *such proportionate share to be determined by the project manager.*" (U.S. Op. Br. 31, quoting Calif. Ex. 380; emphasis by the United States.) California Exhibits 378, 379, and 380 are water right applications bearing dates respectively of 1917, 1910, and 1948. All relate to the

same project and all relate to an appropriation by J. B. Lippincott for the United States, recorded July 13, 1905 (Calif. Ex. 13 (Tr. 8,833)).[3] Those exhibits refer to a proportionate share in a right with a 1905 priority under the United States appropriation. They do not refer to a proportionate share in "project water supply" in the Boulder Canyon Project—a project which did not come into existence until decades after many of the contract applications, of which these are illustrative, were written.

The United States reliance in footnote 11, page 31, upon the Secretary's 1959 contract with the city of Yuma, Arizona, is equally puzzling.[4] The city of

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[3]U.S. Finding 7.1.6, pp. 146-47, recited these facts:

"On July 8, 1905, J. B. Lippincott, Supervising Engineer, United States Geological Survey, for and on behalf of the United States of America, posted a notice of appropriation on the left bank of the Colorado River claiming three thousand cubic feet per second of the water of the Colorado River for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands in Yuma County, Arizona Territory which were to be served by the construction of Laguna Dam and a canal system extending from the Dam. On the same day a similar notice was posted on the right bank of the Colorado River claiming six thousand cubic feet per second of the water of the Colorado River for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands in 'the Yuma Valley adjacent to the Colorado River, below the point of diversion, and in the Imperial Valley, all situated in San Diego County, State of California,' which were to be served by the construction of Laguna Dam and a canal system extending from the Dam.

"Calif. Exs. 12, 13; U.S. Ex. 5, Tr. 15,366-15,369

"The lands described in these notices included the lands of the Reservation Division and almost all of the lands of the Valley Division of the Yuma Project. . . ."

[4]The text of the 1959 Yuma contract is reproduced in Calif. Ex. 7611 for iden. (Tr. 22,760). The contract (art. 6(a)(1), p. 4 of second pagination) is expressly subject to the prior fulfillment of all contracts for diversion at Imperial Dam for irrigation in Arizona; it subordinates Yuma's 1893 priority for 1,000 miner's inches (about 14,500 acre-feet annually at continuous flow) and substitutes a contract right to 50,000 acre-feet subordinate to all Arizona

Yuma, before the execution of the contract, had an appropriation senior to those agricultural districts under which she had been continuously using "mainstream" water for more than half a century. The city nevertheless, by specific contract, was required to subordinate not only her appropriative priorities but her preference under Arizona law as a domestic user to competing agricultural districts in Arizona which have water contracts with the Secretary even though those districts' contracts say nothing about priority. Whatever may be said for this curious "administrative practice," it is certainly not an example evidencing that (a) silence implies proration, or (b) proration is a better dogma than priority.

There is an additional reason why the Government's suggestion that contractees "presumably" prorate with each other should not be taken seriously. That suggestion is entirely inconsistent with the priorities vigorously advocated by the United States and adopted by the Master for Indian reservations and other federal establishments. Rights for Indian reservations and other federal establishments derive from federal law, precisely like the rights the United States says arise from water delivery contracts. Although the incidents

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rights to divert at Imperial Dam. The notice of Yuma's appropriation is Ariz. Ex. 316A (Tr. 19,980).

The United States reliance upon the Yuma contract is likewise curious in view of the express disclaimer in the contract "that this contract is not intended, nor shall it be construed as affecting adversely any claim or contention in the Colorado River litigation [earlier defined as the pending case of "Arizona v. California, et al., No. 9 Original in the United States Supreme Court"] of any contractor for Lake Mead storage outside of the State of Arizona." Art. 27(2). California offered this city of Yuma contract as evidence that the city of Yuma had diverted and used Colorado River water for over 60 years, under an ancient appropriation, *without* a contract. Calif. Op. Br. plate 3 n.17.

of these federal rights, as adjudicated by the Master, are antithetical to appropriative rights in almost every respect, there is one respect in which these federal rights are identical to appropriative rights: Each bears a priority of the date of its creation, even though not one word was spoken in the creation of such rights about priority. The United States supports priorities for these exclusively federal rights, and it does not suggest that there is a lurking presumption that ratability applies to them.[5]

The presumption from contractual silence is priority, not parity; and this cannot be transmuted into the opposite inference when a parallel is drawn with respect to interstate water rights.

2. *The United States Misconstrues Sections 14 and 18*

To sustain its argument that federal water delivery contracts are the source of water rights, interstate and

[5]The United States would reach this incomprehensible result: Although the Colorado River Indian Reservation has a water right with priorities of 1865, 1873, 1874, 1876, and 1915 for the respective areas reserved to the Indians on those dates, and Fort Mohave Indian Reservation has a water right with priority dates of 1890 and 1911 on the same basis, the Valley Division of the Yuma Project in Arizona by contrast would be forced to prorate a water shortage with a future Central Arizona Project for which a future similar contract may be written. This is because the Valley Division's water delivery contract written in 1951 fails to specify either priority or proration, and "presumably" (U.S. Op. Br. 30 n.10) therefore the rule of ratability applies. Water rights of the Valley Division initiated by appropriation beginning in 1890 and bought by the United States for the Yuma Project in 1908, another appropriation by the United States in 1905, the construction of project works long before the Project Act was passed, and beneficial use of water throughout this century, all avail the Valley Division nothing. The other projects in the Yuma area whose water contracts specify neither priority nor proration (*id.* at 30) are in the same perilous situation. The United States evidence establishing the appropriative right of the Valley Division is detailed in Calif. Finding 14C:104, p. XIV-25, with record citations.

intrastate, and that those contracts do not embody or recognize state law, the United States is compelled to eliminate the provisions of sections 14 (with its incorporation of section 8 of the Reclamation Act of 1902) and 18 of the Project Act, by limiting the effect of those provisions to matters which are irrelevant to this case.

a. Section 8 of the Reclamation Act of 1902

Despite its recognition that the Project Act is a part of the reclamation laws, including the Reclamation Act of 1902 (U.S. Op. Br. 32-33), the United States attempts to divorce section 8 of the Reclamation Act of 1902 from the Project Act. It contends that section 8, like section 27 of the Federal Power Act, is relevant only insofar as it supplies an analogy useful in construing section 18 of the Project Act (U.S. Op. Br. 40-41).

Section 27 of the Federal Power Act (unlike section 8 of the Reclamation Act of 1902) is framed in terms of a saving clause. It contains no command to the Secretary, but provides:[1]

> "[N]othing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

It might be said of section 27 of the Federal Power Act that "freedom of the States to enact laws does not compel the conclusion that the [United States] . . . is bound by those laws" (U.S. Op. Br. 39),

[1] 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958).

but this cannot be said of section 8 of the Reclamation Act.

Section 8 of the Reclamation Act of 1902 is not merely a useful tool in construing the provisions of the Project Act, it is incorporated by sections 12 and 14 as an integral part of the Project Act itself. Section 8 does not merely state that Congress does not intend to interfere with state law; it specifically commands the Secretary to proceed in conformity with that law:[2]

> "[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .*" (Emphasis added.)

The United States effort to eliminate the command of section 8 by restricting its operation to the "acquisition of rights to use water for a reclamation project" is unsupportable. Nothing in the language of section 8 lends itself to the interpretation urged by the United States. This Court in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958), did not hold that state law is made controlling by section 8 *only* where the United States follows state procedure to appropriate water, or where the United States acquires water rights within a state by purchase or in the exercise of its power of eminent domain. The Court had no occasion to pass upon the construction of section 8 here

[2] 32 Stat. 390 (1902), 43 U.S.C. § 383 (1958).

urged by the United States, and it did not do so. The United States itself recognizes, in a footnote, that the *Ivanhoe* case is not here in point. (U.S. Op. Br. 42 n. 19.)

The United States fails to recognize that this Court in *Ickes v. Fox,* 300 U.S. 82 (1937), definitively rejected the United States interpretation of section 8 here urged. The Court held that title to water rights within a reclamation project vests in the project landowners, in accordance with principles of state law, and not in the United States. The Government's attempt, in footnote 19, page 43, to construe that holding to the contrary is also refuted by the interpretation placed on *Ickes v. Fox* by the court of appeals in a subsequent installment of the same litigation:[3]

> "Reading the Reclamation Act in the light of the decision in Ickes v. Fox, we find the situation in this case to be as follows: The water-rights of appellants are not determined by contract but by beneficial use. The Secretary of the Interior . . . must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington. He has no concern in disputes between the various entrymen which concern their respective priorities, other than as a stakeholder."

In *Nebraska v. Wyoming,* 325 U.S. 589, 612-16 (1945), the Court confirmed its construction of section 8 by quoting with approval its language in the decision of *Ickes v. Fox.* The Court again made clear that principles of priority of appropriation embodied in

[3]Fox v. Ickes, 137 F.2d 30, 33 (D.C. Cir. 1943), *cert. denied,* 320 U.S. 792 (1943).

state law controlled the title and disposition of water rights and that the Secretary was bound to conform to those principles by the operation of section 8;[4] moreover, these principles were held dispositive of an *interstate* controversy.

The Government argues that this Court's decision in *Nebraska v. Wyoming,* construing and applying section

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[4]Nebraska v. Wyoming, 325 U.S. 589, 614, 615 (1945): "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. . . . Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'"

The Court in Nebraska v. Wyoming made an allocation of the natural flow only and did not make any allocation of the stored water. (325 U.S. at 630, 631.) However, the Court did indicate that the rights of the United States to the stored water were governed by state law (*id.* at 629-30): "The United States claims that it is at least entitled to be recognized as the owner of the storage water with full control over its disposition and use under Wyoming law. That seems to be true under Wyoming law. . . . The decree which is entered will in no way cloud such claim as it has to storage water under Wyoming law; nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow." The Court later stated (*id.* at 639-40): "Certainly an apportionment of storage water would disrupt the system of water administration which has become established pursuant to mandate of Congress in § 8 of the Reclamation Act that the Secretary of the Interior in the construction of these federal projects should proceed in conformity with state law. In pursuance thereto all of the storage water is disposed of under contracts with project users and Warren Act canals. It appears that under that system of administration of storage water *no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use. See Wyo Rev Stats (1931), §§ 122-1504, 122-1508, 122-1602.*" (Emphasis added.) *Compare* the emphasized language *with* the last sentence of the first paragraph of § 5 of the Project Act: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

8, is not here in point. We disagree. The Government identifies the distinction which it perceives as follows (U.S. Op. Br. 43 n.19):

> " 'We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made. * * * [In this case, it is to be noted, an entirely different procedure has been followed. The United States has *not* followed State prescribed procedures to appropriate the Boulder Canyon Project water supply.] The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal Government. Thus even if we assume that the United States owned the unappropriated rights,[5] they were acquired by the landowners in the precise manner contemplated by Congress.' (325 U.S. 614-615.)" (All bracketed material supplied by the United States.)

The question upon which the Court in *Nebraska v. Wyoming* thus intimated no opinion was the power of Congress to appropriate and reserve to the United States all of these water rights by enacting a statute providing some procedure different from that stated in section 8 of the Reclamation Act. The Court was not adverting to any assumed power of the *Secretary* to acquire title

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[5](Footnote ours.) In Nebraska v. Wyoming, 325 U.S. 589, 611 (1945), the Government had argued that it owned all of the unappropriated water in the river prior to the time it filed appropriations for the North Platte and Kendrick projects; therefore its underlying ownership entitled it to an apportionment free from state control. In the Government's brief in this case, it asserts (U.S. Op. Br. 38 n.15): "We do not argue the question of federal ownership of the rights to use the waters of the Colorado River or the unappropriated rights to use the waters of the tributaries. . . ."

for the United States or to affect the title of water users by his choice of some procedure other than that stated in section 8. Contrary to the United States suggestion, section 8 controls the Secretary; the Secretary does not control the applicability of section 8.[6]

> In *Nebraska v. Wyoming* and here, the water rights "were acquired by the landowners in the precise manner contemplated by Congress." (325 U.S. at 615.)

The precise manner Congress contemplated was the acquisition of water rights in conformity with the principles of state law adopted by section 8 of the Reclamation Act.

b. Section 14 of the Project Act

Section 14 expressly makes the Project Act a part of the reclamation laws. Congress' purpose in integrating the Project Act into the federal reclamation laws was to incorporate the directive found in section 8 of the Reclamation Act of 1902: The Secretary of the Interior shall conform to the laws of the states relating to the control, appropriation, use, and distribution of water used in irrigation. The rights of landowners to receive and use the waters developed by a federal reclamation project, whether confirmed or initiated by

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[6]The contentions of the United States are by no means clear. The Government appears to suggest that so long as the Secretary of the Interior does not choose to file an appropriation on behalf of the United States, § 8 is not applicable to control the incidents of water rights either in contests between water users *inter sese* or between water users and the United States. If this is the Government's contention, it is wrong.

The Secretary's omission to comply with the mandate of § 8 could not, and does not, affect the command of Congress that the Secretary obey § 8. His omission could not, and does not, affect the incidents of water rights "acquired by the landowners in the precise manner contemplated by Congress" either in respect of each other or in respect of their rights against the United States.

federal water delivery contracts, were to be controlled by section 8.[7]

Significantly, the United States fails to mention *United States v. Arizona,* 295 U.S. 174, 183 (1935), where the Court dealt with this very question:

> "Arizona owns the part of the river bed that is east of the thread of the stream. *New Jersey v. Delaware,* 291 U.S. 361, 379 *et seq.* Her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flowing therein is unaffected by the Compact or federal reclamation law."[8]

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[7]Senator Johnson, sponsoring the legislation in the Senate, made clear the effect of § 14 when in February 1927 he addressed the Senate stating, 68 CONG. REC. 4291: "I repeat to you that this is a reclamation measure, made so by section 13 [now 14] of the bill. Adverting, then, to section 8 of the reclamation law, let us see how much there is in this statement that is made about appropriating the water of Arizona and taking the property of that State.

"Section 8 of the reclamation act provides:

" 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.'

"So, first, our act is a reclamation act.

"Secondly, under the reclamation law we can no more affect the rights of Arizona in the waters that flow through Arizona than we could affect the title of any Arizona resident to any particular property. In passing, I may remark that it is entirely a misnomer to say that Arizona or any other State in the West, after all, has title to water. Under western law, the appropriator of water has a title to the use when the application is beneficially made of the water that he thus appropriates; but to talk of title of the State to water is entirely a misapprehension and misapplication of terms."

[8]The Court's footnote 2, 295 U.S. at 180, said: "By §§ 12 and 14 of the Boulder Canyon Project Act, the Reclamation Law is defined to mean the Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof and supplemental thereto, including the Boulder Canyon Project Act."

c. Section 18 of the Project Act

The Master limits the effect of section 18 to intrastate consequences; the United States argues that section 18 has no consequences.

Section 18 of the Project Act provides (Rep. app. 395):

> "Nothing herein shall be construed as interfering with such rights as the States *now* have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement." (Emphasis added.)

The United States ask the Court to read the word "now" as if Congress had said "used to."[9] Nothing in the history of the statute lends the slightest support to the United States argument.[10]

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[9]The United States seems to read § 18 to permit the states to enact only ineffective legislation (U.S. Op. Br. 39): "Statutory language which merely preserves 'such rights as the States now have' cannot be construed as a grant to the States of any part of the federal government's authority to control the operation of its own projects. Freedom of the States to enact laws does not compel the conclusion that the Secretary of the Interior is bound by those laws." Section 8 says the Secretary *shall* comply with those laws. What more compelling language could have been chosen?

[10]A Government footnote points out that one draft of the third Swing-Johnson bill contained a former § 8(a) which was omitted from the act ultimately passed (U.S. Op. Br. 35-36 n.13). Former § 8(a) provided that appropriations of Colorado River water in connection with the works authorized by the act shall be made in conformity with the laws of those states "which may or shall have approved the Colorado River compact." Former § 8(a) was proposed and omitted because of interbasin considerations; it had nothing at all to do with the question of what law governs intrastate rights within the lower basin.

Former § 8(a) was inserted by the upper basin representatives in an effort to cajole Arizona into ratifying the Compact for the protection of the upper basin states, as upper basin spokesman,

The United States relies (U.S. Op. Br. 35) upon Senator Johnson's remarks when he accepted section 18 in his bill (70 CONG. REC. 593):

> "Mr. President, with the understanding that the verb relates to the present—the rights they now have to do all of the things that subsequently follow—I have no objection to the amendment."

The United States apparently contends that Senator Johnson meant to say that he agreed to the amendment so long as the "verb relates to the past." It would have been fatuous for Senator Johnson to receive assurance that states' rights not yet in existence were unimpaired.

Delph E. Carpenter, very clearly explained. *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 113, 184-85 (1926). See also Calif. Op. Br. 179 n.8, 180-81, 178 n.4. Upper basin states obviously had no interest in intra-lower basin allocation of water or the water rights of users in the lower basin *inter sese*.

On March 20, 1928, the Senate Committee on Irrigation and Reclamation, without comment, proposed in its favorable report on the bill a committee amendment to strike former § 8(a) from the fourth Swing-Johnson bill. S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 3 (1928); Calif. Ex. 201 (Tr. 7,712), at 10; Calif. Ex. 2001 (Tr. 11,173), at 13. It is not credible that the committee report intended, without one word of explanation, to make the major change in the bill suggested by the United States in the elimination of this language that state law does not govern intrastate rights and priorities, contrary to the views of both of its authors (*supra* pp. 54, 69 note 7). See Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947): "[T]he most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."

Furthermore, the Senate committee hearings, *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. 33, 39-40 (1928), suggest that former § 8(a) was dropped from the bill because it was coercive in requiring Arizona to ratify the Compact before she could receive the benefits of stored water. The committee undoubtedly considered that the provisions retained in the bill (present §§ 8(a) and 13(b), (c), and (d)) subjecting the United States and all claiming under it to the Compact would adequately accomplish the purpose of former § 8(a) to protect the upper basin's Compact apportionment against a nonratifying Arizona.

Senator Johnson very obviously intended to preserve for the future all of the rights which the states then had.[11] Statements of Senator Johnson[12] and Senator King,[1] author of section 18,[2] make clear their intention that state law should be preserved and applied prospectively and that nothing in the Project Act should be construed as if the act "otherwise herein provided" (section 14).

Again, the United States ignores the fact that this Court has already construed section 18 in accordance with its plain and explicit terms:[3]

> "The claim strenuously urged is that the existence of the Act, and the threatened exercise of the authority to use the stored water pursuant to its terms, will prevent Arizona from exercising its right to control the making of further appropriations. . . .
>
> "This contention cannot prevail because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions. The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may

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[11]Congress had been repeatedly informed about the bases and characteristics of western water rights (Calif. Op. Br. 65-66). Moreover, it must have been aware of the principle, settled for more than 100 years by this Court, that in absence of specific federal legislation, the power of the states to promote, limit, or destroy navigability of the waters within their boundaries is unlimited. *E.g.*, Wilson v. The Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866).

[12]68 CONG. REC. 4291 (1927), quoted *supra* note 7.

[1]70 CONG. REC. 169 (1928), quoted *supra* p. 55 note 8.

[2]*Id.* at 593.

[3]Arizona v. California, 283 U.S. 423, 460-62 (1931).

flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein 'shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified' by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired."

This decision has been the consistent basis of administration of the Colorado River by the Secretary of the Interior. In a memorandum adopted by the Commissioner of Reclamation, and which was the basis for withdrawing 1933 regulations offering Arizona a contract, the above passage from the Court's opinion was quoted, somewhat more fully, with this conclusion:[4]

"From this quotation it is apparent that the State of Arizona is entitled to take water from the Colorado River for beneficial use *subject to the rights of prior appropriators.* It appears to me that it is not desirable for the Secretary of the Interior to endeavor to limit or qualify this right except by lawful diversions from the river which may be made by the United States for appropriate use." (Emphasis added.)

In 1937 the Acting Solicitor of the Interior Department analyzed the same decision for Secretary Ickes:[5]

"The decision of the Supreme Court seems to leave Arizona in a position to appropriate any un-

[4]Calif. Ex. 7600 for iden., Tr. 22,760.
[5]Calif. Ex. 7754 for iden., Tr. 22,760.

appropriated water of the Colorado River if it could put such water to beneficial use, and this *without reference to authority given by Congress in the Boulder Canyon project act.*

"It is my opinion that the Secretary of the Interior, in making a contract for repayment of construction costs with landowners on the Gila project, or with an irrigation district comprising a similar area may agree to sell water from Boulder Canyon Reservoir, *but such sale must be subject to prior rights* and to the Colorado River compact." (Emphasis added.)

The authorization for the Gila Project in 1937 subsequently signed by the Secretary and the President did exactly that:[3]

"In all sales of water rights it will be necessary to prescribe that the water supply of the [Gila] project is subject to the Colorado River compact, and to the Boulder Canyon Project Act and to the sales of water under the compact and said act and to the treaty which it is anticipated will be made with Mexico fixing that country's rights in the flow of the Colorado River."

The United States now appears to suggest that if the principles which have been long and consistently recognized are applied to control the title and incidents of water rights of water users *inter sese,* the power of the Secretary effectively to control the dam and reservoir for the purpose of "controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery

[3]Ariz. Ex. 60 (Tr. 269), p. 123.

of the stored waters . . . and for the generation of electrical energy" (Project Act § 1) is somehow impaired. (U.S. Op. Br. 36-40.) The United States fails to explain how appropriation, long recognized as applicable to the Colorado River and other streams on which federal projects are located, will somehow hamper the Secretary in fulfilling the purposes of the act made dominant by section 6. The Secretary has had no uncertainty about the basis of water rights since Mr. Justice Brandeis delivered the opinion of this Court in 1931.

We do not insist upon any doctrinaire distinction between federal and state law. We think that appropriations under state law, which control intrastate rights, applied across state lines as a matter of "federal common law," to use Mr. Justice Brandeis' term,[7] are the basis of water rights within the limitations accepted by agreement of the affected states. But if federal water delivery contracts are the exclusive basis of water rights and if those water rights have the same attributes as rights under federal common law, we do not care whether it is Mr. Justice Brandeis' or the Government's label which is affixed to the result. The Master's denial of interstate priorities is contrary to the rationale of both.

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[7]Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

PART THREE

ANSWER TO THE ARIZONA OPENING BRIEF

PART THREE

ANSWER TO THE ARIZONA OPENING BRIEF

§ I. THE SEVERANCE ISSUE: THE LIMITATION ON CALIFORNIA CANNOT REFER TO THE UPPER DIVISION'S AVERAGE ANNUAL DELIVERY OF 7,500,000 ACRE-FEET AT LEE FERRY PROVIDED BY ARTICLE III(d) OF THE COLORADO RIVER COMPACT

Arizona offers a rewritten version of the Colorado River Compact apparently as an alternative basis for the conclusion which the Master reaches by rewriting the words of the limitation. The only merit in Arizona's argument is that it attempts to harmonize the scope of the Compact and the limitation. (See pp. 18-29 *supra*.) This commendable effort fails, however, for a number of reasons given by the Master himself, any one of which is conclusive; Arizona fails even to mention the most important of these—that her proposed construction is physically impossible.

Arizona asserts:

1. The annual beneficial consumptive use of 7,500,000 acre-feet of water apportioned to the lower basin states by Article III(a) of the Colorado River Compact is the same as the average annual flow of 7,500,000 acre-feet at Lee Ferry specified in Article III(d) of the Compact.[1] (Ariz. Op. Br. 62-63, 72-81.)

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[1]Article III(d) provides, Rep. app. 373: "The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

2. If this were not the meaning of the Compact as negotiated, it is the meaning that must be given to the Compact because Congress so understood it in giving its constitutionally required consent to the Compact in the Project Act; indeed, Congress accordingly amended or modified the Compact. (Ariz. Op. Br. 67-72.)

Arizona's argument thus rejects the Master's patentable novelty, which divorces the Compact from the limitation, and substitutes one of her own invention disclosed for the first time after 30 years of controversy in so-called "amended" pleadings tendered to the Master at the close of trial (Rep. 136-37).[2]

The fundamental conflict between Arizona and the Master is masked by the variable content Arizona's brief gives to the term "main stream." Sometimes Arizona uses the term in the Master's unique sense to mean only the main Colorado River below Lake Mead (Rep. 183), and sometimes in the dictionary sense to mean the entire main Colorado River from Lee Ferry to the Mexican boundary. In argument that the Colorado River Compact apportions water at Lee Ferry, excluding tributaries, Arizona uses the term in the dictionary sense. Geographically, the two definitions are 275 river miles apart, but in terms of the ultimate decision and the reasoning which produces it, the gap between the two definitions is even greater.

Our answers to Arizona's arguments are simple:

1. The Colorado River Compact does not and cannot mean what Arizona says it means.

2. Congress did not so amend it.

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[2]See Calif. Ex. 7302A for iden. (Tr. 22,384), a comparison of Arizona's original and proposed "amended" Bill of Complaint.

A. Arizona's Proposed Construction of the Colorado River Compact Founders on Both Legal and Physical Impossibility, as the Master Holds (Rep. 142-44)

The apportionment made to the lower basin by Article III(a) of the Colorado River Compact encompasses beneficial consumptive uses throughout the Colorado River system (main stream and tributaries) in the lower basin. Arizona's attempt to write the lower basin tributaries out of the Compact falls before its clear and explicit language, the reports of its negotiators, and the rational character of its literal meaning. But even if Arizona's proposed construction were legally permissible, it is physically impossible.

1. *Arizona's Construction of the Colorado River Compact Is Not Supported by Any Colorable Legal Argument*

a. The language of the Compact

The Master correctly concludes that the "unmistakable language" of the Compact "subjugates both mainstream and tributaries" to its rule (Rep. 143).[3] The

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[3]Here is the language of Article III(a) with the express definitions of "Colorado River System" from Article II(a) and "Lower Basin" from Article II(g) italicized and bracketed after those terms:

"There is hereby apportioned from the Colorado River System [*that portion of the Colorado River and its tributaries within the United States of America*] in perpetuity to the Upper Basin and to the Lower Basin [*those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry*], respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article III(b) gives the lower basin "the right to increase its

Court has already held that the Compact means what it says, as against an earlier Arizona effort to perpetuate testimony of the Compact negotiators that it means something different. *Arizona v. California,* 292 U.S. 341 (1934) (alternative holding).

Arizona's argument based on the Compact's use in Article III(a) of the phrase, *"from* the Colorado River System," rather than *"of* the Colorado River System" (Ariz. Op. Br. 75) is a sophistry: The words "of" and "from" have identical meanings in this context.[4] "Waters *of* the Colorado River System *not covered by* the terms of this Compact" referred to by Article VI (italicized thus in Ariz. Op. Br. 75) are the system waters "unapportioned by paragraphs (a), (b), and (c)" of Article III which are the subject of further equitable apportionment after October 1, 1963. (See Articles III(f) and III(g) of the Compact.)

b. The reports of the Compact negotiators

The reports of many of the Compact negotiators—Arizona's evidence[5]—make explicitly clear that the

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beneficial consumptive use *of such waters* by one million acre-feet per annum." (Emphasis added.)

[4]"Of" according to Webster's New International Dictionary (2d ed. unabridged) means "from." "From," according to the same source, means "out of." If Article III(a) said "there is hereby apportioned *of* the Colorado River System in perpetuity," it would make neither good sense nor good grammar. Thus, Article III(b) permits the lower basin to increase its beneficial consumptive use *"of* such waters" by one million acre-feet per annum. Articles III(a) and III(b) obviously refer to the same waters. See Arizona v. California, 292 U.S. 341, 358 (1934): "Paragraph (a) apportions waters 'from the Colorado River system,' i.e., the Colorado and its tributaries, and (b) permits an additional use 'of such waters.'" *Accord,* Mr. Hoover's answer to Mr. Hayden's questionnaire, reported to Congress, quoted *infra* p. 81 note 6.

[5]Arizona put these Compact negotiators' reports in evidence at the outset of the trial. Although Arizona did not reproduce them

Compact was intended to encompass lower basin tributaries as well as the main stream.[6] Neither in these

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in the bound volumes of her exhibits which she supplied the Special Master and the Court, California has included all of them in volume 24 of her own set of exhibits supplied to the Court.

[6]The most explicit discussion of the systemwide scope of the Compact is found in Ariz. Ex. 55 (Tr. 260), answers to 26 questions propounded by [then] Representative Carl Hayden of Arizona to Hon. Herbert Hoover, federal representative to and chairman of the commission which negotiated the Compact, questions 4 (A33), 6 (A34), and 8 (A35):

> *"Question 4. Why was the term 'Colorado River system' used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins, respectively?*
>
> "[Answer:] This term is defined in Article II as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt."
>
> *"Question 6. Are the 1,000,000 additional acre-feet of water apportioned to the lower basin in paragraph (b) of Article III supposed to be obtained from the Colorado River or solely from the tributaries of that stream within the State of Arizona?*
>
> "[Answer:] The use of the words 'such waters' in this paragraph clearly refers to waters from the Colorado River system, and the extra 1,000,000 acre-feet provided for can therefore be taken from the main river or from any of its tributaries."
>
> *"Question 8. As a matter of fact more than 1,000,000 acre-feet of water from the tributaries of the Colorado below Lee Ferry are now being beneficially used and consumed within the State of Arizona. Will the excess above that amount be accounted for as a part of the 7,500,000 acre-feet first apportioned to the lower basin from the waters of the 'Colorado River system' as provided in paragraph (a) of Article III?*
>
> "[Answer:] By the provisions of paragraphs (a) and (b), Article III, the lower basin is entitled to the use of a total of 8,500,000 acre-feet per annum from the entire Colorado River system, the main river and its tributaries. All use of water in that basin, including the waters of tribu-

reports nor in any other evidence of the intent of the negotiators is there a scintilla of evidence supporting the present Arizona view. Some of these reports were before Congress.[7]

Arizona tries only obliquely to rely upon one Compact negotiator, Frank C. Emerson of Wyoming, to support her novel contention,[8] but her reliance is com-

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taries entering the river below Lee Ferry, must be included within this quantity. The relation is reciprocal. Water used from these tributaries falls within the 8,500,000 acre-feet quota. Water obtained from them does not come within the 75,000,000 acre-feet 10-year period flow delivered at Lee Ferry, but remains available for use over and above that amount."

See also Ariz. Ex. 46 (Tr. 255), at A78, report of Delph E. Carpenter, Compact negotiator for Colorado; Ariz. Ex. 47 (Tr. 256), at A110, report of Stephen B. Davis, Compact negotiator for New Mexico; Ariz. Ex. 49 (Tr. 257), at A69, statement by Richard E. Sloan, legal adviser to Arizona's Compact negotiator; Ariz. Ex. 50 (Tr. 258), at A58, statement by W. S. Norviel, Compact negotiator for Arizona; Ariz. Ex. 51 (Tr. 258), at A127, report of Frank C. Emerson, Compact negotiator for Wyoming; Ariz. Ex. 57 (Tr. 262), at A114, A117, report of R. E. Caldwell, Compact negotiator for Utah.

[7]Carpenter's report (Ariz. Ex. 46, *supra* note 6) appears at 70 CONG. REC. 577-84 (1928). Hoover's answers to Hayden (Ariz. Ex. 55, *supra* note 6) are quoted in full at 64 CONG. REC. 2710-13 (1923) and are repeated in part during the December 1928 debates on the fourth Swing-Johnson bill at 70 CONG. REC. 460 (Senator Hayden quoting question and answer 10 re surplus) and 466 (Senator Johnson quoting question and answer 4 re Colorado River system).

[8]In her discussion of the upper division governors' proposal to divide 7,500,000 acre-feet of flow at Lee Ferry among Arizona, California, and Nevada, Arizona asserts (Ariz. Op. Br. 62-63): "It is . . . plain that the water referred to was that apportioned by Article III(a) of the Compact, for the total quantity dealt with by the Governors aggregated 7,500,000 acre-feet per annum, exactly the same quantity which was apportioned to the Lower Basin by Article III(a).[27]" In support of this statement, Arizona's footnote 27 asserts: "The Governors were contemporaries of the negotiators of the Compact. Indeed, Governor Emerson of Wyoming, who voted for the resolution passed at the Governors' Conference, had been the Compact Commissioner for Wyoming."

The upper division governors' proposal, as the Master points

pletely misplaced. In fact, Governor Emerson made clear during congressional hearings on the Project Act that he considered the "Colorado River system" to include the main Colorado River and *all* tributaries.[9]

c. The rational basis of the Compact's inclusion of all tributaries in the United States

Arizona argues that "the only water available to both the Upper and Lower Basins and to *which both could lay claim* was water rising in the Upper Basin and descending to the Lower." (Ariz. Op. Br. 74.)

Obviously, no one contends that water from lower basin tributaries will flow upstream to the upper basin. This does not mean, however, that a Compact whose purpose was to allocate benefits of the Colorado River system resource should disregard any portion of that

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out, related to the delivery of water to be made under Article III(d) and had nothing to do with the apportionment made by Article III(a) (Rep. 188-89). The Master relates the limitation neither to III(d) nor to III(a), but to a body of water quite different from that described in either of these paragraphs—the water in Lake Mead and below.

[9]Here is what Governor Emerson told the Senate Committee on Irrigation and Reclamation on December 19, 1925. Senator Ashurst of Arizona had been arguing that the Gila River is of no interest to the upper basin since its waters cannot be used there. Said Mr. Emerson (*Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 765 (1925)): "I am not able to see your argument in regard to the Gila River—I think it is as much a part of the Colorado River system as our [Wyoming's] Green River."

Senator Ashurst was not satisfied, and a little later returned to the fray (*id.* at 767):

"Senator ASHURST. I regret to see so well informed a man as yourself go into the domain of speculation and imagination and think that we are going to injure Colorado by using the waters of the Gila River or injure Wyoming by using the waters of the Gila River. . . .

"Mr. EMERSON. As a witness here before your committee, I shall have to assert again that the Gila River is just as much a tributary of the Colorado River as are the various other small tributaries thereof."

resource. In fact, the Compact was negotiated with the future Mexican Treaty very much in the negotiators' minds,[10] as Article III(c) makes clear.[1] As to Mexico, all of the states are upstream users.

The principle familiar in water law which gives an upstream appropriator an interest in the use of water from a downstream tributary, although the upstream appropriator can never physically use such water, also gives the upper basin an interest in lower basin tributaries. (See Calif. Op. Br. 99-100.) We need only add that every reason to include tributaries in the Compact applies to the limitation. The limitation is expressly for the benefit of the upper as well as the lower states, and was insisted upon by the upper states to fill a void left in protection afforded to the upper basin by the Compact if Arizona failed to ratify it (Rep. 165).

2. *Arizona's Rewritten Compact Cannot Physically Operate*

Arizona says that the III(a) apportionment to the lower basin is only from the main stream at Lee Ferry.[2]

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[10]See Ariz. Ex. 46 (Tr. 255), at A78, A81, report of Delph E. Carpenter, Compact negotiator for Colorado; Ariz. Ex. 49 (Tr. 257), at A70, statement by Richard E. Sloan, legal adviser to Arizona's Compact negotiator; Ariz. Ex. 50 (Tr. 258), at A61-62, statement by W. S. Norviel, Compact negotiator for Arizona; Ariz. Ex. 51 (Tr. 258), at A127, report of Frank C. Emerson, Compact negotiator for Wyoming; Ariz. Ex. 53 (Tr. 259), at A28, report of Herbert Hoover, federal representative to and chairman of the commission which negotiated the Compact; Ariz. Ex. 55 (Tr. 260), at A35, Hoover's answers to Hayden.

[1]The effect of the system concept upon the impact of the Mexican Treaty burden under Article III(c) of the Compact is described at 22-24 *supra*.

[2]Ariz. Op. Br. 80-81: "It is Arizona's position that the terms of the Compact, when considered in relation to the conflict between the two basins, the purposes which the framers sought to achieve and the geographical and physical facts confronting them,

The compact Arizona describes bears little resemblance to the Colorado River Compact which, in Article III(a), apportions the "beneficial consumptive use" of 7,500,000 acre-feet per annum of Colorado River system water. The Master says (Rep. 148-49), and all parties now agree:

> "In the Compact, 'beneficial consumptive use' means consumptive use (as opposed to non-consumptive use, *e.g.* water power) measured by the formula of diversions less return flows, for a beneficial (that is, non-wasteful) purpose. This understanding of the term is reflected in several of the commissioners' reports. (See Ariz. Exs. 46, 52, 54, 57.)"

This definition is indistinguishable from the meaning of "consumptive use," which is the yardstick for the allocation of the recommended decree (Decree art. I(A), Rep. 345), and of "aggregate annual consumptive use (diversions less returns to the river)" which is the measure specified for the limitation on California (Rep. 185-94; Rep. app. 382).[3]

So long as the sun shall shine and water evaporate and transpire, a compact such as Arizona describes could

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lead directly to the conclusion that Article III(a) apportions to the Lower Basin in perpetuity 7,500,000 acre-feet of water per annum from the main stream of the Colorado River at Lee Ferry and that tributary water is not included in this apportionment."

[3]Arizona lists the definition of "consumptive use" as one of six "questions presented" (Ariz. Op. Br. 9), but her argument explicitly states (*id.* at 105): "Arizona agrees with the Master's conclusion that the § 4(a) apportionment, including the California limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225)."

The only criticism of the Master's definition of "consumptive use" in the recommended decree is our own—its possible ambiguity in failing expressly to include uses of underground water. See Calif. Op. Br. 289-90.

never operate: Because of natural diminutions of supply between Lee Ferry and downstream points of diversion and use, 7,500,000 acre-feet of flow at Lee Ferry could never supply 7,500,000 acre-feet of beneficial consumptive use *(diversions less returns)* below Lee Ferry.[4]

Arizona does not attempt to explain how the impossible could work. Instead, in the following passage of her opening brief, Arizona represents by ". . ." the Master's dispositive refutation of her argument; we restore (with emphasis) the Master's sentence which Arizona omits (Ariz. Op. Br. 79):

> "Article III(d) was incorporated into the Compact to insure the Lower Basin that the apportionment made to it by Article III(a) would be satisfied out of main stream water originating in the Upper Basin and to assure that this apportionment would be met even during those periods when the water supply rising in the Upper Basin was insufficient to fulfill the total apportionment made to both basins by Article III(a).
>
> "In finding this position unacceptable, the Master held:
>
> "'Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. *Since a substantial quantity of water is lost through reservoir evaporation and channel losses as it flows from Lee Ferry, the point*

[4]Arizona expressly agrees with the Master "that losses of water which occur *before* diversion are a diminution of available supply under § 4(a) and are not a consumptive use (Rep. 187)." (Ariz. Op. Br. 106; emphasis added.)

where the III(d) obligation is measured, to the diversion points downstream from Hoover Dam, where most of the appropriations are made, 7,-500,000 acre-feet of water at Lee Ferry will supply a considerably smaller amount of appropriations below Hoover Dam.[5] Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantative [*sic*] measurement of the flow of water at Lee Ferry.' (Rep. 144)"[6]

B. Congress Did Not Unilaterally Amend the Colorado River Compact

Congress did not purport to enact Arizona's amendment to the Colorado River Compact. No intent can be

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[5](Footnote ours.) Our own water supply studies showed that an average Lee Ferry flow of 8,700,000 acre-feet per year will produce about 6,000,000 acre-feet for consumptive use from Hoover Dam to Mexico. Other water supply studies also produced a large margin between Lee Ferry flow and the quantity available from the main stream for consumptive use in Arizona, California, and Nevada. (See Calif. Op. Br. plate 7.)

[6]We need not speculate how the limitation would operate if the limitation's specification of "paragraph (a)" were read "paragraph (d)." The Master says (Rep. 187):

"The United States at one time urged a different conclusion, namely, that Section 4(a) limits California to a part of the water flowing at Lee Ferry.[48] It would necessarily follow that this water must be segregated for California at Lee Ferry and traced downstream, through Lake Mead, to California's diversion works. This interpretation measures the Section 4(a) limitation, not to a portion of aggregate consumptive use, but to a portion of a body of water 650 miles upstream from some of California's diversion works, and 355 miles upstream from Hoover Dam, the operation of which the Project Act was designed to regulate. Furthermore, it charges California for evaporation and channel losses which occur before the water is diverted from the mainstream for use in California, despite the statutory language which limits California to a quantity determined by the measurement of 'diversions less returns to the river.'"

"[48]The United States, in its Comment on the Draft Report, al-

imputed to Congress to render the Compact internally inconsistent and physically inoperative.

Conclusive internal evidence in the Project Act that Congress attempted no such thing is the express definition in section 4(a) of consumptive use: "'diversions less returns to the river.'" If the water of which California may use 4.4 million acre-feet is from a quantity of 7.5 million acre-feet flowing at Lee Ferry, then one of two mutually exclusive alternatives must be accepted:

(1) Congress erred egregiously when it wrote "diversions less returns to the river" into the limitation. No one contends that it erred, and the Master holds "diversions less returns to the river" means what it says.

(2) There cannot be 4.4 million acre-feet for California and 3.1 million acre-feet for Arizona and Nevada, computed by "diversions less returns to the river," out of 7.5 million acre-feet of water flowing at Lee Ferry.

Furthermore, the Project Act is explicit in repeated recognition that the Colorado River Compact covers both the main stream and the tributaries—sometimes referred to as "the Colorado River,"[7] sometimes "the Colorado River *and* its tributaries,"[8] sometimes "the Colorado River *or* its tributaries,"[9] and sometimes

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though it recognizes that this position is fairly implied from its opening brief, says that it altered its position in its reply brief."

[7]"Colorado River" in § 19 of the Project Act obviously includes tributaries. Congress consents to negotiation of compacts for development of the "Colorado River" among all seven named Colorado basin states, although New Mexico and Wyoming have access only to Colorado River tributaries. See also § 4(a) of the Project Act.

[8]§§ 13(b), 15.

[9]§§ 13(c), 13(d).

"Colorado River system."[10] Each of these expressions in the Project Act means the same thing.

Nothing in the Project Act purports to modify the systemwide scope of the Compact approved in section 13(a) (Rep. app. 392). The legislative history reveals that no such amendment was attempted.

During debates on Senator Hayden's proposed amendment which, with modifications,[1] became the second paragraph of section 4(a), the following colloquy between Senators Johnson and Hayden indicates that Senator Hayden did not intend that his proposed amendment modify (unilaterally) the systemwide scope of the Compact (70 CONG. REC. 466, reproduced in Ariz. Legis. Hist. 116-19):

> [Senator Johnson]: "Let us see what the Colorado River compact relates to. I read first from the purposes of the Colorado River compact, Article 1:
>
> " 'The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system.'
>
> "Now, what is the Colorado River system? The Colorado River system then, with meticulous care, is described in the compact in Article II:
>
> " 'As used in the compact (a) the term "Colo-

[10] § 16.

[1] The tri-state compact offered by Senator Hayden was accepted into the bill only after his proposal was modified, first, by making California's ratification thereof permissive only and not a mandatory condition to the effectiveness of the act, and second, by making the effectiveness of the tri-state compact dependent upon ratification of the Colorado River Compact by *Arizona* California, and Nevada. (See *infra* p. 126 note 3 and accompanying text.)

rado River system" means that portion of the Colorado River and its tributaries within the United States of America.'

"Again, sir, we find in Article III the reference to the Mexican situation, and I read it because I have in my hand at the present time the compact itself. We find in paragraph (c) of Article III the following:

"'If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right in the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantity specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lees Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).'

"We find, therefore, that the compact toward which we are all devoting our efforts in order to get everybody satisfied and to unite in agreeing upon it provides for a division of the water of the Colorado River basin, and we find, sir, that in this compact the Colorado River basin embraces not alone the main stream, but embraces the tributaries of the main stream as well.

"Sir, the distinguished Senator from Arizona (Mr. Hayden) read remarks that were made in an-

swer to queries of his in writing of Mr. Herbert Hoover, who is to be inaugurated soon as President of the United States. He laid great stress upon Mr. Hoover's ability. He said Mr. Hoover knew more about the Colorado River and its intricacies and all the technical aspects of it then probably any other one man, and read to his purposes, as was his right, certain questions that he had propounded in writing to Mr. Hoover and answers which Mr. Hoover had in writing made to him.

"But, Mr. President, in reading the queries that thus the Senator put in writing to Mr. Hoover, and which he says were answered so elaborately, so well, so intelligently, and so accurately, the Senator omitted to read one of the very first of the queries that thus he propounded to President-elect Hoover. This is one of the queries that he then propounded to Mr. Hoover that Mr. Hoover in writing answered to him:

" 'Question 4. Why was the term "Colorado River system" used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins respectively?'

"That is the question propounded in writing by the junior Senator from Arizona to Mr. Herbert Hoover, who at that time was the president of the Colorado River Commission, and here is the reply that was made by Mr. Hoover to the distinguished Senator from Arizona:

" 'This term is defined in Article II—'

"I have just read Article II to Senators—
'as covering the entire river and its tributaries in

the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt.'

"What is the Senator asking by this amendment? He is asking, indeed, that we amend the Colorado River compact by the action of the Congress of the United States; and then, followed to its logical conclusion, what must occur? Every State must in like fashion take up the amendment of the Colorado River compact, possibly, and thereafter amend it in conformity with this particular amendment.

"Mr. Hayden. Mr. President, if the Senator from California will be kind enough to yield, I am sure he does not want to overstate my position. *I am not asking that the Colorado River compact be amended in any particular.*

"Mr. Johnson. I am stating the effect of the Senator's amendment.

"Mr. Hayden. I am asking that this effect be secured: That the State of California, which has and will have no interest in the Gila River, waive any claim to the waters of that stream." (Emphasis added.)

Earlier, in the hearings on the third Swing-Johnson bill, during discussion of the provisions of what is now section 13(c), the following exchange took place among Representative Hayden of Arizona, Representative Swing of California (author of the bill), and Delph E. Carpenter (Colorado's Compact negotiator and spokesman for the upper basin interests):[2]

> "Mr. Hayden. What is intended by specifically mentioning the 'tributaries.' Is this another attack upon the much abused Gila?
>
> "Mr. Carpenter. As a matter of fact the Gila is much misrepresented.
>
> "Mr. Swing. I might add parenthetically that there would be no river except for the tributaties. The tributaries make the river.
>
> "Mr. Carpenter. I accept the suggestion of Representative Swing. Tributaries include every branch. The inclusion of the words 'and tributaries' would make the act effective off the main stem of the river. The words, 'and the tributaries' may be something of surplusage. The use of the word 'river' probably includes its tributaries. But lest some hyper-technical person (at a future date) bobs up and says that the tributaries are not affected, we have included the words 'and the tributaries.'
>
> ". . . .
>
> "I am utterly unable to comprehend the peculiar viewpoint of the people of the State of Arizona in that respect. More than 12,000,000 acre-feet of

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[2] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 208-10 (1926).

water of the Colorado River falls upon the soil of the State of Colorado and the principal tributaries have their origin wholly in that State. A large percentage of the water of the Colorado River falls wholly on the soil of Wyoming. Most of the tributaries of the Green have their origin in that State and in the State of Utah. So we might take each one of these States. The river is made up of the water contributed to it by its branches or tributaries and the tributaries flowing through Arizona are no whit different than the tributaries that flow out of Colorado, Wyoming or Utah. I have heard it said that the Gila River is an Arizona stream because it rises in Arizona and yet geographic boundaries and all other sources of information show that the Gila rises in New Mexico. It is primarily a New Mexico river from the standpoint of origin. My recollection is that the Little Colorado also rises in New Mexico.

"Mr. Hayden. Some of its tributaries do.

"Mr. Carpenter. Yes; so that the Gila River is not exclusively an Arizona stream even in the matter of origin. Secondly, the Gila and every other river mentioned contributes, if uninterrupted, its water supply to the main river above the largest diversion canal in America—the Imperial Valley Canal heading now below Yuma. Gila water is of importance to the Imperial Valley Canal. The canal naturally looks to the more stable flow from the main river, but I am informed that Gila water is frequently diverted, and it has been my privilege to see water coming from the Gila River and flowing into the Colorado and down into the Imperial

Valley Canal. That water is just as wet and just as serviceable as the water from the Green River in Utah. The waters of the Gila River are waters of the Colorado River just as much as the waters of the Green River. So that when you look at these facts squarely you are brought to the proposition that there is not a single tributary of the entire Colorado River that does not enter the river above Yuma, and the greatest diverter from this river, or from any river in America, or the world, is the canal of the Imperial Valley, located below Yuma.

"Now the thought is advanced that, because the Imperial Valley people eventually propose to move their heading up to Laguna Dam, therefore the Gila is not a tributary and its waters are not involved. But a canal for the irrigation of lands in Mexico would head below the mouth of the Gila. The whole theory of the Laguna Dam connection is founded upon an all-American canal.

"I will not go into the matter of international relations, because that is for the Department of State, and the Senate; but, even if the Imperial Valley people were to move their headgate up to Laguna Dam and at a point above the mouth of the Gila, and even though there were no Mexican lands, you could yet divert the water. The old and present Imperial canal would remain. Nevertheless, the rule is well fixed that he who changes his point of diversion up stream can not do so to the injury of other appropriators. If the Imperial Valley people see fit to move up stream, and the rights of the States were not fixed by compact,

which they most assuredly should do at an early date; if those rights were still as they are in a chaotic condition, bristling with opportunities for interstate conflict, the Gila River would still be charged against the Imperial Valley in any suit against the upper States, and the Gila would still be a tributary of the Colorado so far as the Imperial Valley is concerned, even if that diversion were voluntarily moved by the Imperial Valley people up to the Laguna Dam, because in moving that dam, the Imperial Valley people well know that they do so at their peril and the peril of loss of the Gila water. I have gone into this matter because there seems to be an idea or a dream that the Gila is not a tributary—an idea that because the all-American Canal will ultimately hook up with the Laguna Dam that therefore the Gila is a river unto itself. Secondly, I can but feel, as an observer, that the rights of New Mexico have not been duly considered by Arizona in the matter of the Gila. They are allowing development on that river to become a potential source of future litigation. I think that answers the question."

C. Arizona's Legislative History Cannot Support Her Construction of the Limitation

On the basis of extracts from legislative history, Arizona contends that Congress intended the words "waters apportioned by paragraph (a) of Article III of the Colorado River compact" to mean 7.5 million acre-feet of average annual flow at Lee Ferry. Arizona apparently contends that the Master's interpretation of the limita-

tion, rewriting the first two references to the Compact,[2a] nevertheless substantially effectuates Congress' intent as reflected in the legislative history Arizona quotes. This is the same legislative history which Arizona says effected an amendment to the Colorado River Compact to exclude the tributaries in the lower basin from the Colorado River system. Arizona misreads the Compact, the legislative history, and the Master's Report.

Arizona's legislative history argument rests on this sequence of events (Ariz. Op. Br. 62-65): In 1927, the governors of all seven Colorado River basin states met in Denver, Colorado, in an attempt to secure seven-state ratification of the Colorado River Compact. As a result of this conference, the governors of the four upper division states (Colorado, New Mexico, Utah, and Wyoming) made a proposal which clearly was limited to the III(d) *flow* at Lee Ferry.[3] Arizona concludes (Ariz. Op. Br. 63):

> "Congress was well aware of the resolution adopted at the Governors' Conference, and in fact

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[2a]The third and final reference to the Compact—"such uses always to be subject to the terms of said compact"—the Master has not suggested rewriting.

[3]Ariz. Legis. Hist. 158: "The governors of the States of the upper division of the Colorado River System suggest the following as a fair apportionment of water between the states of the lower division subject and subordinate to the provisions of the Colorado River Compact in so far as such provisions affect the rights of the upper basin states:

"1. Of the average annual *delivery of water* to be provided by the states of the upper division *at Lees Ferry,* under the terms of the Colorado River Compact

(a) To the State of Nevada, 300,000 acre-feet.

(b) To the State of Arizona, 3,000,000 acre-feet.

(c) To the State of California, 4,200,000 acre-feet." (Emphasis added.)

Article III(d), Rep. app. 373, provides: "The States of the

> the division of water among the Lower Basin states recommended by the Governors of the Upper Division states was the starting point for the compromise finally worked out in the Senate and incorporated in § 4(a) of the Project Act."

The Master explains very clearly why this Arizona legislative history does not support his conclusions. The Master would divide the first 7.5 million acre-feet of water which the Secretary of the Interior makes available for consumptive use from Lake Mead and the main Colorado River below. As we have seen (*supra* pp. 85-87), 7.5 million acre-feet of flow at Lee Ferry (which the upper division governors proposed to divide) cannot physically supply 7.5 million acre-feet of water for consumptive use from Lake Mead and below or from anywhere else below Lee Ferry.

For that very reason, Arizona's legislative history cannot be relevant to any construction of the limitation, which is in terms of consumptive use, defined as diversions less returns to the river.[4]

The Master states that "Congress never clearly understood" that the governors' recommendation related to their Article III(d) obligation. Senator Pittman "did not adopt, or perhaps failed to grasp, that portion of the governors' resolution which expressly found the source of the allocated waters in the Article III(d) obligation of the Upper Division" so that he described the governors' proposal "in apparent misunderstanding

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Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

[4]Rep. app. 382; see Ariz. Op. Br. 105.

of the governors' recommendation." Finally, the Master concludes that "all subsequent discussion in the Senate flowed in the same channel." (Rep. 189-90.) If Arizona is right that the governors' proposal is the correct basis for the construction of section 4(a) of the Project Act, the construction proposed in the Master's Report, by his own analysis, is wrong.

Furthermore, the recommendation of the upper division governors did not exempt any lower basin tributaries from the Mexican Treaty burden.[5] The upper states representatives explained to Congress during the hearings on the fourth Swing-Johnson bill their opposition to Arizona's attempt to exempt her tributaries from the treaty burden. For example, Governor Dern of Utah explained:[6]

> "The conference at Denver for the most part was devoted to a question of dividing the waters of the river. . . . There was one point in connection with the tributaries that the governors repeatedly threw out; but Arizona always came back with that proposal for reconsideration. We have not been able to accept the viewpoint of Arizona regarding that point. She maintained that the tributaries of the

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[5]Paragraph 1 of the upper division governors' recommendation divided the Lee Ferry flow among Arizona, California, and Nevada (*supra* p. 97 note 3). Paragraph 2 also apportioned 1 million acre-feet to Arizona from lower basin tributaries and provided that "said 1,000,000 acre-feet shall not be subject to diminution by reason of any treaty with the United States of Mexico, except in such proportion as the said 1,000,000 acre-feet shall bear to the entire apportionment in [paragraphs] 1 and 2 [of the governors' recommendation] of 8,500,000 acre-feet." Ariz. Legis. Hist. 158. Nothing in the governors' recommendation purported to amend the Colorado River Compact.

[6]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 264-65 (1928).

> Colorado River in Arizona are distinct from the main river. We take the opposite view of it. We say that, under the compact, the tributaries of the Colorado River in all the States are parts of the Colorado system. We are bound by that rule in the upper basin, and the lower basin should be governed by the same principle."

Francis C. Wilson, representative of Governor Dillon of New Mexico, gave the same explanation:[7]

> "Now, as to this 3,000,000 acre-feet [recommended by the governors as Arizona's share of the III(d) delivery], they [Arizona] said that they were not satisfied but they would accept it, placing upon it certain conditions. We met those conditions in the main, but the condition which they attached, that their tributaries should be released from the burden of the Mexican allocation which might be arrived at by treaty; that their tributaries should be free from that burden, we could not consent to, because in the compact there is no such distinction; the entire system, divided as I have read it to you, is subject to that burden when the United States reaches the point of determining by treaty with Mexico what Mexico's allotment or allocation should be."

This aspect of Arizona's opening brief also demonstrates the impossibility of using the legislative history to overturn the express command of section 4(a) of the Project Act. (See Calif. Op. Br. 110-24.) Arizona has filed with the Court a 159-page printed document entitled "Arizona's Legislative History of Sections 4(a),

[7] *Id.* at 292.

5 (1st Paragraph), and 8 of the Boulder Canyon Project Act," and her opening brief is replete with extensive citations to and quotations from that compilation.

On the basis of this same legislative history compilation, Arizona for the last four years has consistently maintained that the limitation's express reference to the Colorado River Compact means Compact. We agree. Her quarrel with California turned upon her construction of the Colorado River Compact. The same history cannot now support her contention that the Master is correct in severing the Compact from the limitation.

On the basis of this same legislative history compilation, Arizona has derived support for her shifting and contradictory interpretations of the meaning of "excess or surplus waters unapportioned" by the Compact. On the same history, she now takes, simultaneously, two inconsistent positions about the meaning of those terms: They mean (1) all waters in the main stream (Lee Ferry and below), and (2) all waters in the "mainstream" (Lake Mead and below)—a reversal in both instances of her still earlier positions that some "excess or surplus" could be found on lower basin tributaries. She has also reversed her earlier position that California could not share in the increase in use specified in Article III(b), which she sometimes said could not be found in main stream, but only in the lower basin tributaries.

Here is a chronicle of Arizona's uses of the same legislative history compilation:

On August 5, 1957, Arizona filed with the Special Master the first edition of the same compilation of legislative history. This history was then offered in support of two documents Arizona filed simultaneously, entitled

(1) "Amended and Supplemental Statement of Position"[8] and (2) "Memorandum on the *Decisive* Application of the *Compact* and Project Act." (Emphasis added.) Arizona's 1957 position, which she asserted on the basis of this legislative history, was in part:

(1) Section 4(a) of the Project Act and the California Limitation Act incorporate provisions of the Colorado River Compact by reference.[9]

(2) The "excess or surplus waters unapportioned" by the Compact are on lower basin tributaries, at least in part.[10]

(3) California is precluded from participating in the increase in use permitted to the lower basin by Article III(b), which increase in use (from lower basin tribu-

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[8]Amended and Supplemental Statement of Position by Complainant, State of Arizona (filed with Special Master, Aug. 5, 1957). This statement was marked for identification as Calif. Ex. 7300 (Tr. 22,382, 22,384). We reproduce it in the appendix to this brief.

In her amended and supplemental statement, Arizona asserted (p. 1): "Arizona considers its Statement of Position heretofore filed herein and certain legal conclusions and arguments set forth in its various pleadings filed herein unsound and not supported in the law in relation to the proper interpretation of Sections 4(a), 5 and 8 of the Project Act and Articles III and VIII of the Compact."

[9]*Id.* pt. II, at 2-4, which presents interpretations of various provisions of the Colorado River Compact. *E.g.*, par. e, p. 3, gives Arizona's definition of Article III(b) waters under the Compact, and par. f, p. 3, states that "California by reason of her Self Limitation Act is barred from any claim on *this* lower basin water." (Emphasis added.)

See also title of "Memorandum on the *Decisive* Application of the *Compact* and Project Act" accompanying Arizona's amended statement of position. (Emphasis added.)

[10]Amended statement of position, *supra* note 8, at 4, par. g: "Any water used by Arizona from the Gila River or other Arizona tributaries above said perfected rights and Article III(b) water (if such, by stretch of the imagination there be) would be surplus or excess waters and not subject to a charge against water allotted Arizona from the main stream of the River."

Arizona did not discuss where any other "excess or surplus" may be found, if at all.

taries) is not "excess or surplus unapportioned" by the Compact.[11]

On August 13, 1958, Arizona tendered to the Special Master amended pleadings accompanied by a motion for leave to file those pleadings. From April through June 1959, Arizona filed with the Special Master proposed findings of fact and conclusions of law and supporting briefs asserting the same position proposed in her tendered amended pleadings. Arizona's 1958-1959 position which she asserted on the basis of this legislative history was in part:

(1) Section 4(a) of the Project Act and the California Limitation Act incorporate provisions of the Colorado River Compact by reference.[1]

(2) The "excess or surplus waters unapportioned" by the Compact are in the main stream (Lee Ferry and below) only.[2]

(3) California is precluded from participating in the increase in use permitted to the lower basin by Article III(b), which increase in use (from the main stream only) is not "excess or surplus unapportioned" by the Compact.[3]

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[11] *Id.* at 3, par. f. *Id.* at 3, par. e: "Article III(b) permits the lower basin users to *increase* their beneficial consumptive use by 1,000,000 acre-feet yearly (over and above perfected rights existing on the effective date of the Compact) on lower basin tributaries."

[1] Ariz. Op. Br. 52 (April 1, 1959); *accord*, p. 44; see also p. 20, noting importance of settling "precisely what water was apportioned by the Compact, i.e., what water is referred to by Section 4(a)."

[2] See Ariz. Proposed Amended Bill of Complaint, par. XXII(3) (Calif. Ex. 7302-A for iden., Tr. 22,383-84, at 14-15), referring to Arizona's claim to half "of the water of the main stream which is excess or surplus above the aggregate of the amounts apportioned by Article III of the Compact." She necessarily assumed that such excess or surplus as may exist is main stream water in the lower basin over and above the 8.5 million of III(a) and (b).

[3] Ariz. Op. Br. 29, 33-34, 45, 52 (April 1, 1959).

Finally, on May 22, 1961, Arizona filed with this Court a printed version of the same legislative history compilation accompanying her opening brief purportedly directed to sustaining the Master's proposed decision either on his rationale or on alternative premises now argued by Arizona.

Arizona's 1961 alternative position which she asserts on the basis of this legislative history is in part:

(1) Section 4(a) of the Project Act and the California Limitation Act incorporate provisions of the Colorado River Compact by reference.[4]

(2) The "excess or surplus waters unapportioned" by the Compact are in the main stream (Lee Ferry and below) only.[5]

(3) Apparently California may share in the increase in use permitted to the lower basin by Article III(b), which increase in use (from the main stream only) is treated by the Project Act, but not by the Compact, as "excess or surplus waters unapportioned."[6]

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[4]Ariz. Op. Br. 73 (May 22, 1961).

[5]*Id.* at 74, 76, 82.

[6]Although Arizona still contends that III(b) waters are "apportioned" by the Compact (*id.* at 81), she now asserts (*id.* at 82):

"Before the Special Master, Arizona argued that Congress properly regarded the water dealt with by Article III(b) as water 'apportioned' by the Compact and that, when Congress by § 4(a), divided 'excess or surplus waters unapportioned by said compact' equally between Arizona and California, it did not intend to include in the surplus 'unapportioned' waters the water which had been apportioned by Article III(b); hence that § 4(a) of the Project Act excluded California from the consumptive use of Article III(b) water. However, after further reflection, we are persuaded by the Special Master's reasoning that Arizona's original position is untenable (see Rep. 194-200).

"Therefore we now concede that the phrase, 'excess or surplus waters unapportioned by said compact,' as used in § 4(a), includes consumptive use of all main stream water above the first 7.5 million acre-feet available for use by the Lower Basin states in any one year."

Arizona's 1961 position which she asserts on the basis of this legislative history in support of the Master's rationale is in part:

(1) Section 4(a) of the Project Act and the California Limitation Act do not refer to the Colorado River Compact which is thus irrelevant in this suit.[7]

(2) The "excess or surplus waters unapportioned" by the Compact are in the "mainstream" (Lake Mead and below) only.[8]

(3) California may share in the increase in use permitted to the lower basin by Article III(b), which increase in use (from the main stream only) is treated by the Project Act, but not by the Compact, as "excess or surplus waters unapportioned."[9]

The results of Arizona's reliance upon her legislative history compilation may be summarized as follows:

(1) Project Act section 4(a) and the California Limitation Act incorporate Compact provisions by reference, a position which Arizona consistently maintained in 1957-1959, prior to the Master's Report and to which she still adheres in 1961, at least alternatively.

(2) "Excess or surplus waters unapportioned" by the Compact can variously be found

(a) Partly on lower basin tributaries (1957)

(b) Wholly on the main stream (*Lee Ferry and below*) (1958-1959, and sometimes in 1961)

(c) Wholly on the "mainstream" (*Lake Mead and below*) (sometimes in 1961)

(3) Participation by California in the increase in use provided in Article III(b) is

(a) Not permitted (1957, and 1958-1959)

(b) Permitted (1961)

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[7] *Id.* at 26-27, 67.

[8] *Id.* at 58.

[9] *Id.* at 26, 81-82.

We think that Arizona's use of this legislative history compilation proves the danger of attempting to construe the Project Act and the California Limitation Act without a firm anchor in the words of the statute.

The Master's conclusion and the Arizona argument that Congress amended the Compact seem to be based on a common premise: Congress failed to understand the defined terms of the Compact. Arizona's solution is to change "paragraph (a)" in the limitation to read "paragraph (d)." The Master, recognizing this impossibility, excises the entire reference to the Compact and writes a limitation that does not refer to the Compact. In either case the effort to rewrite an act of Congress and an act of the California Legislature on the basis of what Congress might have said had it understood the Compact differently is unjustified and dangerous.[10]

§ II. THE PRIORITY ISSUE: ARIZONA'S ARGUMENTS TO SUPPLANT PRIORITY PRINCIPLES ON THE MAIN COLORADO RIVER WITH PRORATION ARE UNSUPPORTABLE

A. Principles of Equitable Apportionment Have Not Been Abrogated by the Boulder Canyon Project Act, by the Construction of Storage Reservoirs Which Regulate the Natural Flow, or by the Colorado River Compact

1. *Boulder Canyon Project Act*

We shall not duplicate here the argument in our opening brief that the Project Act preserves equitable ap-

[10] "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." United States v. Great Northern Ry., 343 U.S. 562, 575 (1952). See also United States v. Calamaro, 354 U.S. 351, 357 (1957); Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930), commenting on Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

portionment and priority principles (within the quantitative ceiling on California established by the limitation) and that the Master's conclusion abrogating those principles on the "mainstream" is unsound (Calif. Op. Br. Part Three). We answer the arguments Arizona now advances to buttress the Master's conclusions.

Obviously, sections 5 and 6 of the Project Act could not and did not abrogate equitable apportionment and priority principles in Arizona's "main stream," which extends from Lee Ferry to the Mexican boundary.[1] Section 5, insofar as relevant here, deals with contracts for the storage and delivery of waters impounded by Hoover Dam in Lake Mead; section 6 deals with the priorities for the operation of Hoover Dam and Lake Mead. By their terms, neither section 5 nor section 6 relates to water or rights to the water in the 275-mile reach between Lee Ferry and Lake Mead before that water reaches the reservoir. Control of this section, in any event, is dependent upon principles of equitable apportionment.

Nor do Arizona's arguments support the abrogation of those principles in the Master's "mainstream," Lake Mead to the Mexican boundary. Arizona herself disagrees with the Master's conclusions whenever the competing rights are those of the United States: Part II of her opening brief denies the Government's constitutional power to reserve navigable waters for federal

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[1]Arizona contends, in effect, that the 7,500,000 acre-feet of "Article III(a) waters" specified in the Compact, in the limitation accepted by California, and in the abortive tri-state compact set forth in the second paragraph of § 4(a) all refer to 7,500,000 acre-feet per annum of water of the main Colorado River at Lee Ferry. (See Ariz. Op. Br. 61-81.)

purposes within a state[2] and asserts that those federal rights should be measured by principles of equitable apportionment.[3]

a. Legislative history of section 5

Arizona argues that the background of section 5 shows a clear congressional intent *not* to recognize appropriative rights as the basis of any claim to water stored in Lake Mead.[3a]

Arizona's conclusion is not supported by the legislative history. (See Calif. Op. Br. 175-82.) The changes in the provisions of section 5 which Arizona describes (*supra* note 3a) were proposed by the upper basin representatives.[4] Obviously, the upper basin had

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[2]Ariz. Op. Br. 121: "After Arizona was admitted to statehood, the United States had no power to reserve water of the main stream of the Colorado River for the use of federal establishments within Arizona."

[3]*Id.* at 181: "Should the Court find there was no reservation of water for use on Indian Reservations, or, should the Court find such a reservation of water but reject Indian needs as the test of the quantity reserved, the amount of water to which the Reservations are entitled should be determined in accordance with principles of equitable apportionment."

[3a]Ariz. Op. Br. 42-43: "As introduced in the 69th Congress, § 5 of the third Swing-Johnson bill provided in part that 'contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators.' However, the clause subjecting contracts to prior appropriative rights was deleted in committee, the permissive provision, 'may be for permanent service', was stricken and the mandatory provision, 'shall be for permanent service', was substituted. At the same time that Congress deleted the provisions recognizing rights of prior appropriators, it added the following requirement:

> " 'No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.'

Congress, by refusing recognition to appropriative rights and by denying any right to the use of water except by contract, evidenced a clear intent that appropriative rights should not be recognized as the basis of any claim to water stored in Lake Mead."

[4]Calif. Ex. 1801 (Tr. 12,234), a committee print of the third Swing-Johnson bill showing the source of proposed amendments, pp. 1, 7.

no interest in the rights of the lower basin states *inter sese* to the waters available for use in that basin consonant with the Colorado River Compact;[5] the purpose of the amendment was to protect the upper basin apportionment under the Colorado River Compact. Delph E. Carpenter, Colorado's Compact Commissioner, acting as the upper basin spokesman[6] to explain these upper basin amendments to the House Committee on Irrigation and Reclamation, made it abundantly clear that the last sentence of the first paragraph of section 5,[7] relied on by Arizona, "has nothing to do with the interstate relations between Arizona and California."[8]

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[5]*Cf.* Ariz. Ex. 2 (Tr. 216), the Upper Colorado River Basin Compact, 63 Stat. 31 (1949), which makes an interstate allocation within the upper basin—without representation of lower basin interests.

[6]See *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess., pt. 1, at 82, and pt. 2, at 120 (1926).

[7]The upper basin amendment accepted as the last sentence of the first paragraph of § 5 provides, Rep. app. 385: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

[8]*Hearings on H.R. 6251 and H.R. 9826, supra* note 6, pt. 2, at 163; quoted in context in Calif. Op. Br. 178-79, and in Calif. Ex. 1802 (Tr. 12,236), at 2:

"Mr. CARPENTER. 'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any person in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water.

"Mr. SWING. The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to

The same views were later expressed by Mr. Swing, the House author of the bill.[9]

b. Section 6

Arizona says (Ariz. Op. Br. 41-42):

> "If the Secretary in managing the reservoir and dam were compelled to meet the demands of appropriative rights in point of time and quantity, it would be impossible for him to comply with the mandate of the Project Act that 'the dam and reservoir . . . be used: First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses *and satis-*

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secure water on the same terms as is afforded to Nevada and California.

"Mr. HAYDEN. How tight would you tie Arizona?

"Mr. CARPENTER. The thought of this amendment is that any water stored in this reservoir under the terms of the compact, when released from storage shall be burdened by the compact wherever it goes. As far as water is concerned, existing claims of the lower States are protected by the compact. *Water must pass through this reservoir to take care of the present existing lower claims.*

"As to future development from the main river, we insist that water stored in this structure by the United States be stored and released upon the express condition that the persons who receive the water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California.*" (Emphasis supplied.)

Section 8(a) of the Project Act, Rep. app. 389 (§ 8(c) of the draft Mr. Carpenter was discussing), provides:

"The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the . . . . works herein authorized, shall observe and be subject to and controlled by said Colorado River compact . . . and all permits, licenses, and contracts shall so provide."

[9] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess., pt. 3, at 116 (1927), quoted *supra* p. 54; and *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess., pt. 1, at 57 (1928), reproduced in Calif. Ex. 1804 (Tr. 12,237), at 3-4.

faction of present perfected rights in pursuance of Article VIII of said Colorado River compact;[1] and third, for power.'"

Arizona refutes her own argument. Arizona agrees with the Master that section 18 of the Project Act requires "that state law shall govern intrastate water rights and priorities." (Ariz. Op. Br. 99.) If Arizona were correct about the physical difficulties in observing priorities, it would be impossible for the Secretary of the Interior to honor intrastate priorities. The practical problems of adhering to a priority schedule in releasing water from Lake Mead, Lake Mohave, and Havasu Lake are identical whether two users whose respective priorities must be observed are on the same side of the river or on opposite sides.

Pursuant to section 6 of the Project Act, navigation, flood control, and river regulation are paramount rights to the use of the dam and reservoir as against irrigation and domestic uses, which are junior. The prior satisfaction of paramount or senior rights, of course, affects the supply of water which will be available to satisfy the rights of junior users, but fluctuations in water supply do not destroy the rights depending upon that supply. In other words, once these senior obligations have been satisfied, there is no incompatibility in supplying irrigation and domestic users *inter sese* in relative order of interstate (as well as intrastate) priorities. Thus, water may be released in the month of January to satisfy a paramount obligation such as flood control; to the extent that it is not required for consumptive use at that time, it would waste to the sea.

[1] (Footnote ours.) In Arizona's quotation the italicized words are represented by ellipsis.

None of that water would be available in the irrigation season in July for a lower priority irrigation use. But once the paramount rights have been satisfied in January, then supplying water for irrigation and domestic uses from the remaining water made available in July, in relative order of priority, does not interfere with operation of the dam and reservoir specified in section 6 of the Project Act.

This practice can be demonstrated from experience on many projects. Here, for example, is the act authorizing the Central Valley Project in California:[2]

> "That the entire Central Valley project, California, heretofore authorized and established . . . is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands . . . *Provided further,* That . . . provisions of the reclamation law . . . shall govern the repayment of expenditures . . . and the Secretary of the Interior may enter into repayment contracts . . . with State agencies, authorities, associations . . . including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands . . . water rights, and other property necessary for said purposes: *And provided further, That the said dam and reservoirs shall be used, first, for river regulation, improve-*

[2]Rivers and Harbors Act of 1937, § 2, 50 Stat. 850.

ment of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power." (Emphasis added.)

Arizona argues that "present perfected rights" recognized by section 6 of the Project Act have no intra-lower basin consequences.[3] If her contention is correct, then the italicized language of the above quoted act authorizing the Central Valley Project is identical in its operation to that of the corresponding language of section 6 of the Project Act in the present litigation.[4] This Court definitively construed that language in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950):

> "We cannot disagree with claimants' contention that in undertaking these Friant [referring to a unit of the Central Valley] projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws.[7] Cf. Nebraska v. Wyoming, 295 U.S. 40, 43; California Oregon Power Co. v. Beaver Portland Cement Co. 295 U.S. 142, 164; Nebraska v. Wyoming, 325 U.S. 589, 614; Silas Mason Co. v. Tax Com. 302 U.S. 186."

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[3]Ariz. Op. Br. 47-52, 56. Nevada makes the same contention. Nev. Op. Br. 57-58.

[4]The Central Valley Project legislation does not, of course, refer to the Colorado River Compact.

The Court's footnote 7 quotes section 8 of the Reclamation Act of 1902, and adds:

> "To the extent that it is applicable [*i.e.*, to the 17 western states] this clearly leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right."

c. Sections 14 and 18

Arizona's opening brief is noteworthy for its failure to treat Project Act sections 14[5] and 18 in the discussion of the purported abrogation of equitable apportionment and priority principles.[6] Both sections preserve those principles[7] and conclusively refute Arizona's contentions to the contrary. (See Calif. Op. Br. 139-58.)

d. Administrative construction

Arizona says (Ariz. Op. Br. 46):

> "The evidence is uncontradicted that, since construction of Hoover Dam, the reservoir and dam have been operated consistently without regard to claimed appropriative rights (Tr. 828-29). The record is clear that no water users in California or

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[5]Section 14 of the Project Act, Rep. app. 394, expressly makes that act a supplement to the "reclamation law" which law "shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Section 12, Rep. app. 392, defines "reclamation law" to mean the Reclamation Act of 1902 and acts amendatory thereof and supplementary thereto. Section 8 of the Reclamation Act of 1902 is thus incorporated into the Project Act.

[6]Contrast Arizona's argument in the section of her brief devoted to federal reserved rights (Ariz. Op. Br. 144): "Section 8 of the Reclamation Act also prescribes that 'beneficial use shall be the basis, the measure, and the limit of the right'. This requirement cannot be reconciled with the concept that a water right may be acquired by reservation without any physical application of water to a beneficial use."

[7]Arizona v. California, 283 U.S. 423, 464 (1931); United States v. Arizona, 295 U.S. 174, 183 (1935).

elsewhere have demanded the release of water in accordance with and in satisfaction of asserted appropriative rights.

"This practical construction reflects a realization on the part of all concerned that since enactment of the Project Act rights to stored water have as their basis the Act and the water delivery contracts, if made pursuant thereto, rather than any prior appropriations of water."

There is no evidence that Hoover Dam and Lake Mead have been operated without regard to appropriative rights, nor may any such inference be drawn from the evidence. Consequently, there is no practical construction that all rights to "mainstream" waters rest upon water delivery contracts or that none of the rights to those waters rest upon prior appropriations. Only in the event of a shortage to supply all claimed rights does any water rights question have to be answered, and there has never been any such shortage on the main Colorado River in the lower basin. The Master accurately points out (Rep. 320):

"[I]t is clear that up to the present time, no existing mainstream project has been refused water, the delivery of which it has demanded."

He might have added that no one, with or without a contract, has ever been prohibited from diverting and using "mainstream" water.

No water users have demanded the release of water in accordance with and in satisfaction of "present perfected rights," and the Master holds that these rights must be satisfied with their priorities (Rep. 311-12). The reason again is that there has never been any short-

age of water to supply these "present perfected rights" or any other rights served by the Government's main stream reservoirs.

If any significance can be attributed to the fact that all main stream contractees have always received a full supply for their needs, the proper inference is the one drawn by the court in *United States v. Tilley*.[8] That case involved a Warren Act contract executed by the Secretary of the Interior on the North Platte project. The contract contained an express provision (article XI) such as Arizona would apparently read into our contracts:[9]

> "The delivery of the water supply provided for in this contract will be accepted by the Company as in full satisfaction of all its rights to the water of the North Platte River, both natural flow and surplus storage from the Pathfinder Reservoir and other Reservoirs of the Reclamation Service constructed in connection with the North Platte Project."

The United States sought an injunction against Nebraska officers and against an irrigation district, successor to the contracting company, and a decree that the appropriative right of the district to natural flow waters had been transferred to and vested in the United States by reason of the cited provision. The court of appeals, affirming the district court, held that the contract applied only to supplemental storage water and that the contract did not transfer the irrigation district's natural flow appropriative right to the United States. The

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[8]124 F.2d 850 (8th Cir. 1941), *cert. denied*, 316 U.S. 691 (1942).

[9]124 F.2d at 854.

court relied *inter alia* on the negotiations surrounding the drafting of the contract,[10] other provisions of the contract, [11] and the administrative and practical construction by the Secretary and the district with respect to deliveries under the contract:[12]

> "A further reason why we think the contention of the United States can not reasonably be adopted here is found in the subsequent actions of the parties under the contract, through a long period of years, which seem to us to evidence a recognition and acceptance of the construction for which the District is contending. From 1912 to 1936, when the present controversy first arose, the District . . . had regularly used the natural flow appropriation as it saw fit, and had merely called upon the United States for a release of storage waters as an auxiliary supply, when there was a shortage in the amount fixed by the contract schedule. At

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[10] *Id.* at 854-55. Compare the Secretary's assurance to attorneys for the Palo Verde Irrigation District in California on July 21, 1930, during the negotiations for the California water delivery contracts, that "those possessed of prior rights to the unregulated flow of the river will be privileged to continue the enjoyment of those rights without interference by storage in the Boulder Canyon reservoir." Calif. Ex. 351 (Tr. 9,929), at 2, discussed in Calif. Op. Br. 172-73.

[11] The Tilley contract expressly provided for delivery by the United States of an amount of water which *"with all the water the Company may be entitled to by reason of any appropriations* and all water to which the lands of said Irrigation District are entitled" would aggregate a specified quantity. 124 F.2d at 854. Compare the language in the Palo Verde contract, representative of the language in each of the California contracts, executed after the assurances to the district noted in note 10 *supra,* by which the Secretary agrees to deliver from Lake Mead "so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River," in the amounts and with priorities thereafter specified. Art. 6 (Rep. app. 424); see Calif. Op. Br. 171-72.

[12] 124 F.2d at 855.

no time during this period is the United States shown to have disputed the District's right to use the natural flow waters as such, or in an amount up to the limit of its claimed appropriative rights in such waters. The District has acted on the theory and construction that Article XI merely fixed or limited the scope of the obligation of the United States; that its effect was simply to prevent the District from calling upon the United States for water, if the available natural flow under its appropriative rights equaled or exceeded the contract schedule; and that when the District had received the amount of water prescribed by the contract, during the period specified, no matter from what source it was derived, the obligation of the United States was thereby satisfied, under the provisions of Article XI. These actions of the parties over a period of almost twenty-five years are strongly indicative of a mutual interpretation, which necessarily is entitled to weight here in settling a subsequent dispute as to the intended meaning of the contract provision."

The foregoing analysis is equally applicable to deliveries under the Project Act contracts, and refutes Arizona's contention that deliveries from Lake Mead cannot be considered to have been made in satisfaction of natural flow priorities.

2. *Reservoirs Which Regulate the Natural Flow*

Arizona says (Ariz. Op. Br. 51):

"Since an appropriative right is fixed and measured in relationship to the supply available from the natural flow of the stream, once the natural

flow is destroyed no standard survives by which to determine the users who may take or how much each may divert."

Arizona later concludes (Ariz. Op. Br. 52):

"The conclusion, therefore, is clear that users in the Lower Basin surrendered their claimed prior appropriative rights in the natural flow of the river (which was silt-laden, given to violent floods and prone to seasonal fluctuations in supply) in exchange for rights to receive from storage a guaranteed average supply of desilted water from a flood-controlled river."

It is undeniably true that flow below a reservoir is interrupted and its regimen changed as soon as a storage reservoir comes into operation, but the same waters, modified in their seasonal or annual occurrence, are brought down by gravity as before. Western streams not now regulated by reservoirs are few in number, and soon will be even fewer. However, the regulation of the natural flow does not destroy preexisting rights which could be enjoyed from the natural flow without the regulation and conservation benefits of a later constructed dam and reservoir; that is, the right to demand quantities of water to the extent that reasonable use could be made of them at the time when they would have been available absent the reservoir. If this is prevented by the reservoir operation, for delivery of the water to another user, there is a taking of the natural flow right which is either subject to injunction or, failing that remedy, is compensable. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950):

"[W]e need not ponder whether, by virtue of a highly fictional navigation purpose, the Government

could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it, and we need not here pass on any question of constitutional power . . . ."

A typical example in the lower Colorado River basin, in evidence in this case, is the operation of the Salt River Project on the Salt River (a Gila tributary) in Arizona. In a physical sense, natural flow (except on the occasions that the reservoir was full and spilling) has not reached that project's diversion works since 1909, when Roosevelt Dam was closed. The natural flow rights are nevertheless recognized and preserved. The project operation is described in *Adams v. Salt River Valley Water Users' Ass'n,* 53 Ariz. 374, 89 P. 2d 1060 (1939).[13] Water is supplied to the project from three sources: (a) natural flow of the river; (b) stored flood waters, unavailable for use before Roosevelt and the other project dams were built; and (c) pumped percolating ground water (not subject to appropriation in Arizona). Different water users in the project, depending on their locations and the constructed works, receive water of each category in different proportions. The aggregate quantity of project water from the three sources varies proportionately from time to time, as do proportionate components of the water supplied to each user. Nevertheless, a water user with

[13]The Kent decree of 1910, described in the opinion, is Ariz. Ex. 101 (Tr. 380). The trial court's opinion in the *Adams* case is Calif. Ex. 1842 for identification (Tr. 12,234). Contracts between the United States and the Water Users' Association are Calif. Exs. 3 and 4 (Tr. 1,816). Arizona's witness McMullin testified about the project's operation in serving natural flow rights. Tr. 2,164-67.

rights in natural flow receives his full requirement according to quantity and priority, whether his water is physically supplied from natural flow, stored water, or pumped percolating ground water. His rights attach to whatever water he receives from the substituted sources.

In *Nebraska v. Wyoming,* 325 U.S. 589 (1945), this Court equitably apportioned the natural flow of the North Platte River. The Court pointed out that "priority of appropriation is the guiding principle" in an equitable apportionment (*id.* at 618). Yet, the Pathfinder reservoir with "a capacity of . . . 79 per cent of the average annual run-off of the North Platte River at that point" had been completed in 1913 (*id.* at 594-95). If Arizona were correct in her contention, the Court's 1945 decree in that suit was a physical impossibility.

3. *Colorado River Compact*

Arizona says (Ariz. Op. Br. 50):

> "Instead of preserving appropriative rights of main stream users, the Compact contemplated that those rights, if any, would be extinguished once storage was provided 'within or for the benefit of the Lower Basin.'"

The Master provides a conclusive answer to Arizona's contention (Rep. 316):

> "The Compact does not govern the relations, *inter sese,* of the states having Lower Basin interests. Therefore, it could not have displaced the principles of equitable apportionment as decisive of the question of rights in Lower Basin tributary supply."

The Master's premise (developed at length at Rep. 139-41) establishes equally well that the *Compact* could not have displaced the principles of equitable apportionment in the main stream supply for the same reasons that it could not do so with respect to the tributary supply in the lower basin.

The Compact words which Arizona quotes ("within or for the benefit of the Lower Basin") are from Article VIII of the Compact. Arizona's argument based on the language of Article VIII—that the Compact contemplated extinguishment of the appropriative rights of main stream users when storage was provided—conflicts directly with her assertion that Article VIII of the Compact "regarding satisfaction of perfected rights is limited to rights basin versus basin and does not apply to intrabasin rights (Rep. 141)" (Ariz. Op. Br. 50).[14]

In the following quotation of Article VIII we italicize the words which also refute the Arizona contention:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin *shall attach to and be satisfied from water that may be stored* not in conflict with Article III." (Emphasis added.)

[14] *Cf.* Arizona's contentions in her Amended and Supplemental Statement of Position, dated Aug. 5, 1957 (reproduced as an appendix to this brief), pars. II(a) and (c).

Article VIII speaks of rights of "appropriators." "Attach to and be satisfied from" is strange language to use if the intended meaning were "wiped out." Furthermore, the Article III(a) apportionment, like California's limitation, includes "all water necessary for the supply of any rights which may now exist." What "rights," if the Compact or limitation contemplated their extinguishment?

Article VI of the Compact also refutes Arizona's contention. After describing negotiation as a means for settling controversies in a number of situations, the final paragraph of Article VI provides:

> "Nothing herein contained shall prevent the adjustment of any such claim or controversy [between any two or more signatory states] *by any present method* or by direct future legislative action of the interested States." (Emphasis added.)

The "present method" contemplated by the Compact clearly refers to an equitable apportionment suit in the original jurisdiction of this Court.

Even if the language and the purpose of the Compact permitted the construction proposed by Arizona, that construction would have to be rejected as completely irrational. The Compact could not have been intended to extinguish the "appropriative rights of main stream users" without substituting any alternative basis for water rights.

B. Even if Priorities Derived From Appropriations Made Under State Law Are Disregarded, Nevertheless Equivalent Priority Principles Control Competing Rights of Holders of Federal Water Delivery Contracts

Arizona advances elaborate arguments to support the major premises and conclusions of the Master's Report

with which she says she agrees. In striking contrast, she confines her discussion of one essential element of the Master's "mainstream" allocation—the substitution among contractees of parity for priority—to one cryptic comment (Ariz. Op. Br. 105):

> "We further agree that, in the event there is in any year less than 7,500,000 acre-feet of main stream water available for use by Arizona, California and Nevada, California's entitlement under its contract is 4.4/7.5 of the quantity available (Rep. 306)."

The reasons for this vacuum are not hard to find: Arizona cannot agree with the Master's rationale, but is unable to discover independently any alternative basis for proration among contractees.[1]

First, Arizona disagrees with the protection which the Master accords to "present perfected rights" within the "mainstream." (Ariz. Op. Br. 46-56.) Yet, the Master relies upon that very protection (Rep. 234-35), improperly we say (Calif. Op. Br. 217-21), as a major element of his argument to abrogate all other priorities and establish proration. Arizona apparently realizes that she cannot have it both ways.

Second, Arizona has said that "we certainly disagree with the Special Master's statement that 'the Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water . . .' (Rep. 235)" (Ariz. Exceptions, p. 2 n.1). Yet the quoted statement of the Master with which Arizona disagrees is another basis for the Master's proration con-

[1]Even if water delivery contracts somehow replace equitable apportionment, there remains the issue of relative priorities among contractees.

clusion. We agree with Arizona that the Master's premise is faulty.

Third, the Master has rejected Arizona's contention that section 5 of the Project Act contains a mandatory direction to the Secretary of the Interior that his water delivery contracts make the allocation which Arizona perceives in section 4(a) of the Project Act (Rep. 162-63, 202); Arizona reiterates her contention (Ariz. Op. Br. 83-99). Arizona bases her argument on the language of section 5 which requires that the Secretary's water delivery contracts "shall conform to paragraph (a) of section 4 of this Act" and contends that thereby "Congress prescribed specific standards which the Secretary was to follow—the formula for the apportionment of water approved by Congress in § 4(a)." (Ariz. Op. Br. 84.) Arizona quotes extensively from portions of the Senate debates on the fourth Swing-Johnson bill (Ariz. Op. Br. 90-99) to support her contention that the language "can relate only to the division of water set out in § 4(a)" (*id.* at 98) and must be so interpreted to save what Arizona contends is otherwise an unconstitutional delegation of legislative functions by section 5. (*Id.* at 88-89.)

If Arizona were correct, California would bear only 50 per cent of any "mainstream" shortage under clause (4) of the second paragraph of section 4(a),[2] not 44/75 (or 58⅔ per cent) as under the Master's formula.

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[2]Clause (4) provides "that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined

Arizona indeed perceives the constitutional infirmity in the "contractual allocation scheme" described by the Master. The Master's "contractual allocation scheme" is unconstitutional, unless the Project Act explicitly directed it or provided adequate standards by which the Secretary would be guided in creating it. Arizona's proposed solution is to convert Congress' invitation for a tri-state compact in the second paragraph of section 4(a) into a mandatory apportionment by statute to which the Secretary must conform.

The Master rejected Arizona's solution for two irrefutable reasons: The proposal requires the Court both to rewrite the language of the second paragraph of section 4(a) and to ignore the history of that section (Rep. 162-63). The second paragraph of section 4(a) was included in the Project Act only after explicit agreement that "this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States."[3] Its language,

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by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin . . . ."

[3]This was the statement by Senator Johnson, 70 CONG. REC. 472 (1928), to which Senator Pittman replied, "Exactly, not. . . . It is not the request of Congress." *Ibid.* No Senator voiced any objection. Senator Johnson then accepted the amendment, which was then adopted without a roll call vote. See Ariz. Legis. Hist. 132.

Arizona inaccurately states on page 98 of her opening brief that "Senator Johnson of California agreed to accept the Hayden amendment [the second paragraph of § 4(a)] as long as it was understood that California was not being coerced into entering into a compact." In fact, the quotation in our text above shows that Senator Johnson accepted the amendment on a completely different understanding which conclusively disproves Arizona's contention. Although her opening brief quoted copiously from

which merely authorizes a tri-state compact, aptly reflects this result.

The legislative history also demonstrates that Congress could not have intended the language to have the constitutional significance Arizona suggests: The "conform to" provision in section 5 was offered before the language of the second paragraph of section 4(a) was offered; the genesis of each was unrelated to the other.[4]

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the legislative history, Arizona does not quote the exact language of Senator Johnson, set forth above in our text.

The Master correctly answers Arizona (Rep. 163): "But the second paragraph of Section 4(a) *is plain in that it* merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. *Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory.* The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected." (First and last emphasis added.)

Arizona purports to quote the Master's argument (Ariz. Op. Br. 87-88); our emphasis adds what Arizona omits: (1) The Master states that the second paragraph "is plain" in merely authorizing a tri-state compact; (2) the Master points out that the legislative history, which Arizona's quotation represents by ellipsis, supports this plain meaning.

[4]The phrase "shall conform to paragraph (a) of section 4 of this Act" first appears in an amendment proposed by Senator Phipps of Colorado on May 19, 1928, but never offered. This amendment (Calif. Ex. 2004 (Tr. 11,173)) proposed to put a limitation provision in § 4(a) and add to §5 the phrase "and shall conform to paragraph (a) of section 4 of this Act." On May 25, 1928, Senator Phipps' colleague from Colorado, Representative Taylor, added the "shall conform" language to § 5 of H.R. 5773 (Calif. Ex. 2005 (Tr. 11,173), p. 8), the House version of the bill, as a "clarifying amendment." 69 CONG. REC. 9988. Section 4(a) of H.R. 5773 provided only for a six-state ratification of the Colorado River Compact. (Calif. Ex. 2005 (Tr. 11,173), p. 6.)

H.R. 5773 passed the House and was transmitted to the Senate where, on December 5, 1928, for parliamentary reasons H.R. 5773 was substituted for S. 728 and the text of S. 728 then substituted

The constitutional dilemma that Arizona futilely attempts to resolve was not created by Congress, but by the Master's effort to change an authorization to deliver water from Lake Mead into a delegation of authority to make an interstate allocation of waters of the Colorado River in the lower basin, and his eradication of the interstate effect of sections 14 and 18 of the Project Act and section 8 of the Reclamation Act of 1902.

We say that the Project Act is constitutional as it is written. The section 5 authorization to the Secretary to execute contracts "for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon" (the normal sort of contract with water users, familiar in the reclamation law) cannot be tortured into a direction to the Secretary to effectuate an interstate compact, which none of the states entered, by means of a contract with a state inferentially determining the rights of other states not parties thereto. Moreover, the Secretary was adequately guided by Congress in sections 14 and 18 to perform the task which Congress in fact delegated: The execution of service contracts with actual water users for the orderly administration and financing of the project serving the same purposes and

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for that of H.R. 5773. 70 CONG. REC. 67-68. On December 11, 1928, Senator Phipps reoffered an amendment providing (1) a limitation on California, (2) addition to § 5 of the language "and shall conform to paragraph (a) of section 4 of this Act," and (3) an embargo on Federal Power Commission licenses on the Colorado River system until the act became effective. 70 CONG. REC. 324, 382. After some parliamentary maneuvers, Senator Hayden's tri-state compact authorization was subsequently added to the Phipps amendment, 70 CONG. REC. 472 (1928).

Significantly, Senator Hayden's original amendment to § 4(a), which included a limitation on California, and a second unnumbered, unlettered paragraph, embodying his tri-state compact, did not include any amendment to § 5 requiring contracts to conform to any paragraph of § 4. Calif. Ex. 2011 (Tr. 11,173).

having the same effect as such contracts have served on reclamation projects throughout the West since 1902.[5]

§ III. OTHER MATTERS

A. The Prohibition Which Arizona Proposes on the Use of Otherwise Unused Water Is Unreasonable

Arizona renews a proposal rejected by the Special Master whereby the Secretary of the Interior would be prohibited from releasing and California would be prohibited from using water not usable in another state (Ariz. Op. Br. 106-08). This is inherently unreasonable. (See Rep. 314.)

The Secretary now has authority, and the Master's recommended decree would leave him that authority, to store or release water in the exercise of the discretion he must have if the project purposes enumerated in section 6 of the Project Act are to be served. Under the Arizona amendment to the recommended decree, however, if flood control conditions required the release of water from Lake Mead, the Secretary might be forced to compel the waste of that water to the ocean rather than to permit its use by a state thereby exceeding its allocation.

No law, no decree, no statute, no compact, no contract has ever—to our knowledge—compelled such a wasteful result.

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[5]Calif. Op. Br. 175-77. Water delivery contracts written with Arizona and California water users decades before the Project Act was passed satisfy the requirements of § 5 of the Project Act. Rep. 212, 218. Calif. Op. Br. 153-57 and *supra* pp. 59-60.

B. On Each of the Three Major Issues Identified in Her Bill of Complaint Which Initiated This Suit, Arizona Has Now Reversed Her Pleaded Position and Agrees With the Pleaded and Present Position of the California Defendants

1. *The III (b) Issue*

Arizona in 1952 identified the issue and her position as follows (Ariz. Bill of Complaint, par. XXII(1), p. 25):

> "(1) Is the water referred to and affected by Article III(b) of the Colorado River Compact apportioned or unapportioned water? The complainant says that it is apportioned water and hence the Project Act and the California Limitation Act, which limits California's rights to 4,400,000 acre-feet annually of water apportioned by Article III (a) plus not more than one-half of the surplus unapportioned by that Compact, preclude California from any rights to water covered by Article III (b). Complainant further says that its position in this regard is sustained by the decision of this Court in the case of *Arizona v. California,* 292 U.S. 341."

Our answer to Arizona asserted that the limitation does not preclude California from sharing in the Article III(b) waters (Calif. Answer, par. 27(d), p. 27), a position we have consistently maintained.

Arizona now in effect concedes that the limitation does not preclude California from sharing in the Article III(b) waters (Ariz. Op. Br. 82).

2. *The Beneficial Consumptive Use Issue*

Arizona in 1952 pleaded (Ariz. Bill of Complaint, par. XXII(2), pp. 25-26):

"(2) How is beneficial consumptive use to be measured? Article III of the Compact does not apportion water. Rather it apportions the beneficial consumptive use of water. The Compact contains no definition of beneficial consumptive use and does not establish any method of measuring beneficial consumptive use. Arizona says that beneficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man. Water salvaged by man is not chargeable as a beneficial consumptive use. The point is most pertinent when applied to the use of waters of the Gila River, a tributary of the Colorado River. In a state of nature the Gila River was a losing stream with large quantities of water lost to the stream before its confluence with the Colorado River. Arizona has salvaged this water by putting it to beneficial consumptive use before it is lost and is chargeable only with the depletion of the stream at the state line. The amount of water involved in the controversy over the method of measurement of beneficial consumptive use exceeds 1,000,000 acre-feet annually."

California answered that the term "beneficial consumptive use" in the Compact means "diversions less returns to the river," the same meaning which the California limitation expressly gives to "aggregate annual consumptive use (diversions less returns to the river)" (Calif. Answer, par. 8, pp. 11-12), a position we have consistently maintained.

Arizona now "agrees with the Master's conclusion that the § 4(a) apportionment, including the California

limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225)" (Ariz. Op. Br. 105). Consequently, Arizona would appear to agree that the term "beneficial consumptive use" in the Compact (which is expressly referenced in the second paragraph of section 4(a)) also means diversions less returns to the river. *Cf.* Ariz. Ans. Br. 60-61 (June 1, 1959).

3. *The Reservoir Evaporation Issue*

In 1952 Arizona pleaded (Ariz. Bill of Complaint, par. XXII(3), p. 26):

> "(3) How are evaporation losses from Lower Basin main stream storage reservoirs to be charged? Such reservoir losses amount to over 700,000 acre-feet of water annually. Arizona says that such losses of water should be apportioned among the users of water from the main stream storage reservoirs in the Lower Basin in the same proportion as the consumptive use of each is to the total consumptive use of such storage water in the Lower Basin."

California answered that the quantities specified in the limitation are not to be reduced by reservoir losses occurring prior to delivery at points of diversion in California (Calif. Answer, par. 27(f), pp. 27-28), a position we have consistently maintained.

Arizona now concurs "with the Master's holding that the delivery obligations under the Secretary of the Interior's water delivery contracts are to be measured, as provided in those contracts, at the points of diversion (Rep. 186)" (Ariz. Op. Br. 105). Arizona does not oppose the Master's direction "that each user of water

shall be charged only for the amount of water actually diverted and which does not return to the main stream and that losses of water which occur before diversion are a diminution of available supply under § 4(a) and are not a consumptive use (Rep. 187)" (Ariz. Op. Br. 105-06).[6]

[6]Arizona does propose one modification not relevant in the context: Users should be charged for water ordered but not, in fact, diverted and used. Ariz. Op. Br. 106.

PART FOUR

ANSWER TO THE NEVADA OPENING BRIEF

PART FOUR

ANSWER TO THE NEVADA OPENING BRIEF

§ I. THE SEVERANCE ISSUE: THE PREMISES ADVANCED BY NEVADA REBUT THE MASTER'S CONCLUSION THAT THE LIMITATION CAN BE DIVORCED FROM THE SYSTEMWIDE SCOPE OF THE COLORADO RIVER COMPACT

The Master's construction of the limitation, as severed from the Compact, is precluded by these two sound premises advanced by Nevada: First, Articles III(a) and III(b) of the Colorado River Compact "make an apportionment of the amount of water that could be applied to beneficial consumptive use in each [of] the Upper and Lower Basins . . . out of the entire Colorado River System" (Nev. Op. Br. 36).[1] Second, the Compact and the Project Act, parts of an "intermingled, interrelated and correlated body of statutory law . . . must always be construed together and are, in effect, one overall statutory enactment" (Nev. Op. Br. 35-36).

The inevitable conclusion from these premises is that the limitation proposed in section 4(a) of the Project Act must be construed consistently with the meaning of the Compact which encompasses all Colorado River system waters in the lower basin. Nevada's premises are thus irreconcilable with her support of the Master's decision.

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[1] *Accord,* Nev. Finding V, p. 10: "That the Compact provides (Art. II(a)) that 'the term Colorado River System means that portion of the Colorado River and its tributaries within the United States of America.' It provides that the water apportioned by Articles III(a) and III(b) are waters from 'the Colorado River System.'"

§ II. THE PRIORITY ISSUE: NEVADA'S ARGUMENT FOR EQUITABLE APPORTIONMENT CANNOT SUSTAIN THE MASTER'S ABROGATION OF "MAINSTREAM" PRIORITIES

Under the topic heading that "the recommended decree is in reality an equitable apportionment of Colorado River water" (Nev. Op. Br. 49), Nevada asserts (p. 51):

> "Assuredly, if the Special Master's determination, that this is a purely statutory allocation suit,[2] is in error, then the only other alternative would be to treat it as an action for equitable apportionment. Viewed in that light the Master's proposed decree, is entirely correct and proper, fully supported by the evidence and a proper exercise of the judicial authority."

The Master's Report itself demonstrates that principles of equitable apportionment cannot sustain the "mainstream" allocation proposed in his Report.

The Master's Report marshals the relevant authorities to establish that priority of appropriation is "the guiding principle of equitable apportionment in the arid regions of the United States" and that "the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation" (Rep. 326).

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[2](Footnote ours.) Nevada states that "Arizona and the United States urged a theory substantially like that adopted by the Special Master" (p. 49) which Nevada (quoting Rep. 100) describes (p. 50) as a "statutory" allocation or apportionment. The "contractual allocation scheme" (Rep. 232) proposed by the Master must, however, be distinguished from the *mandatory* statutory allocation urged by Arizona (Ariz. Op. Br. 83-98), which the Master rejects (Rep. 162-63).

It is equally clear that this Court will not "earmark" or reserve water for future appropriation and use. In *Arizona v. California,* 283 U.S. 423, 463-64 (1931), this Court declared:

> "There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated. . . . This court cannot issue declaratory decrees."

The Master's Report makes quite clear that the proposed "mainstream" allocation is not based on priority of appropriation (except insofar as the Master finds a statutory directive in section 6 of the Project Act to preserve the priorities of "present perfected rights") or protection of existing uses. The recommended decree quite clearly reserves large blocks of "mainstream" water for Arizona and for Nevada over and above the uses or the requirements of their existing projects diverting from that resource.

On the other hand, the Master's equitable apportionment of Gila River system waters between Arizona and New Mexico does take into account both priority of appropriation and protection of existing uses (Rep. 325-31). Furthermore, the Master refuses to reserve water for any of the party states from other lower basin tributaries on which he concedes equitable apportionment principles still apply—both as against "mainstream" states and as against other tributary states (Rep. 316-24).

Nevada says that in any equitable apportionment of waters stored in Lake Mead the water delivery contracts executed by the Secretary of the Interior "would be as much evidence of the rights of the parties to the

mainstream water as any other water right they might present, whether State appropriations, actual use or whatever." (Nev. Op. Br. 51.) However, this principle, even if fully acceptable, would not sustain the Master's "mainstream" allocation for three reasons: First, principles of priority, the fundamental ingredient of equitable apportionment—not proration—govern rights created, recognized, or confirmed by water delivery contracts. (See Calif. Op. Br. 150-52, 169-75; see also our response to U.S. Op. Br. *supra* pp. 36-46.) Second, priorities attach not to "contracts with the respective States," but to "definitive contracts for the delivery of specified quantities for specific projects." (See U.S. Op. Br. 16-17, discussed *supra* pp. 37, 42.) Nevada goes part of the way in recognizing that the "historical pattern" followed under the reclamation laws with respect to water delivery contracts "has, of course, been one in which the Secretary has contracted for the delivery of specific quantities of water to the various entities who would be entitled to divert and use them." (Nev. Op. Br. 41.) However, Nevada does not explain her apparent assumption that priorities do not attach to such contracts.[3] In any event, there are no "definitive" contracts with users in Nevada. Third, section 8 of the Reclamation Act (incorporated by section 14 of the Project Act) declares that "beneficial use shall be the basis, the measure, and the limit of the right."[4]

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[3] *Cf.* Nevada's discussion of the legislative history of the § 4(a) limitation on California: Nevada asserts that the Senators "unquestionably believed that they were taking effective action on the amount of water which California would have as a *prior right* and thus guarantee the allocation of the balance available to the other two States." Nev. Op. Br. 42. (Emphasis added.)

[4] 32 Stat. 390 (1902), 43 U.S.C. § 372 (1958).

One other aspect of Nevada's argument should be briefly noted here. Nevada argues that her allocation under the decree should be insured against reduction below a minimum of 250,000 acre-feet per annum.[5] This anomalous inversion of the priority principle is necessary, says Nevada, because (Nev. Op. Br. 56-57):

> "Nevada users of mainstream water are, and will be of the type which it is necessary to maintain, i.e., municipal, domestic or industrial. In other words, there will not be uses, such as irrigation uses, which can be temporarily suspended without disaster. Uses such as domestic and municipal cannot be arbitrarily cut off, or even heavily reduced, for a period of time, as can agricultural uses."

However, the same equitable considerations which would call for protection of *future proposed uses* in Nevada for domestic, industrial, and municipal purposes

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[5]There is no rational basis for Nevada's figure. If Nevada wants to insure the protection of "'existing present diversions" (Nev. Op. Br. 100) for domestic, municipal, and industrial purposes, it would seem that her minimum should be only 24,370 acre-feet (pp. 100-01: 8,810 + 15,560). (For purposes of this discussion, "domestic" is taken to include "industrial" in accordance with the definition in Article II(h) of the Compact, Rep. app. 372.) On the other hand, if the object is to protect Nevada's claimed ultimate net consumptive use requirements for the stated purposes, it seems that the claimed minimum should be 402,700 acre-feet per annum (Nev. Op. Br. 103: 305,700 + 97,000). Since this is more than the recommended allocation to Nevada, logic would seem to require that Nevada's entire allocation be claimed as a minimum.

California proposed that Nevada be awarded the beneficial consumptive use of 171,500 acre-feet per annum from both Lake Mead and Nevada's tributaries, all from safe annual yield. Calif. Conclusion 12E:201, table 3, p. XII-26. Such an allocation would give proper weight to the factors significant in equitable apportionment, would protect existing uses in Nevada, and would assure a full supply to all appropriators who are proceeding diligently to completion of their existing projects. See Calif. Op. Br. 18-19; Calif. Findings and Conclusions, Part XV.

apply, a fortiori, to similar *presently existing uses* by the completed Colorado River Aqueduct (serving the southern California coastal basin) whose curtailment is a virtual certainty under the recommended decree endorsed by Nevada (Calif. Op. Br. 260-61, 272-76, and table 6).

§ III. OTHER MATTERS: THE AVAILABILITY OF ALTERNATIVE SOURCES OF WATER SUPPLY IS BOTH LEGALLY IRRELEVANT AND FACTUALLY WRONG

Nevada vigorously contends that she alone depends solely upon Colorado River system waters to supply that portion of Nevada within the Colorado River basin, while Arizona and California both have alternative sources of supply available (Nev. Op. Br. 13, 24, 32). Nevada apparently contends that the portions of southern California which are dependent upon Colorado River water can, in the event of shortage, call upon surplus waters from northern California through the Feather River Project[6] and upon desalinized salt water to replace part or all of our Colorado River supply (pp. 32-34).

Alternative sources of water supply are immaterial and irrelevant to the allocation of the Colorado River supply. The issue, if any, concerning alternative sources has not been litigated; the Special Master repeatedly excluded all evidence thereon.

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[6]The 1.75 billion dollar Feather River Project, approved by voters of California in November 1960, will divert surplus waters in northern California to areas of deficiency in various parts of the state including counties in the San Francisco Bay area, the San Joaquin Valley, and the southern coastal basin. See CAL. WATER CODE §§ 12930-42. Design of the project is now under way.

The Master correctly excluded (Tr. 5,948) Arizona's offer of evidence concerning alternative sources of supply in California,[7] and stated (Tr. 5,945):

> "[I]f we admit it [evidence on California's Feather River Project], manifestly it means that we are going to try the entire water problem of each of the States party to the suit. That is going to be a very extensive operation."

Later, the Master gave the same answer to Nevada's offer of such evidence (Tr. 17,212):

> "I think studying the Colorado River is a big enough task for all of us without also studying the entire California Watershed and all its rivers."[8]

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[7]It is true that volumes 1 and 2 of Bulletin No. 2, published in June 1956 by the California Water Resources Board, were received in evidence (Ariz. Exs. 89 and 89-A, Tr. 354, 1,012) but not on the issue of alternate sources of supply and the Feather River Project. Instead, this bulletin dealt with water needs and methods of use, as its title ("Water Utilization and Requirements of California") suggests and as the context in which it was received makes clear.

The issue before the Special Master was the admissibility of evidence generally tending to show recent growth of Arizona and increased water needs, Tr. 1,001 (Mr. Kiendl), and specifically our objection to the following question put to Arizona witness Leggett, Tr. 1,000:

"Q During the ten years following the end of World War II has the population of the State of Arizona increased substantially?"

The Special Master overruled our objection, primarily because of the character of the parties to this litigation, Tr. 1,011-11A; we immediately withdrew any objections to Bulletin No. 2, in view of that ruling, Tr. 1,012, and it was received in evidence. *Ibid.*

Its reception was no precedent for admission of exhibits relating to the California Feather River Project, and the Special Master correctly rejected this argument when made by Arizona (Tr. 5,941-48) and later repeated by Nevada (Tr. 17,210-17).

[8]Near the close of the trial, Nevada reoffered three exhibits relating to the Feather River Project, Tr. 22,384-85, and filed a written argument in support thereof. Memorandum on Nevada's Proof on California Water Plan (Aug. 28, 1958). She advanced

The time and effort required to try the Colorado River problem now before this Court (Rep. 1-6) underscore the wisdom of the Special Master's ruling.

Nevada's contention was rejected, and no specific exception has been made to that decision. If the issue of alternative sources of supply is to be litigated, a new reference is necessary for this "very extensive operation." It cannot be tried on an *ex parte* presentation in briefs by Nevada.

If the matter were tried, the evidence would prove: First, the Feather River Project, which will transport surplus waters from northern California to many areas of deficiency in this state, is now designed to meet the requirements until about 1990 of the southern California coastal basin after Metropolitan Water District's full contract quantity from the Colorado River has been put to use—not to replace that Colorado River supply. Second, economically feasible salt water conversion on a large enough scale to be significant here is now impossible, and future advances in technology are highly speculative.[9] Thus, neither northern California's

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the same contention which she now advocates when the case was being argued before the Special Master: Nev. Finding XXVII, p. 61; Nev. Brief Re Findings and Conclusions, pp. 126-28; Calif. Response to Nevada, pp. 53-56; see also Nev. Comments on Draft Report (June 6, 1960), p. 6: "Nevada has no recourse to retirement of irrigation or desalting of ocean waters to preserve development, once effected."

[9]If Nevada's salt water predictions are as optimistic as her population forecasts, both should be taken with a large grain of salt. Nevada's prediction for the population of Clark County is a case in point. In 1957, Nevada's evidence predicted that this population would increase from 115,000 in 1957 (Nev. Ex. 801 (Tr. 16,790), table 2, col. 6, and table 3, col. 2) to 150,000 in 1960 (*id.* graphs 2 and 3), an increase of 35,000. In fact, the population increased by only 12,000 (Nev. Op. Br. 14, giving a 1960 figure of 127,016), falling short of the projected estimate by about 66%. If within the short space of three years Nevada's

streams nor the Pacific Ocean constitutes an alternative source to replace our Colorado River supply.

CONCLUSION

For these reasons the California defendants urge that their exceptions which they have jointly made to the Report of the Special Master should be approved by this Court, and that the decree to be entered in this case should be in conformity with those exceptions and the views presented in this brief and the California defendants' Opening Brief.

August 14, 1961

Respectfully submitted,

[Signatures follow on next page.]

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estimate of growth is in error by nearly two thirds, one must treat her predictions of other things to come in the more distant future as extremely doubtful at best.

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APPENDIX

CALIFORNIA DEFENDANTS

Exhibit No. 7300
Identification: Aug. 28, 1958. Admitted:.....
Tr. 22,382,
22,384

"AMENDED AND SUPPLEMENTAL STATEMENT OF POSITION BY COMPLAINANT, STATE OF ARIZONA," FILED WITH SPECIAL MASTER, AUGUST 5, 1957

APPENDIX

CALIFORNIA DEFENDANTS

Exhibit No. 7300

Identification: Aug. 28, 1958. Admitted: .....

Tr. 22,382, 22,384

"AMENDED AND SUPPLEMENTAL STATEMENT OF POSITION BY COMPLAINANT, STATE OF ARIZONA," FILED WITH SPECIAL MASTER, AUGUST 5, 1957

(Bracketed numbers show page numbers in original.)

[1]

Arizona considers its Statement of Position heretofore filed herein and certain legal conclusions and arguments set forth in its various pleadings filed herein unsound and not supported in the law in relation to the proper interpretation of Sections 4(a), 5 and 8 of the Project Act and Articles III and VIII of the Compact. Without attempting either a formal revision of all of its pleadings at this point in this proceeding or to set forth other than generally what Arizona considers to be the proper, logical and legal construction and effect of the Colorado River Compact and the Boulder Canyon Project, Arizona states the following:

I.

We are filing herewith an extensive memorandum on the application of the Compact and Project Act, setting forth our comments and arguments as to the proper interpretations of Sections 4(a), 5 and 8 of the Project Act. We are also filing herewith a legislative history of those sections. Section 5 requires that no water use may be made of stored water except by con-

tract and requires that all contracts conform to Section 4(a). Section 4(a) directs that Arizona shall receive 2,800,000 acre-feet and Nevada 300,000 acre-feet in full measure from storage in Lake Mead and that California shall receive the balance remaining of the 7,500,000 acre-feet to be supplied annually by the upper basin; it also requires that the Gila shall be recognized as completely legally utilized by Arizona and that its uses and water supply shall not be considered by the Secretary in contracting for water from storage, thereby excluding it from consideration when surplus water computations and contracts were under consideration.

Since the Memorandum filed amplifies the foregoing we will not further elaborate on the position therein stated.

[2]

II.

With reference to Articles VIII and III of the Compact, Arizona states:

a. Article VIII of the Compact treats of "perfected rights" existing as of its effective date generally; and then of perfected rights so existing of lower basin users *as against upper basin users only.*

b. Lower basin users of water diverted from tributaries of the Colorado River in the lower basin, since the streams from which such uses were made did not receive any waters from the upper basin, of necessity could not have any claims against upper basin users nor could their claims attach to or be satisfied out of any storage of the main stream of the River in or for the benefit of the lower basin; and for like physical

reasons, the claims and rights of such lower basin tributary users could not be satisfied from water delivered at Lee Ferry by the upper basin, i.e., Article III (a) water.

c. The perfected rights of lower basin users, diverting their water from lower basin tributaries of the River, were unimpaired by the Compact in all particulars and respects. Lower basin users who had then perfected claims against upper basin users, i.e., users of water diverted from the main stream of the river and hence of water which was supplied from the upper basin were required to satisfy such then perfected rights from storage when provided in or for the benefit of the lower basin.

d. The apportionment of water found in Article III (a) of the Compact is a basin versus basin apportionment; it evidences the understanding of the lower basin users as to how much water they had the right to receive annually on the average out of the river supply which arose in the upper basin and the understanding of the upper basin users as to how much the upper basin was required to deliver on the average annually to

the lower basin. It served as a ceiling on the rights which the lower basin users might obtain by putting upper basin water to beneficial use and as a floor below which the upper basin might not go in refusing to release water to the lower basin. Out of this supply the lower basin users having a legal claim upon waters arising in the upper basin then existing or thereafter arising or perfected must satisfy all of their legal claims against the upper basin and its water users for a dependable, firm water use.

e. Article III(b) permits the lower basin users to *increase* their beneficial consumptive use by 1,000,000 acre-feet yearly (over and above perfected rights existing on the effective date of the Compact) on lower basin tributaries. Since the limit or ceiling on the water supply which the upper basin was *legally obligated* to supply to the lower basin was 7,500,000 acre-feet per year, or 75,000,000 acre-feet per ten year segments of time, delivered at Lee Ferry, this additional 1,000,000 acre-feet must arise in the lower basin since, as a matter of fundamental water law, a user cannot perfect a right to a beneficial use in water as to which the user has no legal right to require that it be made available. If the lower basin user had no right to demand delivery or release of the water he could not perfect a right to its use. The "increase" referred to is over and above the perfected uses on the tributaries of the lower basin preserved unimpaired by Article VIII.

f. California by reason of her Self Limitation Act is barred from any claim on this lower basin water.

g. Arizona would therefore be entitled under the Compact to have its title quieted to the rights on the Gila and other lower basin tributaries in Arizona perfected on the effective date of the Compact, plus 2,800,000 acre-feet of water from the main stream of the Colorado

River, plus an additional 1,000,000 acre-feet of waters arising in the lower basin as presently beneficially used by Arizona or as may be needed to offset reservoir or channel losses charged to Arizona. Any water used by Arizona from Gila River or other Arizona tributaries above said perfected rights and Article III(b) water

(if such, by stretch of the imagination there be) would be surplus or excess waters and not subject to a charge against water allotted Arizona from the main stream of the River.

In any event, no uses by Arizona from the Gila River or other Arizona tributaries are chargeable against Arizona's share of the main stream Colorado River water.

h. Sections 4(a), 5 and 8 of the Project Act reflect the recognition by Congress that Arizona by virtue of perfected rights preserved by Article VIII of the Compact and beneficial use authorized by Article III(b) of the Compact had completely utilized the water of the Gila and its tributaries. Section 5 requires that no water use may be made of stored water except by contract and requires that all contracts conform to Section 4(a). Section 4(a) directs that Arizona shall receive 2,800,000 acre-feet and Nevada 300,000 acre-feet in full measure from storage in Lake Mead and that California shall receive the balance remaining of the 7,500,000 acre-feet to be supplied annually by the upper basin; it also requires that the Gila shall be recognized as completely legally utilized by Arizona and that its uses and water supply shall not be considered by the Secretary in contracting for water from storage, thereby excluding it from consideration when surplus water computations and contracts were under consideration.

The position and proof of the United States, the states of Utah, New Mexico and Nevada is as yet undeveloped and therefore the full issues as between said parties and Arizona are presently uncertain.

[5]

By reason thereof and since the amendments, supple-

ments and changes to Arizona's position above set forth are in the nature of changes as to legal position and contentions rather than factual matters, Arizona does not attempt at this time a partial amendment of its pleadings but such amendment will be proffered when the proof has been completed so that piecemeal change and amendment may be avoided.

This Amended and Supplemental Statement is filed at this time so that all parties hereto may be advised that Arizona withdraws from the legal positions heretofore taken in its pleadings, insofar as they are inconsistent with the position herein indicated, as legally unsound.

DATED: August 5, 1957.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ANSWERING BRIEF OF THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ANSWERING BRIEF OF THE UNITED STATES

INTRODUCTION

In its brief in support of exceptions to the Special Master's Report, the United States urged acceptance of its position on the few points on which it disagrees with the Special Master's Report. However, in large part we agree with the Special Master's findings and conclusions, and in this brief we shall attempt to support them against the attacks of the States. Although designated as an answering brief, in substance this is our main brief.

QUESTIONS PRESENTED

1. Whether, under the Boulder Canyon Project Act, the United States is authorized to deliver from Lake Mead or the mainstream of the Colorado River below Hoover Dam sufficient water to permit consumptive use of 4,400,000 acre-feet in California, 2,800,000 acre-feet in Arizona, and 300,000 acre-feet in Nevada from

the first 7,500,000 acre-feet available annually, without deducting uses from the tributaries below Lake Mead.

2. Whether the Indian reservations and other federal facilities on the Colorado River have rights to water adequate for their ultimate needs.

INTEREST AND POSITION OF THE UNITED STATES

The controversy among the States of the Lower Basin over the use of the Colorado River has been an impediment to the full development of that area for many years. Efforts to settle the controversy by agreement among the States were unavailing. Settlement by litigation was foreclosed by the indispensability of the United States as a party. *Arizona* v. *California,* 298 U.S. 558. Intervention of the United States makes the present suit, initiated by Arizona in 1952, jurisdictionally possible and thus enables the Court to resolve the important issues involved.

The United States has in the course of the trial of this case necessarily advocated its own claims and rights. It has also sought to aid the Special Master in reaching a solution which would, consistently with the purposes and provisions of the Boulder Canyon Project Act and other applicable federal law, advance the best interests of the Lower Colorado River Basin as a whole and, from that standpoint, accomplish an appropriate distribution of the precious water resources marshaled by the construction of the Boulder Canyon Project. The positions taken by the United States were not taken because of any desire to intrude on the functions of the Special Master or

the Court, but because of our concern that this gigantic federal project be used for the benefit of the entire region it was designed to serve and to achieve reconciliation of conflicting interests within that region.

We believe that a solution which divides the first 7,500,000 acre-feet of consumptive use of mainstream water available annually on a ratable basis in proportions of 4,400,000 to California, 2,800,000 to Arizona, and 300,000 acre-feet to Nevada and permits water in excess of the first 7,500,000 acre-feet per annum to be shared equally by California and Arizona (subject to possible use in Nevada of a small percentage of Arizona's one-half of the surplus) is in accord with the purposes and provisions of the Boulder Canyon Project Act and the contracts made under its authority, and will make possible the optimum development of the entire region so far as the available water resources will permit. This position is, of course, at variance with that taken by California. However, to follow the solution proposed by California would stymie further development in Arizona and Nevada, including the effectuation of present federal projects, and permit California, by default, to exceed the limitation on use in that State which, as a condition precedent to authorization of the Boulder Canyon Project, Congress imposed in anticipation of California's ability to expand its uses of mainstream waters more rapidly than the other States.

Basically the difference in approach between California and the United States is that California treats

this case as a typical problem of allocating the waters of an interstate river between competing States. The United States, on the other hand, views the case as one involving its power and authority to make an appropriate distribution of waters made available by the construction of tremendous federal conservation projects which regulate the river and save its waters for productive uses. The United States believes the distribution made by the Secretary of the Interior and approved by the Special Master in his report[1] falls within the federal power and the terms of the Boulder Canyon Project Act.

STATEMENT

Hoover Dam, the principal feature of the Boulder Canyon Project Act, impounds and regulates substantially all the flow of the Colorado River. Section 1 of the 1928 Act authorizing the Project enumerates the purposes to be served as follows:

> * * * for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking * * *.

The rights in the distribution of water from this Project are the subject of the dispute in this case.

---

[1] But note our exceptions to the Report and supporting brief.

1. *Background of case*

The Lower Basin of the Colorado, consisting of parts of California, Nevada, New Mexico, and Utah, and practically all of Arizona, is almost entirely arid country, requiring artificial irrigation for productive use. In its natural state the Colorado was utilized for irrigation by both the Indians and the early settlers. In 1867, the federal government appropriated money for diversions from the river for the use of the Colorado River Indian Reservation. Later, irrigation was commenced in the Palo Verde Valley in California, the Yuma Valley in Arizona, and the Imperial Valley in California. After the passage of the Reclamation Act of 1902, projects were authorized on the Salt River, a tributary of the Colorado, near Phoenix, and on the Colorado itself in the vicinity of Yuma.

The early projects suffered from both flood and famine. The Colorado River Indian Reservation and Palo Verde Valley Projects were suspended because of difficulties with flood waters, and a levee system for the Mohave Valley was destroyed by floods in 1914. The problems with the transport of water to the Imperial Valley were even more spectacular. As a result of the diversion works the river twice broke from its bed and altered its course from its former channel to the Gulf of California to a new course emptying into the Salton Basin, flooding large areas of Mexico and the United States. After considerable time, the breakthroughs were repaired, but difficulties in maintaining the canal were enhanced by the fact that a part of the system passed through Mexico. While not

as spectacular as the damage from floods, the irrigation projects suffered also from acute shortages of water at the times the river was at low stage. During these periods all, or practically all, of the river waters reaching the intake of the Imperial canal were diverted and applied in irrigation of the Valley.

The ensuing studies recommended building an all-American canal and also storage reservoirs to equalize the flow of the river. In 1919 the All-American Canal Board (California Ex. 185) recommended:

> 1. That the all-American canal, or an equivalent high-line canal, from the Laguna Dam [2] into the Imperial Valley be constructed * * *, and that Congress pass such laws as may be necessary to put into effect any plan that may be agreed upon between the Secretary of the Interior and the Imperial Irrigation District.
>
> * * * * *
>
> 7. The United States should undertake the early construction of storage reservoirs on the drainage basin of the Colorado River as a part of a comprehensive plan for the betterment of the water-supply conditions throughout the entire basin of this river. The stored water should be made available for power and irrigation at a fair charge for this service. By storage on a large scale in well-distributed reservoirs the peak of the lower river's flood discharge will be cut down and the menace to the submersible lands along the Colorado

[2] (Footnote added.) Laguna Dam had been constructed by the United States Reclamation Service as the diversion structure for the Yuma Reclamation Project. It is located on the mainstream of the Colorado River about 10 miles northeast of and 13 miles upstream from Yuma, Arizona.

River below the Grand Canyon, and in particular to the delta region and the Imperial Valley, will be reduced.

Pursuant to Congressional direction, the Secretary of the Interior made an investigation, and the resulting Fall-Davis 1922 Report recommended a canal entirely on American soil and a reservoir at or near Boulder Canyon. The report suggests that river regulation and flood control should be the primary object of future development, with irrigation a secondary objective, and development of power as the third.

The report opens with this statement:

> The control of the floods and development of the resources of the Colorado River are peculiarly national problems for several good reasons:
>
> 1. The Colorado River is international.
> 2. The stream and many of its tributaries are interstate.
> 3. It is a navigable river.
> 4. Its waters may be made to serve large areas of public lands naturally desert in character.
> 5. Its problems are of such magnitude as to be beyond the reach of other than national solution.

The needs of flood control and water storage were called "urgent and vital."

Yet there was a serious political obstacle in the path of further development in the Lower Basin. The States in the Upper Colorado Basin were apprehensive that they would be shut out of their share in the water of the river under claims of prior appropria-

tion because of the more rapid development below which the proposals for improvement would accelerate. In order to eliminate this obstacle, Congress authorized the seven States involved to negotiate a compact providing for an equitable division of the water supply of the Colorado River.

2. *The Colorado River Compact*

On November 24, 1922, compact commissioners representing the seven States of the Colorado River Basin and the representative of the United States executed the Colorado River Compact. It was promptly ratified by the legislatures of all of the seven States except Arizona.

The Colorado River Compact did not accomplish a division or apportionment of the waters of the river system between the States of the Basin. Instead, it provided for division of the river basin into an Upper Basin and a Lower Basin, and apportioned "the use of part of the water of the Colorado River System * * * to each of them with the provision that further equitable apportionments may be made" (Article I and Article III). The matter of interstate allocation of the water included in the respective Basin apportionments was left to some other means unspecified in the Compact. The basic division between the Basins (Article III) was:

> (a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum,

which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

* * * * *

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

3. *The Boulder Canyon Project Act*

In 1928, while the disagreement among the States still persisted, Congress passed the Boulder Canyon Project Act and thereby authorized the construction of an all-American canal and the Boulder and Imperial Dams. By Section 6 of this Act Congress provided:

> * * * The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same * * *.

The same section provided for the uses of the dam as follows:

> First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article

VIII of said Colorado River compact; and third, for power.

Section 4(a) provided that the Act would not take effect and no authority would be exercised thereunder until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming ratified the Compact, or (2) if any of these States failed to ratify the Compact within six months after passage of the Act, then until the Compact should be ratified by six States, including California, and California should agree to limit its annual consumptive use of water from the Colorado River to

> four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

Arizona did not ratify within the six-month period. By its so-called Limitation Act, passed March 4, 1929, California agreed to the limitation upon its aggregate annual consumptive use. Since the other six States had ratified the Compact, the Project Act became effective by Presidential proclamation upon June 25, 1929.

Section 5 authorized the Secretary to make distribution of stored water through contracts and stated:

> No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Contracts for the delivery of water for use in California have been made between the Secretary of the Interior and Metropolitan Water District of California (Pl. Ex. 38, 39), Imperial Irrigation District (Pl. Ex. 34), Palo Verde Irrigation District (Pl. Ex. 33), the City of San Diego (Pl. Ex. 40, Calif. Ex. 486) and Coachella Valley County Water District (Pl. Ex. 36). In the aggregate they provide for delivery of 5,362,000 acre-feet per annum of "beneficial consumptive use," subject to the availability of the water for use in California, in accordance with the amounts and priorities established by agreement with the State under the so-called "Seven Party Agreement."

Under date of February 9, 1944, a contract was executed between the United States and the State of Arizona for the delivery of stored water for use in Arizona (Pl. Ex. 32; Rept., App. 5). The contract was unconditionally ratified by an Act of the Legislature enacted on February 24, 1944, and approved by the Governor of Arizona the same day. At the same time Arizona also unconditionally ratified the Colorado River Compact. (Sp. Master's Ex. 4 (p. A559).)

The Arizona contract of February 9, 1944, provides:

> 7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver * * * each calendar year from storage in Lake Mead * * * so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet [plus] one-

> half of any excess or surplus waters unapportioned by the Colorado River Compact * * *.

The Arizona contract also stipulated:

> (d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

As provided for in subdivision (l) of Article 7 of the Arizona water delivery contract, the United States has made a number of contracts for the delivery of water to individuals, irrigation districts, corporations and political subdivisions within the State of Arizona. Deliveries have also been made to lands of the United States (Rept. 212–214, 254–300).

On January 3, 1944, the United States contracted with the State of Nevada for the delivery of water from storage in Lake Mead in quantities not to exceed 300,000 acre-feet annually. (Rept. 209.)

4. *Claims of the United States*

Before the Special Master:

(a) The United States sought recognition of its right to use and control the use of the waters of the mainstream for purposes of navigation, river regulation, flood control, and power generation. No quantitative claims for such purposes were asserted.

(b) The United States asserted, as an overriding claim against the entire supply of water, its obliga-

tion and right to deliver water to Mexico according to the terms of the 1944 treaty with that country. The quantity required to satisfy the treaty may vary according to certain circumstances specified in the treaty, but for practical purposes, it is 1,500,000 acre-feet per annum measured in the limitrophe section of the river.

(c) The United States claimed rights to use mainstream waters for irrigation and other uses on the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Indian Reservations.

(d) The United States claimed rights to use mainstream waters on the Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge, and Cibola Valley Waterfowl Management Area.

(e) The United States claimed rights to use mainstream waters on the Lake Mead National Recreation Area.

(f) The United States claimed rights to divert and deliver mainstream waters for the Yuma Reclamation Project in Arizona and California, the Yuma Auxiliary Reclamation Project in Arizona, the Gila Reclamation Project in Arizona, Boulder City, Nevada, and areas served by the All-American Canal System in Imperial and Coachella Valleys in California.

5. *Report of Special Master and Proposed Decree*

So far as the issues covered by this brief are concerned, the Special Master found that the water to be distributed under the Project Act consisted of the "mainstream" of the Colorado River, which he defined as including Lake Mead and the mainstream

of the Colorado River below Lake Mead, thus excluding the Gila River and other tributaries and leaving out all consideration of Arizona and Nevada uses thereof. The Special Master found that the Act authorized the Secretary of the Interior to contract for distribution of the mainstream water without being bound by considerations of equitable apportionment or prior appropriations, but that his contracts must give recognition to "present perfected rights" and must be made in accord with California's Limitation Act by which it agrees to accept only 4,400,000 acre-feet out of the first 7,500,000 acre-feet available, plus one-half of the surplus or unapportioned waters. The Special Master found that the Secretary of the Interior had validly contracted to deliver, out of the first 7,500,000 acre-feet of mainstream water, 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada, the surplus to go one half to California and one half to Arizona, subject to Nevada's right to contract for a small share.

The Decree recommended by the Special Master adopts the priorities of use stated in Section 6 of the Boulder Canyon Project Act, the first being the right of the United States to use mainstream waters for river regulation, improvement of navigation and flood control. The recommended Decree further provides that the United States may release water in satisfaction of its obligations to Mexico under the treaty of February 3, 1944, without regard to such priorities. (Rept. 347.)

The Special Master also makes specific provisions within his recommended Decree for the claims of the

United States for use of water on the specified mainstream Indian Reservations, Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge, and the Lake Mead National Recreation Area. The Special Master concluded that the uses of the United States within each State are limited by that State's allocation, except to the extent that the uses are protected by Section 6 of the Project Act as "present perfected rights." (Rept. 302.) The United States' claims of right based on reservations of public lands made before the Project Act became effective are accorded this status (Rept. 310).

The Special Master also held that these federal uses are "chargeable to the state within which the water is consumed, and this consumption is included within each state's apportionment" (Rept. 312–313).

5. *Present Claims of the Parties*

Arizona accepts the Special Master's allocation of mainstream water as among the Lower Basin States. It now concedes that one-half of all mainstream water in excess of 7,500,000 acre-feet may be used in California. Arizona continues to dispute the validity of the provisions of her contract insofar as they recognize rights in Nevada, Utah, and New Mexico with respect to excess or surplus waters unapportioned by the Compact. Arizona supports the Special Master's determination that uses from the mainstream or tributaries above Lake Mead are not to be included in her accounting—a ruling to which the United States excepts for reasons stated in its opening brief. Arizona disputes the Special Master's conclusions as to

the reserved rights of the United States for the federal reservations.

California[3] asks that the "safe annual yield"[4] of mainstream water available for use in the Lower Basin be fixed at 5,850,000 acre-feet of beneficial consumptive use (diversions less returns to the River) and that this supply be allocated as follows:

4,600,000 acre-feet for use in California
1,129,500 acre-feet for use in Arizona
120,500 acre-feet for use in Nevada

From the "provisional supply"—water presently available in the Lower Basin on a "safe annual yield" basis but subject ultimately to use in the Upper Basin—California asks that the following allocations be made:

778,000 acre-feet per annum for use in California
80,000 acre-feet per annum for use in Arizona
None for use in Nevada

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[3] Throughout the trial of the case, and in the briefing for the Special Master, California's presentation has involved a number of alternative positions. The quantity of consumptive use of mainstream water to which it claims to be entitled varies according to the particular theory advanced. However, with its proposed findings and conclusions it proposed a form of decree. (Calif. Proposed Findings and Conclusions, Vol. I, pp. Decree–1 to Decree–26.) We have referred to that proposed decree as the best indication of California's basic claim in terms of water quantity.

[4] Defined at I H.(2) of California's proposed decree as "that quantity of Colorado River system water which may reasonably be expected to be permanently available at an equal annual rate for beneficial consumptive use within the lower basin * * * net of all diminutions of supply."

Nevada in effect accepts the Special Master's Report.

The United States agrees with the major part of the Special Master's Report. As pointed out in our exceptions and brief in support thereof, we submit that the contracts between the United States and Arizona and Nevada, which charge their share of the water with uses from the mainstream and tributaries above Lake Mead are valid and that, contrary to the Special Master's ruling, intra-state distribution pursuant to the contracts is not controlled by State law.

SUMMARY OF ARGUMENT

A. The first portion of our argument deals with the interstate allocation of the Colorado River water made available for use by Hoover Dam. Three States in the Lower Basin are so situated that they can make use of this water, namely, California, Arizona, and Nevada. The Special Master upheld the validity of an allocation effected through contracts executed by the Secretary of the Interior pursuant to the Boulder Canyon Project Act granting California 4,400,000 acre-feet, Arizona, 2,800,000 acre-feet, and Nevada 300,000 acre-feet, out of the first 7,500,000 acre-feet available annually, with California and Arizona evenly dividing any surplus or unapportioned water, subject to Nevada's right to contract for a small part thereof.

Congress has the constitutional power under the Commerce Clause, the General Welfare Clause, and the Property Clause to govern the distribution of the waters of the Colorado River which it has brought under control through the construction of Hoover

Dam and related facilities. By the Boulder Canyon Project Act Congress authorized the Secretary of the Interior to distribute the stored water among the States by contract. One of the limitations on the Secretary in making these contracts was that uses in California must comply with a limitation which it was required to accept as a condition for the effectiveness of the Act. This limitation provided that California's use of water from the Colorado River should not exceed 4,400,000 acre-feet of the water "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," plus "one-half of any excess or surplus waters unapportioned by said compact." This Section of the Act is properly construed to refer solely to waters of the mainstream of the Colorado River. The allocation permitted by the Act has no reference to the Gila River. This appears not only from the provisions of the Act itself but also from consideration of its legislative history, which demonstrates that Congress had in mind only the water which would be delivered from the Upper Basin to the Lower Basin at Lee Ferry and which could be impounded by Hoover Dam. Arizona's use of the Gila was not included.

The contracts executed by the Secretary of the Interior with Arizona and Nevada and with the several users in California comply with the provisions of the Project Act in this respect. California asserts that these contracts and the decision of the Special Master do not provide the necessary protection for existing uses in California. Insofar as these uses constitute

"present perfected rights," the Secretary of the Interior is required to satisfy them, as the Special Master held. But this is the limit of the obligation placed upon the Secretary by the Project Act to recognize claims of appropriative rights under State law. He is not required otherwise to give priority to California uses on any principle of prior appropriation or equitable apportionment.

The decree proposed by the Special Master would terminate the dispute among the Lower Basin States by affirming the apportionment made by the Secretary of the Interior under authority of Congress. California's assertions that the decree will result in disaster for the Metropolitan Water District are based on the assumption that the Upper Basin States will utilize their entire allotment in the near future. The right of the Upper Basin to all the water apportioned by the compact is not to be questioned but, as a practical matter, it is at best uncertain when Upper Basin developments will reach this point. It would be undesirable to abandon needed development in Arizona and Nevada in order to protect against possible future shortages which by reason of scientific discoveries or other factors may never occur.

B. The second portion of our argument deals with the right of the United States to utilize the impounded waters on federal reservations, including Indian reservations. This right is supported by the power of the United States delegated to the Secretary of the Interior to make an appropriate distribution of waters which are the product of a federal conservation project. The same reasoning which supports

the allocation of the water between the States supports the use of it on federal reservations.

In the alternative, regardless of such power, the United States has a proprietary interest in the use of the waters of the Colorado River and its tributaries appurtenant to its reservations which supports its right to deliver water to them in the quantity necessary to fulfill the purposes for which the reservations were established. The proprietary rights of the United States to the use of waters on the public domain apply to both navigable and non-navigable streams and, at least with respect to the use of the waters reserved for federal establishments from navigable waters, there has not been any surrender of that right. When the United States established the reservations here involved, it withheld from any other use sufficient water to accomplish their purposes. The right to use that water in this way is a "present perfected right" under the terms of the Boulder Canyon Project Act. The principles of equitable apportionment are not applicable to satisfaction of this claim against the water, and it is required to be recognized by the Secretary of the Interior.

The rights of the United States to water for use on these federal establishments, including the Indian reservations, must be safeguarded whatever apportionment is decreed among the States. The Special Master took account of these rights in the apportionment that he approved. It is the position of the United States that, regardless of the interstate division, these rights are entitled to be fulfilled.

ARGUMENT

I

THE WATERS OF THE BOULDER CANYON PROJECT ARE LAWFULLY ALLOCATED BY THE PROJECT ACT AND THE CONTRACTS MADE THEREUNDER BY THE SECRETARY OF THE INTERIOR

The Report of the Special Master is predicated upon this central thesis. By act of Congress and the exercise by the Secretary of the Interior of powers delegated to him by Congress, the United States has allocated the mainstream waters of the Colorado River impounded and controlled by the Hoover Dam and related works. This federal allocation is binding and supersedes all rights which might otherwise be claimed in the natural flow of the River by a State on behalf of its citizens under the law of prior appropriation or equitable apportionment.

In this portion of our brief we show that the central thesis of the Report is essentially correct. We submit first that Congress has the power, under the Constitution, to allocate among the citizens of different States waters which have been brought under control as a federal project by the expenditure of federal funds, notwithstanding State laws of prior appropriation or interstate doctrines of equitable apportionment. If Congress has exercised this power over the waters of the Colorado River, the elaborate arguments of California based upon prior appropriation and equitable apportionment are irrelevant to the disposition of this controversy.

We then go on to show that this federal power has in fact been validly exercised. Section 5 of the Boulder Canyon Project Act authorizes the Secretary of the Interior to make an allocation of the waters of the Colorado River subject to control by Hoover Dam and, contrary to California's view, does not require charging to Arizona any use of the waters of the Gila River. The Secretary of the Interior made such an allocation under Section 5 by entering into contracts with the States and individual users. The contracts permit the satisfaction of "present perfected rights" as required by Section 6 and are also valid and binding in all other respects.

It follows that the Special Master correctly based his recommendations for a decree upon the allocation made by the Secretary and, in our submission, these aspects of the recommendation should be approved by the Court.

A. CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO AUTHORIZE A FEDERAL ALLOCATION OF THE WATERS OF THE COLORADO RIVER

Congress has Constitutional power to regulate the navigable waters of the United States for the purposes of flood control, navigation, power production, and watershed and river development. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508; *Arizona* v. *California*, 283 U.S. 423; *United States* v. *Appalachian Power Co.*, 311 U.S. 77. Congress may also promote the general welfare through large scale projects for reclamation, irrigation and other internal improvement, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275,

and dispose of and make all needful rules and regulations respecting property belonging to the United States. Constitution, Art. IV, Sec. 3, Cl. 2; *Ivanhoe Irrigation District* v. *McCracken, supra; United States* v. *Grand River Dam Authority,* 363 U.S. 229; *Winters* v. *United States,* 207 U.S. 564; *Federal Power Commission* v. *Oregon,* 349 U.S. 435; *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690.

The Colorado River is a navigable stream. The Boulder Canyon Project Act authorized the construction and operation of the entire project, including Hoover Dam, Imperial Dam and the All-American Canal System,[5] for the purpose of controlling floods, improving navigation, delivering impounded waters for reclamation of public lands and other beneficial uses, and generating electric energy as a means of making the project financially self-supporting. The enactment of this legislation, therefore, was indisputably within the power of Congress, *Arizona* v. *California,* 283 U.S. 423.

The project involves the storage and disposition of waters amounting to substantially the entire flow of the Colorado River below Lee Ferry. In every real sense the availability of waters for use downstream results from the project and is controlled by its manager, the Secretary of the Interior. Accordingly, Section 5 of the Project Act, as we demonstrate below, authorized the Secretary to determine the disposition of the waters by contract. Section 5 also provides—

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[5] And see, 49 Stat. 1039; 61 Stat. 628; 68 Stat. 1045; H. Doc. 415, 80th Cong., 1st Sess.; the Mexican Water Treaty, 59 Stat. 1219.

> No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

These arrangements for the allocation of the Colorado River waters controlled by Hoover Dam plainly constitute reasonable conditions and limitations on the use of federal funds, federal property and federal privileges. *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275. Referring to earlier precedents the Court said (p. 295)—

> The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and other over-all objectives thereof. * * *

A federal allocation of the waters of a project built and managed by the United States pursuant to the exercise of Congressional power excludes all inconsistent claims. "* * * a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress * * *. Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action." *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 295.

The principles of priority of appropriation and equitable apportionment are irrelevant, therefore, once it is shown that Congress has made or authorized a federal allocation. Recognition of this proposition removes the underpinning from California's attack upon the decree recommended by the Special Master,

for the essence of California's claim is that the principles of prior appropriation and equitable apportionment, when applied to the waters of the Colorado River, give her a right to a water supply adequate to permit full utilization of the capacities of her present projects, which should not be at the hazard of sharing shortages in the total main stream supply with future projects in Arizona and Nevada.

There is no merit in California's claim that her citizens could acquire "prior rights" (Calif. Opening Br., p. 37) in the navigable waters of the Colorado River before the United States exercised its powers over the stream. Any claimed rights recognized under State law were subject to, and could be displaced by, the exercise of the superior federal authority. In *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 423, although the respondent had "as complete a right * * * as can be obtained under state law", the Court nevertheless held the right subject to federal control because "the state and respondent, alike * * * hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce." The principle is well established by both prior and subsequent decisions. *E.g.*, *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69 ("that the running water in a great navigable stream is capable of private ownership is inconceivable"); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510; *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228; *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334.

Such cases as *Wilson* v. *Black-bird Creek Marsh Co.*, 2 Pet. 245, and *Gilman* v. *Philadelphia*, 3 Wall. 713, relied on by California, are immaterial because they hold at most that the States have implied power to act with respect to purely local facilities in the absence of Congressional legislation. Nor is the point affected by *Federal Power Commission* v. *Niagara Mohawk Corp.*, 347 U.S. 239, and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, which hold only that the destruction of uses recognized by State authority is compensable if Congress has indicated an intent to provide compensation. The only prior state-recognized rights in the waters of the Colorado River provided for by the Project Act are the "present perfected rights" protected under Section 6 and, as we show below, the contracts negotiated by the Secretary of the Interior and the decree recommended by the Special Master accord these rights their full statutory protection. In any event, the issue of compensation is not involved in the present controversy. Cf. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 296–297.

The principles underlying the *Chandler-Dunbar* case and later authorities dealing with claims for compensation are equally applicable to any argument that the federal allocation invades state sovereignty. As the Court said of a similar contention in *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534—

> * * * the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. * * *

B. SECTION 5 OF THE PROJECT ACT AUTHORIZES AN ALLOCATION OF THE MAINSTREAM WATERS OF THE COLORADO RIVER

1. *Section 5 authorizes the Secretary of the Interior to make an allocation.*

Section 5 of the Project Act authorizes the Secretary under such general regulations as he may prescribe—

> to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon * * *.

Section 5 then specifies the purposes for which water may be delivered and prescribes in considerable detail both the conditions under which contracts may be let for the use of water for generating electric energy and also the terms that shall be included in contracts for the sale of electric energy. Section 5 also stipulates—

> No person shall have or be entitled to have the use for any purpose of the waters stored as aforesaid, except by contract made as herein stated.

These plain words make it too clear for argument that Section 5 authorizes the Secretary to apportion the consumptive use of the waters impounded and controlled by the Boulder Canyon Project. A contract, to be valid, would have to conform to the requirements of the other sections of the Project Act, but any contracts which satisfied those requirements would constitute binding allocations and no person could have any rights to the water of the lower Colorado River except as provided by a contract with the

Secretary.[6] We explored this at greater length at pages 24–34 of our brief in this Court in support of our exceptions to the Special Master's Report.

It may be urged to the contrary that the allocation of the waters of the Colorado River among the citizens of several different States was too controversial and important a problem for Congress to delegate the determination to the Secretary of the Interior. But the Project Act does not leave the Secretary at large. The first paragraph of Section 4(a) places specific limits upon the aggregate annual consumptive use for which water may be delivered to users in California. The limitation necessarily implies that the remainder is to go to Arizona and Nevada since Utah and New Mexico have no access to the mainstream. Furthermore, the second paragraph of Section 4(a) indicates the kind of apportionment which the Congress would deem proper by granting Congressional consent in advance to a proposed interstate compact between California, Nevada, and Arizona. While this paragraph never became operative because the tri-state compact was never negotiated, it supplied guidance for the Secretary's exercise of discretion by indicating the kind of division which Congress considered equitable.

2. *The allocation authorized by Section 5 and the provisions of the California Limitation Act apply only to mainstream waters.*

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[6] Section 6 directs the Secretary to respect "present perfected rights." The meaning of this provision is discussed at pp. 49–50, *infra*.

Section 5 of the Project Act requires, *inter alia,* that contracts made by the Secretary "shall conform to paragraph (a) of Section 4 of this Act." The critical passage in Section 4(a) provides that California's

> aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River * * * shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact * * *.

The contracts made by the Secretary of the Interior allocate only water from Lake Mead and from the mainstream below Hoover Dam, except that, to protect against upstream use decreasing project water, the contracts require Arizona and Nevada to deduct from their allotments for uses above Lake Mead whether from the mainstream or from tributaries. We submit that this limitation was authorized by the Project Act and that the Special Master erred in refusing to accept it. See our Brief in Support of Exceptions pp. 7–21. This issue does not affect the present point which relates to Lake Mead and waters below Hoover Dam. The contracts rest upon the proposition that the quoted passage from the Project Act and the corresponding language of the California Limitation Act refer only to mainstream waters, with the result that California is limited to—

> (i) four million four hundred thousand acre-feet annually out of the first seven million five hundred thousand acre-feet of mainstream

water available to the Lower Basin States, plus—

(ii) one-half of the mainstream water in excess of seven million five hundred thousand acre-feet.

Since the Master's Report adopts this first interpretation and the recommended decree rests upon it, we deem it important to show that the interpretation is correct.

It is plain that the critical passage in Section 4(a) cannot be read literally. Indeed, as the Special Master observed, no one argues for a completely literal interpretation.[7] California proposes a second construc-

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[7] The interpretation of Section 4(a) submitted by the United States and approved by the Special Master would not depart from the literal meaning of the words if Arizona's contention that Article III (a) and (b) of the Compact apportions only mainstream water were ultimately upheld. But notwithstanding the Master's observations respecting the meaning of various Compact provisions (Rept. 138–151), many of the questions presented by the conflicting contentions of California and Arizona respecting Compact interpretations are questions in which the Upper Basin States have a substantial interest and which cannot be finally answered in their absence. Among these, in addition to those on which the Master has expressed his opinion, is the question whether "beneficial consumptive use" is to be measured for Compact accounting purposes at site of use or by depletion of flow at some downstream point. Another is whether uses by the United States on its Indian reservations are chargeable to either basin for purposes of interbasin accounting. (See Article VII of the Compact.) Still another is whether reservoir losses of water in storage for use in either basin are chargeable for purposes of interbasin accounting. As observed by the Special Master with respect to the Upper Basin's delivery obligation under Article III(c) of the Compact (Rept. 145), these are all questions which "ought not to be

tion. It construes the Compact as an apportionment of all the waters in the Colorado Basin and, reading the first phrase in the critical passage literally, contends that "waters apportioned to the lower basin States by paragraph (a) of Article III of the * * * compact" means the first 7,500,000 acre-feet of annual consumptive uses of Colorado River system water in the Lower Basin, including all uses from the Gila River and other tributaries. Since California calculates the present average annual consumptive uses on the tributaries at approximately 1,950,000 acre-feet and treats them as apportioned by Article (a), it argues that the waters in the mainstream "apportioned to the lower basin States by paragraph (a) of Article III of the * * * compact" do not exceed 5,550,000 acre-feet of consumptive use annually.[8] Of this water, says California, the limitation of use in California only precludes use of any part over 4,400,000 acre-feet. All waters in the mainstream in excess of those required for consumptive use of 5,550,000 acre-feet are, according to California's contention, "excess or surplus waters unapportioned by"

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answered in the absence of the states of the Upper Basin" and which need not "be answered in order to dispose of this litigation affecting only Lower Basin interests." Here it is necessary to determine only what Congress meant by the language in question. Whether or not such meaning accords with the meaning of the Compact provisions referred to need not be determined in this case.

[8] The figure is obtained by subtracting the 1,950,000 acre-feet of consumptive use on the tributaries from the total figure of 7,500,000.

the Compact.[9] But California is unwilling to read the second phrase in the critical passage literally. A literal construction of "one-half of any excess or surplus waters unapportioned by said compact" would exclude California from any share of the next 1,000,000 acre-feet of consumptive use annually because this water is apportioned by Article III(b).[10]

Arizona offers still another interpretation. It argues that by the first phrase, "waters apportioned to the lower basin States by paragraph (a) of Article III of the * * * compact," Congress meant the first 7,500,000 acre-feet of annual consumptive uses in the Lower Basin States *from the mainstream.* Therefore, says Arizona, by consenting to the Compact with this understanding of the meaning of Article III, Congress modified the Compact even if Article III were otherwise construable as effecting

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[9] Since use in California is limited to "*not more than one-half* of any excess or surplus waters unapportioned by" the Compact, we are unable to state the argument on which California urged the Special Master to recommend a decree which would allocate the consumptive use of mainstream waters in excess of 4,400,000 acre-feet in proportions of

978,000 acre-feet to California
152,000 acre-feet to Arizona
28,000 acre-feet to Nevada

[10] In view of Arizona's present concession (Opening Br. 82) that the phrase "excess or surplus waters unapportioned" by the Compact includes all mainstream water above the first 7,500,000 acre-feet available for use in the Lower Basin States in any one year, there would appear to be no further need to review the legislative history which supports the Special Master's rejection of the argument which would have excluded California from sharing in the Article III(b) water.

an apportionment of system, as distinguished from mainstream, waters. Alternatively, Arizona argues that the Compact apportionment for use in the Lower Basin refers only to the use of waters in the mainstream and is exclusive of Lower Basin tributary uses. Under either of these alternative arguments, consumptive uses in California out of the first 7,500,000 acre-feet of mainstream waters available annually in the Lower Basin would be limited to 4,400,000 acre-feet, with the remaining 3,100,000 acre-feet available for use in Arizona and Nevada.

The choice between the conflicting interpretations depends upon the true Congressional intent in the enactment of Section 4(a). Even if Congress used the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" or the words "excess or surplus waters unapportioned by said compact" in a sense entirely different from the Compact use, it is the understanding and purpose of Congress that is important here. The meaning of the negotiators of the Compact need not be resolved in this case, because the case is controlled by the meaning which Congress attributed to the words. An analysis of Section 4(a) itself, including the relationship of its two main paragraphs, and its legislative history demonstrate that Congress intended the reference to waters apportioned by the Compact to mean the first 7,500,000 acre-feet of annual consumptive use from the mainstream available in the Lower Basin.

(a) *The statutory provisions*

The Boulder Canyon Project as a whole deals with the portion of the Colorado waters delivered from the Upper Basin to the Lower at Lee Ferry and otherwise reaching the mainstream below that point. The purpose of the project was to build a reservoir of sufficient size to control the waters of the river above the dam, so as to eliminate the devastating floods and reduce the shortages in order that all of the mainstream waters available could be devoted to beneficial uses, including delivery through the new All-American Canal. No part of the project touched the Gila River[11] or the other downstream tributaries. The waters which the Secretary would control would be essentially mainstream waters. It is reasonable to suppose, therefore, that Congress, in preparing this statute, was thinking of the waters of the Colorado River itself, *i.e.*, the mainstream waters, not the waters of the river system or the entire Lower Basin.

The words of Section 4(a) themselves bear out this inference. The provision in question limits the aggregate annual consumptive use in California "of water of and from the Colorado River." It is to the "Colorado River," and not to the river system or Lower Basin, that the limitation explicitly refers.

The second paragraph of Section 4(a), in which Congress gave advance consent to a prospective tri-state compact, shows that the first paragraph refers

[11] The Gila actually joins the Colorado at a point below the present diversion point for the All-American Canal so that, in any event, any water which might join the mainstream from the Gila would not be available for that project.

only to mainstream waters. Arizona, California, and Nevada were authorized to enter into an agreement which would provide that of the 7,500,000 acre-feet apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River compact there should be apportioned to Nevada 300,000 acre-feet and to Arizona 2,800,000 acre-feet of annual consumptive use, with Arizona to have the exclusive use of the Gila River within that State. Since California was to receive 4,400,000 acre-feet under the first paragraph, the authorized compact would divide among these three States all the water to which Congress referred at the start of the second paragraph in the phrase—

> 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact * * *.

To interpret this phrase literally to mean the first 7,500,000 acre-feet out of all the waters of the Lower Basin, including the tributaries, would attribute to Congress an intent to authorize California, Nevada, and Arizona to divide this water among themselves and thereby entirely exclude New Mexico and Utah from Lower Basin tributary waters which were being consumed in those States at the time the Project Act was enacted. The only reasonable inference is that Congress used the phrase as a way of referring to 7,500,000 acre-feet of water *out of the mainstream.* This is the water which the draftsman, rightly or wrongly, supposed Article III(a) to apportion.[12]

[12] See p. 30, *supra*, especially note 7.

The first of the critical phrases in the first paragraph of Section 4(a) is substantially the same as the phrase in the second paragraph, *viz.*—

> apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact * * *.

It is impossible to believe that this phrase does not refer to the same waters as those described in the second paragraph, even though the number of acre-feet is not mentioned. Therefore, in the first paragraph Congress must have used the phrase "waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact" as a way of referring to 7,500,000 acre-feet of water out of the mainstream.

The inference is confirmed by item (3) in the second paragraph of Section 4(a), which authorizes the three States to give Arizona the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of Arizona. Congress obviously believed that the division of 4,400,000 acre-feet to California, 300,000 acre-feet to Nevada, and 2,800,000 acre-feet to Arizona would complete the disposition of the water which the Upper Basin undertook to deliver to the Lower Basin by Article III(d). The allocation of the Gila River to Arizona was therefore additional. The only interpretation which permits the Gila water to be treated as additional, in accordance with the obvious intent, is to read the 7,500,000 acre-feet as referring to the mainstream. Senator Johnson recognized this during the debates upon the second

paragraph of Section 4(a), when he said (Calif. Compilation, p. 175)—

> When Arizona says that she has but 2,800,000 acre-feet of water, to that must be added the Gila River with its 3,500,000 acre-feet.

The second paragraph of Section 4(a) also provides that the tri-state compact authorized by Congress may divide between Arizona and California all the "waters unapportioned by the Colorado River compact." If this reference were to be taken literally and if the Compact were to be construed, in the manner for which California contends, as an apportionment of all the water in the system, then the proposed tri-state compact authorized by Congress would be inconsistent with the Compact, for Article III(f) of the Compact reserved the future division of waters "unapportioned" by the Compact to a new agreement between the States of the Upper and Lower Basins. Again, inconsistency and resulting unfairness can be avoided only by understanding that Section 4(a) refers to 7,500,000 acre-feet of mainstream waters.

The relationship between the first and second paragraphs of Section 4(a) was appreciated during the debate upon the Project Act. The second paragraph is the result of an amendment offered by Senator Hayden which he described as "a mere corollary to the amendment" which was adopted as the first paragraph of Section 4(a) (Arizona Compilation of Legislative History, p. 65).

(b) *The Legislative History.*

The legislative history of Section 4(a) of the Project Acts supports our conclusion that Congress intended to limit the annual consumptive use in California to 4,400,000 acre-feet of the first 7,500,000 acre-feet of mainstream waters available for use in the Lower Basin. In debates of such duration, participated in by many individuals, representing competing interests, it is inevitable that many arguments were advanced and statements of intention made which confuse the picture. The Special Master reviews some of this contradictory matter (Rept. 189–194) and California makes the most of it (Calif. Opening Br., pp. 110–124). Since all the materials are before the Court, we shall content ourselves with a review of the salient features of the debate which we believe require our conclusion.

Before examining the debates, it is important to understand the situation facing Congress when the Project Act was under consideration. The Colorado River Compact had not been ratified by all the signatory States as required by Article XI. Arizona was unwilling to ratify. Arizona may well have feared that California, which was growing far more rapidly, would gobble up the largest part of the 7,500,000 acre-feet which the Compact proposed to apportion to the Lower Basin. Although the development of Arizona had lagged behind that of California, it was fairly to be anticipated that Arizona's use of water would develop more rapidly than the Upper Basin States' and therefore, in the absence of the Compact, Arizona would be able to establish a basis for making

a claim for appropriative rights having priority over uses in the Upper Basin. The representatives of the Upper Basin States were therefore reluctant to enact legislation that would facilitate increased use of waters in the Lower Basin before something was done to protect the interests of the Upper Basin.

The best way out of the impasse would be for Arizona, California, and Nevada to negotiate an interstate compact dividing the river below Lee Ferry. Obviously the Upper Basin had no interest, either direct or indirect, in the division between the Lower Basin States of the water from the mainstream *and tributaries;* once Arizona's interest in the mainstream was secured, her opposition to the Compact would relax. After a conference in Denver, Colorado, in the summer and autumn of 1927, the Governors of the four Upper Basin States recommended "the following as a fair apportionment of water between the States of the lower division, subject and subordinate to the provisions of the Colorado River Compact:

> 1. *Of the average annual delivery of water to be provided* by the States of the upper division at *Lees Ferry* under the terms of the Colorado River compact: (a) To the State of Nevada, 300,000 acre-feet, (b) To the State of Arizona, 3,000,000 acre-feet, (c) To the State of California, 4,200,000 acre-feet." [Arizona Compilation, pp. 33 and 34, and p. 105; emphasis added.]

While this recommendation was followed by recommendations that the waters of Lower Basin tributaries be apportioned to the States in which those tributaries flowed (Arizona Compilation, pp. 35 and 105), the factor of most significance here is that this

starting point for the ultimate figure of 4,400,000 acre-feet of Article III(a) water for use in California was expressly related to the average annual delivery of 7,500,000 acre-feet at Lee Ferry under the terms of the Colorado River Compact.

These recommendations played an important part in the evolution of present Section 4(a). Their substance was introduced in a committee amendment to Section 5 of S. 728, reported on March 20, 1928, by the Senate Committee on Irrigation and Reclamation in S. Report No. 592, 70th Congress, 1st Session, which was "designed to give further assurances to the various states, *particularly those in the Upper Basin,* against any undue advantages or rights to California." (Calif. Compilation of Legislative History, p. 6.) This amendment would have provided that contracts under Section 5 should not "provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the Lower Basin by the Colorado River compact * * * and one-half of the unallocated, excess and/or surplus water: * * *." (Calif. Ex. 2001.)

This amendment was offered in Committee by Senator Kendrick of Wyoming "for the purpose of protecting the water rights of the four upper States" against the possibility that otherwise "California would only be restricted by *the 7,500,000 acre-feet that went down*" and, if Arizona stayed out of the Compact, "she would have her legal right to appropriate as much water as she could put to beneficial use." Such might have been the result "unless there was an agreement as to exactly how much water should go to

the lower States out of *the 7,500,000 acre-feet that went down to them.*" See also the explanation by Senator Pittman during the debate on the Bratton amendment to the Phipps amendment, which was approved and became the first paragraph of Section 4(a). (Arizona Compilation, p. 59; Calif. Compilation, pp. 107 and 108.)

While the 4,600,000 acre-foot limitation proposed in the committee amendment to Section 5 was the quantity demanded by California's representatives at the Denver conference, rather than the quantity recommended by the Upper Basin Governors as a compromise (see discussions by Senator Hayden, Arizona Compilation, p. 38, and Senator Pittman, California Compilation, p. 109), it is obvious that the water which was considered available for possible use by California and which was in the Committee's contemplation in proposing the limitation as to both "allocated" and "unallocated, excess and/or surplus water" was water in the mainstream, just at is was in the contemplation of the Upper Basin Governors.

The compromise recommended by the Governors' Conference was placed before the Senate in full by Senator Hayden early in the debate on the proposed Hayden amendment to Section 4(a) of the pending bill.[13] The Phipps amendment was later substituted

[13] The recommendation of the Governor's conference was frequently referred to on other occasions during the debates on the various amendments of which the first paragraph of Section 4(a) was the fruition. See the remarks of Senator Pittman of Nevada (Arizona Compilation, pp. 13 and 14, p. 60), Senator Hayden of Arizona (Arizona Compilation, pp. 33 and 34), Senator King of Utah and Senator Bratton of New Mexico (Arizona Compilation, p. 47).

(Arizona Compilation, pp. 13 and 14). The Phipps amendment fixed the limitation at 4,600,000 acre-feet. The dispute over whether the limitation upon California should be 4,200,000 acre-feet or 4,600,000 acre-feet continued, but everyone agreed that the total amount to be apportioned was the 7,500,000 average annual flow to come down the mainstream to the Lower Basin. The dispute was resolved by the Bratton amendment which substituted the compromise figure of 4,400,000 acre-feet for the 4,600,000 acre-feet proposed by Senator Phipps. With minor changes the Phipps amendment became the first paragraph of Section 4(a). The Hayden amendment, with minor alterations, became the second paragraph.

Throughout the debate Senators spoke as if the universe to be divided was the mainstream waters. Senator Pittman repeatedly referred to the 7,500,000 acre-feet that "went down" to the Lower Basin. (Arizona Compilation, p. 59; Calif. Compilation, pp. 107–108.) An amendment to Section 5 proposed by Senator Waterman of Colorado during the first Session of the 70th Congress, but not debated or voted upon (Calif. Compilation, p. 14), would have required California to agree to furnish, from her 4,600,000 acre-feet and one-half of the unallocated water, any water required by Arizona "out of the main stream" in excess of 2,900,000 acre-feet per annum plus one-half the unallocated water, "so that in no event shall there ever be demanded or required, *out of the main stream of the Colorado River,* by the States of Arizona, California, and Nevada * * * any water in excess of the amount apportioned to

them by Article III of the Colorado River compact, to be delivered to them * * * at Lee Ferry * * * or elsewhere." (Emphasis added.)

In discussing Arizona's contention for 4,200,000 acre-feet, Senator Pittman on December 7, 1928, said: "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California *dividing the water let down to the three lower States. Of the 7,500,000 acre-feet of water let down that river* they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together." (Arizona Compilation, p. 44; emphasis added.)

On December 8, 1928, Senator Bratton was explaining a proposed amendment to Section 4(a) which would have limited California to 4,400,000 acre-feet of III(a) water, 500,000 acre-feet of III(b) water, and one-half of the excess or surplus waters unapportioned by the Compact. (Arizona Compilation, pp. 46–47.) The following colloquy occurred:

> MR. KING. I will ask the Senator if it is not a fact that at the time when the governors' conference considered the matter and recommended a settlement upon a basis of 4,200,000 acre-feet to California there had not been fully discussed and fully appreciated the fact *that there was probably a million acre-feet subject to capture* which, under the compact, was allocated to Arizona and to California, so that if 4,200,000 acre-feet were awarded out of the 7,500,000 there would be an additional 500,000 acre-feet out of this 1,100,000 acre-feet which,

> under the compact, was to be allocated to the two States, so California in the aggregate would get 4,700,000 acre-feet? [Emphasis added.]
>
> MR. BRATTON. That is true if the estimated surplus actually exists. At the same time, Arizona would get her 3,000,000 acre-feet agreed to by the governors as her just share of the allocated water, plus 500,000 acre-feet, being one-half of the unallocated surplus, so that while California would get 4,700,000 acre-feet Arizona would get 3,500,000 acre-feet. The surplus to which the Senator from Utah refers would be equally divided between Arizona and California. Neither State would get an advantage by reason of the division of the surplus. [Arizona Compilation, p. 47.]

The existence of the estimated surplus could be doubtful only if the area of discourse was limited to the mainstream waters of the Colorado River. In that event the proposed figures would exhaust the 7,500,000 acre-foot annual average of which the Lower Basin was alone assured. If the subject of the discussion also included the 3,500,000 acre-feet then supposed to be available in the Gila River (see Senator Johnson's statement, *supra,* p. 37), no one could have doubted for a moment the existence of a surplus in excess of the 7,500,000 acre-feet.

The subject matter of the discussion was again made clear by Senator Phipps on May 2, 1928, in response to a comment by Senator Johnson of California:

> MR. PHIPPS.
>
> * * * * *

> The Senator from California referred to the limit of 4,600,000 acre-feet of water written in this bill as the maximum amount which California might use per annum out of the stream. I think in that statement he was disregarding the fact that California would be entitled to at least her one-half of the surplus or additional waters *which are known to pass through the stream annually,* to the extent, it is estimated, of at least 1,000,000 acre-feet. [Calif. Compilation, p. 12; emphasis added.]

And after the Bratton amendment to the Phipps amendment to Section 4(a) had been approved but before final adoption of the Phipps amendment, Senator Pittman said:

> The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get * * *. [Arizona Compilation, p. 80.]
>
> As I understand this amendment, *Arizona today has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River.* It is there for their use * * *. [Arizona Compilation, p. 82.]
>
> We have already decided as to the division of the water, and we say that if the States wish they

can enter into a subsidiary agreement confirming that. * * * [Arizona Compilation, p. 85]

As the Special Master states (Rept. 180), "every expression of intent made by any Senator who had anything to do with the legislation" indicates that Congress was thinking only of mainstream waters when it placed limitations upon California and divided the surplus by the first paragraph of Section 4(a).

It follows that the allocation which the Secretary is authorized to make by Section 5 is an allocation of mainstream water which limits California to (i) 4,400,000 acre-feet of the first 7,500,000 acre-feet annually available in the mainstream and (ii) one-half of any surplus of mainstream waters in excess of 7,500,000 acre-feet.

C. THE CONTRACTS EXECUTED BY THE SECRETARY OF THE INTERIOR MAKE A VALID ALLOCATION OF THE MAINSTREAM WATERS

1. *The contracts constitute interstate allocations.* Since California's access to the Colorado River is restricted to the mainstream, it is obvious that contracts for delivery of water to users in California have no bearing on the controversy as to whether the allocations made by the Secretary are limited to mainstream waters. The only issue with respect to them is whether they conform to the Limitation Act and recognize present perfected rights.

Nevada has no access to tributaries entering the river below Lake Mead, and we have discussed in our opening brief (pp. 7–21) our reason for urging that uses from the tributaries entering above Lake Mead should be deducted from Nevada's share.

However, Arizona does have access to the lower tributaries, principally the Gila, and if the Project Act were properly interpreted to cover allocations of water from those sources, the Secretary of the Interior would have to consider uses on the tributaries in making his contract with Arizona. In 1944, the Secretary of the Interior entered into a contract with Arizona providing for the delivery from storage in Lake Mead of so much water as may be necessary for beneficial consumptive use in Arizona of a maximum of 2,800,000 acre-feet, taking into account the extent to which consumptive uses of water above Lake Mead diminish the flow into the reservoir. While the 1944 contract does not specifically refer to the Gila River, it in effect excludes water used from it because of its omission to provide for any reduction on account of such use.[14] It is our understanding that this contract with Arizona does not by itself authorize the actual delivery of water in compliance with Section 5 of the Project Act, since that Section requires that the contracts be entered into with the actual

[14] The "General Regulations for the Storage of Water in Boulder Canyon Reservoir and the Delivery Thereof in Arizona" issued by the Secretary of the Interior on February 7, 1933 (Pl. Ex. 28) provided for the delivery from storage in Lake Mead of "so much available water as may be necessary to enable the beneficial consumptive use in Arizona of not to exceed [2,800,000] acre-feet annually by all diversions affected from the Colorado River and its tributaries below Lee Ferry (but in addition to all uses from waters of the Gila River and its tributaries) * * *." These regulations were withdrawn when Arizona did not accept the proposed contract within a few months after their issuance.

users of the water. Rather, this contract is in the nature of a commitment by the Secretary to enter into contracts with users in Arizona up to the limit of 2,800,000 acre-feet. In this sense it is an allocation by the Secretary of that amount of water for future contractual use.

The important thing is that the Secretary's contract to deliver 2,800,000 acre-feet to Arizona, when added to the 300,000 acre-feet included in the Nevada contract and the 4,400,000 acre-feet permitted to California under its Limitation Act and the contracts made with users there, totals 7,500,000 acre-feet, the amount of mainstream water initially available for apportionment. Since all of these undertakings involve mainstream use, these contracts in fact exclude tributary use below Lake Mead from the Secretary's calculations.

It is true that in the contracts with Arizona and Nevada the Secretary has disclaimed any intention to resolve the dispute among the States respecting the meaning of the Project Act and the Colorado River Compact. It is also true that the contracts are specifically made subject to the availability, legally and physically, of water to fulfill the Secretary's obligations. As we interpret the Project Act, these contracts are in full conformity with the requirements of Section 4(a). What the Secretary said in order to preserve any prior rights of the States, is less important than what he did. And he did make an apportionment under the authority delegated to him by the Project Act. Therefore, the Special Master was entirely justified in finding, as he did, that the

allotments of project water to the contending States were validly made by the terms of the Project Act and the contracts executed thereunder.

2. *The contracts conform to the requirements of Section 6 for the satisfaction of present perfected rights.*

Section 6 of the Project Act requires that stored water be used for the "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact." California raises the question whether it is necessary for the Secretary of the Interior to protect all existing California projects as "present perfected rights" by limiting allocations for future uses in other States.

In our Brief in Support of Exceptions to the Special Master's Report and Recommended Decree, pp. 24–47, we have demonstrated that neither Section 14 nor Section 18 of the Project Act makes State laws of prior appropriation applicable to the distribution of the water supply of the Boulder Canyon Project. In the same context we have demonstrated that there is nothing in federal reclamation law or in 59 years of administration of that law to support the California contention that State laws relating to the appropriation, control, and distribution of water govern the administration of the water supplies of federal reclamation projects. We refer to, but do not repeat here, the arguments presented in that brief.

It is apparent that by the use of the term "present perfected rights" Congress meant to state the full extent of the obligation of the Secretary of the Interior to recognize priorities established through ap-

propriation and use. By not accepting the usual language of "prior appropriation", or making reference to State law as such, Congress showed that it intended to accomplish a different result than would have been achieved by adopting those criteria. Under the law generally applied in the States recognizing prior appropriation, a landowner may establish a right to water superior to subsequent claims by filing a notice and diligently proceeding to construct a project to put the water to use. His right to the full amount of water which the project could ultimately use relates back to the time he makes the initial appropriation, even though he does not get the water until the completion of the project. By using the term "present perfected" Congress indicated that the projects it intended to recognize must not only have been initiated, but have been carried through to completion before the effective date of the Project Act. Thus, the Special Master concluded that a "present perfected right" is one "acquired in compliance with the formalities of state law" and constituting "an actual diversion and beneficial use of a specific quantity of water applied to a defined area of land or to a particular domestic or industrial use." (Rept. 308.)[15]

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[15] We are not concerned here with reserved rights of the United States, which differ from appropriative rights in that they are not dependent upon affirmative action to bring them into existence. The water rights already exist and are reserved for a particular use by reason of an express or implied reservation. The Special Master quite properly found that the federal reserved rights should also be considered "present perfected rights" under the Act. See *infra*, pp. 65–66, 89–90.

But it is unnecessary to determine whether all or part of California's projects are to be considered "present perfected rights" within the meaning of the Project Act. California cannot complain that these rights are not given sufficient recognition because in its Limitation Act it specifically accepted, as the Project Act required, the 4,400,000 acre-foot allocation, plus one half of the surplus, in satisfaction of "any rights that may now exist." So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met.

The priorities as between users in California are established by the Seven-Party Agreement which accords with the recommendation of the Chief of the Division of Water Resources of the State of California. Therefore, California's only claim that its present perfected rights are being interfered with must be based on the theory that when the water available to it falls below 4,400,000 acre-feet, all of its uses must be met in full before any new uses in other States can be recognized. It is not conceivable that Congress had any such intention in the use of the phrase. Since the contracts with California users do give full recognition to the State's own agreement as to priority, California is in no position to complain with regard to recognition of perfected rights.

It should also be noted that the decree recommended by the Special Master in paragraph II(B)(5) gives ample protection to all present perfected rights as between States. Under this provision, if the amount of water available in a State's allotment proves to be insufficient to satisfy its present perfected rights, it

is entitled to draw from the allotments to the other two States to make up the deficiency. In California's case this right is limited by its own Limitation Act setting a ceiling of 4,400,000 acre-feet even with respect to its perfected rights. Therefore, under the contracts, as interpreted by the decree, California's rights in this respect are fully protected.

D. THE ALLOCATION MADE IN THE CONTRACTS EXECUTED BY THE SECRETARY OF THE INTERIOR SUPPORTS THOSE PORTIONS OF THE DECREE RELATING TO THE INTERSTATE DIVISION OF MAINSTREAM WATERS

The decree proposed by the Special Master, if adopted, would terminate the dispute among the Lower Basin States by affirming and enforcing the interstate allocations made by the Secretary of the Interior through his contracts under the Project Act.

Specifically, the decree by Section II(B) would affirm by order of this Court the apportionment from the first 7,500,000 acre-feet available in the mainstream of the Colorado River of 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada. Further, it would provide for suitable allocations if surplus water is available.

The decree orders a pro rata reduction of these quantities if insufficient water is available to meet the full allotments. Although it might have been argued that the Secretary of the Interior is authorized by the Project Act to determine how deficiencies should be met, just as he is authorized to make the allotments in the first place, the pro rata reduction of allotments in the case of deficiencies has been the practice gen-

erally followed by the Secretary of the Interior for 59 years in his administration of reclamation projects. It is reasonable to construe these contracts in the light of this history.

California argues that the allocations approved by the Special Master are "based on error", the consequence of which can only be described by the word "disaster". (California Opening Br., p. 50.) California amplifies this conclusion by a prediction of the effect of the decree on the future operation of the Metropolitan Water District, which pumps Colorado River water over the mountains to the South Coastal Plain in California. (California Opening Br., pp. 266–277.) The very foundation of California's argument is that the Upper Basin States will in the near future utilize the entire 7,500,000 acre-feet allotted to them by the Compact. Surely the Upper Basin has every right to do so, and presumably the development of the country will be advanced by this area's putting to productive use its fair share of the water of the Colorado River. But even the California argument does not predict this result before 1990 (California Opening Br., p. 261), and the Bureau of Reclamation is much more conservative as to the time when the Upper Basin will achieve use of its full apportionment. (Tr. 21343–21344; S. Doc. 101, 85th Cong., 2d Sess., p. 13.) The dangers depicted by California must be discounted on the basis of remoteness. In the intervening years there may well be many advances in science leading to better conservation and more efficient storage, transportation, and use of water. Other

sources of water may be developed, such as saline conversion plants. California would go too far in mortgaging the present to protect the remote future, perhaps because it is Arizona's present that will be sacrificed as security for California's future. We agree with the Special Master's conclusion (Rept. 102):

> * * * the record in this case gives no indication that the "chaotic disaster" which California fears will, or is likely to, materialize. Her dire predictions appear to be unfounded.

II

THE SPECIAL MASTER'S RECOMMENDED ALLOCATIONS OF WATER FOR USE ON FEDERAL RESERVATIONS SUFFICIENT IN AMOUNT TO ACCOMPLISH THE PURPOSES OF THE RESERVATIONS ARE CORRECT

The United States entered this litigation partly because the case involves the disposition of water controlled by the Secretary of the Interior under the Boulder Canyon Project Act and the contracts executed under Section 5. The United States is also interested as the guardian of Indian Tribes and as the proprietor of Indian and other federal reservations. We deal with the latter interests in this portion of our brief.

Under the decree recommended by the Special Master the Secretary is authorized to release water in specified quantities for the benefit of five Indian reservations, two national wildlife refuges, and a national recreation area. The decree also secures the right of the United States to divert water from the

mainstream of the Gila and San Francisco Rivers in quantities necessary to fulfill the purposes of the Gila National Forest with a priority as of the dates of the establishment of each forest area. We excepted to a small part of this portion of the decree (see United States Brief in Support of Exceptions, pp. 51 to 53), but are satisfied that in other respects the decree adequately protects the claims of the United States for Indian and other federal reservations.

The portions of the decree relating to Indian and other reservations may be supported upon either of two independently sufficient lines of reason. If, as we sought to demonstrate in Point I, the Secretary of the Interior is authorized to allocate the waters of the mainstream of the Colorado River for use by citizens of the lower basin, then the Secretary necessarily has the same power to use, or to reserve the use of, a portion of those waters for the lands of the United States. The only restriction upon his discretion in this regard is the duty under Section 6 to protect "present perfected rights."

The rights of the United States to waters for these federal establishments also stem from its property rights in the waters of the Colorado River and its tributaries. Ownership of the right to use these waters on the public domain was acquired by the United States through the original treaties of cession with Mexico. These property rights were not abandoned upon opening the public domain, nor were they surrendered to California, Nevada and Arizona upon

their admision to statehood. When the reservations were established, the United States reserved the rights to use adjacent waters on the reservations in quantities sufficient to satisfy their ultimate needs.

The logic of this line of argument, which we develop at pages 61 to 93 below, would seem to require an allocation to the United States for the satisfaction of these rights separate from the allocations to Arizona, California and Nevada. Before the Special Master the United States did indeed, at one time, make this contention. We do not press the point here because the recommended decree appears sufficient for all practical purposes to protect the federal establishments. It treats the rights appurtenant to Indian reservations as "present perfected rights" under Section 6 of the Project Act, and therefore, accords them their appropriate priorities along with other "present perfected rights" in time of shortage, when present perfected rights can be satisfied only through use of waters otherwise allocated to another State. Rights reserved for reservations established subsequent to the Project Act are recognized as having priorities, intrastate, as of the respective dates of establishment of the reservations.

We wish to emphasize, however, that the property rights of the United States to use of the waters of the Colorado River and its tributaries on behalf of federal establishments are entitled to recognition, with the priorities the Report accords them, under the reasoning just outlined regardless of whether the in-

terstate allocation be made upon the central thesis adopted by the Special Master or upon the theory advocated by California or, indeed, upon any other theory. Yet there is no inconsistency between the Master's thesis concerning the effect of the Project Act and recognition of the property rights to the use of water of the United States by virtue of implied reservations. The rights of the United States appurtenant to the reservations are "present perfected rights" within the meaning of Section 6 and the Secretary is therefore not only entitled, but obliged, to deliver the necessary water. The nub of the matter is that the rights of the United States appurtenant to the federal establishments are to be safeguarded whatever disposition is made of other issues.

Arizona's Opening Brief is divided into two parts. Part I, relating to the "controversy among Arizona, California and Nevada," generally supports the Special Master's Report, upholding the power of the United States to construct and operate the Boulder Canyon Project and to make a "statutory [interstate] apportionment" of the waters controlled by the project. This has been done, Arizona asserts, in exercise of the United States' "dominion and plenary power over navigable waters of the United States." (Arizona Opening Brief, pp. 24, 30.) Part II relates to a different subject. Here, Arizona assesses the "claims of the United States to water." In doing so, counsel appear to forget all that is asserted

in the 100 pages of Part I in an effort to show that the United States is without power to use its navigable waters on federal establishments.[16]

The inconsistency between the two arguments is apparent, and we urge that the principal arguments in Part I are right and those in Part II are wrong.

A. UNDER THE PROJECT ACT THE SECRETARY OF THE INTERIOR HAS THE SAME POWER TO ALLOCATE WATER FOR USE ON FEDERAL ESTABLISHMENTS AS HE HAS TO ALLOCATE WATER TO OTHER USERS

The same principles which support the power of the United States to construct and operate the Boulder Canyon Project and to contract for the delivery of stored waters to others support its power to use the water itself and to reserve it for use on Indian and other reservations. In a prior portion of this brief, we have argued that this power exists under the Commerce Clause, the General Welfare Clause and the Property Clause. (*Supra,* pp. 22–26, *et seq.*) Decisions of this Court with respect to comparable projects sustain that power. See, *e.g., Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275. In fact, in the original litigation as to this very project, though

[16] At p. 283 of its opening brief, California notes its disagreement with, but does not argue, the Master's recommendations respecting the reserved rights of the United States. Because Arizona vigorously disputes those recommendations as to the reservations in Arizona, we refer in this part of the brief especially to the reservations located there. The arguments made, of course, equally support the United States' reserved rights to use water on the several reservation areas in California.

the opinion was carefully limited, the decision goes far toward sustaining the power here in question. *Arizona* v. *California,* 283 U.S. 423. Since the Secretary of the Interior has the power to contract for the delivery of stored water "for irrigation and domestic uses," it seems clear that he derives power from the same sources to use mainstream water for similar purposes on federal lands.

Under these circumstances, there is no foundation for Arizona's attack upon the United States' power to use a part of the mainstream waters for its own purposes, including the sustenance of its Indian wards. Surely, if Congress has the power to provide by statute for a contract system to govern allocation of the waters of the Colorado River, it likewise has the power to provide for the use of those waters on federal lands. Just as surely, if Congress by its direction for the "satisfaction of present perfected rights" can breathe life into claims of appropriative rights under state law to use the navigable waters of the Colorado River, *supra,* pp. 49 to 52,[17] it can by the same method cure any asserted defects in the United States' claims of reserved rights to use those waters on federal establishments.

Congress has expressly indicated its intention to exercise its powers so that the Project waters are

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[17] In its opening brief, p. 34, Arizona says: "Congress in the exercise of this power and dominion [under the Commerce Clause of the Constitution] may abolish, limit or preserve, as it deems fit, pre-existing rights to the use of navigable water."

available for use on lands of the United States. One of the purposes expressly enumerated in Section 1 of the Project Act is "providing for storage and for the delivery of the stored waters * * * for reclamation of public lands and other beneficial uses * * *."[18] In addition to the reclamation of "public lands," the reclamation of Indian reservations is specifically referred to in Section 2 of the Act of August 30, 1935, 49 Stat. 1039, by which Parker and Headgate Rock Dams were authorized.

Under these statutory provisions, it is plain that the Secretary of the Interior has full authority to release project waters for use on the mainstream Indian reservations and other lands of the United States.

At page 312 of the Report, fn. 3a, the Special Master observes: "Of course the Secretary need not contract with himself, and hence no contracts are required for Indian Reservations and similar federal establishments." Indeed, the Arizona 1944 contract, subdivision (1) of Article 7, in addition to providing for deliveries to individuals, irrigation districts, corporations or political subdivisions under contract with the Secretary of the Interior, specifically provides that deliveries of water may be made under the contract "to lands of the United States within Arizona."

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[18] See, also, the discussion, *infra*, pp. 89–90, respecting the inclusion of federal reserved rights in the Section 6 requirement for "satisfaction of present perfected rights."

B. THE UNITED STATES HAS RESERVED, FROM ITS ORIGINAL PROPRIETARY RIGHTS, THE RIGHT TO USE SUFFICIENT QUANTITIES OF THE APPURTENANT WATERS TO SATISFY THE ULTIMATE NEEDS OF INDIAN RESERVATIONS AND TO ACCOMPLISH THE PURPOSE OF OTHER FEDERAL RESERVATIONS. THESE RESERVED RIGHTS ARE "PRESENT PERFECTED RIGHTS" FOR WHICH WATER MUST BE MADE AVAILABLE UNDER THE PROJECT ACT

1. *Ownership of rights to use waters of the Colorado River and its tributaries on the public domain was acquired by the United States through treaties with Mexico.*

The territory comprising the Lower Colorado River basin was acquired by the United States through treaties with Mexico. The major portion of the territory was ceded in 1848 by the Treaty of Guadalupe Hidalgo. 9 Stat. 922. A small portion south of the Gila River in Arizona was acquired by the Gadsden Purchase in 1854. 10 Stat. 1031. When the United States acquired this territory by cession from Mexico, it became the owner not only of the land itself, but of all rights pertaining thereto as well, except for those lands and appurtenant rights granted to individuals by the previous sovereign. *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U.S. 10, 15–16; *Knight* v. *United States Land Ass'n,* 142 U.S. 161, 183–184. The right to use the appurtenant waters was one of the whole bundle of rights so acquired.[19]

[19] When the United States became owner of the lands in this territory, there was no other government or person with authority to assert any right to use the water on the lands except those individuals holding rights previously granted by the Spanish or Mexican governments. There was no authority in others to assert title because the doctrine of appropri-

The federal proprietorship has long been recognized. Kinney, one of the leading authorities on water rights, stated in 1912:

> The Government is still the owner of the surplus of the waters flowing upon the public domain, or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * * [Kinney, *Irrigation and Water Rights,* Vol. 1, 2d ed., pp. 692–693.]

And, as recently as 1960, this Court in *United States* v. *Grand River Dam Authority,* 363 U.S. 229, in denying the Authority's assertion that it had compensable rights to use the waters of the Grand River under an act of the Oklahoma Legislature, declared at p. 235:

> Moreover, no water rights condemned under this Act are shown to have passed to Oklahoma and from Oklahoma to respondent. Yet the Federal Government was the initial proprietor in these western lands and any claim by a State or by others must derive from this federal title. See *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 747; *Federal Power Commission* v. *Oregon,* 349 U.S. 435. * * *

See also *Lux* v. *Haggin,* 69 Cal. 255, 338–339; *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 746–

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ation was not yet adopted by the United States and, as the Court said in *Atchison* v. *Peterson,* 20 Wall. 507, 512: "* * * the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship * * *."

747; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162; *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U.S. 690, 703.

The federal proprietorship of the rights to the use of waters in the territory acquired from Mexico is the predicate of the Desert Land Act of 1877, and its precursor Acts of 1866 and 1870. In this legislation Congress provided for the acquisition from the United States of rights to use the surplus unappropriated non-navigable waters on the public lands in certain States by appropriation in accordance with local laws and customs. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142. As the Court explained in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 447–448:

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of *possessory rights* on public lands asserted under local laws and customs. *Jennison* v. *Kirk*, 98 U.S. 453. The Desert Land Act severed, for *purposes of private acquisition*, soil and water rights on public lands, and provided that *such water rights* were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142. See also, *Nebraska* v. *Wyoming*, 385 U.S. 589, 611–616. [Emphasis added.]

The decision of this Court involving the reservation of rights to the use of water for Indian reservations is founded upon the federal ownership of the usufruct of the unappropriated waters upon the pub-

lic domain in the public land States. In *Winters* v. *United States,* 207 U.S. 564, 577, the Court said:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. * * *

If the government had not already owned the water rights, it could not have reserved them. Reservation of the right to use the water upon the reserved land, like severance of the land and the water thereon for purposes of private acquisition, is legally dependent upon ownership of the interest reserved. See also group of Ninth Circuit cases cited *infra,* p. 66. The settlement of Indians upon the reservations would have been impractical had it not been possible for the United States as owner of the reservation lands to assure the use of the appurtenant waters so that the Indians for whom the reservations were established could obtain a sustenance.

2. *The United States has never surrendered its proprietary right to use the waters of the Colorado River appurtenant to its reservations.*

The rights of the United States to use the waters on the public domain, being property rights, may be acquired by others only as authorized by Congress. Constitution, Art. IV, Sec. 3; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389; *Van Brocklin* v. *Tennessee,* 117 U.S. 151, 168; *United States* v. *California,* 332 U.S. 19, 27. As observed above, the Desert Land Act is such an authorization with respect to *non-navigable* waters on the *public* lands in certain States. But this Act is not applicable with respect

to waters upon *reserved* lands (*Federal Power Commission* v. *Oregon,* 349 U.S. 435, 448), and by its express terms it does not authorize the appropriation of rights to use *navigable* waters anywhere. Nor is there any other federal statute which has transferred these proprietary rights from the United States. Arizona claims that its admission to the Union had that result, but we shall deal with that assertion below. See *infra,* pp. 84–89.

3. The establishment of the Indian and other federal reservations here involved has resulted in the reservation of the appurtenant water rights necessary to accomplish the purposes of the reservations.

(a) *The United States may apply its retained rights to the use of the water to the purposes of the reservations.*

The establishment of a federal reservation of lands out of the public domain also reserves, contemporaneously, the right to use the appurtenant waters for the purposes of the reservation. Thereafter the resulting federal right to use the appurtenant waters is not subject to defeasance through appropriation by others, even if the waters were previously subject to private acquisition under the Desert Land Act. In *Winters* v. *United States,* 207 U.S. 564, this Court held that the very establishment of an Indian reservation out of public lands itself implied a Congressional intention also to reserve the use of all appurtenant waters necessary for the fulfillment of the purposes for which the lands were reserved. The implication was found in the circumstances surrounding the establishment

of the Indian reservation, with principal emphasis upon the geographical fact that without the use of the waters on the reservation the lands would be worthless and incapable of supporting the Indians. Sources of water supply on lands reserved out of the public domain cannot be appropriated under the Desert Land Act even when there is no indication of the intention with which the reservation was established, because the Act is expressly restricted to "sources of water supply upon the public lands * * *" and reservations are not "public lands." *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 448; see also *United States* v. *Winters,* 143 Fed. 740 (C.A. 9), affirmed, 207 U.S. 564; *Conrad Investment Co.* v. *United States,* 161 Fed. 829 (C.A. 9); *United States* v. *McIntire,* 101 F. 2d 650 (C.A. 9); *United States* v. *Walker River Irrigation District,* 104 F. 2d 334 (C.A. 9); *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321 (C.A. 9), certiorari denied, 352 U.S. 988.

The application of these principles to the present case is not affected by the navigability of the waters. The only real difference in this respect between navigable and non-navigable waters may be that as to the former there is no need for reservation to preserve the rights against appropriation by others because there is no statute which provides for their transfer or appropriation. As noted above, the Desert Land Act by its express terms applies only with respect to non-navigable waters on the public lands. Its precursor Acts of 1866 and 1870 have been similarly construed by this Court. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142;

United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690.[20]

But the fact that the United States has not generally authorized the acquisition by others of rights to use the navigable waters *vis-à-vis* the United States does not mean the United States itself is precluded from using such waters for its own purposes. Neither does it mean that the United States is precluded from establishing along a navigable stream a reservation of federal lands for federal purposes requiring the use of such waters. It simply means that no claim of privately owned appropriative right to use such waters to which Congress has not given its consent can be asserted against use by the United States on a reservation, regardless of whether the private claim of right was initiated before or after the date of establishment of the reservation. The same considerations which establish the power of the United States to reserve rights to use non-navigable waters compel this conclusion with respect to navigable waters. The use of navigable waters for the benefit

[20] In the *Rio Grande* case, the Court, at pp. 706–707, said: This legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. * * * To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.

of government property bordering on the stream is undoubtedly subject to their use for purposes of commerce at the direction of Congress, but this qualification does not militate against the right of the United States to make use of the water upon the reservation if it chooses.[21]

(b) *The President has authority to set apart reservations of public lands and to reserve rights to use the appurtenant navigable waters.*

Arizona questions the authority of the President to "reserve navigable water" by executive order (Ariz. Opening Br., pp. 129, *et seq.*). The argument

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[21] *United States* v. *Winans*, 198 U.S. 371, involved an actual reservation of a water right, in that case the right to take fish, in the navigable waters of the Columbia River prior to the admission of Washington to the Union. At page 384, the Court said:

> * * * surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." * * *

And in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, when dealing with interference by an upstream structure with the use of the stream at a point where it was navigable, this Court said (p. 703):

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * *

is really directed toward the authority of the President to establish federal reservations for, as is demonstrated by the Court's decisions discussed above (and see Rept. 257–266, 291–294, 296–298), the reservation of the use of waters appurtenant to federal areas results from the reservation of the land.

(1) *Indian reservations.*

Arizona's argument necessarily excepts the original 75,000 acres of the Colorado River Indian Reservation which were set apart by Congress in the Act of March 3, 1865 (13 Stat. 541, 559; U.S. Ex. 501). This is a substantial exception since the area of the original statutory reservation adjacent to the Colorado River in Arizona includes within it a great part of the irrigable acreage of this reservation for which the Special Master recommends water rights be decreed. The Congressional intent to reserve rights to use water of the Colorado River manifested both in the selected location of this reservation and the many appropriation bills to finance irrigation works on such lands will be demonstrated *infra*, pp. 73–75.

With respect to the remainder of the Colorado River Indian Reservation added by executive orders, as well as the other mainstream Indian reservations, the power of the President to reserve public lands for the Indians was recognized and confirmed by Congress as early as 1887. The General Indian Allotment Act then enacted (Act of February 8, 1887, 24 Stat. 388) authorized the President to allot lands for "any reservation created for their [Indian] use, either by treaty stipulation or by virtue of an act of Congress

or executive order setting apart the same for their [Indian] use." The Court of Appeals for the Ninth Circuit in *United States* v. *Walker River Irrigation District,* 104 F. 2d 334, recognized that the effect of the Allotment Act was to make applicable to reservations created by acts of Congress or by executive order the same rules applying to reservations established by treaty.

Later Congressional enactment reposed extensive powers in the President to reserve public lands for various public purposes. By the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, the President was specifically authorized to reserve public lands of the United States for "water-power sites, irrigation, classification of lands, or other public purposes * * * and such * * * reservations shall remain in force until revoked by him or by an Act of Congress." The presidential authority to establish Indian reservations was specifically terminated with regard to the States of New Mexico and Arizona by the Act of May 25, 1918, 40 Stat. 561, 570, 25 U.S.C. 211, and by the general Act of June 30, 1919, 41 Stat. 3, 34, providing as follows:

> That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress.

These statutes constituted a clear change in the Congressional policy with regard to the establishment of Indian reservations by executive order. Until that time, Congress had imposed no restrictions on the President in this respect.

The extent of the practice of creating Indian reservations by executive order is reflected in the Court's opinion in *United States* v. *Midwest Oil Company,* 236 U.S. 459, 470, where it is stated that prior to the year 1910 there had been issued 99 executive orders establishing or enlarging Indian reservations. The congressional acquiescence which the Court found to apply to such an extensive practice can be demonstrated with regard to the individual reservations here involved. For example, there are over 50 appropriation acts specifically providing for the development of irrigation of the Colorado River Indian Reservation, none of which distinguishes between the original reservation and the area added by executive orders. (U.S. Ex. 507 for identification.)

(2) *Other federal reservations.*

As is evident from the text of the Act of June 25, 1910, 43 U.S.C. 141, quoted in part *supra,* p. 70, Congress there confirmed the broad powers of the President to deal with public lands. These powers continued to apply to reservation of public lands for all public purposes except that as to Indian reservations they were terminated by the Acts of May 25, 1918 and June 30, 1919, *supra,* p. 70. Accordingly, there can be no question of the authority of the President to establish by executive order the Lake Mead National Recreation Area (Executive Orders dated May 3, 1929 (No. 5105) and April 25, 1930 (No. 5339)), the Havasu Lake National Wildlife Refuge (Executive Order of January 22, 1941 (No. 8647)), and the

Imperial National Wildlife Refuge (Executive Order of February 14, 1941 (No. 8685)).[22]

In the case of the Gila National Forest located on the mainstream of the Gila River, the Forest was established by Presidential Proclamation dated March 2, 1899, pursuant to the express provisions of Section 24 of the Act of March 3, 1891 (26 Stat. 1103, 16 U.S.C. 471). The area of the forest reserve was later enlarged and modified (U.S. Exs. 2720A–2720B).

(c) *Water rights have been reserved for the particular reservations here involved.*

In sustaining the claims of the United States for use of water on mainstream Indian reservations, the Special Master has applied the *Winters* doctrine which holds, as explained above, that the creation of an Indian reservation out of the public domain, whether by treaty, statute, or executive order, in arid country also implies a reservation of the beneficial use of the quantity of water necessary to effectuate the purposes of the reservation. Confronted with this established rule, Arizona seeks to distinguish the degree of proof required to show the intent of Congress, arguing that there must be a "clear manifestation of intent to reserve *navigable* water." (Arizona Opening Br., p. 135, emphasis added.) No logical reason is advanced for requiring an express intent to reserve rights with respect to navigable waters when implied

[22] Attention is invited to pages 51 to 53 of the United States' Brief in Support of Exceptions. The United States is entitled, without regard to the matter of reservation, to use the waters salvaged by development of the Havasu and Imperial Wildlife Refuges for the operation of those refuges.

intent is sufficient for all others. The considerations which have resulted in the finding of intent by implication in the decided cases require that the same implications be found when the waters are navigable. If there is to be any difference, it should be in favor of the reservation of navigable waters because the Desert Land Act does not open them to private appropriation.

(1) *The Colorado River Indian Reservation.*

Although it is not necessary to find express intent to reserve navigable waters, the Congressional intent is easily demonstrated with respect to the Colorado River Indian Reservation by examination of events contemporaneous with the creation of the Reservation. The Superintendent of Indian Affairs for Arizona had been authorized to select a reservation for Indians of the Colorado River (U.S. Ex. 511). He caused an engineering survey to be made of 75,000 acres of valley lands on the eastern bank of the Colorado River from "Corner Rock to Halfway Bend." (U.S. Ex. 513, p. 157.) The conclusion of the survey was that the lands were most fertile and highly suitable for irrigation from the Colorado River (U.S. Ex. 514). This report was transmitted to, and considered by, Congress (U.S. Ex. 502). By the Act of March 3, 1865, there was set apart in the Territory of Arizona 75,000 acres from Half-Way Bend to Corner Rock on the Colorado River for an Indian reservation "for the Indians of said river and its tributaries" (U.S. Ex. 501; 13 Stat. 541, 559).

A need for water for irrigation to make the reservation habitable was at least as plain from the geography of the area as was the need on which the Court based its implication of intent in *Winters*. This was articulated by the Delegate from the Territory of Arizona in arguing, contemporaneously with approval of the Act creating the Reservation, for an appropriation with which to initiate irrigation on the Reservation.[23]

> Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life; and all they ask of you is to give them a few agricultural implements to enable them to dig an irrigating canal by which their lands may be watered and their fields irrigated, so that they may enjoy the means of existence. * * * [Cong. Globe, March 2, 1865, p. 1321; U.S. Ex. 502.]

Notwithstanding this manifest concern with irrigability of the reservation thus created, Arizona finds it significant that neither the statute of creation nor later executive orders mention "water of the Colorado River much less any reservation of that water" (Arizona Opening Br., p. 140).[24] But Arizona neglects to mention that the Executive Order of May 15, 1876 (U.S. Ex. 505), enlarged the reservation by *including* within its boundaries the Colorado River.

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[23] The first appropriation, of $50,000, was made by the Act of March 2, 1867. (U.S. Ex. 507 for identification.)

[24] The same argument was advanced in *Winters*, but the Court found the omission did not defeat the reservation implied by the circumstances. 207 U.S. at 576; 143 Fed. 740, at 745.

Continuation of the intent to reserve a quantity of water sufficient to irrigate a large area is demonstrated by appropriation acts commencing in 1867, which financed construction of works of various sorts for the diversion of Colorado River water to Reservation lands, culminating in the completion in 1941 of Headgate Rock Dam by which 105,000 acres of the Reservation can be irrigated by gravity. (U.S. Ex. 507 for identification; Tr. 13,992.)

Arizona seeks to detract from this continuous policy based on the original purpose to enable the Indians to obtain a livelihood dependent on irrigation on the Reservation by referring to the Act of April 21, 1904, 33 Stat. 224, which authorizes inclusion of lands of the Colorado River Indian Reservation in a reclamation project under the Federal Reclamation Act of 1902. (Ariz. Opening Br., p. 142.) But this 1904 statute dealt with the application of the 1902 Act, which has in fact never been applied; it has no reference to the reserved rights which have been developed on the Reservation. Nor is it apparent how Arizona gains any comfort from the Appropriations Act of April 4, 1910, 36 Stat. 273, and the later appropriations acts referred to in its brief (Ariz. Opening Br., pp. 144–148) which show Congress' purpose through the years to develop an irrigation project on the Colorado River Indian Reservation of the magnitude of 150,000 acres. The appropriations supplement, rather than negate, the existing authority. The significant fact is that a substantial project was built—it is in being and constitutes the best evidence of congressional and executive intent to reserve adequate

water from the mainstream of the Colorado River for use on the project.

(2) *Other mainstream Indian reservations.*

The considerations reviewed above support the Special Master's conclusion that under the *Winters* doctrine, water rights were also reserved for the other mainstream Indian reservations. The aridity of their climate is substantially identical to that of the Colorado River Indian Reservation. The need for water for irrigated agriculture to provide even a minimum subsistence for those living on the reservations is the same. Without water, the reservation lands are "a barren waste" (*Winters* v. *United States, supra,* 207 U.S. at 577). Arizona's objections are based more on denial of the power of the Executive to establish the reservations than on doubt as to whether there was an implied reservation of water rights. See Arizona's comments on Fort Mohave Reservation (Arizona Opening Br., pp. 148–150). And, as is pointed out above, the specific provisions for water from other sources, referred to by Arizona, may be taken to supplement rather than supersede the reserved rights.

(3) *The Gila National Forest.*

Arizona disagrees with, but does not argue, the Master's conclusion (Rept. 335) that the United States has reserved rights to use the waters of the Gila and San Francisco Rivers on the Gila National Forest.[25] Arizona states that it is not necessary that this

[25] Since no specific challenge has been directed at the Special Master's similar conclusions respecting the Lake Mead National Recreation Area (Rept. 291) and the Havasu and Imperial National Wildlife Refuges (Rept. 296), we rely simply on the general principles above discussed to support those conclusions.

question be resolved, since, according to the contention, the Master erred in his finding of an intent to reserve water for national forest purposes. (Arizona Opening Br., p. 193.)

Arizona bases its contention on the Acts of March 3, 1891 (26 Stat. 1101), and June 4, 1897 (30 Stat. 36), and certain statements and declarations by congressional committees and the Forest Service and Department of Agriculture, which Arizona apparently presents as administrative construction of the mentioned acts. Arizona concludes this argument with the statement of an Assistant Secretary of Agriculture in 1956 that:

> For example, it has been the firmly established policy of this Department for nearly half a century to acquire, in strict accordance with State laws and procedures, the water rights needed for the administration of the national forests. [Arizona Opening Br., p. 198.]

This statement is taken from hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs.

Arizona's argument ignores the fact that Section 1 of the Act of June 4, 1897, 30 Stat. 36 (16 U.S.C. 481) expressly provides [26] that water on the national forests may be used in accordance with state or *federal* law. Surely, there is nothing in this language to sup-

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[26] "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

port the contention that the United States may not exercise, by reservation or otherwise, its rights to use the unappropriated waters which pertain to the national forest lands. As the Special Master stated: "The power of the United States to make such a reservation with respect to the Forest cannot be logically differentiated from the power of the United States with respect to Indian Reservations and Recreation Areas." (Rept. 335.)

Moreover, we deny that there has been any consistent administrative interpretation that rights of the United States to use water on national forests must be obtained in accordance with State law. Explanatory of the policy of the Department of Agriculture and the Forest Service in proceeding under State law, is a recent statement of the Secretary of Agriculture made to the Senate Committee on Interior and Insular Affairs.

> It has long been the policy of this Department to make filings with appropriate State agencies and in accordance with the procedures established by State law on waters needed in connection with the development and administration of the National Forests. In this way, we have endeavored to indicate those rights which are needed in connection with the administration of the National Forests so that both the State officials and those seeking to use the waters from the National Forests would have information as to the needs of the Federal Government. The project of making these filings is not complete but is proceeding as rapidly as funds and

manpower permit. The Department plans to continue this policy.[27]

Thus it appears that the filings are for the purpose of giving information, not of establishing legal rights.

(d) *The water rights reserved include at least sufficient water to accomplish the purposes of the reservations.*

Generally speaking, the quantity of water necessary to accomplish the purpose of a reservation is the minimum measure of the rights to use water reserved by the reservation of public lands for federal purposes. In the case of an Indian reservation, the measure is the quantity required to satisfy the ultimate needs of the Indians of the reservation.

The Special Master concluded "that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable land in a Reservation and to supply related stock and do-

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[27] Letter of June 14, 1961 from Orville L. Freeman, Secretary of Agriculture to Senator Clinton P. Anderson, Chairman, Senate Committee on Interior and Insular Affairs (Hearings before the Committee on Interior and Insular Affairs, United States Senate, 87th Cong., 1st Sess., on problems arising from relationships between the States and the Federal Government with respect to the development and control of Water Resources, June 15 and 16, 1961.)

The fact that in the Lower Colorado Basin the project for making filings under State law, referred to in the Secretary's letter, had been completed as of the close of the evidence before the Special Master with respect to only 537 places of use within the national forests in the basin out of a total of 5204 places of present use demonstrates the error of the Arizona argument. U.S. Exs. 2702–2722.

mestic uses." (Rept. 262.)[28] This conclusion is amply supported by decisions of this Court and the Court of Appeals for the Ninth Circuit recognizing that the reserved right extends to the ultimate needs of the Indians. *United States* v. *Powers,* 305 U.S. 527; *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *Conrad Investment Co.* v. *United States,* 161 Fed. 829 (C.A. 9).

Arizona's argument that irrigable acreage is not a correct measure of the reserved water right was made to the Special Master who responded as follows:

> * * * Arizona seems to envisage that the United States intended to create water rights in gross which would fluctuate in magnitude as the Indian population and needs fluctuated, the water right being measured by the amount of water needed at any particular time by the Indians actually inhabiting a particular Reservation. As pointed out above, the more sensible conclusion is that the United States in-

[28] Whether the reservation of water rights is limited to the needs of the Indians for irrigation and related stock and domestic uses is a question which need not be considered insofar as the reservations for which the Master recommends that rights be decreed are concerned. In *Conrad Investment Co.* v. *United States,* 161 Fed. 829, 831, the Court of Appeals for the Ninth Circuit recognized that the accomplishment of "other useful purposes" is included within the intent of the reservation. Cf. Rept. 265. In an appropriate case, we would assert that the needs of the Indians to be satisfied by the reserved water right include additional uses of the reserved lands which serve the economic necessities of the Indians entitled to reside there.

tended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights.

But even if Arizona were correct in her contention, the most feasible way to give full effect to the water rights created by the United States, as Arizona defines them, would be to decree to each Reservation enough water to irrigate all of the practicably irrigable acreage. It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements. Even if, as Arizona argues, the reservation of water was in gross for Indians and not Reservation lands, the Indians' needs may well increase in the future and these increased needs would have to be provided for. * * * [Rept. 263.]

The necessity for making provision for the expanding needs of the Indians of the Lower Colorado River Basin as the Special Master recommends (Rept. 262, *et seq.*) is amply demonstrated by the record in this case. The population of the Indians of the Lower Basin is increasing and a total population of over 130,000 can reasonably be expected by the year 1970. Tr. 15,237. They presently number in the neighborhood of 120,000. Calif. Ex. 2600–1 through 2600–26. The mainstream Indian reservations include 136,636 acres of irrigable land. Certainly it cannot be said that water rights for 136,636 acres as the Special

Master recommends is in excess of the future needs of the Indians of the reservations.[29]

The Colorado River Reservation was established "for the Indians of said river and its tributaries." Act of March 3, 1865, *supra,* p. 69.[30] Arizona says "the Indians of said river and its tributaries" means only those tribes which were found in the area of the Lower Basin near the mainstream in 1865. Congress has indicated a contrary view. By the Act of April 19, 1950, 64 Stat. 44, Congress authorized the appropriation of $88,570,000 to promote the rehabilitation of the Navajo and Hopi tribes in better utilization of the Navajo and Hopi Indian Reservations and for other purposes, including the relocation and resettlement of Navajo and Hopi Indians on the Colorado River Indian Reservation. Speculation as to considerations which might deter the settlement there of additional Indians, as argued by Arizona, is not a proper basis for limiting the quantum of the water rights reserved for a reservation established "for the Indians of the [Colorado] river and its tributaries."

Arizona singles out for separate treatment the quantity of water allocated to the Fort Mohave Indian

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[29] Even were the matter of need to be measured by the present population of the organized tribes entitled to reside on the several reservations, it is to be noted that the irrigable lands per Indian, calculable from the table at page 157 of Arizona's brief, would in no case be as much as the irrigable acreage allowed under Federal Reclamation law for support of a family, and in most instances it would be very greatly less.

[30] The Fort Mohave Reservation was established "for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon." U.S. Exs. 1304, 1305.

Reservation, apparently because of its undeveloped nature, and claims that the United States has "abandoned" irrigation on this Reservation (Arizona Opening Br., p. 166). But the Indians themselves are without means to develop an irrigation project. The fact that the United States has not gone forward with development does not support the argument that the rights reserved for the benefit of these Indians should now be foreclosed. As the Court of Appeals for the Ninth Circuit recently said in *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321, 328, certiorari denied, 352 U.S. 988, "We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government that Congress did not move with sufficient speed to appropriate the funds necessary to complete this irrigation system by 1908 rather than by 1915, or that the Government had thus lost or forfeited the rights reserved for the Indians."[31]

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[31] The record discloses a population of several hundred members of the Fort Mohave Tribe entitled to reside on the Fort Mohave Reservation. The record also discloses that a considerable number of these Indians live in a nearby colony in Needles, California, which was established with Tribal funds received from sale of some of the Reservation lands. Tr. 13,764–5, 14,220–2. This colony is close to their place of employment by the Santa Fe Railroad. Although great emphasis is placed by Arizona on the fact that what little irrigation there was in times past on this Reservation has been discontinued, the evidence demonstrates that efforts to develop the valley lands of the Reservation were frustrated by the flood hazard prior to the closure of Hoover and Davis Dams. With the completion of the dams referred to and channelization of the river through the lands of the Reservation, this hazard is now eliminated and development of the lands of the Reservation for irrigation can now go forward. Tr. 14,076–8.

4. *The attempted distinction between navigable and non-navigable waters lacks merit; therefore, the United States' right to use appurtenant navigable waters on its public and reserved lands was not surrendered upon the admission of Arizona, California, or Nevada to statehood.*

Since the federal ownership of the usufruct of non-navigable waters on the public domain is well established, except where the right has been transferred to others under the Desert Land Act or other Congressional authorization, Arizona attempts to draw a distinction between navigable and non-navigable waters. Arizona argues upon this basis that ownership of navigable waters passed to the States upon their admission to the Union along with title to the bed of the stream. We submit that there is no merit to the distinction. None of the differences between the law governing navigable streams and the rules applicable to non-navigable waters supports the anomalous conclusion that although the United States retained ownership of the right to use non-navigable waters in the public lands States, it surrendered ownership of its similar rights in streams which are equally essential to the development of the federal domain and intimately related to the control of navigation and river development.

The decisions of this Court which Arizona cites to establish the point that, upon admission of a State

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As held in the *Ahtanum* case, *supra*, delay by the United States in developing the lands of this Reservation to provide for the needs of the Indians entitled to reside thereon is no basis for a determination that rights of the United States to use water thereon have been lost.

into the Union, title to the "water * * * of navigable streams" passes to and vests in the State do not support the argument.[32] With one exception, each involved the question of ownership of the shores of, or lands beneath, navigable waters;[33] none involved the

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[32] The Arizona argument respecting the United States' ability to reserve, prior to the admission of a State, rights to use the waters of a navigable stream boils down to one respecting intent and is answered, *supra*, pp. 72 to 79.

[33] The property right in question in each case was as follows: *Borax Consolidated, Ltd.*, v. *Los Angeles*, 296 U.S. 10—title to land in Los Angeles Harbor claimed to be tideland; *United States* v. *Utah*, 283 U.S. 64—title to the bed of the Colorado River in Utah; *Massachusetts* v. *New York*, 271 U.S. 65—title to land under the navigable waters of Lake Ontario; *United States* v. *Holt State Bank*, 270 U.S. 49—title to the bed of Mud Lake in Minnesota; *Port of Seattle* v. *Oregon & W.R.R.*, 255 U.S. 56—the right of the owner of upland along navigable water to build a pier in the soil covered by the navigable water in order to reach the navigation channel wherein the State of Oregon claimed ownership of the soil under the navigable water; *United States* v. *Mission Rock Co.*, 189 U.S. 391—title to submerged lands in San Francisco Bay; *Knight* v. *United States Land Ass'n*, 142 U.S. 161—title to property in the City of San Francisco claimed to have been below the line of ordinary high-water upon the acquisition of California from Mexico and thus property of California after its admission to the Union; *Goodtitle* v. *Kibbe*, 50 U.S. 471—title to property in the City of Mobile claimed to be part of the shore of a navigable tide-water river and lying below high-water mark when Alabama was admitted to the Union and thus property of the State; *Pollard* v. *Hagan*, 44 U.S. 212—title to property in the City of Mobile claimed to be in the same area as that in *Goodtitle* v. *Kibbe*, *supra*; *Martin* v. *Waddell's Lessee*, 16 Pet. 367—title to land under the navigable waters of the Raritan river and bay in the State of New Jersey.

United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690, is the one exception noted in the text. That case does not help Arizona's argument either. There no question of ownership of navigable waters by the State was involved. The question was whether the State could authorize construction of a dam and the

question of ownership of the water itself and, even more significantly, none involved the question of the United States' rights to use the waters upon its public and reserved lands.

Furthermore, any claim of ownership of the water or of the right to use the water of the Colorado River which Arizona may assert on the basis of title to the bed of the stream is refuted by the Court's holding in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53. At p. 69 the Court said:

> But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river is of no prime importance. In neither event can there be said to arise any ownership of the river.* * *

Of the dictum in Mr. Justice Brandeis' opinion in *Port of Seattle* v. *Oregon & W.R.R. Co.*, 255 U.S. 56, 63, quoted at p. 123 of Arizona's Opening Brief, the Court said in *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 425: "[That case] centered around the issue of title to land under navigable water. Nothing further was involved as to the use of the water than its navigability."

Arizona's argument is likewise refuted by the decision in *Moore* v. *Smaw*, 17 Cal. 199 (1861) by Mr. Justice Field while he was Chief Justice of the Su-

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diversion of water in the non-navigable upper reaches of the Rio Grande River, against the United States' contention that the dam and proposed diversions would be an obstruction to navigation in the lower reaches of the river.

preme Court of California. The case involved the ownership of minerals in land in California patented by the United States in confirmation of a grant made by the Mexican Government before the territory was ceded to the United States. The Court concluded, first, that "[a]t the date of the cession of California to the United States" the minerals in question were "the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States." 17 Cal. 216–217. The defendants did not deny this but claimed that the United States held the minerals "in trust for the future State, and that upon the admission of California the ownership of them vested in her * * *." 17 Cal. 217.[34] At pages 218–219 the Court noted the distinction between sovereign and proprietary rights.

> It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future State, and that such rights at once vested in the new State upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State than that of any other property, which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an

[34] This is the same contention which Arizona is making here except that here the resource is water while there it was gold and silver.

> independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. In this country this authority is vested in the people, and is exercised through the joint action of their Federal and State Governments. * * * To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.

It then rejected the defendant's claim saying at p. 222:

> It follows * * * that * * * the gold and silver which passed by the cession from Mexico were not held by the United States in trust for the future State; that the ownership of them is not an incident of any right of sovereignty; that the minerals were held by the United States in the same manner as they held any other public property which they acquired from Mexico; and

that their ownership over them was not lost, or in any respect impaired by the admission of California as a State.

This analysis is particularly applicable to the usufruct of all the waters, navigable as well as non-navigable, upon the public and reserved lands in the arid portion of the United States. Title to those lands has *not* passed to the States except for those specifically granted. "To the existence of the political authority of [Arizona] * * * the ownership of the [navigable waters of the Colorado River] is in no way essential." But the continued ownership of the right to use such waters "so far at least as may be necessary for the beneficial uses of the government property" bordering on the stream (*United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703) is essential to the United States administration and disposition of those lands, except as Congress may specifically have determined otherwise. The considerations which have resulted in the Court's determinations with respect to the transfer of ownership of lands underlying navigable waters upon admission of a State into the Union are not applicable with respect to the waters themselves or the right to use them.

5. *The reserved rights appurtenant to federal reservations are "present perfected rights" for the satisfaction of which water must be released under Section 6 of the Project Act.*

Those reserved rights of the United States, to use mainstream waters upon its Indian and other federal reservations adjacent to the mainstream, which antedate the Project Act are accorded preferred status in

the statutory plan for distribution of the project water supply. The direction of Section 6 of the Project Act is that Hoover Dam shall be used, *inter alia,* for the satisfaction of "present perfected rights." As we have pointed out above, the right to use water, a basic necessity for any use of these arid lands, is effectively preserved when the land is reserved for federal uses. The reserved right constitutes a "perfected right" recognized by the Act, with priority as of the date of establishment of the reservation. This was the conclusion of the Special Master in his report at pp. 310–311:

> To hold that Congress did not include reserved water within the protection of Section 6 would require a holding that Congress, without saying so expressly, and without ever considering the matter, [fn. omitted] intended to nullify, in times of shortage, the very purpose of the reservation. The cases cited at pp. 258–259, *supra,* demonstrate that reservation of water was made by the United States to assure an adequate supply of water for the future needs of the federal establishments, in order that they could fulfill their purposes. It would frustrate this intent to deny the United States the use of this reserved water in times of shortage.
>
> I do not believe that Congress, when directing that the dam be operated in "satisfaction of present perfected rights," intended these consequences, and accordingly, I conclude that water rights reserved before June 25, 1929, for federal establishments are "perfected rights" within the meaning of Section 6.

6. The principles of equitable apportionment are inapplicable to adjudication of rights reserved by the United States for use in Arizona vis-à-vis other users in Arizona.

Arizona argues that the rights of the United States to use water on its Indian reservations should be determined, as against potential uses in Arizona, by application of principles of equitable apportionment. In this connection, Arizona would confer a quasi-sovereign status on the Indian tribes of the several reservations and, on this basis, argues what counsel appear to consider the equities of non-Indian citizens of that State *vis-à-vis* its Indian citizens.

The novelty of Arizona's suggestion is emphasized by the argument in Part I of its brief (pp. 40, *et seq.*) against application of the principles of equitable apportionment to the controversy among the states. In effect, Arizona is saying that the doctrine of equitable apportionment should not be applied to resolve the interstate controversy, the area of historical application of the doctrine,[35] but that it is properly usable to resolve rights intrastate.

We shall not reargue here the proposition that, under the Project Act, it is not equitable apportionment but the authorized distribution by the Secretary of the Interior which governs the use of the Boulder Canyon Project and the waters controlled thereby. (*Supra,* pp. 22 to 26.) That proposition is as true with respect to the rights of the United States

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[35] *Nebraska* v. *Wyoming*, 325 U.S. 589; *Colorado* v. *Kansas*, 320 U.S. 383; *New Jersey* v. *New York*, 283 U.S. 336; *Connecticut* v. *Massachusetts*, 282 U.S. 660.

to use water on its Indian reservations as it is with respect to the interstate allocation. (*Supra,* pp. 58–60, 89–90.)

We do note, however, that even in an interstate allocation which is not controlled by statute, as the Project Act controls here, the reserved rights of the United States are not subject to reduction by apportionment between the states. This court's decision in *Hinderlider* v. *La Plata Co.,* 304 U.S. 92, makes clear that rights acquired under state law are subject to ultimate determination of the state's equitable share of the waters of an interstate stream. This principle, however, is not applicable to rights of the United States established by reservation out of its original ownership of the public domain. Rights so established are reserved out of the entire water supply which affects them and which they affect. The rights reserved transcend state boundaries and extend against all conflicting claims of use upstream and downstream. Since they do not depend for their validity upon the law of any state, they are not, unlike rights established under state law, subject to limitation by determination of the equitable share in the river of the state in which the federal reservation may happen to be situated.

But even if the doctrine of equitable apportionment were applicable as Arizona suggests, it does not justify reducing the quantity of water reserved for use on the Indian reservations. It is true that this Court held in *Nebraska* v. *Wyoming,* 325 U.S. 589, that factors other than priority of appropriation may have to

be considered in order to secure an equitable apportionment. But the Court did not say, or even suggest, that priority is to play no part in that apportionment. It went no further in this respect than to hold that an established economy based on *present use* under junior rights should not be destroyed by future expanded uses under senior rights. There is nothing in any of the equitable apportionment decisions of this Court to support Arizona's suggestion that use of water on the reservations should be subject to defeasance because of a claim that the water could be better used elsewhere within the State. If Arizona were right, no federal water development within a State would be secure against a later State determination that other areas need the water more. Cf. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534–535. The priorities of the rights for the mainstream Indian reservations have been established; the quantities of those rights as recommended by the Special Master are realistic and fair in the light of the future needs of the reservations. Nothing in the doctrine of equitable apportionment weighs against adoption of the Recommended Decree.

C. THE RIGHTS OF THE UNITED STATES TO WATER FOR FEDERAL ESTABLISHMENTS MUST BE SAFEGUARDED, WHATEVER APPORTIONMENT MAY BE DECREED AMONG THE STATES

The preceding argument shows that the United States has certain rights to the use of water in the Lower Colorado River Basin arising from its ownership of land and the reservation of certain of those lands for

specified purposes. These rights to use water carry with them priorities according to the dates of creation of, and addition to, the various Reservations. These rights extend to the ultimate needs of the Reservations.

The Special Master has given full recognition to the rights of the United States and has integrated such rights into his allocation among the States. However, the Court's ultimate decree in this case should sustain these rights regardless of its action upon the Special Master's allocation. These rights of the United States exist independently, against all other uses, without regard to state boundaries or shares. They are rights of the United States, not capable of limitation by the apportionment among the States. Accordingly, these rights must be safeguarded, whatever the basis or the nature of the allocation among the States.

III

MISCELLANEOUS MATTERS

A. BOUNDARIES OF THE COLORADO RIVER INDIAN RESERVATION AND THE FORT MOHAVE INDIAN RESERVATION

In the process of determining the irrigable acreage of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation and the consequent quantity of the water rights to be decreed for these Reservations, the Special Master had to resolve disputes between the United States and California concerning the proper location of the western boundary of each of these Reservations. The opinions of the

Special Master are found on pp. 274–278 and 283–287, respectively, of the Report.

With particular reference to the boundary determinations respecting the Colorado River Indian Reservation, California continues to argue (California Opening Br., pp. 279–283) that the Decree should disclaim any intention to pass on land titles of occupants of the disputed areas. Responsive to such California request, the Special Master stated:

> Of necessity, a determination of the amount of irrigable acreage within the Reservation and the consequent award of a quantity of water based on this determination requires adjudication of the boundaries of the Reservation. The findings herein made are therefore binding on the parties. Nevertheless, in the hearings and in this Report, I did not inquire into or determine the right of any occupant, whoever he might be, to the possession of lands within the questioned areas. [Rept. 278.]

We agree that this is the extent of the assurance that can be accorded California in this matter. The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters. *Rhode Island* v. *Massachusetts,* 37 U.S. 657. We oppose the disclaimer proposed by California because of its possible derogative effect upon the water rights herein decreed to the United States.

B. RESPONSE TO NEVADA'S PROPOSAL FOR AMENDMENT OF THE DECREE

Nevada continues to argue, in its opening brief (pp. 52–55), that the general requirement of the Recommended Decree that all users of mainstream waters have contracts with the Secretary of the Interior should be made inapplicable to users in Nevada. Our opposition to the Nevada argument is set forth in Point IV, pp. 48–51, of the Brief in Support of Exceptions of the United States to the Special Master's Report and Recommended Decree.

CONCLUSION

For the foregoing reasons it is respectfully submitted that with respect to the interstate allocations and the recognition of the right to use waters on the federal reservations, the Report of the Special Master and the proposed decree should be approved except as otherwise pointed out in the brief of the United States in support of its exceptions to the Report.

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IN THE

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October Term, 1961

No. 8, Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

UNITED STATES OF AMERICA AND STATE OF NEVADA,
Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Defendants

MOTION ON BEHALF OF NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA, NEW MEXICO AND UTAH, FOR LEAVE TO INTERVENE, BRIEF IN SUPPORT THEREOF, AND PETITION OF INTERVENTION.

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MOTION ON BEHALF OF NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA, NEW MEXICO AND UTAH, FOR LEAVE TO INTERVENE

COMES NOW the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, and respectfully moves this Court for leave to intervene in the above-entitled cause and for leave to file a petition of intervention therein, and as reason therefor states the following:

I.

That the Navajo Indian Reservation is located within the northeast corner of Arizona, the northwest corner of

New Mexico and the southeast corner of Utah. The Reservation is in part located within the drainage basin of the Colorado River and of the Little Colorado River, a tributary of the Colorado River.

The Little Colorado River flows into the Colorado River at a point between Lake Mead and Lee Ferry. It is, therefore, a Lower Basin tributary which feeds into the Colorado River above Lake Mead.

II.

That the Navajo Indians, as a consequence of their aboriginal rights and of the establishment of their Reservation as above described, are entitled to substantial rights in and to the water of the Colorado River and the Little Colorado River, which rights are in perpetuity and are vital to the present and future well-being of the Navajo Indians.

III.

That this action was first begun in 1952 upon motion of the State of Arizona. Since that time, pleadings have been filed by the several parties and Statements of Position made. The Special Master, to whom the case was referred, has made his report. During the development of the case, there has been much dispute concerning the breadth of the controversy. The Special Master has, in his report, declined to make any apportionment of waters in the Lower Basin above Lake Mead. The Special Master states, however, at page 322 of his Report, that "The States of Nevada, New Mexico and Utah have asked for a decree confirming present uses and reserving water for

future requirements on various interstate tributaries of the Colorado River flowing within their borders . . . New Mexico asserts rights in the Little Colorado and Gila System; . . . .' In addition, California objects to the consideration solely of waters in and below Lake Mead, and would have the other waters of the Lower Basin taken into account in applying principles of equitable apportionment. The United States, for its part, argues that the uses above Lake Mead ought to be deductible in making allocations of waters from Lake Mead. In light of these various contentions concerning Colorado River and tributary waters above Lake Mead, it is altogether possible that there will be in this action an adjudication of the rights of the respective parties to water in the Colorado River above Lake Mead and in the Little Colorado River and that the interests of the Navajo Indian Tribe will thereby be affected. The Navajo Indian Tribe is now represented by the United States, inadequately however as hereinafter set forth, and will be bound by any decree that apportions the said waters, if such a decree is entered.

IV.

That it has become apparent that the representation of the Navajo Indian Tribe in this controversy by the United States has been inadequate fully to assert and protect the interests of the Navajo Indians which may be adjudicated herein.

The United States has failed vigorously to assert these interests in at least five areas of major importance:

First, the United States has failed, in its exceptions to the Report of the Special Master and in its brief in

support of its exceptions, to assert the justiciability of issues pertaining to the tributary waters above Lake Mead. In essence, it has abandoned the case so far as the adjudication of the rights of the Navajo Indians is concerned. At page 27 of its original Petition of Intervention the United States spoke of a "protracted conflict" among the parties possessing claims to water in the Lower Basin. It stated that this "protracted conflict" was to the "detriment of all parties" and asked for a decree "quieting the title of all parties to their respective rights". But later, after the Special Master in effect has sought to exclude the adjudication of the rights of the Navajo Indians and of other claimants above Lake Mead from this lawsuit, the United States has made no exceptions to such a ruling, and seems content to allow the "protracted conflict" to continue as to the rights of the Navajo Indians.

Second, the United States has adhered in this lawsuit to a doctrine inimical to the interests of the Navajo Indians, as well as of all other indians represented by it, in taking the position, as stated on page 254 of the Special Master's Report, that indian water rights are "subject. . . to the priority of appropriative rights established before (the) Reservation was created . . . ." In admitting the priority of such other rights, the United States has failed to understand and to present to this Court the aboriginal nature of indian water rights, which existed long before the present-day reservations were established. When the indians by treaty or otherwise entered into their existing reservations, they did not obtain water rights where previously they had none. Rather, they retained rights of an ancient character, which — being aboriginal in their source — cannot rightly be made subject to the priorities of much later appropriators, even if such appropriators

used water prior to the formal establishment of a reservation. In its failure to assert and defend these aboriginal indian rights, the United States has failed adequately to represent the Navajo Indians in this cause.

Third, by a combination of (1) accepting the Special Master's findings that the Boulder Canyon Project Act and associated water delivery contracts constitute an apportionment of water in and below Lake Mead and (2) having divided the said water by its water delivery contracts among states only, without separate apportionment to indian users, the United States has consented, in effect, to the thesis that there may be an apportionment to the States only, and that the indians must in turn look to the states for their share of water. The states, however, have no trustee relationship as to indians within their respective borders. Rather, their interests are adverse to those of reservation indians. History has shown that this has caused the states to be hostile to indian interests. The error of requiring the indians to look to the states for water has been reflected in this lawsuit by the United States as to Navajo Indian rights, and is manifested in the failure of the United States to insist upon an apportionment of Lower Basin water to the Navajo Indians separate and apart from apportionments made to Arizona, New Mexico, and the other parties litigant. In so failing to insist upon a separate apportionment to the Navajo Indians, the United States has inadequately represented their interests in this cause.

Fourth, as a vital corollary to the third area of inadequate representation just stated, the United States, by the position it has taken permitting the apportionment of water to states alone, would put the Navajo Indian Tribe in perpetual political conflict with the State of

Arizona, in particular, and with the States of New Mexico and Utah. It is clear that a precipitating cause of this litigation has been the proposed Central Arizona Project and the desire of Arizona for water to sustain it. One or more of the possible points of diversion of water for this Project are above Lake Mead. If the rights allocated to the Navajo Indian Tribe are to be subtracted from the apportionment ultimately made to Arizona, the consequence will be a conflict of interests which necessarily will produce many years of unnecessary, injurious and altogether avoidable political hostility between the Navajo Indians and the State of Arizona, where previously the Navajo Tribe has made substantial progress in recent years toward amicable relations with Arizona and her citizens.

Fifth, the United States apparently acquiesces in the theory of the Special Master, expressed at page 262 of his Report, that the extent of indian water rights is to be measured as being "sufficient water to irrigate all of the practicably irrigable lands in a reservation and to supply related stock and domestic uses." The United States has made no exception to this view. Nor has the United States affirmatively pressed in this litigation for a determination that the Navajo Indian Tribe is in fact entitled to legal recognition of a water right, of an open and flexible nature, which in terms of amount is co-extensive with the future needs of the Navajo Indian Tribe for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of civilization. In failing fully to assert the entire extent of the water right to which the Navajo Indian Tribe is entitled, the United States has certainly not adequately represented the Navajo Indians in this litigation.

V.

That this inadequacy of representation is the product of the dual and conflicting role played by the Attorney General in this litigation. At one and the same time, in the same lawsuit, he is charged with asserting and protecting, on the one hand, the proprietary rights and contract commitments of the United States and, on the other hand, the rights of the Navajo Indian Tribe and other indian tribes in conflict therewith. It is relevant to note also that, in other connections, it is his obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by indian tribes seeking compensation for loss of water rights. Therefore, the position of the Attorney General both within and without this lawsuit is such that it is difficult for him vigorously to protect and assert the full rights of the Navajo Indians. This difficulty has, in practice, spond to a request of the General Counsel of the Navajo been evidenced by the Attorney General's failure to re- Indian Tribe, contained in a letter of February 2, 1961, that he diligently assert and maintain the rights of the Navajo Indians in the waters of the Colorado River and its tributaries.

VI.

That Paragraph 2 of Rule 9 of this Court, pertaining to Original Jurisdiction, provides that the Federal Rules of Civil Procedure may, where appropriate, "be taken as a guide to procedure in original actions". Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as a matter of right when "the representation of the applicant's interest by existing parties is or may be

inadequate and the applicant is or may be bound by a judgment in the action." Since it is apparent that the United States, an existing party, is not adequately representing the Navajo Indian Tribe, which tribe may be bound by a judgment in this action, and since it is likewise apparent that this motion for leave to intervene is timely made, in light of the fact that the full extent of the inadequacy of the representation could not have been determined until the United States filed its exceptions and brief in response to the Report of the Special Master, the Navajo Indian Tribe seeks the leave of this Court to intervene in this cause. In thus asking leave, the Navajo Indian Tribe would seek respectfully to exercise its power to intervene "as of right" under the terms of Rule 24(a), cited above.

VII.

That the intervention of the Navajo Indian Tribe will not itself make necessary the referral of the cause back to the Special Master for the taking of additional evidence. It has been noted previously here that California, Nevada, New Mexico, the United States and Utah all have raised important contentions in respect to Lower Basin waters above Lake Mead. If it should prove necessary to refer the matter back to the Special Master, it is probable that such further reference will have been required so as satisfactorily to resolve the conflicting claims of those parties, rather than merely to provide the foundation for the legal recognition of the rights of the Navajo Indians. If, however, the cause is once again referred to the Special Master, in order to adjudicate the many claims heretofore made by the said parties, it is apparent that in such an eventuality it will be necessary to take con-

siderable additional evidence as to all rights in the Lower Basin above Lake Mead. In such a case, the presence in the lawsuit of the Navajo Indian Tribe will be of considerable usefulness, since the taking of further evidence as to the needs and condition of the Navajo Reservation will then be required.

WHEREFORE, the Navajo Indian Tribe, applicant for intervention herein, respectfully moves the Court for leave to intervene in the action and to file therein its petition of intervention, exceptions to the report of the Special Master, and briefs in support thereof, which are annexed to this Motion.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 8, Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

UNITED STATES OF AMERICA AND STATE OF NEVADA,
Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Defendants

BRIEF OF THE NAVAJO INDIAN TRIBE IN SUPPORT OF MOTION TO INTERVENE

I. SOURCE OF RIGHT TO INTERVENE

This is an action within the original jurisdiction of the Court under the Constitution. The procedure in such actions is not specified by the Constitution. However, Rule 9 of the Revised Rules of the Supreme Court of the United States pertains to actions within the Court's original jurisdiction. We are particularly guided, as to matters of intervention, by Paragraph 2 of that Rule, which refers to the Federal Rules of Civil Procedure, 28 U.S. C.A., and specifies that "where their application is ap-

propriate", these rules "may be taken as a guide to procedure in original actions in this court."

There would seem to be nothing in this action which would render inappropriate the application of the Federal Rules of Civil Procedure in determining the right of the Navajo Indian Tribe to intervene. The provisions of Rule 24(a) of the Federal Rules are explicit on the question of the right of a person to intervene in certain instances, and the instances described may as readily arise in actions within the original jurisdiction of the court as in other actions.

Rule 24(a) is entitled "Intervention of Right". It states that "*Upon timely application* anyone *shall* be permitted to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ." (Emphasis added). It is to be noted that the provision is mandatory in its language, giving a right to intervene, provided the three stated requisites are present. These requisites are:

1. Timely application
2. Inadequate representation
3. Binding effect of judgment

In this Brief, these requisites will be discussed in this order. If they are found to be present, the right of the Navajo Indian Tribe to intervene will have been established.

II. REQUISITES FOR RIGHT TO INTERVENE

A. Timeliness of Motion.

1. *The Law and Rationale of "Timeliness"*

The question of the timeliness of the Navajo Indian Tribe's motion to intervene is not a simple one. There are many things to be considered in connection with it. It is true, as it is likely to be suggested by those who do not favor the intervention, that the litigation has been long pending and has reached a certain stage of maturity. But it is also true that the lack of intervention heretofore is not the fault of the Navajo Indians. They have been represented in this action by the United States. Until the litigation reached such a point in its fruition that the inadequacy of that representation became clearly apparent, it could not have been incumbent upon the Navajo Indian Tribe to seek to break the ties of that representation through an intervention in its own behalf. Those who would say that the intervention is not timely necessarily press upon the Court an impossible hypothesis. It is that the Navajo Indians could have intervened earlier in the suit before the inadequacy of the representation given them by the United States became fully apparent and before appreciable damage was done to their interests thereby, but that the Navajo Indians may not now intervene at a point at which the failure vigorously to press their interests has become clearly manifested and at a point where serious injury to their rights may only be averted by intervention.

It seems more cogent to think of intervention as a practical sort of remedy. Surely it cannot be said that it

is to be asserted when the need for it is not apparent and that it is to be denied on the ground of "untimeliness" when the need for it is greatest. Timeliness is, instead, to be judged with common sense in light of the circumstances of the parties and of the litigation itself.

It has often been held by the federal courts and by the courts of the respective states that the question of timeliness is to be judged according to the facts and circumstances of each case. In speaking of a motion to intervene as of right under Rule 24(a), the Ninth Circuit Court of Appeals has stated that "In determining the timeliness of such a motion a court should consider not only the period of time that has passed, but also the circumstances contributing to the delay." *Pellegrino v. Nesbit,* 203 Fed. 2d 463, 465 (1953). It is interesting to note that in the Pellegrino case, which involved an intervention by a corporate stockholder after the corporation's Board of Directors decided not to appeal from the judgments of the District Court, the Circuit Court of Appeals went on to say that "Intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected."

The law as stated in the *Pellegrino* case receives substantial support from the other authorities. The following cases state the rule as to the need to look to the circumstances of the case in determining timeliness: *Clark v. Sandusky,* 205 F. 2d 915 (7th Cir. 1953); *Pyle-National Co. v. Amos,* 172 F. 2d 425 (7th Cir. 1949); *American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co.,* 112 F. 2d 669 (2nd Cir. 1940); *In re Rumsey Manufacturing Corporation,* 9 FRD 93 (D.C.N.Y. 1949); *Woburn Decreasing Co. of New Jersey v. Spencer Kellogg & Sons, Inc.,* 3 FRD 7 (D.C.N.Y. 1943). The

rule that intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected is stated in *Wolpe v. Poretsky,* 144 F. 2d 505 (1944), certiorari denied 323 U.S. 777, 65 Sup. Ct. 190; *United States Casualty Co. v. Taylor,* 64 F. 2d 521 (4th Cir. 1933), certiorari denied 290 U.S. 639, 54 Sup. Ct. 56.

In keeping with the view that the facts and circumstances of each case are to be considered, the courts have often said that the determination of the question of timeliness lies within the discretion of the court. Referring to the aspect of timeliness in relation to intervention, this Court stated in *Smith v. Gale,* 144 U.S. 509, 12 Sup. Ct. 674, 677 (1892) that "A limitation upon the right to intervene . . . presupposes a certain amount of discretion in the court." This view has been reiterated by the Second Circuit Court of Appeals in *Defense Plant Corporation v. United States Barge Lines,* 145 F. 2d 766, 767 (2nd Cir. 1944), where it is said:

> The mere fact that a final decree had been entered would not necessarily be a bar to intervention on the ground of tardiness. The admiralty court has wide discretion as to the time of intervention.

The discretion of the court has been recognized in such other cases as *Simms v. Andrews,* 118 F. 2d 803 (10th Cir. 1941); *Braatelien v. Burns,* 74 N. D. 29, 19 N. W. 2d 827 (1945); *Hartwig v. Harvey,* 250 Wis. 478, 27 N. W. 2d 363 (1947).

One of the more important circumstances to be considered in exercising the discretion of the court is whether the intervention, if permitted, would be an intervention

"as of right" or merely a "permissive intervention". Where the person seeking to intervene may be bound by the decree and is not adequately represented in the cause, the courts are far more reluctant to deny the intervention on the ground of untimeliness than they are where there is no urgent need for the intervention, as in a permissive intervention. Such a reluctance to deny the intervention is a commonsense attitude based on a proper weighing of the conflicting interests involved. The rationale behind this judicial attitude has been well expressed in *Moore's Federal Practice*, Vol. 2, 1938, at page 2369:

> Intervention may . . . . be permitted at a late stage in the proceedings, depending upon the amount of administrative inconvenience this would cause, and also whether the right to intervene is unconditional or conditional. *Here the character of the right is particularly important.* Since the basis for the permissive right to intervene is largely one of trial convenience a court might properly deny a motion to intervene unless made at a very early stage, since it is required by subdivision (b) to 'consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' On the other hand the basis for intervention as of right is chiefly the fact that the court's processes are apt to injure or prejudice the applicant unless he is permitted to intervene. Rule 24(a) does not, of course, give an absolute right to intervene unless the application is timely, but *since something more than trial convenience is here involved an application to intervene under Rule 24(a) may well be granted at a time in the suit when it would be wise to deny permissive intervention. The problem of the late intervener shades off into the problem of his status.* (Emphasis added)

The importance of looking to the character of the intervention sought was likewise emphasized in *Cameron v. President and Fellows of Harvard College*, 157 F. 2d 993 (1st Cir. 1946). In an opinion which cited favorably the above statement by Moore, the court said:

> This question of timeliness cannot be split off and considered in vacuo — as one separate and apart from the question of the paragraph of Rule 24 under which intervention is sought. The reason for this is that an assertion of a legal right to intervene might well be considered timely even when made at a relatively late stage of the main action whereas a request for leave to intervene in discretion made at the same stage in the main action might well be considered otherwise.

The motion of the Navajo Indian Tribe to intervene in the present case is a motion to intervene "as of right". It is based upon the vital interest which the Navajo Indians have in the subject matter of this suit. To the Navajo Indians, their right to water from the Colorado River and from the Little Colorado River is the *sine qua non* of their present and future prosperity, happiness and development. And, yet, although they may be bound by the decree which is ultimately handed down, the representation given them by the Attorney General of the United States has proved to be woefully inadequate, as will appear more fully in later portions of this brief. These are circumstances which must necessarily weigh heavily in favor of an exercise of the Court's discretion in granting the motion to intervene.

In this litigation the situation of the Navajo Indians has been analogous to that of a member of a class whose interests are represented by the plaintiff in a class action. It is certainly not incumbent upon the members of a class

individually to intervene at an early stage in the proceeding in order to assure the adequacy of their representation at a later stage. To hold otherwise would be to render chaotic all class litigation. Intervention is only called for when the need for it becomes apparent, and this may occur either late or early in the proceeding. The late Mr. Justice Brandeis of this Court expressed the law in this regard in *Southern Pacific Co. v. Bogert,* 250 U.S. 483, 39 Sup. Ct. 533, 536 (1919) when he said: "Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf, not only of the plaintiff, but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights." The same rule is found in *Moore's Federal Practice,* Vol. 2, 1938, at page 2333:

> Where a petitioner is represented in a proceeding, he will be bound by a decree of the court, whether he can show an interest in the property or not. It, therefore, becomes even more important that the right to intervene be absolute if the representation is shown to be inadequate.

2. *Past Efforts of Navajo Tribe to Secure Adequate Representation*

There has been no delay in the efforts of the Navajo Tribe to secure effective representation of its interests in this case. It was alerted to the inadequacy of representation being given to it by the Attorney General and government counsel purporting to represent the interests of all the Indian tribes in Arizona, when in the pre-trial conference before the Special Master on April 10-13, 1956, two and one-half years after the Government's petition for intervention was filed, the United States declared that

it was not ready to define its position on indian claims either from the standpoint of law or facts (TR. April 10, 1956, pp. 18, 23-26, 34-35). The Government's attitude was clearly that of a passive bystander wishing an inactive role and not the role of advocate defending the interests of its wards. The Assistant Attorney General in charge urged:

> The United States would like to be last, and we will ask the questions we feel the States have not covered, if that will be permitted. (TR. p. 39)

This statement of a policy of general inarticulateness was followed by the failure to cross examine witnesses for the State of Arizona in respect to indian water rights and established uses of water by indians in Arizona. The Navajo Tribe promptly caused the following steps to be taken:

1. Upon examining the pleadings in the office of the clerk of the court, counsel for the Tribe discovered that when the petition of the United States to intervene was filed in this case on December 31, 1952, protection of the interests of the indians was urged as a major ground for intervention of the United States (Para. XII, Motion for Leave to Intervene; p. 32, U.S. Brief in Support of Motion). On November 2, 1953, when the Government filed its petition of intervention pursuant to the Court's order, the petition asserted clearly and unequivocally the "prior and superior" rights of indians, as follows (Para. XXVII, p. 23):

   > The United States of America asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set

> forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.

Political pressure from the then Governor of the State of Arizona was brought to bear upon the Attorney General's office, with the result that the Attorney General wrongfully and in violation of the rules of this Court, which provide that "original or file copies of pleadings and papers, or briefs, may not be withdrawn by the litigant" (Rule 1, Sub. Para. 2), withdrew its petition for intervention. This was done four days after the filing of the Government's original petition and apparently before distribution of copies to members of this Court. On December 8, 1953, a revised petition for intervention was filed by the Government in which the above allegation respecting the prior and superior rights of indians was deleted — all without application by the United States to this Court for leave to amend its original petition. (TR. pp. 2448-2449, 2480-2482).

2. Counsel for the Tribe discovered that the attorney in the Department of Justice who had long been in charge of the Government's preparations in this case, and was well informed as to indian water rights and skilled in the practice of asserting such rights, had been removed from the case and new counsel had been substituted within a relatively short time before hearings were commenced in San Francisco before the Special Master (TR. p. 2450). The said new counsel did not, and in so short a time for preparation probably could not even if he

had so desired, properly question witnesses in the proceedings before the Special Master in respect to indian uses of water.

3. The General Counsel for the Tribe joined with representatives of other indian tribes in Arizona in urging Assistant Attorney General J. Lee Rankin, then in charge of this litigation in the Department of Justice, to recognize the conflict of interests which existed between the other parties or interests which the Government sought to represent and the prior and superior rights of indians which Government counsel also purported to represent. In a final conference on July 5, 1956, with the Assistant Attorney General, representatives of most of the indian tribes in Arizona requested that special counsel be appointed within the Department of Justice to represent the interests of the indians. The Assistant Attorney General refused the request, contending that representation by Government counsel was adequate (TR. pp. 2432-2435).

4. The General Counsel of the Navajo Tribe joined with other counsel of indian tribes in Arizona to present to the Special Master a motion for leave to file a representation of interests, requesting the Special Master to recommend to this Court that special counsel be appointed to represent the interests of the indians. The General Counsel of the Navajo Tribe on behalf of the Tribe and on behalf of all other indian tribes in Arizona, presented the matter to Mr. Justice Douglas (then in California during the adjournment of this Court), who referred the motion to the Special Master for appropriate action. The Motion was argued on July 6, 1956, in

San Francisco before the Special Master (TR. Vol. 15, pp. 2419-2498). The foregoing and other facts respecting the inadequacy of the Government's representation of the indian interests were set forth. Counsel for the State of California, in the course of his reply to the General Counsel of the Navajo Tribe, confirmed what the latter had said respecting deletion from the Government's original petition for intervention of the allegation asserting the prior and superior rights of indians, that deletion having been made — as the California counsel stated — under political pressure from the Governor of the State of Arizona (TR. pp. 2480-2481).

5. On July 18, 1956, the Special Master held that the trusteeship of the United States in behalf of the indians is a creation of a plenary legislative power and that it "is beyond the power of the Courts to disqualify this Trustee" . . . and that "The legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action." The Special Master assumed "accomodation" by the Attorney General in respect to presentation of any evidence which the indian tribes might wish to have offered, and recommended that a brief amicus curiae be filed in the Supreme Court on behalf of the indians (TR. Vol. 16, pp. 2638-2641).

With deference to the outstanding ability of the Special Master, it was evident in the proceedings that the subject of indian water rights was new to him. The assistance which he was entitled to receive from counsel for the Government, and which a conscientious advocate would have offered, was not forthcoming. This inadequacy of

representation of the Navajo Indian Tribe and the other tribes similarly situated in Arizona bore fruit and became more apparent after the report of the Special Master was filed. His proposed findings are in several respects highly prejudicial to the rights and interests of the Navajos and other indians, as will appear more fully in later portions of this brief.

The General Counsel of the Navajo Tribe made a last effort to secure appropriate action by the Attorney General by requesting in a letter of February 2, 1961, that the Attorney General take exception to the Special Master's report in numerous vital respects, stating, inter alia:

> "The Special Master has made a number of proposed findings which are gravely prejudicial to the position of the Navajo Indian Tribe. This is to request that exceptions be taken to the report of the Special Master and that any other action be taken that may be necessary to protect and preserve the position of the Navajo Indian Tribe which is represented in this cause by the Department of Justice."

The Special Master had set February 27, 1961, as the date for filing exceptions to his report. However, Government counsel did not reply and the United States took no action pursuant to the letter of the General Counsel of the Navajo Indian Tribe. Indeed, the objections filed by the United States do not even bear upon the question of indian rights. The exceptions filed by the United States, and the brief in support thereof, are themselves mute testimony to the extent of the neglect of indian interests. The Navajo Tribe could not have known in advance that there would be no action taken pursuant to its letter to the Attorney General and that the exceptions filed by the

United States would utterly fail to maintain and assert the Tribe's full legal position. It was only at this point, after the Special Master's Report was filed and the exceptions of the respective parties were made, that the inadequacy of the representation was at last so conclusively established that this petition for intervention by the Navajo Tribe became a necessity.

The Navajo Tribe, through its General Counsel, took immediate steps after the filing of the exceptions of the United States to retain counsel especially experienced in water law to seek intervention in this Court. Time was required for such employment, not only for consideration by the Navajo Tribal Council, but also to secure approval by the Secretary of the Interior pursuant to Title 25 U. S. C., Sec. 82. And thereafter counsel had to analyze the position of the Tribe and prepare these documents in intervention.

It is clear, therefore, that the Navajo Tribe has not slept upon its rights. Having first sought with other tribes to secure adequate representation through the office of the Attorney General of the United States, and having failed to secure that conscientious assertion of indian rights which normally could be expected from any experienced advocate, the Navajo Tribe now respectfully seeks to fill this patent void before it is too late to protect its interests. Clearly, the question of timeliness of this motion merges into the question of inadequacy of representation thusfar given to the interests of the Navajo Tribe. The two issues, although logically separate questions, cannot possibly be considered independently in this instance and must be considered together in regard to the timeliness of this motion to intervene.

B. Inadequacy of Representation.

In its Motion for Leave to Intervene, the Navajo Indian Tribe has set forth in some detail five areas of major importance in which the United States has failed vigorously to assert the interests of the Navajo Indians. The nature of these interests, and the extent of the failure of the United States to give expression to them, has been stated in some detail in the motion itself. The following discussion here will attempt to supplement, but not repeat, what was said in the motion.[1]

1. *The Justiciability Issue*

In his Report the Special Master has excluded the determination of water rights in the Lower Basin and tributaries between Lee Ferry and Lake Mead. Such a finding would in effect exclude the interests of the Navajo Indians from this law suit. Despite the fact that at page 27 of its original Petition of Intervention it has recognized a "protracted conflict" among the parties possessing claims to water in the Lower Basin, the United States has raised no objection to the finding of the Special Master in this regard. In making its exceptions, the United States has touched upon this question only obliquely. Its first two exceptions are to the effect that in making allocations of waters from Lake Mead among Lower Colorado River Basin states, the Secretary of the Interior is authorized to make deductions to compensate for upstream consumptive use in Arizona and Nevada of water which would otherwise flow into Lake Mead. This is not, strictly speaking, an argument in favor of the justiciability of the con-

[1]Some repetition will be unavoidable in the interest of continuity.

troversy as to waters above Lake Mead. Instead of meeting the issue straight on in a diligent effort to protect the Navajo Indians in the "protracted conflict" which it has recognized, the United States has preferred to discuss the issue only peripherally as it affects the Secretary of the Interior in his technical operation of the federal water projects under the Boulder Canyon Project Act.

It ought to be apparent, however, that the justiciability of the controversy encompasses the Lower Basin as a whole. The Lower Basin waters above Lake Mead are as much involved in the controversy as those in and below it. To say, as the Special Master has said, that the controversy will be treated as involving a part of the waters of the Colorado River in the Lower Basin, is to "truncate" not merely the Colorado River, but is also to truncate the controversy itself. The controversy is, in essence, one as to the availability of water for present and proposed uses. It is great in its magnitude and importance, and is imminent in its threatened interference with those uses. The Lower Basin is entitled to a given amount of water under the Colorado River Compact and the critical problem before the Court concerns the legal availability of this water for Lower Basin uses. This is the nature of the controversy in its entire scope. When a controversy exists, courts will determine the entire controversy. They will not artificially split a part of the over-all problem off in order to say, in effect, that by considering just a part of it a solution may be worked out which will settle the more imminent problems, leaving the less imminent parts of the controversy unjusticiable. This would make justiciability depend not on the extent and imminent nature of the controversy itself, but on the particular twist or turn taken by the proposed solution. But justiciability rests on a

much sturdier foundation than such a view would have us suppose. Once a controversy is found to exist encompassing an entire subject-matter, the courts continue to treat it as a whole, do not truncate it, and seek to settle the issues involved without making necessary a multiplicity of suits. What can be settled in one justiciable lawsuit will not be so treated as to force several independent actions.

There can be little doubt but that this controversy, as framed by the contentions of the various parties themselves, has encompassed the entire Lower Basin and concerns the legal availability of water therein. In Paragraph XIX of its Bill of Complaint, Arizona recites that she "desparately needs additional water from the main stream of the Colorado River. Without such additional water . . . agricultural production will be reduced to a dangerous extent, population will decline, and the economy of the state will be destroyed in large measure. The only source of water to prevent such a catastrophe is the main stream of the Colorado River." There is to be seen in this no limitations whereby Arizona states that it "desperately needs additional water from the main stream of the Colorado River *in and below Lake Mead.*" Rather, the needs and claims giving rise to this litigation are more urgent and all-encompassing. They pertain to the available water in the Lower Basin. This breadth is also reflected in Paragraph XX of the Bill of Complaint, where Arizona complains that the Central Arizona Project has been interfered with and postponed because of the alleged "wrongful assertion by the defendants of unwarranted and unlawful claims to the use of water of the Colorado River system." The same pervasive scope of this litigation, in terms of the claims of the respective parties, is

reflected in the recital on page 322 of the Special Master's Report that "the States of Nevada, New Mexico and Utah have asked for a decree confirming present uses and reserving water for future requirements on various interstate tributaries of the Colorado River flowing within their borders . . . New Mexico asserts rights in the Little Colorado . . . ." In addition, as appears more fully from the section beginning at page 124 of the opening brief of the California defendants in support of their exceptions to the report of the Special Master, the California defendants object to the "truncation of the Colorado River at Lake Mead" and would have the other waters of the Lower Basin taken into account in applying principles of equitable apportionment. The United States, for its part, argues that the uses above Lake Mead ought to be deductible in making allocations of waters from Lake Mead. In light of these conflicting contentions, the Colorado River and its tributaries below Lee Ferry but above Lake Mead can hardly be said to be superfluous to this controversy when it is considered as a whole.

This controversy, taken as a whole and considered in its entirety, constitutes a justiciable controversy under the law as heretofore stated by this Court and other courts in the United States. The test for justiciability was set down by this Court in *New York v. Illinois,* 274 U.S. 488, 47 Sup. Ct. 661 (1927), where reference was made to the need for "an actual or presently threatened interference with the rights of another", and in *Colorado v. Kansas,* 320 U.S. 383, 64 Sup. Ct. 176, 181 (1944), where the court posed the need to determine "whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream." In *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 57 Sup. Ct. 461, 464 (1937) this Court

recognized that the "controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." The Court went on to say that "it must be a real and substantial controversy admitting of specific relief . . ." Another court has said, in *Mayor, Etc. of Savannah v. Bay Realty Co.*, 90 Ga. App. 261, 82 S.E. 2d 710, 711 (1954) that "a controversy is 'justiciable' when there are interested parties asserting adverse claims upon an accrued state of facts." Certainly all of these criteria, as stated in the cases referred to, are met by the Colorado River controversy as it appears in this litigation.

Once an entire controversy is before a court, the court will decide it without a truncation of its various aspects. "It is the policy of the court to determine the whole controversy." *Hoskins v. Hotel Randolph Co.*, 203 Iowa 1152, 211 N.W. 423, 429 (1926). It has been said that "the . . . court, having first acquired jurisdiction, may exercise it to dispose of the whole subject-matter of the litigation and adjust all of the equities between the parties, and is entitled to do so." *Cleveland v. Ward,* 116 Texas 1, 285 S.W. 1063, 1070 (1926). "The courts, having jurisdiction . . ., have the right and authority to hear and determine all questions that occur in the case and are essential to a decision of the merits of the issues." *Taylor v. Hulett,* 15 Ida. 265, 97 Pac. 37, 39 (1908). To like effect are *Pittsburgh, C., C. & St. L. Ry. Co. v. Peck,* 44 Ind. App. 62, 88 N.E. 627 (1909); *Lenderink v. Sawyer,* 92 Neb. 587, 138 N.W. 744 (1912); *Heidenheimer v. Johnston,* 76 Texas 200, 13 S.W. 46 (1890).

In addition to the policy of deciding entire controversies, it has long been the policy of the law to avoid, where

possible, a multiplicity of litigation. "One of the functions and duties of this court is to exercise its powers so as to avoid future litigation." *Mallonee v. Fahey,* 117 F. Supp. 259, 275 (1953). "It is one of the favorite objects of a court of equity to do full and complete justice between the parties by avoiding the delays and hardships incident to a multiplicity of suits." *Weininger v. Metropolitan Fire Insurance Co.,* 359 Ill. 584, 195 N.E. 420 (1935).

Taken together, these principles require that the rights in and to waters in the Lower Basin above Lake Mead be adjudicated as a part of the over-all controversy, which is itself justiciable.

In its failure to press for a complete determination of the matters involved in the controversy, the United States has, for its part, abandoned any attempt to have the rights of the Navajo Indian Tribe adjudicated in this cause. This means that it has acquiesced in a continuation of the "protracted conflict" so far as their rights are concerned. If — as we have seen — their rights may be determined in this litigation, and if the United States is willing itself to acquiesce in a failure to determine them, leaving them a subject of future controversy, it is manifest that the United States is inadequately representing the Navajo Indian Tribe, and is preoccupied by its other interests in this litigation.

2. *The Extent of Indian Priority.*

The brief of the United States in support of its exceptions to the Special Master's Report makes no mention of the relative priority of indian water rights as against other claimants.

Its Answer Brief, however, emerges from the former silence sufficiently to remark, without apparent objection, that "Rights reserved for reservations established subsequent to the Project Act are recognized as having priorities, intrastate, as of the respective dates of establishment of the reservations." (United States Answer Brief, p. 56).

It would seem incredible that the United States, who in this litigation has stood in the relation of trustee to the Navajo and other indian tribes of the Lower Basin, could with such ease and facility ignore well-established law as to the nature of Indian rights. The law ignored is law which the United States itself has asserted previously in this Court. It is law which this Court has forcefully expressed on two important occasions and which has been reiterated as recently as 1956 by the Ninth Circuit Court of Appeals in a case instituted by the United States.

The water rights of indian tribes, we submit, are not subordinate to the claims of appropriators who were using water before the present reservations were established. The indian rights are ancient and aboriginal in their character. As such, they are prior to all appropriative rights of a later origin, whether those later appropriations occurred before or after existing reservations were created.

In order fully to appreciate this fact, and the basis for its assertion, it is necessary to be fully cognizant of the fact that the creation of an indian reservation has historically and legally involved a *grant by the indians* as to their larger claims and a *reservation by them* of certain important rights which pre-existed the making of the treaty or agreement and which continued to exist thereafter. It is a mistake to consider that when an indian reservation is created water is "reserved for its benefit"

in the different sense that a previously non-existent right is called into being and is now present as a "reserved right". Rather, the reservation of the right to water is made by the indians themselves and is the reservation of a much older, pre-existing right.

This stands out starkly in the great landmark cases heretofore decided by this Court. These are the cases of *United States v. Winans,* 198 U.S. 371, 25 Sup. Ct. 662 (1905) and *Winters v. United States,* 207 U.S. 564, 28 Sup. Ct. 207 (1908). The recent case reiterating their principles is *United States v. Ahtanum Irrigation District,* 236 F. 2d 321 (9th Cir. 1956).

United States v. Winans was a suit brought by the United States to enjoin certain respondents from obstructing Indians of the Yakima Nation, in the State of Washington, in their exercise of fishing rights and privileges on the Columbia River. While the subject under discussion was fishing rights, rather than water rights, the law expressed by the Court is altogether relevant to the question of priority of water rights. The Court gave explicit recognition to the fact that "the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians." It is stated that these rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." Referring to the treaty made between the United States and the Indians in 1859, the court made the following significant observation: "*The treaty was not a grant of rights to the Indians, but a grant of right from them, — a reservation of those not granted.*" (Emphasis added). It is to be seen, then, that in the view of the Court the fishing rights which the United States sought to protect in the lawsuit were not the product of the treaty, but were rather pre-

existing rights which survived the treaty. Although it is true that the case dealt with fishing rights rather than water rights, so far as the law is concerned that is a mere distinction without a difference. There is nothing in logic which can distinguish the applicability of the central concept involved so far as the two separate types of rights are concerned. If the concept that the rights pre-existed the treaty is applicable to the fishing rights, there would seem to be no cogent reason why it would not with equal force apply to water rights.

Three years later, in 1908, this Court did in fact express the same rationale in a case involving water rights. This is the famous case of *Winters v. United States, supra,* which gave rise to the so-called Winters Doctrine.

Winters v. United States involved a suit by the United States to enjoin the building of certain dams which would prevent water from flowing to the Ft. Belknap Indian Reservation. The Court pointed out that the reservation created by the agreement of May, 1888, "was a part of a much larger tract which the indians had the right to occupy and use." The rationale of the *Winans* case is readily apparent in the following statement made by the Court: "The Indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" The questions raised in this quoted language were rhetorical. The Court considered that they answered themselves. The indians, the Court held, did not "give up" their water rights when they entered into the Reser-

vation. But if they did not "give them up", then it must be concluded that they retained their rights. And if they retained them, the retention was from an earlier period, a period which preceded the establishment of the Reservation. In other words, they retained their ancient and aboriginal rights, not "giving them up" when they entered into the reservation.

How, then, can it conceivably be said that relative latecomers arriving on the scene and using water within a few short years before the establishment of a formal indian reservation can have a legally cognizable right prior to that of the rights adhering in the indians themselves? To grant such persons priority is to deny the pre-existing character of the indian rights and is to fly in the face of both the Winans and the Winters decisions.

It cannot be said, in contradiction to this, that the *Winans* and *Winters* cases are no longer virile as modern statements of the law. The doctrine which they so soundly proclaimed has found renewed expression, as recently as 1956, in *United States v. Ahtanum Irrigation District, supra.*

The *Ahtanum* case involved a suit by the United States to quiet title to the right of indians to use water from Ahtanum Creek. The Ninth Circuit Court of Appeals, following in the footsteps of the *Winans* and *Winters* cases, stated:

> "As in the *Winters* case, we must answer in the negative the question there posed: 'Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?' As was said in the *Winters* case: 'The res-

> ervation was a part of a very much larger tract which the indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people.' When the indians agreed to change their nomadic habits and to become a pastoral and civilized people, using the smaller reservation area, it must be borne in mind, as the Supreme Court said of this very treaty, that 'The treaty was not a grant of right to the indians, but a grant of right from them — a reservation of those not granted.' *Before the treaty the indians had the right to the use of not only Ahtanum Creek but of all other streams in a vast area. The indians did not surrender any part of their right* to the use of Ahtanum Creek . . . ." 236 F. 2d at 336. (Emphasis added).[2]

Thus, what we might call the "aboriginal rights" doctrine expressed by the *Winans* and *Winters* cases (although they did not use the term) has not been buried by the passage of time. And there are important reasons, so far as the legitimate interests of the Navajo Indian Tribe are concerned, why it should be vigorously reasserted in the present litigation. As the trustee for the indians, it has been the duty of the United States to see to it that such established law favorable to indian rights not

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[2]Indian reservations have been established in the past by several methods: treaty, executive order, Interior Department action, or agreement. The law as to the indians' water rights is the same in each case, not being affected by the manner of establishment of the reservation. See **Winters v. United States,** 207 U.S. 564 (1908) (reservation established by agreement); **United States v. Ahtanum Irrigation District,** 236 F. 2d 321 (9th Cir. 1956) (reservation established by treaty); **United States v. Walker River Irrigation District,** 104 F. 2d 334 (9th Cir. 1939) (reservation established by Interior Department Action); **Conrad Inv. Co. v. United States,** 161 Fed. 829 (9th Cir. 1908) (reservation established by agreement).

become obfuscated and supplanted. The United States has thusfar failed in this duty. In light of this failure, it would seem that the only manner by which the law as heretofore developed may be fully presented to this Court is through intervention by the indians in their own behalf.

3. *The Right of the Navajo Indians to an Apportionment of Water Separate from the Apportionments Made to the States*

The United States has not pressed in this action for a separate apportionment of water to the Navajo Indian Tribe, or to the other indian tribes located within the Lower Basin. Its policy seems to be one of contentment with seeing water apportioned to states, from which indian tribes must then draw their share. This view has been manifested in this litigation by the failure by the United States to assert affirmatively the need for a separate apportionment to the Navajo Indian Tribe, or other indian tribes, and in its acceptance of the Special Master's findings that the water delivery contracts entered upon under the Boulder Canyon Project Act, which would provide for delivery of water to non-indian users only, constitute an apportionment of water in and below Lake Mead.

There is, however, nothing more inappropriate, both practically and legally, than for the waters of the Lower Basin to be so apportioned that the Navajo Indian Tribe and other indians must look to the States of Arizona, New Mexico and Utah for their water.

It is to be remembered that — as a matter of law — the indians are under the trusteeship of the United States, not of individual states. Arizona, New Mexico and Utah, separately or in combination, are not now, nor have

they ever been, trustees charged with an affirmative duty of looking after the interests of the indians.

The relationship of the indian tribes to the United States and to the several states has been made clear in a number of cases. In *United States v. Ahtanum Irrigation District, supra,* the court referred to the role of the federal "government as trustee for the Indians." The position of the indians was made particularly clear in *United States v. Kagama,* 118 U.S. 375, 6 S. Ct. 1109, 1114 (1886), where it was said that "These Indian tribes are the wards of the nation. They are communities *dependent* on the United States — dependent largely for their daily food; dependent for their political rights." (Emphasis by Court). In addition to recognizing explicitly the fact of federal trusteeship, the Court went further and explained the lack of trusteeship on the part of the states in which the indian reservations are located. The Court said: "They (the indians) owe no allegiance to the states, and receive from them no protection." Not only is there a lack of trustee-ward relation, the Court said, but also "because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."

A rather complete discussion of "The Scope of State Power over Indian Affairs," in which it is made abundantly clear that the primary relation of indian tribes is with the United States, and not with the states individually, is to be found in Felix S. Cohen, Handbook of Federal Indian Law 116-122 (1941) and in United States Department of the Interior, Federal Indian Law 501-514 (1958).

While this observation by the Court was made in 1886, so that there are sure to have been certain changes

in attitude between then and now, it is well known that such attitudes often change only slowly. During recent years, for example, there has been a gradual amelioration of relations between the Navajo Indian Tribe and the states in which the Reservation is located. But this amelioration has not so changed the basic circumstance that it would now be practical or wise to create an important new dependency by the indians upon the states. Nor is there any basis in law — as we have seen — for charging the states with a duty to look after the interests of the indians. This function has historically and legally been that of the United States.

On page 56 of its Answering Brief the United States has stated that it now acquiesces in the Special Master's making of apportionments to the states alone. The acquiescence stated there finds further expression in the failure of the United States to except to the Special Master's Report and recommended decree as to such combined apportionment. This has not always been the view taken by the United States, however. It formerly held, as it points out in its Answering Brief, to the sound contention that there should be a separate apportionment. Strangely enough, the United States is now willing not to "press the point here" in favor of a separate apportionment and is willing to acquiesce in the Special Master's view, even though the United States admits that "the logic" of the matter does in fact demand separate allocations. In other words, the United States is willing to acquiesce in the making of apportionments to the states alone even though it has held, and still holds today, the view that there ought really to be a separate allocation. We would submit, of course, that the United States is right in its logic, but wrong in its acquiescence.

The reason the United States has surrendered the point is that it has concluded that "the recommended decree appears sufficient for all practical purposes to protect the federal establishments." But does the recommended decree in fact contain such practical assurances? The answer can only be that it does not. One of the grounds for the United States' satisfaction is that "Rights reserved for reservations established subsequent to the Project Act are recognized as having priorities, intrastate, as of the respective dates of establishment of the reservations." (United States Answering Brief, page 56) In essence, then, the United States is willing to abandon the "logic" of the matter because it has accepted the equally fallacious premise, which we have already examined here, that indian priority dates, intrastate, are based upon the dates the indian reservations were created. But surely one fallacy cannot justify another. The fact is that the "practical" means by which the recommended decree "appears to protect the federal establishments" is not well founded. Moreover, the muddled position in which the Navajo Indian Tribe would find itself if an apportionment of water were made only to the states is further testified to by the United States' Answer Brief itself on page 91 where it is pointed out that "Arizona argues that the rights of the United States to use water on its Indian reservations should be determined, as against potential uses in Arizona, by application of principles of equitable apportionment." Referring to "the novelty of Arizona's suggestion", the United States proceeds in its Answering Brief to point out its unsoundness.

In light of this, it would have been far better for the United States to have adhered to the much sounder position that there should be a separate apportionment of

water to the indian tribes, or to the United States for purposes of satisfying the indian rights, and that this apportionment should be independent of that given to any state. Such a conclusion is based upon both practicality and logic. It is based upon a recognition that (1) the United States, and not the states, is the Trustee in relation to the indians; (2) the indian rights are not derived from state law, but rather find their source elsewhere, being of an aboriginal nature and having been reserved by the indians at the time of the establishment of formal reservations; and (3) a separate apportionment will, as a practical matter, lend itself far less to continued rivalry and hostility during the years to come.

In failing to "press the point here" the United States has inadequately represented the Navajo Indian Tribe in this litigation.

4. *Dependence of the Navajo Indian Tribe upon the States for Water Would Lead to Continuing Political Conflict Detrimental to Navajo Interests.*

It is a vital corollary to the third area of inadequate representation just stated that the United States, by the position it has taken permitting the apportionment of water to states alone, would thus place the Navajo Indian Tribe in continuing political conflict with the State of Arizona, in particular, and with the States of New Mexico and Utah. With the indian right included within the state apportionment, the indian and the white populations are placed in inevitable competition for the water to which the state is entitled and, expressly here, the indians must compete with the Central Arizona Project, the desire for

which by the white population spawned this litigation. Even if, in depending on the states for its water, the Navajo Indian Tribe were to prove altogether successful over the years in having its rights fully upheld, both as to extent and priority, the effect of the dependency would be injurious to the mutual relations of the parties. The Navajo Indian Tribe and the states in which its reservation is located must necessarily deal together in many connections. It is to be appreciated that each will benefit if their relations can grow increasingly amicable with the passage of time. But such progress will be impeded in these other aspects if a significant area of dispute is left open to fester between them. So far as the political and general human relations involved are concerned, there is much to be gained by giving "unto Caesar that which is Caesar's" in the sense that each is apportioned its own lawful share.

The legal foundation for a separate apportionment has been more fully discussed above. Reference is made at this point to the over-all non-legal consequences of a combined allocation because they must enter strongly into any true understanding of the extent of the prejudice which will befall Navajo interests if the inadequate representation thusfar afforded them in this cause is permitted to continue.

5. *The Extent, in Terms of Quantity, of the Navajo Indian Water Right*

The failure of the United States adequately to represent the Navajo Indian Tribe is nowhere more apparent than in connection with the question of the extent of indian water rights as to their quantities.

For its part, the United States is willing vaguely to assert, as it does on page 79 of its Answer Brief, that "In

the case of an Indian reservation, the measure is the quantity required to satisfy the ultimate needs of the Indians of the reservations." Although such a statement is certainly broad enough to include the full extent of indian rights, it is in no way specific. And it is in the specific application of such a concept that the really important issues arise. It is important, so far as the effective assertion of full indian rights is concerned, to make it clear that these indian needs include not merely the "ultimate needs" of a people living an existence of marginal subsistence, but also sufficient water to permit the indians to take their rightful place in the advance of civilization, as through industrial use.

The danger in a failure specifically to point this out lies in the fact that the Special Master and the Court may, as a result of the lack of proper advocacy in behalf of indian claims, overlook the full extent and ramifications of the existing rights.

Unfortunately, this danger is by no means spurious or academic. It has already been realized, and — so far as the Special Master's Report and even the position of the United States in respect thereto is concerned — the danger may be pointed to not as potential in character, but as an accomplished fact. The Special Master and the United States have indeed fallen into the very error of omission and oversight to which we have just referred. At page 262 of his Report, the Special Master concluded "that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable land in a Reservation and to supply related stock and domestic uses." The United States has shown its willing-

ness, at page 80 of its Answer Brief, to accept this conclusion. After quoting from the Special Master, the United States says "This conclusion is amply supported by decisions of this Court . . . ." It is only in a footnote at the bottom of page 80 that the United States suggests that the indian rights may in fact be far more extensive. It states that "Whether the reservation of water rights is limited to the needs of the Indians for irrigation and related stock and domestic uses is a question which need not be considered insofar as the reservations for which the Master recommends that rights be decreed are concerned." One is led to ask the question why the United States, which is charged with a positive duty to assert fully the rights of the indians, is willing to acquiesce in a patent understatement of the extent of indian water rights. Even if it is conceded, for the purposes of argument, that such an understatement is sufficient for the limited purposes which the Special Master has in mind, there can be no doubt but that the eventual incorporation of this understatement into the opinion of this Court, if such were to occur, could do irreparable injury to the legal position of the indians in any later attempt to assert the full extent of their rights as heretofore recognized. The failure of the United States to press for a proper statement of the law in this litigation could easily lead to an inadventent restriction of indian rights in all future cases because of language emanting from the Court at this time.

It is not merely in future litigation that the present shortcomings may have their effect. It is by no means certain that the rights of the Navajo Indians will not be litigated in this controversy. In this brief it has already been stated at some length why those rights should, as a matter of law, be litigated here. And if the Navajo In-

dian Tribe's rights are in fact to be determined, the full extent of their right ought to be decreed, and ought not to be left in doubt for future statement of a more precise nature.

As examination of past cases indicates that it has not been the intention of this Court, or of other courts, to limit the water right of the indian tribe merely to uses for irrigation. The reservation of the rights by the indians was more extensive, including water for other useful purposes, as those purposes might arise in the development of the indian tribe. This is apparent from the language of the Court in *Winters v. United States, supra,* 28 S. Ct. at 211, where the Court said that "The indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, 'and grazing the roving herds of stock,' or turned to agriculture *and the arts of civilization.*" (Emphasis added) The Court then asked rhetorically: "Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" It is important to note that the court specifically made reference to uses other than agricultural uses when it referred to "the arts of civilization". Not only the language, but also the rationale, of the Court in the *Winters* case sustains the view that the indians retained more than merely what is sufficient for purposes of irrigation. There can be no doubt but that they retained, when they entered into their Reservation, enough water to progress normally toward an advanced civilization.

Two cases from the Ninth Circuit Court of Appeals, one decided in 1908 and the other decided in 1956, have augmented the view expressed in the *Winters* case. The most recent of these cases is *United States v. Ahtanum*

Irrigation District, 236 F.2d 321 (1956). The court there observed that "As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the indians . . . ." By what stretch of the imagination can "reasonable needs" be limited merely to agricultural and domestic needs in an age where industrial uses are becoming more and more important to the economy and welfare of a people? The language of the court contained no such restriction.

The earlier of these cases is *Conrad Investment Co. v. United States,* 161 Fed. 829 (1908). The court proclaimed "the paramount right of the indians of the Black Feet Indian Reservation to the use of the waters of Birch Creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic *and other useful purposes.*" (Emphasis added) Again, the language of the court reflects an intention not to delimit the right of the indians to the mere accomodation of a type of economy based solely on agriculture. The court has clearly left open the door for future changes in the indian economy which will call into existence the need for water to satisfy "other useful purposes".

In the letter written by the General Counsel of the Navajo Indian Tribe to the Attorney General of the United States on February 2, 1961, to which a reply has never been received by the Navajo Indians, request was made to the Attorney General to make absolutely clear in this litigation the extent of the indian water rights as expressed by these cases. The importance of these cases, and the doctrine expressed in them, is underscored by the following remarks contained in that letter:

"I respectfully request that you take exception to this interpretation on the grounds that the so-called Winters doctrine is not so limited. It is true that water was reserved for Indian tribes for agricultural, stock, and domestic uses, but it was also reserved for any other use that Indian tribes might make for the reservations set aside for them by the United States Government. For example, on the Navajo Reservation there has been industrial development and we contemplate greatly expanded industrial development in the near future. This development will require water in substantial quantities and no recognition of such use is given in the Special Master's Report. While the tribes allocated water by the Master may not have contemplated industrial development on their reservations, this construction of the Winters doctrine could be fatal to many tribes who depend on industrial development."

For the reasons stated in the letter, it is imperative that the full extent of indian water rights not be obfuscated in this litigation. They must be expressed forthrightly on behalf of the respective indian tribes, including the Navajo Indian Tribe, and properly determined to their full lawful extent. The United States has not done this, and its failure to do so can hardly be characterized less forcefully than "as inadequate representation."

C. Binding Effect of Judgment

One of the pre-conditions for intervention "as of right" under Rule 24(a) of the Federal Rules of Civil Procedure is, as we have stated above, that "the applicant is or may be bound by a judgment in the action".

The Special Master would himself cut the controversy into two fragments and has proposed a solution which he contends renders one of the fragments unjusticiable. This latter fragment pertains to claims to water in the Lower Basin above Lake Mead. Earlier in this brief we have shown the invalidity of this proposed fragmentation.

In light of the controversy which has raged among the parties for many years as to this water and especially in light of the specific contentions of California, Nevada, New Mexico, Utah and the United States in respect thereto, it is likely that this Court will not acquiesce in the proposed truncation of this controversy. In such an eventuality, the Navajo Indian Tribe, whose claims pertain to the waters of the Colorado River and the Little Colorado River above Lake Mead, will be bound by the terms of any decree that may be forthcoming in this action. Certainly there is no assurance at this stage in the litigation that the Navajo Indian Tribe will not be bound. Nor is such an assurance requested, in light of the need for a complete adjudication of the controversy.

Few legal authorities need be cited in support of the elementary proposition that the Special Master's Report and his findings are not determinative of the issues of this cause, including the issue having to do with its breadth and with the scope of the decree ultimately to be rendered. The Special Master's report can do no more than to present the case to the Court for the Court's own determination. This is clearly set forth in the order entered June 1, 1954, by the Court appointing the Special Master. The order states that "the findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or approval by the court." This

order is in keeping with the traditional practice of the Court. See *North Carolina R. Co. v. Swasey,* 23 Wall. 405, 23 L.Ed. 136.

No other conclusion can intelligently be reached but that the Navajo Indian Tribe "may be bound by a judgment in the action". As in all other respects, the terms of Rule 24(a) are fully satisfied.

III. CONCLUSION

The Navajo Indian Tribe is making timely application to intervene "as of right" in a matter of the greatest importance to it. The intervention is based upon the inadequacy of the representation given to the Navajo Indian Tribe by the United States, which is itself already a party to this action. The decree ultimately handed down may be one which will bind the Navajo Indian Tribe itself. It is imperative that, in all of the connections discussed above, the lawful rights of the Navajo Indian Tribe be fully protected and asserted, so that they may not become atrophied through neglect and inattention.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 8, Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

UNITED STATES OF AMERICA AND STATE OF NEVADA,
Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Defendants

PETITION OF INTERVENTION ON BEHALF OF NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA, NEW MEXICO AND UTAH

COMES NOW the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, and by leave of Court first had and obtained, files this Petition of Intervention in the above-entitled cause, and alleges and states as follows:

I.

The Navajo Indian Tribe has, for many generations and long prior to the acquisition of the territory by the

United States under the Treaty of Guadalupe Hidalgo in July, 1848, lived in, used and occupied the area directly to the east of the Grand Canyon. Part of the area occupied by the Tribe during the said period now constitutes the Navajo Reservation which is located within the northeast corner of Arizona, the northwest corner of New Mexico and the southeast corner of Utah.

During these centuries of occupancy, the Tribe has made beneficial use of the waters of the Lower Basin of the Colorado River, and in particular of the waters of the Colorado River and the Little Colorado River. The present Reservation is bordered on the west by the Colorado River and is in part within the drainage basin of the Little Colorado River, a Lower Basin tributary of the Colorado River which flows through the Reservation and into the Colorado River at a point between Lake Mead and Lee Ferry.

II.

The Navajo Indian Tribe claims as a matter of ancient and aboriginal right extensive water rights in and to the Colorado River and the Little Colorado River, which rights existed long prior to the establishment of the Navajo Reservation, but which rights are now appurtenant to the land contained within the Reservation.

III.

The Navajo Indian Tribe asserts the priority of these water rights over those of all other claimants, whether such claimants appropriated water before the establishment of the Navajo Reservation or not, insofar as such other claimants do not themselves possess a still more

ancient and aboriginal claim upon the waters of the Colorado River and the Little Colorado River.

IV.

Upon the establishment of the Navajo Indian Reservation by the United States, the United States reserved unto the Navajo Indian Tribe its previously existing water rights, which rights remained in the said Tribe and were not given up by it. The reservation of existing rights was coextensive with the future needs of the Navajo Indian Tribe for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of civilization. Such rights cannot, by their nature, be permanently fixed and limited at a given amount. Rather, they are rights of an open and flexible nature, and depend as to their amount upon the needs of the Tribe as aforesaid.

V.

Said rights in and to water of the Colorado River and of the Little Colorado River existing in the Navajo Indian Tribe are rights existing separate and apart from any hierarchy of rights established according to the law of any given state. The rights of the Navajo Indian Tribe do not depend upon state law for their priority, duration or extent. Therefore, it is most appropriate that in this cause the Court give separate recognition to the right of the Navajo Indian Tribe to the use of water in the Lower Basin, such recognition to be apart from the apportionment made to any given state.

VI.

For many years, there has been a protracted conflict among the several users of water in the Lower Basin of the Colorado River as to their respective and conflicting claims in and to the water of the said Basin. This conflict has cast a cloud upon all rights and uses within the Lower Basin. This controversy is justiciable in its nature, and involves claimants as to waters in the Lower Basin above Lake Mead, whose claims, not being severable from the controversy as it exists as to all Lower Basin waters, are themselves justiciable as among themselves and as against claimants to waters in and below Lake Mead.

VII.

The Navajo Indian Tribe denies all the allegations, arguments, conclusions or averments in the respective pleadings of the parties which are at variance with the facts and allegations of this petition of intervention or in contravention of the rights of the Navajo Indian Tribe as hereinabove set forth.

WHEREFORE, the Navajo Indian Tribe respectfully prays:

1. That the rights of the Navajo Indian Tribe in and to the waters of the Lower Basin of the Colorado River, and in particular in and to the waters of the Colorado River and of the Little Colorado River, be adjudicated in this action.

2. That these rights be declared to be of an ancient and aboriginal nature, and prior to all other rights,

whether such other rights were established before the creation of the Navajo Reservation or not, insofar as such other claimants do not themselves possess a still more ancient and aboriginal claim.

3. That these rights be determined by this Court as to their present amount, but that this Court recognize their open and flexible nature, subject to such future changes in amount as may result from changes in the future needs of the Navajo Indian Tribe for hunting, grazing, agriculture or for other arts of civilization.

4. That the apportionment of water to the Navajo Indians be to the Navajo Indian Tribe itself, and not to one or more of the states.

5. That the Navajo Indian Tribe have such other and further relief as the Court may deem proper.

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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

CLOSING BRIEF OF IMPERIAL IRRIGATION DISTRICT

October 2, 1961

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CLOSING BRIEF OF IMPERIAL IRRIGATION DISTRICT

The Imperial Irrigation District as a defendant, owning and operating the largest California project involved herein and one of the very earliest developments, feels impelled in justice to its interests and in fairness to this Court to respond to matters contained, and also omitted, in the Brief of parties other than California defendants. Hence this Closing Brief on behalf of the Imperial Irrigation District.

Preliminary Statement

The matters before this Court on the Exceptions of the parties as briefed to now have gone far afield from the cause as plead and as tried. The result is that the inseparable influence and relevancy of the Compact on the decisions that must be made herein has been beclouded and is being lost sight of.

The Master's concept is that the only water rights or uses involved in this case are those from Lake Mead and the main stream below.[1]

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[1]The Master holds that rights to and uses of water in any or all Lower Basin tributaries are irrelevant and not chargeable *pro tanto* to the using state. (R. Pgs. 242, 226—except unexplainedly the Bill Williams R. Pg. 184.) This is held to apply, also, to the Gila River uses. (R. Pgs. 179 and Note 38; 184 Note 46; 231-232;) and to make the 265 miles of the main stream from Lee Ferry to Lake Mead a tributary and uses therefrom not accountable. (R. Pgs. 151 Note 18 and Pg. 183.) The Master even invalidates provisions of the Nevada Contract (Article 5(a), Pg. 420 R.) and the Arizona Contract (Art. 7(d) Pg. 401R.) charging those states pro tanto for uses above Lake Mead (R. Pgs. 207; 237 et seq.) This last holding Nevada and Arizona approve (Nev. Op. Br. Pgs. 19, 48, Nev. Rp. Bf. Pg. 49:— Ariz. Op. Br. Pgs. 100, 101.) In fact Arizona contends that provisions in her contract providing for Nevada, New Mexico and Utah to share in water uses as specified in Article 7(f), (g)(M.R. Pg. 402) are invalid (Ariz. Op. Br. Pgs. 29, 99, Rp.

Arizona goes so far as to contend that the Compact deals only with the main stream[2] on the basis that *supply* from the Upper Basin at Lee Ferry (Article III (d)) equals and is the same as the quantitative amount of *uses* (Article III(a)) at Lake Mead and below[3], undiminished by pro tanto charges for uses above Lake Mead.[4]

United States claims that the main stream from Lee Ferry down is involved[5] and with uses above Lake Mead, including tributaries, to be charged pro tanto to the states of use.[6]

Except for the claim of the United States for pro tanto charge for tributary uses above Lake Mead, the United States, Arizona and Nevada join in the contention that tributary rights and uses in any part of the Lower Basin are irrelevant and of no concern in this case.

The Master holds the Compact and the law of appropriation and equitable apportionment irrelevant to his "main stream"—i.e., waters of Lake Mead and main stream below[7]—though applicable to the Colorado River *System* in the Lower Basin, including the tributaries.[8]

Br. Pg. 88;) United States contends tributary and other uses above Lake Mead must necessarily be chargeable pro tanto to the state of use. U.S. Op. Br. Pgs. 15 et seq.; U.S. Rp. Br. Pg. 17.)

[2]Ariz. Op. Br. Pgs. 67, 72. Ariz. Rp. Br. Pg. 58 Note 73.

[3]Ariz. Op. Br. Pgs. 78 et seq.

[4]Ariz Op. Br. Pg. 101; Ariz. Rp. Br. Pg. 88.

[5]U.S. Op. Br. Pg. 9; U.S. Rp. Br. Pgs. 33-34.

[6]U.S. Op. Br. Pg. 15 et seq.; U.S. Rp. Br. Pg. 17.

[7]M.R. Pg. 138.

[8]M.R. Pgs. 142 re tributaries in *System*. M.R. bottom Pg. 140 re application law of appropriation.

The irrelevancy noted is upon the basis that the Project Act and Secretarial contracts are controlling.[9]

The issues herein are clearly drawn. Nevada and Arizona, naturally, support the Report and Recommended Deeree because it gives each the uncontrolled and additional use of tributary waters without accounting or charge pro tanto as against their respective state's rights in the Colorado River System. The qualified[10] support of the United States is upon the basis of purported validation of the contracts of the United States plus desired Federal controls.

We will attempt here to establish that no decision herein, whether as an intermediate or piecemeal adjudication of Lower Basin rights, can be made other than on a *System* as distinguished from so-called "main stream" basis. That the Compact and not merely the Project Act is inescapably and basically controlling in the administration of Lower Basin water rights and uses.

We shall try to be as objective as possible. We shall try to document why the Compact is *not* irrelevant and why the Compact is basically controlling on the water rights of the Lower Basin parties hereto. We shall try to document why water use rights in the Lower Basin *have* to be determined on a *System* (including all tributaries) basis and *cannot* be determined on a so-called "main stream" basis. We shall try to document why the Arizona Contract as construed by the Master is in

[9]M.R. Pg. 138.

[10]U.S. excepts to invalidating pro tanto charges for tributary and other uses above Lake Mead. (U.S. Op. Br. Pg. 1, Item 1) Also to application of state law as to when, where and in what quantity or priority water may be used in a state. (U.S. Op. Br. Pgs. 1-2, Items 2 and 3. Also Pgs. 21-23).

violation of not only the Compact, but in violation of, and contrary to, the Project Act. We shall try to document and demonstrate why priority of appropriation was and still is the applicable rule, subject to equitable apportionment considerations.

The foregoing may appear to be repetitious. May we assure this Court that we will limit any repetition to matters necessary to enable us to document our position and to set forth background matters necessary to point up our additional bases for our position herein.

Pre Compact Situation

Much has been written concerning the pre 1922 situation in the Colorado River Basin. The only reference we wish to make here to that subject is to a factual and physical or geographic error of the Master as to the Gila River. Also as to why the Gila River water uses, in particular, and all Lower Basin tributary uses, in general, were in 1922, we believe, considered as Lower Basin rights and uses in the Compact.

The Gila River Error:

The Master recognizes the right of a main stream appropriator to enjoin junior upstream tributary appropriators. He states, however, that California had no such claims against the Gila because "their points of diversion all being upstream from the confluence of the Gila with the main stream".[1] In a footnote the Master reiterates his concept that while the Gila River flows into the Colorado River, the confluence is below points

[1]Next to last paragraph Pg. 229 M.R.

of use in the United States and therefore of no consideration as a part of the System.[2]

The errors in this concept are these. Imperial's predecessors appropriated the waters of the Colorado River for diversion at what is called Hanlon Heading, a point several miles *below* the confluence of the Gila.[3] The appropriations were made principally before, but some after the 1900's.[4] Various physical structures were built as diversion works at Hanlon but all served the diversion purpose at that point until the All-American Canal went into operation[5] in 1940.[6] Also, deliveries of Colorado River water to Mexico under a Treaty were definitely contemplated in 1922.[7]

Following many previous United States investigations and reports concerning uses of Colorado River System water in the Lower Basin, Congress in 1920 directed a further examination and report concerning irrigation development of Imperial Valley and vicinity.[8] With respect to the Gila River it was reported that the drainage area was some 57,000 square miles.[9] That the average annual discharge of the Gila River to the Colorado River was 1,070,000 acre feet per annum and 6% of the total tributary contributions in the Colorado River Basin.[10] A possible site for a 2,200,000 acre

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[2]See footnote 46, Pg. 184, M.R. Also second paragraph in footnote 38 on Pg. 179 M.R.

[3]Tr. Pg. 6898, L. 9; Cal. Ex. 91, Tr. 6915.

[4]Cal. Exs. 70, 71-89; Tr. 6904-6912, 7088.

[5]Tr. 7037-7038.

[6]Tr. 7202.

[7]Art. III(c) Compact, Pg. 373 M.R.

[8]41 St. 600. See Pg. 196 Ariz. Ex. 45; Tr. 254 (Senate Doc. 142, 67th Cong. 2nd Session).

[9]Pg. 3, Ariz. Ex. 45.

[10]Pg. 2, Ariz. Ex. 45.

feet additional reservoir on the Gila was also referred to.[11] The run-off of the Gila into the Colorado from 1903-1920 is given on a monthly as well as a yearly basis.[12] Also see Arizona Exhibit 98 showing the Gila run-off from 1903-1950.[13] These run-off records report amounts, after existing Arizona uses, as high as four million acre feet in one year and some over two million acre feet and some over one million acre feet—per annum (1916, 1904, 1906, 1915, and 1909, 1917 and 1920 respectively).[13] In conjunction with this there is to be kept in mind that a dam and reservoir building program was being put into effect in Arizona on the Gila System. Roosevelt Dam on the Salt River in 1909[14] and Coolidge Dam on the Gila[15] were followed by a series totalling some eleven in number. As reported by the Master, their construction dates disclose the apparent reason for the complete impounding in Arizona of the run-off of the Gila System after 1941.[13] These matters, as of 1922, were reported by the Fall Davis Report to Congress in February 1922.[16] As it covers in detail the claims and uses in the Lower Basin as well as data on the Upper Basin, we submit it is reasonable to assume it was given study and consideration by the Compact Commissioners in their deliberations prior to November 1922.

The foregoing explains, in our opinion, why the claim of Arizona is unsound that the tributaries in the Lower

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[11]Pg. 8, Ariz. Ex. 45.
[12]Pg. 219, Ariz. Ex. 45.
[13]Ariz. Ex. 98. See Pgs. 708-9, U.S.G.S. Paper 1313, Tr. 363.
[13]Ariz. Ex. 98. See Pgs. 708-9, U.S.G.S. Paper 1313, Tr. 363.
[14]M.R. Pg. 40, Item 5.
[15]M.R. Pg. 39, Item 1.
[16]Ariz. Ex. 45, Pg. ix.

Basin, and particularly the Gila, were of no interest to the Upper Basin.[17] Also why, when Project Act opponents were seeking to eliminate tributaries from consideration and accounting as uses of System water while the Compact was up for ratification and the Project Act was being considered, proponents were so adamant on the inclusion of the Gila River. Also why the Compact was so understood and intentionally so. Rather than reprint the documentation of this we refer to the explanation of Herbert Hoover, as United States Commissioner, on the Compact, made known to Congress.[18] Also to the statement of Governor Emerson of Wyoming to the Senate Committee stating that the Gila is as much of a tributary as the Green in Wyoming.[19] Arizona may argue that with Imperial's diversions to be above the confluence of the Gila under the Project Act the Gila would no longer be of interest to the Upper Basin or to California. This point was raised during the debates and by Arizona. The reply given by Mr. Carpenter, one of the Compact Commissioners and an Upper Basin representative, we think answers this fully, showing why the System, including *all* tributaries, had to be accounted for not only as to the Upper Basin and to Imperial Valley, but because of obligations to Mexico.[20]

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[17]Next to last paragraph Pg. 74, Ariz. Op. Br.

[18]Cong.Record Jan. 30, 1923, Pgs. 2710-2713. Also see Appendix 205, Pg. A31 et seq. Sp.M. Ex. 4. The particularly pertinent parts are printed in Footnote 6, Pg. 81 Cal. Rp. Br.

[19]Cong. Rec. 69th 1st Session, Pg. 765 reprinted in part in Footnote 9 at Pg. 83, Cal. Rp. Br.

[20]See material Pgs. 89-96 Cal. Rp. Br. See especially Pgs. 93 through 96.

Early Appropriations of Water:

In the Fall Davis Report of February 1922 not only were the tributary waters of the Gila reported upon but the same report called attention to the matter of appropriations of water under state law.[21] Sufficiency of rights to irrigate Palo Verde Valley was expressed.[22] Appropriations for the Yuma Project are listed.[23] The area of public and private lands to be irrigated and referred to as Imperial Valley is given at 1,134,700 acres.[24] The Fall Davis Report refers to previous reports, including the All-American Canal Board Report[25] of 1919 which in turn had reported on notices of 1895-1899 to appropriate 10,000 second feet at Hanlon.[26] In fact, studies and reports to Congress of various departments of the United States concerning the navigability of the Colorado River and diversions therefrom for agricultural purposes were made beginning in 1890[27] and 1895.[28] Also there could be detailed a joint report of the United States Departments of State; Justice; and Corps of Engineers; Army and others in

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[21]Ariz. Ex. 45, third from last paragraph Pg. 13.

[22]Ariz. Ex. 45, paragraph under "Ownership" Pg. 57.

[23]Ariz. Ex. 45, paragraph headed "Appropriations" Pg. 63.

[24]Ariz. Ex. 45, chart in center of Pg. 80. This is the area and quantity originally intended to be irrigated at the time of the appropriations for Imperial Valley and so then reported. See Cal. Ex. 69 at Pg. 3 thereof. The diversion works and canal built had the capacity to divert 10,000 second feet. See Tr. Pg. 7200. The natural flow was adequate to sustain diversions of 4,000,000 a.f. per a. See Cal. Ex. 293, Tr. 8227, 8264, 8277 and Cal. Ex. 287, Tr. 8237. The appropriations were for 10,000 second feet. See Cal. Exs. 71-89, Tr. 6904, 7175.

[25]Cal. Ex. 185.

[26]Cal. Ex. 185, next to last paragraph Pg. 19.

[27]Cal. Ex. 56, Army Engineers.

[28]Cal. Ex. 57, Army Engineers.

1901-1902;[29] several other later reports[30] and permits from the War Department,[31] as well as reports to Congress by Presidents of the United States concerning protecting agricultural development.[32]

These matters, i.e., tributaries as a part of the Colorado River System and claims of appropriative rights for agricultural use—are mentioned to emphasize the notoriety of the topics and claims as the Compact was being drafted in 1922.

Another important event took place just before the meetings of the Compact Commissioners. It was the 1922 decision of this Court in Wyoming vs. Colorado[33] which after arguments for several days in 1916, 1917, 1918, 1921 and again in 1922 and decided June 1922,[34] finally settles the application of the law of appropriation of water interstate as well as intrastate in the Western states adhering to the law of priority of appropriation.[35] It was a landmark decision available to the Compact Commissioners as a guide. Mr. Delph Carpenter was not only one of the leading Compact Commissioners but counsel in the Wyoming-Colorado case. It would seem not to need argument to support the proposition that the principle of interstate applications of the law of prior appropriation was an estab-

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[29]Cal. Exs. 141-142. See in particular Ex. 141, Pgs. 11-14, 36, 56, 72-73.

[30]Cal. Ex. 143, Army Engineers; 145 Sec. of War; 140 Reclamation Service.

[31]Cal. Ex. 157 (1910); 162 (1916); Annual permits from the War Department were continued from 1916 until after 1930, Tr. 7529.

[32]Cal. Exs. 147 (1907); 152 (1912).

[33]259 U.S. 419; 66 L. Ed. 999 (1921).

[34]From headnote Pg. 1003 of 66 L.Ed.

[35]259 U.S. 419 at 465, 468, 470, 66 L.Ed. 999 at 1013, 1015-1016.

lished matter when the Compact was signed in November 1922.

With the foregoing pre Compact matters in mind, we feel justified in attaching to the language of the Compact drafted and signed in 1922 and ratified by Congress in 1929, the significance that *System* beyond question included all tributaries, including the Gila River. Also, that "rights as may now exist" related to and meant appropriative rights with their normal Western water law priorities. It is with the purpose of relating this concept to the language used in the Compact and trying to establish the inescapable relevancy and applicability of the Compact to all rights to use of any System water that we wish now to direct attention.

The Compact

The Master holds the Compact irrelevant[1] and only interbasin.[2] Nevada contends that the Compact, Project Act, Limitation Act and Reclamation Laws are a single body of laws.[3] Arizona contends that the Compact is purely a main stream matter[4] and only interbasin,[5] although Arizona contends the Compact and Project Act must be construed together and that the Master erred in that regard.[6] Arizona also contends the Project Act modified the Compact to limit the Compact to the main stream.[7] The United States contends that the Compact divided the System between Basins and

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[1]M.R. Pg. 138.
[2]M.R. bottom Pg. 139.
[3]Nev. Op. Br. Pg. 16.
[4]Ariz. Op. Br. Pg. 72; Ariz. Rp. Br. Pg. 58 note 73.
[5]Ariz. Rp. Br. Pgs. 32, 81.
[6]Ariz. Op. Br. Pg. 67.
[7]Ariz. Op. Br. Pg. 27, third paragraph from top of page.

the Project Act modified the Compact but that uses above Lake Mead should be accounted for pro tanto.[8] The United States is indefinite on the Compact application except to approve conditionally the Master's Report and reserve its position.[9] The position now seems to be that the language and meaning of the Compact as signed in 1922 is immaterial[10] and only Congressional intent in 1929 is material.[10]

That the Compact accomplished a division of the *beneficial consumptive uses* of the Colorado River *System* as between the Basins is generally agreed. On the basis that all the Compact dealt with is the main stream (Arizona's position) and that the Project Act is controlling and makes the Compact irrelevant (the Master's position partially concurred in by the United States but questioned in part by Arizona and the United States) little, if any, analysis of or attention to the application of the Compact has been made.

The Tributaries:

Inasmuch as the Master holds rights and uses on the tributaries to be immaterial and not subject to pro tanto charge to the states of use (including uses on the main stream above Lake Mead)[11] and invalidates pro tanto deductions in the Arizona and Nevada Contracts[12] (on the basis of the Project Act and contracts being controlling), may we analyze the Compact on this subject.[13]

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[8]U.S. Op. Br. Pgs. 10 et seq., U.S. Rp. Br. Pg. 8.
[9]U.S. Op. Br. Pg. 6 "Argument."
[10]U.S. Rp. Br. Pg. 33.
[11]M.R. Pgs. 183, 226, 242, 316, 325.
[12]M.R. Pgs. 207, 237.
[13]The effect of the Project Act is discussed later under that topic heading.

Use and Supply:

We believe that to interpret properly the Compact and its effect on the Project Act and Secretarial contracts there must be first kept in mind the distinction between *supply* on the one hand and the division of *beneficial consumptive uses* dealt with by the Compact on the other hand.

The obligations of the Upper Basin to furnish *supply* to the Lower Basin are contained in the following provisions of the Compact.

Article III(d) provides that the Upper Division will not cause the flow of the River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series.[14]

Article III(e) provides that the Upper Division shall not withhold water and the states of the Lower Division shall not require the delivery of water which cannot reasonably be applied to domestic and agricultural uses.[15]

Article III(c) provides that in the event of a treaty with Mexico giving rights to System water, such shall be supplied *first* from surplus *above* 16,000,000[16] acre feet of *uses* (7,500,000 in Upper Basin and 8,500,000 in Lower Basin) and then if there shall not be such surplus, one-half of the deficiency shall be supplied by each Basin, the Upper Basin's share to be delivered at Lee Ferry.[17]

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[14]M.R. Pg. 373.

[15]M.R. Pgs. 373-374.

[16]Articles III(a) and III(b).

[17]M.R. Pg. 373.

Turning now to the division made by the Compact between Basins, we find in Article III(a) that what is apportioned there is *not supply* but exclusive beneficial consumptive *use* in perpetuity. In other words, the exclusive *right* to beneficial consumptive *use* in *perpetuity* of 7,500,000 acre feet per annum in the Lower Basin.[18]

This vast distinction quantitatively between supply at Lee Ferry and uses at sites and places of *use* scattered throughout the Lower Basin is recognized by the Master. Claims that in the Compact supply and use are correlative (III(d) and III(a)) or that Article III(a) uses are confined to the main stream are rejected.[19] The Master points out that said *supply* is considerably smaller than uses given by Article III(a).[20]

Tributary Uses:

We, however, submit that there can be no room for argument, as made by Arizona, that the perpetual beneficial consumptive *uses* permitted to the Lower Basin do not include *all* Lower Basin tributary uses, including the Gila River beneficial consumptive uses. Article III(a) specifically says that the III(a) uses are "from the Colorado River System".[18] To further fortify this contention attention is called to Article II(a) of the Compact which expressly defines *System* as meaning Colorado River and its *tributaries* within the United

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[18]M.R. Pg. 373; Article III(a): "There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

[19]M.R. Pgs. 142-143.

[20]M.R. Pg. 144, first paragraph.

States.[21] That the Project Act made no change in this situation is treated hereinafter under Project Act.

Appropriative Rights:

The foregoing is not all that Article III(a) of the Compact does. Having in mind the then current decision in Wyoming vs. Colorado holding the law of appropriation to be applicable to interstate streams and rights[22] and the Fall, Davis and other Reports calling attention to the Lower Basin claims to appropriative rights,[23] we submit that there is significant language in the Compact recognizing these claims. Article III(a) of the Compact provides that the 7,500,000 acre feet per annum of *System* beneficial consumptive uses apportioned to the Lower Basin shall "include *all* water necessary for the supply of any *rights which may now exist*".[18] We submit that in the atmosphere of 1922 this would be peculiar language and mere surplusage unless it had some purpose and definite meaning.

To us it had and still has a very plain and necessary meaning. To us it meant and means this. That the Lower Basin States agreed with the Upper Basin States that the total or aggregate of all Lower Basin *then existing rights* would be included within and *sat-*

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[21]M.R. Pg. 372.

[22]259 U.S. 419 at 465, 468, 470; 66 L.Ed. 999 at 1013, 1015-1016 (1922).

[23]See Pg. 8 supra.

[18]M.R. Pg. 373; Article III(a): "There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

isfied from the *System* uses[24] in the Lower Basin. That quantitatively this relates to and means the permanent right to use[24] of the first 7,500,000 acre feet per annum.

To us this meant and means that this *perpetual* aggregate annual right to 7,500,000 acre feet of beneficial consumptive uses from the *System* in the Lower Basin was and is, as between the Lower Basin States, a competitive and adverse right in each Lower Basin State against the other, to a part of that total. To us it also meant and means that as to each Lower Basin State not only was there given protection of its existing *System* rights but each such state was and is correlatively chargeable, accounting-wise, with all its *System uses.*[24]

Compact Accounting:

This brings into focus the matter of the need of Compact accounting. May we digress from existing rights for a moment to try to demonstrate why we think Compact accounting is inevitable. Also, why this case cannot be disposed of here without Compact accounting.

Basin vs. Basin:

Taking this matter first from the standpoint of Compact accounting Basin vs. Basin, we again turn to Article III(c) of the Compact.[25] Under Articles III(a) and (b) the Lower Basin has the right to put to beneficial consumptive use 8,500,000 acre feet per annum from the *System,*[26] not simply the main stream. By

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[24]Meaning beneficial consumptive uses.
[25]M.R. Pg. 373.
[26]M.R. Pg. 373.

Article III(c) the Lower Basin is protected against the Upper Basin to the extent of the 8,500,000 annual acre feet use of *System*—not *main stream*—uses, as against the impact of the Mexican Treaty obligation.[27] The Upper Basin is likewise protected as to its 7,500,000 a.f. per a. of such uses. Then if there is a deficiency below 16,000,000 a.f. per a., Article III(c) requires each Basin to contribute in equal shares to the deficiency for Mexico.[28] It seems to us too clear for argument that before the Lower Basin may call on the Upper Basin for any part of the deficiency for Mexico the Lower Basin must first show that beneficial consumptive uses in the Lower Basin from all *System*—not simply main stream sources—have been exhausted to the extent of 8,500,000 a.f. per a. This calls for accounting.

State vs. State:

If Basin vs. Basin, all Lower Basin uses from System, as distinguished from uses of the main stream or some part thereof, are accountable before the Lower Basin can call upon the Upper Basin for water for Mexico, then what of the relation of the Lower Basin states one against the other as to such a System accounting? Before any Lower Basin state can be called upon to supply any part of a deficiency for Mexico is not that state as against other Lower Basin states entitled to participate in the System accounting of Lower Basin uses? It is to be remembered that under the Compact the uses the Lower Basin is given is of *Sys-*

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[27]Since fixed by Treaty as 1,500,000 a.f. per a. from all System sources net delivery into limitroph section of River at boundary. See Ariz. Ex. 4, Tr. 220 at Pgs. 1288 et seq. of Ex.

[28]M.R. Pg. 373.

tem, not merely "main stream" character—and includes tributaries by definition.[29] And is not each Lower Basin state against the other entitled under Article III(a) of the Compact to have its existing rights to III(a) *System* water uses protected against the inroads of uses not chargeable to or protected by the existing use provisions of Article III(a) or III(c)? Put in another way—may uses out of the main stream by any or all Lower Basin states total the amount of uses available to the Lower Basin by the Compact and any one or more Lower Basin states also make tributary uses in addition thereto? Is each Lower Basin state at liberty to make all the uses of non "main stream" waters at will and without limit or pro tanto charge and only be charged with its "main stream" uses as its total use of System uses permitted to the Lower Basin by the Compact? We submit this just can't be against the Upper Basin. We also submit that it is impossible between states of the Lower Basin. The aggregate of the Lower Basin states' uses, we submit, is controlled between states on the same bases as Basin vs. Basin, i.e., System—not "main stream" wise. We submit no state—one against the other—can be compelled to give up its III(a) uses as to a state using water in addition to its III(a) rights. If Arizona's uses on the Gila are III(a) uses, then we submit she can't have her full share of III(a) uses again from the main stream.

It is to be remembered that the Upper Basin as against the Lower Basin is entitled, before furnishing deficiency water for Mexico, to an accounting of all System Lower Basin uses up to 8,500,000 a.f. per a. This

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[29]Articles II(a), III(a) and (b), Pgs. 372-373, M.R.

same accounting, we submit, is available to and a right of each Lower Basin state against the other before the Lower Basin is to be required to give up *any part* of its *8,500,000* a.f. per a. of uses.

Compact Controlling:

The question may be asked as to why we stress the Compact so much when the Master agrees that the Compact includes all tributaries.[30] The reason is that the Master holds the Compact irrelevant[31] and the Project Act controlling.[32] To this we call attention to the fact that the Master fails to consider or apply the language of the Project Act making the Compact controlling. When Congress provided in the Project Act for ratification of the Compact, Congress also in the same Section of the Act provided (1) that the rights of the United States and those claiming under the United States should be subject to and controlled by the Compact as to the waters of the Colorado River and its *tributaries;*[33] and (2) that all contracts or other privileges from the United States or under its authority necessary or convenient for the use of the waters of the Colorado River or its *tributaries* shall likewise be subject to and controlled by the Compact.[34] But Congress did not stop there. It also provided that the *United States* as well as its contractees and users and *appropriators* of water from the reservoirs and *works provided for in the Project Act* should be *subject* to and *controlled* by the *Compact—notwithstanding anything in*

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[30]M.R. Pg. 142.
[31]M.R. Pg. 138.
[32]M.R. Pgs. 138, 151.
[33]Pro. Act, Section 13(a), Pg. 393 M.R.
[34]Pro. Act, Section 13(b), Pg. 393 M.R.

the Project Act to the contrary and that all contracts should so provide.[35] We submit these provisions, ignored by the Master and our opponents, are unanswerable and make the Compact not only relevant but controlling, and the matter before the Court a System and not a segmented "main stream" one.

The contracts of the parties do specifically provide that the Compact is controlling.[36] It is to be noted that these contract provisions,—as does Project Act Section 13(a),—include tributaries as being subject to the Compact.[37]

The Master reasons that there is no basis in law for regulation of the tributaries by the United States. As stated—"United States cannot by its operation and control of Hoover Dam regulate the flow of water in the tributaries—".[38] Also, the Master indicates that charging pro tanto uses on tributaries is contrary to Section 18 of the Project Act.[39] Section 18 leaves to the states the appropriation, use and control of water within their borders, except as modified by the Compact.[40] The Master overlooks the proposition that by *ratification* of the Compact the *states* have consented and *agreed* to an *accounting* of their beneficial consumptive uses on all parts of the *System,* including all tributaries. This does, however, raise the question of administration. We submit this does not mean that

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[35]Pro. Act, Section 8(a), Pg. 389 M.R.

[36]See Sec. 14 Palo Verde Contract as typical of Cal. contracts, M.R. Pg. 431. See Sec. 14 Nev. Contract, Pg. 414 M.R. See Sec. 13 Ariz. Contract, Pg. 406 M.R.

[37]M.R. Pg. 393.

[38]M.R. Pg. 173-174 last sentence bottom Pg. 173.

[39]Last paragraph Pg. 240 M.R.

[40]M.R. Pg. 395.

the United States may go into a state and control the place, quantity and priority of use intrastate at the will of the United States, as the United States contends with respect to its position in Nevada[41] and elsewhere. Congress has decided to the contrary as to the United States powers by providing that the United States is bound by the Compact notwithstanding anything contained in the Project Act[42] and providing for state regulation of appropriation and use of water within a state.[43]

Administration of the Compact in Harmony With Project Act:

The administration sounds complicated. In fact, we submit it is not as complicated as would be the Master's formula which sounds simple but, we urge, is not. His formula is predicated on a combination of "present perfected rights"[44] and pro ration[45]. To complicate the matter he decrees that the first 7,500,000 acre feet per annum in the segmented "main stream" under the Project Act[46] is subject to disposition under the Project Act and Secretarial contracts in the full Compact quantity from the "main stream" only. It is submitted this is in direct conflict with the controlling effect of the Compact provided in the Project Act, and contrary to the express requirements of the Compact that the first 7,500,000 a.f. per a. is *System* and shall satisfy

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[41]U.S. Op. Br. Pgs. 5, 23, 36, 39.

[42]Section 8(a) Pro. Act, Pg. 389 M.R.

[43]Section 18 Pro. Act, Pg. 395 M.R.

[44]M.R. bottom of Pg. 152 and Pgs. 234, 347-349, 359.

[45]M.R. Pg. 233.

[46]First and second paragraph of Section 4(a) of Project Act which the Master says gives of the *Article III(a) Compact water* 4.4 to Cal., .3 to Nev. and 2.8 to Arizona.

existing rights. Also because the Master's formula, after allocating 7,500,000 a.f. per a. from the "main stream" in effect allocates without pro tanto charge the tributary uses and uses on the main stream above Lake Mead. How any administration could be had under this conflicting set of factors we submit is beyond determination. Yet the Compact, we submit, cannot be and was not intended to be ignored even in the passage of the Project Act. If so, what is the meaning of the several above provisions of the Project Act making the Compact controlling?

It is submitted that the only feasible way to administer the matters involved in this case is to start with the Compact. Then apply the Project Act subject to the Compact. Such an accounting is inevitable in the end. Any piecemeal disposition of the matter in this case only evades the ultimate. You just can't, we claim, dispose of a part of the main stream and leave all other uses out and ever conform interbasin or interstate to the Compact. The Master does it by ruling the Compact irrelevant and this without reference to the provisions of the Project Act making the Compact controlling.[47]

Project Act

The Master holds the Project Act to be controlling over the Compact but only as to the "main stream" from Lake Mead and below.[1] The Compact which he holds applies to the System and includes the tribu-

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[47]See infra Pgs. 39-48, 52 for an outline and formula for the Decree in this case, which formula, we submit, harmonizes the Compact and Project Act and defines the rights of all Lower Basin states.

[1]M.R. Pg. 151.

taries,[2] is held to be irrelevant.[3] This is done upon the basis that the Compact deals only interbasin.[4]

A significant holding is that the Compact is only applicable to the extent made applicable by Statute (presumably Project Act) and contracts.[5] Then it is held that the Project Act is the source of authority—not for allocation of System uses in the Lower Basin—but only from the segment of the main stream water from Lake Mead and below.[6] On this theory the Master holds that pro tanto charges for uses above Lake Mead are void.[7] By implication and omission in the Arizona Contract the uses on the Gila River are excluded from pro tanto charge of Compact uses.[8] It is then held that the Project Act by Section 4(a) second paragraph furnishes authority for Arizona to have the Gila uses without pro tanto charge therefor, and in addition thereto its alleged full quota from main stream sources.[9]

Here we clash with the Report. The Master holds Section 4(a) second paragraph[10] and Section 5[11] to be the guiding source of authority for the contracts, and the Arizona contract in particular.[12] The Arizona contract is held valid, except for pro tanto charges for Arizona uses above Lake Mead.[13] Arizona contends

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[2]M.R. Pg. 142.
[3]M.R. Pg. 138.
[4]M.R. Pg. 139.
[5]M.R. bottom Pg. 141.
[6]M.R. Pg. 151.
[7]M.R. Pg. 227.
[8]M.R. Pg. 232.
[9]M.R. Pg. 179.
[10]M.R. Pgs. 382-383.
[11]M.R. Pgs. 384-387.
[12]M.R. Pgs. 171 and 151.
[13]M.R. Pg. 201.

that other provisions of her contract recognizing the right of Nevada, Utah and New Mexico to specified uses of water are also invalid.[14]

Arizona Contract Invalid as Interpreted:

We contend that the Arizona Contract as interpreted is invalid for the reasons that it is contrary to and in conflict and violation of the Compact and also in violation of the Project Act. That the Project Act requires contracts under the Project Act to be subject to and controlled by the Compact notwithstanding anything to the contrary in the Project Act.[1] This relates specifically to the Project Act works.[1] All contracts are required to be conditioned on their being subject to and controlled by the Compact.[1] Arizona's contract is so conditioned.[2]

As the Project Act, and in particular the second paragraph of Section 4(a) thereof, are claimed by Arizona to be the mandatory basis of its contract[3] and the Master holds it to be at least a guide,[4] may we turn to the Arizona Contract for some of its terms. Section 7 thereof deals with the quantities of beneficial consumptive uses of water Arizona is to have.[5] It is to be noted that the use Section 7(a) of Arizona's Contract purports to allocate to the extent of 2,800,000 acre feet of use per annum is not by the contract identified except to specify "from storage in Lake Mead—" thus main stream as segmented. Now may we turn to

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[14]Ariz. Op. Br. Pg. 29.
[1]Sec. 8(a) Pro. Act, Pg. 389 M.R.
[2]Sec. 13 Ariz. Contract. See Pg. 406 M.R.
[3]Ariz. Op. Br. Pg. 83, Ariz. Rp. Br. Pg. 88.
[4]M.R. Pg. 163.
[5]M.R. Pgs. 400-403.

the language of the second paragraph of Section 4(a) of the Project, said to be the source of giving Arizona 2,800,000 a.f. per a. out of the main stream as segmented *plus* non pro tanto charge of uses above Lake Mead or from tributaries, i.e., System uses. There we find that the language of the Act is not to give Arizona 2,800,000 a.f. per a. of a segment of main stream uses, or just any uses, but on the contrary 2,800,000 a.f. per a. of that 7,500,000 a.f. per a. of System uses of water apportioned by Article III(a) of the Compact.[6] The III(a) uses are *System*—not simply or confined to a segment of the main stream—and are clearly and unequivocally defined as such in Articles II(a) and III(a) of the Compact.[7]

Not only is the Arizona Contract in violation of the Article III(a) aspects as expressed in the second paragraph of Section 4(a) of the Act as well as Article II(a) of the Compact, but it is in conflict with and violates another provision of the Compact incorporated into the Act by reference. The beneficial consumptive uses allocated in perpetuity to the Lower Basin of the first 7,500,000 a.f. per a. are to include all water necessary to supply any rights "which may now exist" in the Lower Basin. As III(a) is System and not main stream or a segment thereof, we submit there is no basis for allocating all of that 7,500,000 a.f. per a. out of the main stream.[7a] That any beneficial con-

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[6]M.R. bottom Pg. 382 and top Pg. 383.

[7]M.R. Pgs. 372-373.

[7a]The Master's formula is 4.4 to Cal., .3 to Nev. and 2.8 to Arizona out of III(a)—all from Lake Mead only. While the contract language does not identify these items as III(a) the authority for the allocation of this 7.5 is of III(a). See both paragraphs of Section 4(a) of Act, Pgs. 382-383, M.R.

sumptive uses of water in the Lower Basin by Arizona from any part of the *System* must be charged pro tanto as a part of any 2,800,000 a.f. per a. to Arizona of III(a) uses.

Turning now to paragraph 7(b) of the Arizona Contract,[8] this provides for Arizona to have one-half of the excess or surplus unapportioned by the Compact—less such thereof as may be of right in Nevada, New Mexico and Utah. Here again the source is Lake Mead storage. Arizona says the Secretary had no right to recognize any rights of Nevada, Utah or New Mexico to any part of said excess or surplus.[9]

Going back to the said second paragraph in the Project Act, the authority there is—(if we are to consider something that never came into being)—for Arizona to have one-half of the excess or surplus unapportioned by the Compact.[10] In the language of this subparagraph of Section 4(a), it is obvious, we think, that the excess and surplus referred to includes use available to the Lower Basin above the III(a) uses. We can find no other waters referred to there as to these first two items other than III(a) and surplus and excess. Here again we refer back to the Compact and the other or additional 1,000,000 a.f. per a. of uses of which the Lower Basin may make use by Article III(b) of the Compact.[11] The uses there referred to are of *such* waters, referring back to System uses specified in Article III(a). The Master holds this to be

[8]M.R. Pg. 401.
[9]Ariz. Op. Br. Pg. 29, Ariz. Rp. Br. Pg. 88.
[10]M.R. top Pg. 383.
[11]M.R. Pg. 373.

so.[12] Thus to the extent of 1,000,000 a.f. per a. of excess or surplus in the second item of Arizona's Contract,[13] any part thereof confined and limited to the segment of the main stream—i.e, Lake Mead—is under the language of the Arizona Contract, void as contra to the Project Act and contrary to the Compact. The contract, as to surplus or excess, allocates such to Arizona—not from the System, where it is under the Compact and the Project Act (by its reference to the Compact)—but from Lake Mead.

To make matters worse, the Master by his allocation scheme, said to be authorized by the Project Act and implemented by the Secretarial contracts,[14] allocates all 7,500,000 a.f. per a. of III(a) uses plus both halves of all surplus or excess however defined—*out of Lake Mead*. This by his own definition includes the III(b) uses. Therefore, the Master's formula disposes of the total of at least 8,500,000 a.f. per a. of Compact uses —the total available to the Lower Basin from the *System* by Articles III(a) and (b) of the Compact but *not* from the *System*—but from *Lake Mead*. In addition, the Master's formula allows all tributary uses,[15] including the Gila, without pro tanto charge against the 8,500,000 of uses. This completely defeats the Compact by allocating 100% of the Compact III(a) and (b) from the main stream and treating other uses from tributaries as available over and above and free from accounting to the Upper Basin and this not *accountable* as to Mexican Treaty waters.

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[12]M.R. Pgs. 172, 194.

[13]Section 7(b) Pg. 401 M.R.

[14]M.R. Pgs. 138, 151, 153.

[15]Except for unexplained reasons—the Bill Williams. M.R. Pg. 184.

This, we submit, demonstrates the utter impossibility of any administration except by administration of the Colorado River System. It nullifies the Compact and its administration. We submit you just can't have any such accountings now or later because the necessary factors cannot be harmonized at all.

Here we again refer to the above material in reference to the Compact being controlling.[16] If the rights under the Project Act do not have to be harmonized with and be subject to and controlled by the Compact —then what—we ask, is the meaning of the several provisions of the Project Act and of the contracts so providing?[17] Also, it is to be noted that if the Tri-State Compact,—preratified by Congress as provided in the second paragraph of Section 4(a) of the Project Act—had been agreed upon by the three states, it would have had to have been upon the condition that such a Tri-State Compact had to be "in all particulars" subject to the provision of the Colorado River Compact and Arizona would have had to ratify the Colorado River Compact.[18] This coupled with the fact that the second paragraph of said Section 4(a) as to items (1) and (2) (2.8 plus excess) refer to Compact uses, i.e., System uses, we submit demonstrates that the Arizona Contract and the Master's main stream formula are unsound and unsupported and the Arizona Contract is void as interpreted by the Master.

This is not to say that Arizona might not be entitled to 2,800,000 a.f. per a. of III(a) uses and one-

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[16]See Pg. 18 supra.

[17]See Sections 8(a), 13(b),(c) and (d) of the Project Act.

[18]See items 6 and 7 of said second paragraph of Sec. 4(a) at Pg. 383 M.R.

half the excess or surplus, and Nevada 300,000 a.f. per a. subject to the rights of Utah and New Mexico from *System* uses available to the Lower Basin but *not* from the *main stream alone* with tributary uses added.

If the concept behind the formula of the Master be; that by allocating 100% of the III(a) water from Lake Mead and allocating 100% of surplus and excess from Lake Mead and allowing all tributary and other uses as plus 100%, it can be done by depending upon there being physically available in the main stream below Lee Ferry unused portions of Article III(a) uses apportioned to the Upper Basin in perpetuity—then we submit there are unsurmountable legal obstacles.

First is the matter of the Master's designation of the main stream from Lee Ferry to Lake Mead—265 miles—as a tributary and uses therefrom not to be deductible pro tanto from the allocated Lake Mead amounts.[19] A holding herein that would become res adjudicata would wreck the whole concept of the Compact as well as the Project Act.

To decide that the Arizona Contract for water from Lake Mead may be *permanently* attached to unused water apportioned in perpetuity to the Upper Basin to satisfy Lower Basin III(a) or (b) uses encounters several legal obstacles.

One is that Section 5 of the Project Act provides that the Secretarial contracts shall be *for permanent service.*[20] How can a supply that has been allocated "in perpetuity" to the Upper Basin be made the subject of permanent service to a Lower Basin state?

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[19]M.R. Pg. 226.

[20]See Pgs. 384-385 M.R. last sentence beginning on Pg. 384.

Secondly, to assume the inability of Upper Basin states to develop projects including transmountain diversions sufficient to put to use the full perpetual allocation of the Upper Basin is unsound as a practical matter and no basis for the legal assumption of availability to the Lower Basin on a permanent basis.

Thirdly, if there are quantities of the Upper Basin allocation of 7,500,000 a.f. per a. physically present at Lee Ferry because unused in the Upper Basin, its very presence would preclude calling on the Upper Basin for water for Mexico and the Upper Basin could, and undoubtedly would, require its application to Mexico. In so doing there seems to be no answer to the proposition that in such an accounting all Lower Basin System uses would have to be accounted for. In this accounting we submit California is not required to sit by and have only main stream uses by other states accounted for before the California uses are to be burdened. We submit California would be entitled to have Arizona charged for all her tributary uses as well as her main stream uses as a part of the 8,500,000 a.f. per a. that are available and chargeable to the Lower Basin before demand can be made on the Upper Basin. Being in the Lower Basin as surplus already, we submit the Upper Basin could require this surplus contribution to Lake Mead to be used for Treaty purposes. Thus, we claim, it would not be available in the Lower Basin for permanent service to Arizona. Therefore, at least interbasin—and we submit between states in the Lower Basin—this 2,800,000 a.f. per a. allocated by the Master to Arizona from the "main stream" would be subject to the Mexican Treaty obligation at least to the extent of Arizona's uses on the Gila. Arizona's rights

to main stream uses would also be subject to such diminution—because of her Gila uses—to the extent of other Lower Basin states' rights to main stream water. Therefore, we say that there could be nothing legally firm or permanent or justified in awarding Arizona her alleged full share of System water out of the main stream, whether or not dependent upon conjectured and unfirm use of Upper Basin water. Also because, we submit, you just cannot give Arizona 100% of her alleged share of System water out of the main stream and also give her unaccounted for uses out of the Gila and much less above Lake Mead, or in defiance of the use rights of other Lower Basin states.

The Gila Under the Project Act:

We submit that under the Compact there is no room for argument against the Compact including all the tributaries, including the Gila, as System. That the 8,500,000 a.f. per a. of uses avialable to the Lower Basin is of System water. The Master so holds.[1]

Arizona insists that the Project Act, second paragraph of Section 4(a), gives to Arizona the exclusive use of the Gila. Also, gives protection against Arizona being required to release any of the waters of the Gila System for use in Mexico.[2] Arizona also interprets this language as giving the Gila System uses to Arizona free from any quantitative accounting or pro tanto charge against her share of System water uses available under the Compact.[3] There is no question but that Arizona sought by every device from 1922 through 1929

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[1]M.R. Pgs. 142-143.

[2]Items (3) and (4) Section 4(a), second paragraph M.R. Pg. 383.

[3]Ariz. Rp. Br. Pg. 78.

to get the Gila uses exclusively for Arizona, and out from under the Compact. Arizona's briefs and citations show diligent efforts and skillful maneuvering to this end. On the other hand, the opponents to this were equally as adamant that the Gila River be included along with all other tributaries as a part of the System and its uses accountable as a part of the System. Wishing to avoid repetition, we here refer to the material at Pages 91-96, 99-100 of California's Reply Brief. To us the many arguments pro and con before ratification of the Compact and before passage of the Project Act demonstrate that the issue was strenuously debated. To us it also demonstrates that if there had been any intent to amend the Compact to exclude the Gila System, or any tributaries, from the Colorado River System, the matter was so prominently before Congress that it could and would have been expressed by amendment of the Compact. Two express amendments were made to the Compact.[4] We therefore submit that as the Project Act specifically makes the Compact controlling[5] and it was not specifically amended in respect to System, then that is decisive.

But Arizona says the Project Act amended or modified the Compact in this regard.[6] Much legislative history is quoted by all parties hereto. The United States makes a timely observation. "In debates of such duration, participated in by many individuals, representing competing interests, it is inevitable that many argu-

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[4]One related to the navigability of the Colorado. See Art. 4(a) Compact, and Sections 1 and 6 of Project Act. The other related to six state ratification of the Compact. See Article XI Compact and Section 13(a) Project Act.

[5]See Pgs. 18-19.

[6]Ariz. Op. Br. Pg. 27.

ments were advanced and statements of intention made which confuse the picture."[7] We therefore merely cite the record to show that if there had been any intention to eliminate the Gila from System or System accounting it could have been expressly done. We submit it was not done either as to the Compact or Project Act.

As to the effect of the second paragraph of Section 4(a) of the Project Act and with particular reference to the Gila River, we submit the following. The United States expresses the matter aptly. The above mentioned paragraph of Section 4(a) was a way out of a possible impasse. It merely offered to Arizona, Nevada and California an opportunity to make a Compact. The Compact was never made. No such agreement was ever made. We do not believe it necessary to resolve any precise meaning to items (3) and (4) of said second paragraph of Section 4(a).[8] By her series of reservoirs of eleven or more on the Gila System[9] Arizona has successfully and completely cut off any flow of the Gila into the Colorado and is putting it fully to use in Arizona. The Arizona and New Mexico Gila System uses are now far upstream on the Gila and remote from the Colorado, and it is physically very unlikely that any interest would advocate or be able to release from Arizona reservoirs water so as to make it available to Mexico near Yuma. Therefore, Arizona has really accomplished what we believe to be the suggestion in 4(a) aforesaid.

However, we submit that it was never the intention of the Upper Basin states, much less the Lower Basin

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[7]U.S. Rp. Br. Pg. 38.
[8]M.R. Pg. 383.
[9]M.R. Pgs. 39-43.

states, to give Arizona the use of the Gila as being unaccounted for. Even if so, it was never done by Compact or agreement. To carve the Gila System out of the Colorado River System, accounting-wise, and give it to her in addition to a full allotment of all her claims to her alleged share of System water is too big a jump, we contend.

The Master holds and Arizona, naturally, agrees that the Secretarial contract affects this non-accounting for Gila uses because there is no reference to accounting or pro tanto reduction of Arizona's Gila uses.[10] This, we submit, fails of its own weight. The Master says the Project Act does not cover the Gila[11] and only the Project Act and contracts are held to be controlling.[12] It is hard, then, to see how the Project Act could eliminate Compact accounting on the Gila if the Project Act did not deal with the Gila and the failure in the Contract to exclude the Gila, amounting to exclusion from Compact accounting, is negatived by the provisions of Sections 7(c) and 13 of the Arizona Contract unequivocally making the Compact controlling.[13]

Under the Pleadings and Evidence:

It is submitted that it is very significant that following 1929 ratification of the Compact and passage of the Project Act, Arizona did continue to try to eliminate being charged for Gila uses. If the Compact or Project Act notoriously settled the issue as now

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[10]See Section 7(d) of Arizona Contract, M.R. Pg. 401. Master's holding Pg. 232 of Report.

[11]M.R. Pg. 232.

[12]M.R. Pg. 138.

[13]M.R. Pgs. 401 and 406.

claimed by Arizona, there would have been no need for Arizona's subsequent conduct.

Having tried unsuccessfully to eliminate the Gila from accounting by Tri-State Compact, Arizona next resorted to the claim that at least one million a.f. per a. of Compact uses (i.e., III(b)) were subject only to Arizona Gila use under the Compact and Project Act and contracts made by the Secretary were infringing upon this right.[14] This Court held there was no merit to Arizona's claim that III(b) water related only to the Gila or was exclusively for Arizona.[15]

And may we now call attention to the pleadings herein and the trial record herein. We submit this is important. The contentions of Arizona, now made, that the Gila had been eliminated from accounting in 1929 and was so understood is completely refuted by Arizona's own pleadings herein. Further, we submit that the pleadings herein and the years and volume of trial record herein were devoted, not to the issue argued by Arizona or contained in the Report, but to a complete disposition of the Compact as well as the Project Act, Limitation Act and contract issues herein. The pleadings and trial were devoted to the issues of the rights and uses of Nevada and Utah on their respective tributaries, as well as Nevada's main stream claims. The pleadings and trial also covered in detail the New Mexico tributaries rights and uses. They also covered in detail the rights and uses of Arizona on the Gila and the main stream. It also covered the California claims to

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[14]Arizona vs. California, 292 U.S. 341 at 349, 350-351; 78 L.Ed. 1298 at 1301, 1302 (1933).

[15]Arizona vs. California, 292 U.S. 341 at 358; 78 L.Ed. 1298 at 1306.

rights and uses on the main stream. As we are here discussing primarily the Gila, we will document the issues in the pleadings and the evidence under a separate heading.[16]

The next effort of Arizona to eliminate the Gila from System accounting was in this case. It was based on the concept of gaining, without accounting therefor, about one million a.f. per a. on the Gila by this process. Regardless of the amount actually put to beneficial consumptive use on the Gila, Arizona urged that she should only be charged or have to account for the diminution to the flow of the main stream by the action of man on the Gila. Even though Arizona at various times claimed her Gila uses to be about 3,000,000 a.f. pe a.,[17] she claimed the "reconstructed virgin flow into the Colorado from the Gila to be only about one million a.f. per a."[18] This claim she has now receded from and admits accounting for use should be based on beneficial consumptive use at places of use.[19]

As a part of Arizona's claims in her Complaint she stated her Gila uses but claimed she should only have to account therefor to the extent of her uses in excess of one million a.f. per a. This million measure was based on her main stream depletion theory.[20] She also alleged that her Gila uses were chargeable to III (b) uses and to III(a) uses only to the extent that III(a) uses exceeded the one million of III(b) uses.[21] Strange pleadings in 1952, it would seem, if it was so

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[16]See Pg. 38 infra.

[17]Arizona v. California, 283 U.S. 423 at 460.

[18]Ariz. Complt. Pg. 26, Ariz. Ans. to Cal. Ans., Pgs. 4, 16-17.

[19]Ariz. Op. Br. Pg. 105.

[20]See Pg. 26 Ariz. Complt., first paragraph.

[21]See top Pg. 17 Ariz. Answer to California Answer.

well known to Congress in 1929 and to Arizona at all times since then that the Gila was excluded from Compact or any accounting, or if the Project Act in 1929 accomplished giving the Gila to Arizona free from accounting. Nevada plead that the Gila uses were accountable as III(a) uses.[22] The United States refers to the Arizona Contract for its terms and alleges the United States is "in grave doubt" about whether the Arizona Contract covers tributaries and applies to the Gila and requests this Court to resolve the matter.[23] Weeks were spent in trying Arizona's rights and uses on the Gila and primarily on the issue of the extent of and how to measure them quantitatively.[24] New Mexico plead her rights and uses on the Gila River and its tributaries in New Mexico—many, many miles and the width of Arizona away from the main Colorado[25] and claimed she was entitled to and was of right using III(a) and III(b) uses.[26] Her whole case on the trial was devoted to her detailed uses in New Mexico from the Gila System.

Again, we say these are strange pleadings and trial proceedings if the Gila had been eliminated. Also, may we ask this question. If only the main stream of the Colorado from Lake Mead and below are involved in this case and tributaries, including the Gila, are not involved in this case, and the Project Act is controlling and the

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[22]See Pg. 18, Nevada Complt.

[23]See Pgs. 36-37 U.S. Complt. in Intervention.

[24]Ariz. Exs. 77, 77A-E, Tr. 325, 3851, 3988. Ariz. Exs. 100-103 re water rights on Gila, Tr. 379-380. Ariz. Exs. 107-120 Tr. 408-418, Ariz. Exs. 128-134, Tr. 800-1017; Exs. 137 Tr. 1206-.....; Ex. 162 Tr. 2013 and many others. See Tr. Pgs. 1326-2194, 2647-3650 re testimony in this.

[25]See Pgs. 4-6, N.M. Appearance and Statement of Claim.

[26]Also see Pg. 7, N.M. Appearance and Claim.

Compact is irrelevant—then why any decision on the Gila either in Arizona or New Mexico, and where does jurisdiction therefor come from? We submit that the Gila and all tributaries are involved in this case and that the case was plead and tried on that basis and should be so decided.

The Compact, Project Act, Limitation Act and Contracts Harmonized

We herewith submit our contentions that the Compact, Project Act and Limitation Act can be and must be harmonized to enable any administration of the Colorado River System in the Lower Basin and in both Basins. We also submit that the contracts can all be sustained under the interpretations we offer. We further submit that the following was and is contemplated in the drafting and ratification of the Compact, the passage of the Project Act, the enactment of the Limitation Act and in the drafting of the contracts.

Application of the Compact:

We contend that the Compact contemplated and provided in Article III(a) for two things. One was that the beneficial consumptive uses to be perpetually available to the Lower Basin to the extent of the use of the first 7,500,000 a.f. per a. were to be of System—not merely a part thereof. That by providing that that amount of beneficial consumptive use should "include all water necessary for the supply of any rights which may now exist," each Lower Basin state was and is entitled to have its then existing uses served from said amount of uses. The Master has held, and we agree, that the operative date is June 25, 1929[1] when the

[1]See M.R. Pg. 152 and footnote 20.

Compact became effective by ratification by the United States and Proclamation of the President. This right to use of the first 7,500,000 a.f. per a. of such uses we claim had as reciprocal thereto the obligation to account anywhere on the System for existing uses in the Lower Basin.

To demonstrate this concept, we beg the indulgence of this Court for an analysis of the issues in the pleadings, the evidence and record in support of the proposition that this case as plead and tried was a System—not main stream matter. We wish to demonstrate that as a practical as well as legal matter the case can and in fact must be disposed of on a System and not main stream basis. Also, that Compact accounting, practically and legally, is not only possible but required. We beg indulgence to show in some detail that the rights of all Lower Basin states are not only before this Court but what their rights are and how administration can best be had by Decree herein.

Reference to the pleadings and record as to each Lower Basin states rights of use as established in the case follows. We will make it as concise as possible. We feel it important to the overall determinations to be made herein.

We do not contend that the following details are all the evidence, but we do contend that the following is substantially the picture and furnishes a basis and pattern for disposition of this case.

As to Utah:

We submit Utah was entitled to protection for her then existing rights as of 1929 on her tributaries in the Lower Basin. She plead her claims of right on

her tributaries, *i.e.*, on the Virgin River and adjacent areas and on Kanab and Johnson Creeks. She claimed existing rights to 65,625 plus 15,173 a.f. per a. for 22,857 plus 5,338 acres; also asked for 70,852 a.f. per a. for new future uses.[2] Utah proved that her existing uses were initiated and established in the early Mormon days in 1847[3] and 1870.[4] A map of the irrigated areas was introduced.[5] A 1902 detailed study of these uses showing ditches used and areas served was received.[6] A series of Decrees adjudicating priorities prior to 1929 are in evidence.[7] Evidence as to acreages, names of appropriators and descriptions of properties served were introduced.[8] Thus Utah plead and proved very old uses, *i.e.*, III(a) uses, and asked for recognition for future needs from surplus.[9] The established Utah appropriations and existing uses are as follows: From Virgin River, 48,750 a.f. per a.; Johnson and Kanab Creeks, 6,850 a.f. per a. (Vol. II, Cal. Findings, pgs. XVII-1-10). Summarized to rounded figures of 56,000 a.f. per a. (Vol. I, Cal. Findings, pg. IV-55), recapped pg. VII-14.[9a] See Master's Report, pg. 97.

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[2]See Utah Complaint and Answer in Intervention, Pgs. 2-3.

[3]Tr. 17827.

[4]Tr. 17829.

[5]Utah Ex. 1, Tr. 17811-17823.

[6]Utah Ex. 2, Tr. 17830.

[7]Utah Ex. 9-18, inc., Tr. 17871.

[8]Utah Exs. 20, 21 and 22, Tr. 17878, 17883, 17885.

[9]See Utah Complt., Pgs. 3, 6.

[9a]These references to proposed California Findings are cited also for their references to the supporting material in the transcript and trial exhibits as cited.

As to Nevada:

Nevada alleged a right to 539,100 a.f. per a. of III(a) uses.[10] She alleged in detail her existing rights and future claims on her tributaries on the Virgin and Muddy Rivers and Meadow Valley Wash. Her total tributary "existing" uses were plead as 48,340 a.f. per a.[11] and she prayed that her use rights be decreed to be of III(a) and to have a right in the future to share in surplus.[12] The tributary uses were established to be very early ones, some dating back to Mormon colonization dates in 1865.[13] Evidence of early appropriation was introduced on the Virgin River showing pre-1905 rights and priorities.[14] The Meadow Valley Wash rights stemming from 1864[17] were evidenced by priority tables, legal descriptions, permits for a total acreage of 1,790 acres.[18] The established Nevada appropriations and existing uses are as follows: Virgin River System, including Muddy River and Meadow Valley Wash, 51,000 a.f. per a. (Vol. II, Cal. Findings, pgs. XV-1-16; Vol. I, Cal. Findings, pg. IV-55, Finding 4F-102, recapped at pg. VII-14). Nevada's main stream uses are all post-1929 See Master's Report, pg. 71 concerning Nevada uses.

As to New Mexico:

New Mexico plead uses for 20,900 acres i.e. 9,500 on the Little Colorado and 11,400 acres on the Gila—

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[10]See Nev. Petition in Intervention, Pg. 10.

[11]See Nev. Pet. Pg. 12.

[12]See paragraphs 2 and 4 of prayer, Nev. Pet. Pg. 25.

[13]Tr. 16241.

[14]Nev. Ex. 7, Tr. 16222.

[17]Tr. 16257.

[18]Nev. Ex. 17, Tr. 16258.

all in New Mexico—as existing uses and rights,[21] as III(a) and (b) uses,[22] and claims to surplus.[23] The evidence presented was extensive and included some 3,000 pages of deposition[24] a stipulation concerning documents[25] and a series of maps.[26] The New Mexico contest was really one between New Mexico on the one hand and Arizona's conflicting claims and the claims of the United States for Indian and Federal uses.[27] The established appropriations and existing uses are as follows: On the Gila System, including San Francisco and San Simon Creeks, 34,650 a.f. per a. (Vol. II, Cal. Findings, pgs. XVI-3-9-16A-101.) This is rounded to 35,000 a.f. per a. in the California recap on tributaries (Vol. I, Cal. Findings, pg. VII-14, Item 71-201). Of this, the Master has allowed New Mexico not to exceed 28,227 a.f. per a. as herein indicated. This deduction of 6,423 a.f. per a. from New Mexico's uses are then to be added to Arizona's uses. A compromise as to the Gila uses in New Mexico was arrived at and is adopted by the Master in upholding New Mexico's claims.[28] Article IV Page 354 and VII Page 359 of the Master's proposed Decree set forth the uses New Mexico may make and may not make. They are: From San Simon for 2,900 acres, not to exceed 8,220 a.f. per a.; from San Francisco Creek for 2,269 acres, not to exceed 4,112 a.f.

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[21]N. M. Appearance and Statement, Par. VII, Pgs. 4-5.
[22]N. M. Appearance, Pgs. 6, 8.
[23]N. M. Appearance, Pg. 8.
[24]Tr. 17249, L. 15.
[25]Tr. 17251, L. 13.
[26]N. M. Exs. 402A-402H, Tr. 17286-17298.
[27]M. R. Pg. 325.
[28]See Master's holding R. Pg. 324—Also M.R. Pgs. 329, 330.

per a.; and from the Gila proper not to exceed, for 7,057 acres, 15,895 a.f. per a.[29] New Mexico is annually to report the acreages irrigated in accordance with Article IV of the proposed Decree.[30] Neither New Mexico, the United States nor Arizona has excepted from this. See Page 76 for Master's Report on New Mexico uses.

The New Mexico uses on the Little Colorado are established as 10,500 a.f. per a. (Vol. II, Cal. Findings, pg. XVI-6-8, Item 16B-201, summarized in Vol. I, Cal. Findings, pg. IV-55, Item 4F-102, recapped in Vol. I, pg. VII-14, Item 7I-201, Cal. Findings).

This makes a total of tributary uses for New Mexico of 45,500 a.f. per a. (Vol. I, Cal. Findings, pg. VII-14, Item 7I-201). Adjusted to the Master's limitation for New Mexico on the Gila System to 28,227 a.f. per a., this reduces New Mexico's tributary rights and uses by 6,423 a.f. per a. as against New Mexico's proof. Adjusted to the round figures of the Cal. Findings (35,000 a.f. per a. for the proof of 34,650 a.f. per a.), New Mexico's tributary rights and charges are fixed at 45,500 a.f. per a. minus 6,423 a.f. per a. or a total of 39,079 a.f. per a. See Master's Report, pg. 76.

As to Arizona:

Despite lengthy pleadings and a protracted trial over the rights of Arizona on the Gila from the standpoint of the uses being very early ones, and particularly on the measure of Arizona's uses, the matter has become comparatively simple. Arizona now concedes the correctness of the Master's ruling that uses are to be

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[29]M. R. Pgs. 354-355.
[30]M. R. VII, Pg. 359.

based on beneficial consumptive use at the places of use.[31] The problem of accounting for the measure of Arizona's beneficial consumptive uses on the Gila System has been made simple by studies and evidence as to the safe annual yield there. These studies show that the safe annual yield of the Gila Basin is approximately 1,844,000 af. per a.,[32] as against Arizona's actual uses in excess thereof.[33] California has suggested that in accounting for Gila uses by Arizona this figure for safety be 1,750,000 a.f. per a. of continuous beneficial consumptive uses.[34]

Arizona's tributary uses on the Gila, Little Colorado, Kanab Creek, Virgin River, Bill Williams and miscellaneous tributaries are set forth in detail in Vol, II, Cal. Findings, pgs. XIV-57-103, Items 14G-101-14L-201. These, exclusive of the Gila River System, total 82,500 a.f. per a. (Vol. I, Cal. Findings, pgs. 14-54-55, Items 4F 101-102). The Gila River System uses and rights are given in detail. (Vol. II, Cal. Findings, pgs. XIV-57-75, Items 14G-101-204). The safe annual yield of the Gila System is there calculated at 1,715,000 a.f. per a. (Vol. I, Cal. Findings, pg. IV-54). Recapped, the total Arizona tributary claims and uses, including the Gila River Systems, is 1,797,500 a.f. per a. on a safe yield basis (on the Gila). (Vol. I, pg. VII-14, Item 7I-201, Cal. Findings.) To this figure of 1,797,500 a.f. per a. must now be added 6,423 a.f. per a. taken from New Mexico, thus enlarg-

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[31]Measure, M.R. Pg. 186, Arizona position, Ariz. Op. Br. Pg. 105.

[32]Cal. Exs. 1513, 1513A, Tr. 10,477 et seq.

[33]Cal. Ex. 1514A, Column 5.

[34]See Page V-35, Vol. I, Cal. Findings and Conclusions for details.

ing Arizona's Gila uses. This makes Arizona's total tributary uses 1,803,923 a.f. per a.

As to the United States:

The Master holds that rights to use and uses of main stream water by the United States are to be charged to the share of the state in which it is used.[35] As there is no other source there appears to be no argument. The United States presented all of its claims of rights and uses in extreme detail. The Master sets out each claim in detail, commencing at Page 80 of his Report. These claims are largely, sofar as number is concerned, off the main stream but include all main stream claims.[36] These claims are made the subject of holdings by the Master[37] as well as Findings as to acreages and quantities of water.[38] It is to be noted that quantitatively the Master fixes the uses as per this example, *i.e.*, 51,616 acre feet of annual diversions or a quantity—necessary to supply the consumptive use required for irrigation of 7,743 acres—*whichever is less.*[39]

As to Main Stream:

By the provisions of the first paragraph of Section 4(a) of the Project Act[40] and the provisions of the California Limitation Act[41] California is limited to beneficial consumptive use at points in California of 4,400,000 a.f. per a. of the first 7,500,000 a.f. per a. of such uses available to the Lower Basin plus one-half

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[35]M.R. Pg. 247.
[36]M.R. Pgs. 80-96.
[37]M.R. Pgs. 254-266.
[38]M.R. Pgs. 267-304.
[39]M.R. Pg. 269.
[40]M.R. Pg. 382.
[41]M.R. Pgs. 397-398.

of any excess or surplus unapportioned by the Compact. The two provisions specifically define the 4,400,000 a.f. per a. as III(a) uses.[42]

The second paragraph of Section 4(a) of the Project Act, for whatever influence it may have, authorized a Tri-State Compact that would have given Nevada and Arizona, respectively, *from* the 7,500,000 of III(a) uses, i.e., *System*, 300,000 to Nevada and 2,800,000 to Arizona, and Arizona the other half of any excess or surplus not apportioned by the Compact. As above discussed, we claim it did not purport to give these quantities to Nevada or Arizona solely from the main stream but from the System.[43]

All of the immediate foregoing is to bring into focus the case as plead and tried; also to give the data for a formula for a Decree we propose in place of the Master's proposed Decree.

We submit that the Compact in making the first 7,500,000 a.f. per a. of beneficial consumptive uses available to the Lower Basin from the System—to include "all water necessary for the supply of any rights which now exist"[44] meant this.

That, as of the effective date of the Compact, the following states were entitled to that part of the System water to which they had existing rights up to an aggregate of 7,500,000 a.f. per a.:

Utah's rights and uses from the Virgin River and Kanab and Johnson Creek, as above shown, are 56,000 a.f. per a.

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[42]See M.R. Pgs. 382, 397-398.

[43]See Pgs. 23-27 supra.

[44]Article III(a) Compact, M.R. Pg. 373.

Nevada's tributary rights and uses, as above indicated, are 51,000 a.f. per a.

New Mexico's rights and uses on the Gila System, allowed by the Master, are 28,227 a.f. per a., and her rights and uses on the Little Colorado are determined as 10,500 a.f. per a., making a total of Nevada's tributary uses of 38,727 a.f. per a.

Arizona's tributary uses on the Gila and Little Colorado Rivers, Kanab Creek, Virgin River and the Bill Williams and miscellaneous tributaries, increased by the deduction from New Mexico, makes Arizona's total tributary uses 1,803,923 a.f. per a.

California had whatever her existing rights were within this first 7,500,000 a.f. per a. of III(a) uses.

The foregoing demonstrates that of the first 7,500,000 a.f. per a. of System uses, consisting of existing right uses, 1,949,650 a.f. per a. were from that part of the System made up of tributaries, leaving 5,556,773 a.f. per a. for main stream existing use rights, if they totaled that much. By this process the provisions of Article III(a) of the Compact as to System and as to existing rights would be satisfied. There will, of course, be such additional quantities in the main stream as are there as a result of excess or surplus.

Application of the Project Act:

The Master holds the Compact irrelevant and the Project Act and contracts controlling.[47] We contend that the Project Act by its language harmonizes with the Compact instead of making the Compact irrelevant. We have already pointed out the provisions of

[47]M.R. Pg. 138.

the Project Act that make the Compact controlling, notwithstanding anything in the Project Act to the contrary.[48]

On both the questions of recognition of System as against main stream and on appropriative rights as "existing rights" may we turn to Sections 4(a) and 5 of the Project Act. These two Sections are said to make the Compact inapplicable and furnish the basis for its irrelevancy and authorize a main stream decision and nullify the law of appropriation or equitable apportionment. May we analyze this.

Section 5 says the contracts shall conform to Paragraph (a) of Section 4 of the Project Act. Turning to Section 4(a)—first paragraph—we find that after all the debates and contentions of Federal regimentation and the now contention that the Compact provisions as to System and existing rights are displaced by the Project Act that Congress perpetuated System and existing rights instead of displacing them. In this subsection we find that Congress provided and California agreed—"that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and *all water necessary for the supply of any rights which may now exist* shall not exceed four million four hundred thousand acre feet of the waters *apportioned* to the Lower Basin states by paragraph (a) of Article III of the Colorado River *Compact,* plus not more than one-half of any excess or surplus waters unapportioned by said *Compact,* such

[48]Sections 8(a) and 13(b) and (c) Pro. Act. Also Pg. 18 supra.

uses *always to be subject to the terms of said Compact.*"[49]

It is submitted that the above emphasized language clearly indicates that the requirements of Section 5 that the Secretarial contracts conform to Section 4(a) plainly mean this. That the uses to be available to California under contract should *include*, among other things, *all water necessary for the supply of any rights which may now exist in* California—not to exceed, however, 4,400,000 plus half of the excess or surplus unapportioned by the Compact. Also, that with respect to the uses not to exceed 4.4, they are specifically earmarked and designated as III(a) uses, i.e., Compact uses—not main stream only. The fact that California could and can get water only out of the main steam does not militate against the obvious reference to System and existing rights in Compact and Project Act provisions. Also to be noted is that here again we have that constant and repeated Project Act reference back to the Compact as controlling—"such uses always to be subject to the terms of said Compact."[50] How, we asked, under this language could you divorce from Compact accounting interbasin or interstate the uses allowed to California?

Now, with reference to the second paragraph of Section 4(a), considered from the standpoint of conflict or harmony with the Compact, we have hereinbefore analyzed items (1) and (2), being the 2.8 and half of the surplus reference to Arizona, and .3 to Ne-

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[49]M.R. Pg. 382. Corresponding provisions of Limitation Act, M.R. Pg. 398.

[50]M.R. Pg. 382, end of paragraph on that page.

vada.[51] We again submit that it is too clear for words that the 2.8 to Arizona and .3 to Nevada are by specific language III(a) uses. Also, that surplus relates to III(b)—also Compact uses. Again there is to be noted that "all the provisions of said Tri-State Agreement shall be subject in all particulars to the provisions of the Colorado River Compact."[52] Again we say this recognized Compact System accounting and by the controlling effect of the Compact—existing rights as the basis of contract. Interbasin or interstate the System accounting is necessary and contemplated in our view.

Application of the Contracts:

If we consider the Compact as recognizing and perpetuating *"existing rights"* from III(a) System uses and the Project Act as following that pattern, we then have to consider the series of contracts to see if they are also in harmony with the administration of a Compact accounting interbasin and interstate.

California Contracts:

The California contracts, prior in time to the Nevada and Arizona Contracts, have a common provision in each. This provision, typified in the Palo Verde Contract[53] in items designated as "Sections" 1 through 12,[54] permits uses up to a total of 5,362,000 a.f. per a. at points in California. The contracts are silent on the question of III(a) or other Compact designations of the uses except to provide repeatedly that the Compact

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[51]See Pg. 27 supra.
[52]Item (6) M.R. Pg. 383.
[53]Ariz. Ex. 33, Tr. 249.
[54]M.R. Pgs. 425-429.

is controlling.[55] The preservation of present perfected rights is also recited.[56] However, as these contracts are made under the first paragraph of Section 4(a) of the Project Act and under Limitation Act the 5,362,000 a.f. per a. would have to be 4,400,000 from III(a) System existing right uses and the balance from half of the designated surplus, the first million of such uses being also System III(b) uses—interbasin and interstate.

So far as California is concerned, as of June 1929 it had long been recognized in the debates in Congress and elsewhere that the uses to be served in California under the Compact and Project Act included not only Palo Verde and Imperial Valleys, but Coachella Valley and the Metropolitan areas on the California Coast—this last to the extent of at least 1,000,000 a.f. per a. of uses.[57] Pre-1929 appropriations for the coastal area had been made and Metropolitan District bought and paid for the pre 1929 works and we submit succeeded to the pre 1929-rights.[58]

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[55]Palo Verde Contract, M.R. at Pg. 428 and Section 14 of Contract, M.R. Pg. 431.

[56]Palo Verde Contract, M.R. Pg. 428.

[57]See H.R. Rep. No. 918, 70th Cong., 1st Sess., pt. 1, at 20-21 (1928); also S. Rep. 592, 70th Cong., 1st Sess., pt. 1, at 24-25 (1928); also, Hayden in Cong. Rec. 70th Cong., 1st Sess. 464 (Dec. 12, 1928).

[58]The City of Los Angeles as early as 1924, and San Diego as early as 1926, filed applications to appropriate water for their coastal areas. See Cal. Ex. 419, Tr. 9395 and Ex. 436, Tr. 9395. Commencing in 1923 extensive work was done to implement these appropriations, Tr. 9451, and the work continued over nearly 10 years, Tr. 9467. Infiltration galleries for diversions were excavated, Tr. 9457-9459. Nearly two million dollars was so spent and when Metropolitan was organized to carry out this project, it acquired these benefits and efforts from Los Angeles, for which Metropolitan paid over two million dollars to Los Angeles, Tr. 9471. Thereafter Metropolitan financed and completed the present works as elsewhere detailed.

The Secretary called upon the California agencies to agree upon their appropriative priorities in time and quantity. This was done in the "Seven Party Agreement."[59] The Secretarial contracts with the California defendant agencies conformed in precise langauge. Of necessity the contracts, whether expressly saying so or not, had to recognize existing rights as required by the first paragraph of said Section 4(a). Recognizing the fact that all uses had to be accounted for, all California contracts had in the delivery obligation of the United States the pro tanto deduction provision "including all other waters diverted for use."[60]

Nevada Contracts:

As hereinbefore indicated, after the pre 1929 existing rights on tributaries in Utah, Nevada, New Mexico and Arizona had been protected as to existing rights to System uses, approximately 5,556,773 a.f. per a. of III(a) uses were available from the main stream,[61] first to satisfy existing rights and then any residue for other uses. The United States made contracts with Nevada for 300,000 a.f. per a.[62] Attention is called to the pattern that the contracts do not specify how much is III(a) or surplus. Article 5(a) of the contract conforms to the Compact accounting concept (we say recognized in the Project Act) by providing for pro tanto deduction from this 300,000 a.f. per a. for uses diverted by Nevada from the Colo-

[59]Ariz. Ex. 27, Tr. 242.

[60]Palo Verde Contract Section 6, M.R. Pg. 424.

[61]See Pg. 46 supra.

[62]Ariz. Exs. 43 and 44, Tr. 253. See M.R. Pgs. 409 and 419.

rado River System from tributaries above Lake Mead.[63] This we submit was and is in harmony with the Compact, the Project Act and interbasin and interstate accounting. In 1929 Nevada had no main stream uses.

The Arizona Contract:

The Arizona Contract does not designate the 2.8 a.f. per a. mentioned in Section 7(a) or the half of surplus mentioned in Section 7(b) of Arizona's Contract as being III(a) or III(b).[64] The second paragraph of said Section 4(a) of the Act does identify the uses as III(a) as to the first 7.5 of uses to the Lower Basin. We submit the contract must be so interpreted. Section 7(c) of the Arizona Contract recognizes the preference to "present perfected rights" and also incorporates the Compact by making the contract subject to and controlled by the Compact.[65] Section 7(d) of the contract follows the recognized System accounting pattern by imposing the pro tanto charge for existing or future Arizona uses above Lake Mead.[66] The Compact accounting requirements are further recognized in said contract—in that Arizona recognizes and agrees that New Mexico and Utah are entitled to share in the uses apportioned and unapportioned by the Compact.[67] Arizona also by her contract agrees to the right of the United States to contract with California agencies for uses, provided the contracts do not exceed 4.4 of III(a) uses and uses of one-half of the

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[63]"—to so much water, including all other waters diverted for use within the State of Nevada from the Colorado River System —", M.R. Pg. 420.

[64]See Pgs. 400-401, M.R.

[65]M.R. Pg. 401.

[66]M.R. Pg. 401.

[67]Section 7(g), M.R. Pg. 402.

"surplus".[68] The Contract also again agrees that the Compact is controlling.[69]

Now as to the interpretation of the Arizona Contract. The contract agrees to pro tanto charges for uses above Lake Mead;[70] also agrees to recognize Nevada's contracts which also provide for pro tanto charge for uses above Lake Mead;[71] also agrees to recognize the rights of Utah and New Mexico to share in III(a). System uses and surplus available under the Compact.[72] If her contract is interpreted to mean that her 2.8 of III(a) uses is from the uses available from the first 7.5 of uses available to Arizona from the Lower Basin in accordance with the terms of the second paragraph of Section 4(a) of the Project Act and the control of the Compact, it would be in harmony with the Compact, Project Act, Limitation Act and her own contract. Her contract does not negative her 2.8 as being of III(a) uses. The report merely interprets it as solely from Lake Mead and therefore divorced from Article III(a). We submit this does violence to the controlling Compact, the provisions of Sections 4(a) and 5, and especially Sections 8(a), 13(b) and (c) of the Project Act and the provisions of her own contract making the Compact controlling. If Arizona's contract is interpreted as entitling her out of the main stream to so much of 2.8 of III(a) uses as are not already exhausted by prior existing rights

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[68]Section 7(h), M.R. Pg. 402.

[69]Section 13, M.R. Pg. 406.

[70]Section 7(d), M.R. Pg. 401.

[71]Section 7(f), Ariz. Contract, M.R. Pg. 402. Note Nevada Contract with its Article 5(a) pro tanto provision was made Jan. 19, 1944, M.R. Pg. 419. The Arizona Contract, Feb. 9, 1944.

[72]Ariz. Contract, Section 7(g), M.R. Pg. 402.

and contracts therefor and charging Arizona with her tributary existing right uses as a part of her III(a) rights, the Compact, Project Act, Limitation Act and contracts can all be reconciled. What Arizona may be short of as III(a) uses from the main stream she will gain as her part of excess or surplus therein. In any event, what is more important all Lower Basin states will be protected and share in III(a) uses as contemplated, and a uniform accounting as to all states will be available.

To further demonstrate, Utah and New Mexico are the only Lower Basin states that are not involved directly in main stream uses. The New Mexico uses on the Gila System have been settled. If there are post 1929 or future Utah or New Mexico uses from tributaries above Lake Mead that are to be settled herein—and they should be—it is very probable they could be settled quantitatively by stipulation. In Nevada and Arizona the question of each state allowing further tributary development would be cared for by the pro tanto deduction principle of the using state's rights. The problem between main stream and such tributary uses as to priority is a state problem under their own law.[73] Arizona's contract recognizes Nevada's contract for 300,000 a.f. per a. of III(a) and 1/25th of any surplus.[74] Arizona's contract recognizes the California contracts for 4,400,000 a.f. per a. of III(a) plus one-half of the surplus.[75] Arizona's contract recognizes the right of New Mexico and Utah to share

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[73]See Section 18 Pro. Act, M.R. Pg. 395.

[74]See Section 7(f) Ariz. Contract, M.R. Pg. 402.

[75]See Section 7(h) Ariz. Contract, M.R. Pg. 402.

in III(a) and surplus.[76] Arizona's contract recognizes the pro tanto charges for any present or future uses above Lake Mead.[77] Arizona's contract provides that the quantities involved in her contract from Lake Mead are, "Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act—".[78] Therefore, if the Arizona contract is interpreted according to its own terms and the Compact and Project Act, we submit she gets her quantities of III(a) uses from the *System* and her surplus from the main stream. As stated before—what she loses as III(a) from the main stream she gains as surplus from her contract designated share. That is the deal she made by her own contract. That, we submit, harmonizes all contracts and complies with the Compact, Project Act and Limitation Act, and enables an orderly administration of the System in the Lower Basin.

Administration

This brings up the matter of the necessities as to administration of the uses available to the Lower Basin and of a Decree herein. There are several departments of the United States that are competitive with each other as to control. The Department of Interior has conflicting interests within the Department. The State Department concerning the Mexican Treaty, the Army Engineers with respect to navigation and flood control are interested. All of these interests are competitive

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[76]See Section 7(g) Arizona Contract, M.R. Pg. 402.
[77]See Section 7(d) Arizona Contract, M.R. Pg. 401.
[78]Beginning of Section 7(a) Arizona Contract, M.R. Pg. 400.

not only internally but as to each Lower Basin state. The states are competitive with each other.

The matter of a Compact accounting interbasin, as well as the unavoidable Compact accounting between Lower Basin states, is made necessary but the agency for administration is not set up.

Accounting for existing right III(a) uses and other uses involved in the accounting is provided for in the Compact by the consent of the Compact states to the inclusion of tributaries as a part of the System.

It is submitted that it is desirable as well as necessary in the settling of Federal questions as well as state questions that the Court appoint a Commissioner or Commission to administer the entire matter in the Lower Basin under the direction of this Court.

The Master has arrived at an appropriate way of administering tributary uses once established. It is to require the using state annually to list and account for all such uses to the end of an accounting so as not to exceed the limit locally on such uses. A Commissioner or Commission could best supervise this under the authority of the Court in administration of the Decree.

The Master has also furnished a possible pattern in the furnishing of any details needed by a Commissioner or Commission to administer the System in the Lower Basin. The Master provides for a two year period within which the states shall furnish to this Court and to the Secretary (and we now suggest to the Commission instead) a list of present perfected rights claims as of June 1929 with claims of priorities, etc.[79] We sub-

[79]Art. VI, Proposed Decree, M.R. Pg. 359.

mit that if this Court adopts the interpretation of the Arizona contract herein believed to be proper—then, where there is anything left beyond the details of the trial as to existing right uses or post 1929 uses or claims on surplus, those claims could be filed with the Commission and if there is disagreement, the areas of such be referred to another Master for limited hearings. By this process, formula, or yardstick, the quantitative and priority claims of all states can easily be settled to the end that as between Basins and as between states there can be an orderly administration of the whole subject.

It is to be remembered that water rights and rights of use to water are not administered on the basis of annual crop rotation, or market conditions but on a right of use basis. Therefore, the formula only needs to define the limit of existing rights in each state for areas or projects and the administration would be able to see to it that those limits were not exceeded. Water within specified rights and not used would either go from tributaries to the main stream or on the main stream remain in reservoirs.

Miscellaneous

There are diversionary matters in Briefs in opposition to California which Imperial wishes to clear up.

Source of Imperial Water:

The implication is made by Arizona[1] that the source of the water supply to Imperial Valley was not from appropriations or diversions in California, but from Mexico. The Imperial Valley supply was diverted in California North of the Mexican Border and carried by

[1]Ariz. Op. Br. last paragraph Pg. 12.

canal into and through Lower California, Mexico back into then San Diego, now Imperial County, and there distributed by canals of the California Development Company, the California appropriators, and later by Imperial Irrigation District, to local mutual water companies for local area distribution.[2] In 1916 Imperial District acquired the properties of the California Development Company and in 1922 the mutual water companies.[3] That the diversion works in California, the transmission works through Mexico and into the United States and the canal system in California were considered and held by the Supreme Court of California to be all one System and one project is clearly shown in the case of *Title Insurance and Trust Company vs. California Development Co., 171 Cal. 173 at 179 et seq. (1915)*. An interesting review of the history of the project is there detailed.

Alleged Waste in Imperial Valley:

Arizona claims that of the water diverted from the Colorado River for Imperial Valley, Imperial District is wasting into the Salton Sea approximately one million acre feet of water per year.[1] As there is not enough water available to all the agricultural agencies in California for California agricultural and domestic uses, i.e.,

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[2]The appropriations were from California points. See Cal. Exs. 70-90, Tr. 6903, 7175; also see engineering report Cal. Ex. 69, Tr. 6894, 7182. The original diversion gate, Chafey, was in California, Tr. 7037-7042; this was in the vicinity of Hanlon Heading the area for the permanent works from which the supply was diverted in California. See Cal. Ex. 50 and Tr. 6914, 6988, 7038. The capacity was 10,000 second feet, Tr. 7200.

[3]Cal. Exs. 104 and 105, Deeds, Tr. 6936, 7175 and Cal. Exs. 167 and 167B-N, Tr. 7553 and Tr. 7049.

[1]Ariz. Rp. Br. Pg. 134.

3,850,000 a.f. per a. plus 300,000[2] to supply all the lands and need within those agencies, we submit that anything but unavoidable losses—termed here waste—will not occur.

However as so much is made by Arizona as an item of prejudice, we take leave to reply.

The Salton Sea is at the bottom of a large drainage area of approximately 7,500 square miles of which about 1,000 square miles is in Lower California, Mexico.[3] The extreme depth is 273 feet below sea level.[4] It is the site of an ancient inland lake.[5] The drainage area is shown generally on a map showing Imperial, Coachella and Mexicali Valleys and the surrounding mountain and desert areas included.[6]

The Sea was recreated in the 1905-07 flood when the entire flow of the Colorado River ran into and through Imperial Valley.[7]

The constant irrigation of ever-increasing acres in Imperial Valley resulted in irrigation water penetrating beneath the surface until prevented from going to depths because of the nature of the soil. As a result, a large underground body of highly saline water collected throughout the Valley. This underground water, because of its saline quality and water logging of land for lack of drainage, caused some lands to go out of production.[8] This brought about drainage stud-

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[2]See Palo Verde Contract, Sections 3 and 6 of Article (6) M.R. Pgs. 425, 426.
[3]Tr. Pg. 6461, Ls. 3-14.
[4]Tr. Pg. 6464, corrected 6469, L. 9.
[5]Cal. Ex. 46, Tr. 6447, 7019.
[6]Cal. Ex. 47, Tr. 6459, 7264.
[7]Tr. 6522 and see photo of flow, Cal. Ex. 146, Tr. 7400.
[8]Tr. Pg. 7906.

ies in 1922[9] resulting in bond issues to finance a drainage program.[9] The result was the ultimate construction of a network of open drainage canals throughout the Valley to try to drain off this accumulation[10] These drains directed the drainage water to Salton Sea.[11] Some 1400 miles of these drains were constructed.[12]

But open drains alone did not drain off this huge accumulation of saline underground water.[13] In 1929 a program of underground tile leach lines to drain the water off to the drainage ditches was started.[14] This has been beneficial and resulted in some 5,000 miles of tile drains covering about 200,000 acres. Most of the lands will have to be tiled eventually.[15] Thus there is being leached out from the soil the highly saline stored up waters. The tile drainage water will carry out about 5½ tons of salt per acre foot of water leached out.[16] By this process Imperial Valley has been putting into the Salton Sea much larger quantities of salt than have been coming into the Valley in irrigation water from the Colorado River.[17] This is one source of water to the Salton Sea from Imperial Valley.

Another source of drainage water to the Sea is from what is called "salt balance" requirements. As each

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[9]Tr. Pg. 7904.

[10]Cal. Ex. 240, Tr. 7914.

[11]Tr. 7907, L. 13.

[12]Tr. 7915, L. 14.

[13]Tr. 7908, L. 16.

[14]Tr. 7910, L. 19-7911, L. 3.

[15]Tr. 7914, L. 8. For general description of tiling see Tr. 7911 et seq., also Tr. 7917.

[16]Tr. 8202 et seq.

[17]See Cal. Exs. 242, 243, Tr. 7986-7991.

acre foot of water is brought into Imperial Valley it carries with it quantities of salt that is spread on the land by irrigation. As this salt does not evaporate and little is taken up by the plants, there would gradually accumulate tremendous tonnages of salt in the top soil if not forced down and out into tile or natural drainage means by the application of enough water to drive the accumulation down and out. By this process the salt content in the soil will become the same as the content of irrigation water being used.[18] The question of the quantity of water that needs to be applied to the surface over and above the amount the plants consume, and evaporation from the surface was the subject of extensive study and testimony. On the basis of there being over the extended future a salt content of 1.25 tons of salt per acre foot of water coming into Imperial Valley, the studies showed the need for the water to be applied in addition to said plant consumption and surface evaporation was and will be about 22%.[19]

It is, however, not our purpose here to argue the exactness of the requirement. We merely here point out that to maintain "salt balance" as above discussed a certain quantity of water must be applied to the surface and forced down and out into tile and drainage lines to get rid of the excess salt in the root zone and to keep the soil from becoming too salty for production. This process is going on. Therefore, this class of drainage water also has to go to the Sea. In a project of the size of the Imperial Irrigation District—the lar-

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[18]Tr. 7981, 7996.

[19]See the testimony of Dr. Fireman, an expert on the subject. Tr. 20515 et seq., 21357 et seq., and 21988 et seq. Also see Cal. Exs. 5201, 6101-6103-A, particularly Ex. 6104, Tr. 21391 et seq., also testimony of Dowd, Tr. 8199-8204, Cal. Ex. 283.

gest such in the United States—there is inevitably such drainage. Also other operational losses. The Salton Sea also receives the drainage water of mountain rains and drainage from Mexicali Valley and Coachella Valley.

Arizona also recognizes and uses water for "salt balance" and has recognized quantities of regulatory loss—called by Arizona as to Imperial—waste.[20]

In any event the project efficiency of Imperial was established as almost the best of any irrigation project in the Lower Basin.[21]

The quantity of drainage called waste may furnish a diversion, but, we submit, not a matter of substance on the merits.

Measure of Present Perfected Rights:

The Master defines the measure of present perfected rights as the quantity applied to use[1] as of June 25, 1929, and not the capacity of existing works.[2] The Master misunderstood Imperial's contention.

Imperial does not contend that the capacity of the works is the sole measure or that there can be a perfected right to more than the quantity needed for the project, merely because a larger quantity is claimed in notices of appropriation or because of the large capacity of the works.

Imperial does claim that the proper definition is for that quantity necessary for the completed project as

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[20]Ariz. Ex. 65-65A, Pg. B-13; also Table B-5 following Pg. B-15; Tr. 3292.

[21]Tr. 20781, 21313, Cal. Exs. 5106, Tr. 20768, Ex. 5107, Tr. 20768, Tr. 20767, Ex. 5108, Tr. 20769; also see Cal. Ex. 3049, Tr. 19875, Cal. Ex. 5106-5108, Tr. 20768-9.

[1]M.R. Pg. 308, next to last paragraph.

[2]M.R. Pg. 308, last paragraph.

originally contemplated, if within the quantities claimed, and if works therefor to the needed capacity have been constructed or are being constructed—all provided—due diligence has been exercised from the time of claim of appropriation and that this diligence has been exercised—both as to construction of the final project work and the application of water to use.

Imperial does claim that, especially with respect to large projects, the whole protection to appropriative rights by priority would be defeated if the rights of a project could be defeated, though 99% complete merely because water had not yet been run through a long and expensive system of works or only delivered to a portion of the area to be served.

That this is the recognized rule of appropriation under Western water law as defined by the Courts of last resort of the Western states and as well as by this Court is briefed in Volume III (Agencies) of the April 1, 1959 Findings and Conclusions and Briefs of California. It is in said volume under Imperial Section, Pages I.I.D.-B10-B52. See especially on necessity of recognizing rights in projects to which full supply of water has not yet been delivered, I.I.D.-B28-B52. For the sake of brevity we do not repeat here but ask reference thereto:

Federal Constitutional Claims—Moot:

The United States claims several United States constitutional powers as supreme and giving freedom of control to the United States through the Secretary of Interior. These powers are claimed to be free from the necessity of recognition of any application of the West-

ern water law of appropriation or any recognition of states' rights or controls.

We submit that we do not need herein to argue or decide those powers or their extent. We contend that the Congress of the United States by ratification of the Compact determined this in part.[1] We also contend that Congress in the passage of the Project Act decided these questions and bound the exercise of any powers of the United States to the framework of the Compact.[2] Congress also provided that nothing should be construed as interfering with such rights as the states now have, with respect to the appropriation, use or control of waters within their borders[3] and made the Project Act a supplement to the Reclamation laws.[4]

We shall not here review the many Acts of Congress in the Reclamation laws or in other Acts giving recognition to the law of appropriation and directing the Departments and Agencies of the United States to observe those state laws.[5]

We wish here to point out that the waters herein being dealt with are *not un*appropriated waters except possibly to a limited amount.

We submit these questions of constitutional powers of the United States are moot herein.

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[1]Article III of the Compact provided for the basis of agricultural and domestic uses and use rights, i.e., beneficial consumptive use of System for existing rights. Also for recognition of present perfected rights in Article VIII, M.R. Pgs. 373 and 376.

[2]Section 8(a) Pro. Act provides that the *United States,* its contractees and appropriators of water *shall observe* and be *subject to* and *controlled* by the Colorado River *Compact.* See also Sections 8(b) and 13(b), M.R. Pgs. 389, 393.

[3]Section 18, Pro. Act., M.R. Pg. 395.

[4]Section 14, Pro. Act, M.R. Pg. 394.

[5]See compilation in Cal. Reply Brief before Master at Pgs. B-1 through B-21.

There is one contention that we submit this Court might well put to rest. It is the claim of the United States that it owns all the waters in the areas acquired by conquest or purchase from foreign countries. It is urged periodically and if ever sustained, such a decision, we believe, would work endless havoc in many sections of the United States and in many regards. We do not argue the matter of Federal control over navigable water for commerce or flood control, nor will we burden the Court with the vast number of cases holding title to the bed and banks of navigable streams to be in the states and not the Federal Government.[6] This Court has held that any title acquired by the Federal Government from foreign countries is held in trust for the states, including future states.[7]

The more important point is that Congress has directed the exercise or non-exercise of those Federal powers in relation to navigable and non-navigable streams. Contrary to the contention of the United States that Congress dealt only with non-navigable waters, attention is called to the Act of July 26, 1866 that recognized the law of appropriation in the Western states and provided therein for the use of public lands for canals, etc. This Act was not limited to non-

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[6]Starting with Martin vs. Waddell, 16 Peters 367 at 411; 10 L.Ed. 997 at 1013 (1842); Pollard vs. Hagan, 3 Howard 212 at 230; 11 L.Ed. 565 at 574 (1845); Mumford vs. Wardell, 6 Wallace 423 at 436; 18 L.Ed. 756 at 761 (1867); U.S. v. Utah, 283 U.S. 64 at 71 and 75; 75 L.Ed. 844 at 849 at note 1 (1930). The rule si also recognized as to inland navigable waters in U.S. vs. Cal., 332 U.S. 19 at 36; 91 L.Ed. 1889 at 1898 (1946).

[7]Pollard vs. Hagan, 3 Howard 212 at 229; 11 L.Ed. 565 at 573 (1845); Weber vs. Board of Harbor Commissioners, 18 Wall. 57 at 65-66, 85 L.Ed. 798 at 802 (1873); U.S. vs. Utah, 283 U.S. 64 at 71-72, 83; 75 L.Ed. 844 at 853 (1930).

navigable waters.[8] This Court held that Act and other Federal recognition of the law of appropriation not to create the right but to recognize it as existing law on the subject.[9] The supervision of diversions from navigable streams was placed in the hands of the Secretary of War and Army Engineers, who issued permits therefor.[10] Many other Acts were passed in this regard and they are reviewed at length in the California Reply Brief before the Master, Pages B-1 through B-21, to which we refer for the citations and copies.

We submit Congress has acted covering the subject and again we say constitutional powers of the United States are a moot matter herein.

Project Act Benefits to California:

Our opponents point for some purpose to the benefits California has gained from the Project Act works. We are proud of them. Some of these defendant agencies and other California agencies by contracts underwrote the costs, not only of the All-American Canal works, but Hoover Dam and Lake Mead facilities as required by the Act.[12] Arizona did not.

We submit that it is not in harmony with the Compact, Project Act, Limitation Act or the contracts or previous decisions of this Court or equity to deprive

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[8]14 Stat. 251, now Title 43, U.S.C.A. 661.

[9]Atcheson vs. Peterson, 20 Wall. 507 at 513-514; 87 L.Ed. 414 at 416 (1874); Broder vs. Natoma Water Co., 11 Otto 274 at 276; 25 L.Ed. 790 at 791.

[10]30 Stat. 1151 (1899) as now amended, to be found 33 U.S.C.A. Secs. 401-403, and others.

[11]

[12]See Section 4(b) of Pro. Act, M.R. Pgs. 383-384.

the long established completed projects in California for a prospective, now non-existent project.

We appreciate the indulgence of this Court in considering our views.

Respectfully submitted on behalf
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Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

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IN THE

Supreme Court of the United States

October Term, 1961

No. 8 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

REPLY BRIEF FOR ARIZONA

This reply brief, like Arizona's Opening Brief, is divided into two parts. Part I considers matters pertaining to the controversy among Arizona, California and Nevada with respect to Colorado River water. Part II deals with the controversy between Arizona and the United States with respect to the rights of federal establishments to water in

the main stream of the Colorado River and water from the Gila River System for the Gila National Forest.

The basic questions involved in the controversy among the states are:

> First. Does the Project Act make a statutory allocation, or authorize the Secretary of the Interior to make a contractual allocation, of water among the three Lower Basin states?
>
> Second. If an interstate allocation is effectuated or authorized by the Project Act, is it an allocation of main stream water only?

The Special Master finds the evidence to be clear that Congress in enacting the Project Act intended to provide for an apportionment of main stream water exclusively and authorized the Secretary of the Interior to enter into water delivery contracts which, in the absence of an interstate compact, control the allocation of main stream water among Arizona, California and Nevada (Rep. 99-100, 152-54, 173-85, 201).

If the Master's conclusions are sound—and all the parties save California agree that they are—California's case necessarily collapses. A statutory allocation of main stream water, whether achieved directly by the statute itself or by secretarial contracts pursuant to the statute, renders untenable the fundamental positions upon which California's case is based, namely:

> First. That principles of equitable apportionment and prior appropriation are applicable to and decisive of the issues in this litigation.[1]

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[1] Briefed by

Arizona	Ariz. Op. Br. 40-46; Ariz. Ans. Br. 4-57.
California	Cal. Op. Br. 25, 39, 46-47, 52, 68, 138-94; Cal. Ans. Br. 29-31, 36-75, 106-29, 136-40.
Nevada	Nev. Ans. Br. 29-43.
United States..	U. S. Ans. Br. 21, 24-25.

Second. That the water to the use of which California is limited by the Project and Limitation Acts consists of both main stream water and water of Lower Basin tributaries.[2]

Third. That the future water supply in the Lower Basin can and must be determined in order to sustain the Court's jurisdiction and to decide the legal issues involved.[3]

Arizona has exhaustively briefed her position in support of the Master's conclusion that the Project Act authorizes an allocation among Arizona, California and Nevada of water of the main stream of the Colorado River only (Ariz. Op. Br. 57-108; Ariz. Ans. Br. 4-97).

In Part I of this brief we shall continue to correct California's persistent misreading and miswriting of the legislative history. We shall not repeat arguments which we have previously made, except when necessary to meet variations contained in California's Answering Brief of contentions she has previously urged.

Since the Opening Brief of the United States did not deal with the claims for federal establishments, we deferred their further consideration until this reply brief. In Part II of this brief we respond to the contentions made in the Answering Brief of the United States with respect to these claims.

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[2] Briefed by

Arizona	Ariz. Op. Br. 57-82; Ariz. Ans. Br. 58-85.
California	Cal. Op. Br. 69-137; Cal. Ans. Br. 18-29, 33-36, 77-106.
Nevada	Nev. Op. Br. 35-49; Nev. Ans. Br. 16-18.
United States	U. S. Ans. Br. 22-46.

[3] Briefed by

Arizona	Ariz. Ans. Br. 98-146.
California	Cal. Op. Br. 232-78; Cal. Ans. Br. 31-32.
Nevada	Nev. Ans. Br. 47-48.
United States	U. S. Ans. Br. 53-54

ARGUMENT

I

California continues to misread the legislative history of the Project Act.

The Special Master found that the pertinent legislative history was so clear and conclusive as to necessitate his fundamental findings and recommendations as to the meaning of the Project Act and the significance of the water delivery contracts (Rep. 154). However, California seems bent upon injecting ambiguity and confusion into the legislative history in the hope that the Court may find it of doubtful utility in the decision of the basic issues, the resolution of which rests in the last analysis upon the intent of Congress in enacting the Project Act. This strategy is pursued in California's Answering Brief with respect to the two basic issues: (1) the statutory allocation question and (2) the main stream versus system allocation question.

A. As to the Statutory Allocation Issue

California persists in asserting that the legislative history of the Project Act shows that Congress did not intend to delegate authority to the Secretary of the Interior to make an allocation of the water of the Colorado River (Cal. Ans. Br. 50-56). She criticizes the use by the United States, in support of its contention that Congress did so intend, of statements of opponents of the bill denouncing it as an unwarranted assertion of federal power, upon the ground that "views expressed by opponents of an act are not persuasive legislative history" (Cal. Ans. Br. 51).

However, California neglects to state that the authors of the Project Act—Senator Johnson and Congressman Swing—well understood that the statute did authorize

an allocation of water of the Colorado River and nevertheless supported the measure as a proper exercise of federal power. The majority of the Senate and House Committees which favorably reported the fourth Swing-Johnson bill (which became the Project Act) similarly appreciated the effect of the bill, as did witnesses who testified before those Committees in favor of the measure (Ariz. Ans. Br. 30-47).

California not only ignores these views of the authors and supporters of the Project Act, but she erroneously claims that the proponents of the statute "refuted" the charge of its opponents that §5 gave to the Secretary of the Interior authority to make an interstate allocation of water (Cal. Ans. Br. 51). For example, she says (Cal. Ans. Br. 53) that Mr. Swing "responded" to the charge of Mr. Douglas of Arizona that the Swing-Johnson bill "vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam".[4] California comments: "It is unlikely that any member of the House took seriously Mr. Douglas' diatribe" (Cal. Ans. Br. 54). Yet, at the very outset of his response to Mr. Douglas, Mr. Swing stated:

> "Mr. Chairman and gentlemen of the House, I want to congratulate my colleague [Mr. Douglas of Arizona], who has just preceded me, on presenting as forcefully, as effectively as it is humanly possible to present it, the side of the case against the Boulder Dam project."[5]

Mr. Swing proceeded to discuss the Boulder Dam Project—its engineering feasibility, its necessity as a means of flood control and its economic soundness.[6] Not until the

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[4] 69 Cong. Rec. 9623 (1928).
[5] 69 Cong. Rec. 9635 (1928).
[6] 69 Cong. Rec. 9635-45 (1928).

very close of his argument did he discuss what he termed "the so-called question of constitutional rights".[7]

Mr. Swing then argued in favor of the bill's constitutionality and cited, among other legal authorities, what he characterized as a "very able brief" prepared by an Arizona law firm in which the conclusion was reached that

> ". . . the rights of the Federal Government to withdraw the river, for the purposes of development, from State sovereignty is undoubted."[8]

While thus arguing for his bill as a constitutional exercise of federal power, not once in the course of his protracted speech did Mr. Swing "respond" to the Douglas charge that the bill "vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam".

Mr. Swing's statement that the contentions made by Mr. Douglas "have been answered in the investigations made of the project and in the hearings held on this bill"[9] did not and could not have referred to the question whether the bill was intended to make an interstate allocation of water. As the record of the congressional committee hearings establishes, there was a clear understanding that the Project Act made, or empowered the Secretary of the Interior to make, an allocation of water among the lower Basin states. The primary area of dispute between proponents and opponents of the bills was not over the effect of the proposed legislation but whether Congress had the constitutional power so to allocate water among the states (Ariz. Ans. Br. 30-44).

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[7] 69 Cong. Rec. 9645 (1928).

[8] 69 Cong. Rec. 9645 (1928).

[9] 69 Cong. Rec. 9635 (1928).

California also claims that proponents of the Project Act "refuted" the assertion of Congressman Colton of Utah that §5 gave the Secretary of the Interior "control of all the water stored in the reservoir and its delivery to any part of the river below". This so-called refutation is said to have been made by Congressmen Bankhead of Alabama and White of Colorado (Cal. Ans. Br. 51-53). The Colton-Bankhead exchange is quoted only in part by California (Cal. Ans. Br. 52-53 note 1). It is set forth in full in the margin.[10]

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[10] "Mr. Colton. . . . Our [Utah's] whole industrial life has been built up upon the theory that the State owns the waters, and a man in my State to-day can not acquire the ownership of any water for any purpose. He can acquire the right to use any water, and as long as he puts that water to a beneficial use he can assert control over it; but when he ceases to put it to beneficial use it reverts to the State and is again subject to appropriation by any other citizen within the State. So that when you say that the Government of the United States owns and controls waters within that State, cannot you see that you strike at the very basis of our industrial life? You are saying that you are going to take it away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.

"Mr. Bankhead. As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter.

"Mr. Colton. I will answer in this way: *If the gentleman from Alabama were stating the proposition correctly, there would not be the slightest objection to this bill other than from the engineering and economic standpoint. I feel sure that it is not fully understood. We do not get full protection under this bill, for there is no seven-State compact. Arizona is not a party at all to this compact.*

"She and her citizens may appropriate water at any time.

"Mr. Douglas of Arizona. Arizona is a party to it, but Arizona has not ratified it.

"Mr. Colton. Yes. The gentleman's statement is more accurate. *Arizona can grant applications for water if my theory is*

The Colton-Bankhead colloquy was not concerned with the effect of the provisions of §5 of the Project Act but rather with the question whether, in the absence of seven-state ratification of the Colorado River Compact, the State of Utah would be protected against claims of right to the use of Colorado River water by appropriations in or by Arizona. Mr. Bankhead had erroneously assumed that the bill provided for seven-state ratification of the Compact. When Mr. Colton pointed out that six-state ratification was required, Mr. Bankhead had nothing further to say.

Shortly after this there occurred the Colton-White discussion, which is quoted only in part by California to support her claim that "Mr. Colton's charges . . . [that §5 gave the Secretary of the Interior authority to make an interstate allocation of water] were refuted by Mr. White . . . (and, in effect, by Mr. Colton himself)" (Cal. Ans. Br. 51-52). California misreads the record. Actually Mr. Colton, in quoting §5, refuted the assertion of Mr. White that the pending legislation made no attempt "to nullify, abrogate, or change the doctrine of priority in the use of water". When Mr. Colton cited the provisions of §5, Mr. White made no further comment. Indeed, no one arose to dispute Mr. Colton's construction of the meaning and effect of §5 of the Project Act or to deny his assertion that it gave the Secretary of the Interior control of the water to be impounded by the dam and stored in the reservoir

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correct, and her citizens can acquire rights by prior usage to every bit of water belonging to the upper States. There is absolutely no protection against her and her citizens. The gentleman from Alabama [Mr. Bankhead] has stated the principle for which Utah is contending. We have been pioneers in the development of the Colorado River. We are anxious to see California prosper. This development, however, must not be made at the injury and expense of other States." 69 Cong. Rec. 9648 (1928). (Unless otherwise indicated, italics appearing in quotations in this brief have been added for emphasis).

authorized by the Act. The complete text of the Colton-White colloquy is set forth in the margin.[11]

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[11] "Mr. Colton. Congress can not allocate water. I want to say to the gentleman that I have here figures showing that in two counties of my State they have now 277,839 acres under cultivation, and there is enough land susceptible of practical irrigation and reclamation to make a total of 689,762 acres in those two counties, so that there are 300,000 acres in two counties alone of my State that are now susceptible of reclamation and irrigation, and the projects for reclamation are perfectly feasible. We say we are not opposing this dam, provided it will not be under terms that are injurious to Utah. But we must have future development protected. There are seven or eight other counties in my State which have lands capable of reclamation.

"Mr. Leatherwood. Will the gentleman yield?

"Mr. Colton. Yes.

"Mr. Leatherwood. I just want to call the gentleman's attention to the fact that the gentlemen who are raising the question about our refusal to go ahead without a full seven-State compact in every case have insisted that in their State they be absolutely protected without any question.

"Mr. Colton. I think the gentleman is right in that.

"Mr. White of Colorado. Will the gentleman yield?

"Mr. Colton. Yes.

"Mr. White of Colorado. A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.

"Mr. Colton. I think they have not that power.

"Mr. White of Colorado. There is no attempt to do anything of that kind by this bill. On the contrary, the bill expressly provides for a compact among six States, and the only State that has shown the slightest tendency to stay out of the compact is Arizona. Now, how can that affect a State that is not a member of the compact?

"Mr. Colton. It can not. Moreover, I admit we are somewhat protected so far as California is concerned, although even that is a question in my mind. As the gentleman from Arizona has stated, you have an interstate compact made by seven States, and I do not believe six States may make it binding on the other. I would like to hear the opinion of the gentleman from Virginia [Mr. Montague] on that. He is a good lawyer. That raises a serious question at least. Let me point out to the gentleman just what this bill provides. In section 5 it is provided:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe—

"To do what?

> to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on

California next refers to a colloquy between Senators Hayden and King and to what she describes as a discussion between Senators Hayden and Borah. These are cited to support California's assertion that the "charge that the bill gave control of water rights to the Secretary of the Interior was repeatedly answered by proponents of the measure" (Cal. Ans. Br. 55). California classifies Senator King and Senator Borah as "proponents" of the measure solely because they ultimately voted for its enactment.[12]

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said canal as may be agreed upon, for irrigation and domestic uses.

"The Chairman. The gentleman has used 30 minutes.

"Mr. Colton. I thank the Chair. If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I can not understand the English language; and, gentlemen, that is exactly what we are objecting to. We are saying the Federal Government is trespassing upon territory that does not belong to it whenever it attempts to regulate or control the waters of a river when it is not for the express purpose of navigation and commerce. That is the only power the Congress of the United States has over the water in the streams of this country, and the basic principle upon which Utah has rested its opposition to this bill is that the States control the water for all other purposes." 69 Cong. Rec. 9648-49 (1928).

[12] 70 Cong. Rec. 603 (1928). Although Senator King ultimately voted for the Project Act, he can hardly be classified as a "sponsor" or "proponent" of the measure. The Project Act evolved from the fourth Swing-Johnson bill as altered through a series of amendments. In voting upon these amendments Senator King is to be found in most instances aligned with Senators Ashurst and Hayden of Arizona and opposed to Senators Johnson and Shortridge of California.

Early in the debate he stated frankly that his sympathies were with Arizona regarding the division of water between Arizona and California. 70 Cong. Rec. 164 (1928).

On the Hayden amendment to the Phipps amendment, which would have reduced the California limitation from 4,600,000 to 4,200,000 acre-feet per annum, Senator King voted for the amendment (with Senators Ashurst and Hayden and against Senators Johnson and Shortridge). 70 Cong. Rec. 382-84 (1928).

On the Bratton amendment to the Phipps amendment, which reduced the California limitation from 4,600,000 to 4,400,000 acre-feet per annum, Senator King voted for the amendment, with

The King-Hayden colloquy was unrelated to the powers conferred on the Secretary by the Act. It concerned Senator King's contention that there ought to be a judicial determination of water rights before any money was appropriated for the Boulder Canyon project (Ariz. Ans. Br. 46).[13]

The Hayden-Borah colloquy was really a Hayden-Borah-King discussion. California makes no reference whatever to Senator King's participation in it. Perhaps this conspicuous omission may be explained by the fact that Senator King pointed out to Senator Borah that the pending legislation *did* clothe the Secretary of the Interior with authority to allocate water and to generate and allocate power pursuant to contracts which the bill authorized him to make, and that these provisions jeopardized what Senator King described as Arizona's "future consumptive use of her just share of the waters of the Colorado River".

Senators Ashurst and Hayden and against Senators Johnson and Shortridge, who voted against it. 70 Cong. Rec. 384-87 (1928).

On the Hayden amendment to the Phipps amendment, which would have stricken from §4(a) the provision for six-state rather than seven-state ratification of the Colorado River Compact, Senator King did not vote, but was paired with Senator Shipstead of Minnesota, who was absent. However, Senator King stated that, if present, Senator Shipstead would have voted "Nay" and, therefore, if permitted to vote, Senator King would have voted "Yea". Senators Ashurst and Hayden voted for the amendment, while Senators Johnson and Shortridge voted against it. 70 Cong. Rec. 394 (1928).

On the Hayden amendment to authorize the Secretary of the Interior to investigate the feasibility of the Parker Project and to appropriate $250,000 therefor from the Colorado River Dam fund, Senator King did not vote. Senators Ashurst and Hayden voted for the amendment and Senators Johnson and Shortridge opposed. The amendment carried. 70 Cong. Rec. 574-75 (1928).

At one time Senator King thought that Imperial Valley should be assessed for the cost not only of the All-American Canal but of the dam as well and intended to introduce an amendment so providing. He later changed his mind. 70 Cong. Rec. 474, 528 (1928).

[13] 70 Cong. Rec. 169 (1928).

So that there may be no possible doubt about the matter we set forth in the margin the full text of Senator King's statement in the context of the Borah-Hayden discussion.[14]

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[14] "Mr. Borah. I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial use in other States, she might lose her rights. She would not lose them, however, by reason of this legislation, but by reason of the acts of appropriation.

"Mr. Hayden. That is exactly what we fear—that if, subsequent to the passage of this legislation, a great dam is erected in the Colorado River without the consent of the State of Arizona, the water impounded behind that dam will be claimed and controlled by the Federal Government, and the State of Arizona will have no jurisdiction over it. *The Secretary of the Interior may then enter into contracts to permit the use in California of a much larger quantity of water out of that dam than is fair to the State of Arizona.* The State of Arizona will be helpless unless it does proceed, as the Senator suggests, by filing a suit in the Supreme Court of the United States to determine its rights.

"Mr. King. Mr. President—

"Mr. Hayden. I yield to the Senator from Utah.

"Mr. King. I desire to suggest to my friend from Idaho this situation:

"By this bill the Federal Government is asked to appropriate more than $100,000,000 to construct a dam in the States of Arizona and Nevada particularly for the purpose of generating power. *The bill requires that the Secretary of the Interior shall make contracts for the sale of power and stored water.* It is obvious that Arizona, not being ready to utilize all of the water of the river to which she believes herself entitled, may lose her right largely because of the acts of the Federal Government. The construction of the dam and the use of a portion of the water for the generation of power places the Government in the position of aiding California in appropriating water which Arizona claims.

"By this bill the Government is aiding California, by taking money out of the Treasury of the United States, to appropriate a part of the river flow for power, irrigation, and domestic purposes. This appropriation may be, and probably is, a part of the stream to which in all justice Arizona is entitled. *Under the terms of the bill we are requiring contracts to be entered into by the Secretary of the Interior to raise sufficient sums to annually meet the expenditures made by the Government.* These contracts will require that power be developed by utilizing a portion of the water claimed by Arizona. *Contracts are to be made requiring that a portion of the waters of the river be diverted therefrom and*

In attempting to answer Arizona's position that §§4(a) and 5 of the Project Act constitute a formula for the allo-

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taken to Los Angeles and other coastal cities for domestic and other purposes; so that the United States is asked to become a party to a policy which may deny to Arizona the future consumptive use of her just share of the waters of the Colorado River.

"Arizona is vitally interested in this proposed legislation, and in securing an agreement with California as to a division of the water; doubtless she feels that before she can vote to ratify the compact there should be an agreement dividing the water of the river. She may feel that if no agreement is entered into and she is not in a position to utilize her share of the water for some time, California, with the aid of the Government, will use for power and other purposes water which is justly hers. In this situation, when Arizona is in a position to require the water, and it is claimed by California, a demand might be made upon the upper States for a portion of the quantity allocated to them.

"It will be observed that there are serious problems involved in the proposed legislation which we are considering.

"Mr. Borah. Mr. President, of course it would have been extremely satisfactory to all members of the Senate if the seven States could have agreed. They have been unable to agree, however; and we must, therefore, make our choice of whether we will do nothing, or whether we will pass such legislation as is now proposed.

"Then, again, here is a river some 1,700 miles long, I think, national and international in its scope, affecting immediately seven States, and indirectly as many more. There is no one except the Government of the United States who can deal with that river so far as flood control and such matters are concerned. No one else is able to do it; no one else could do it; no one else really has the authority to do it; and, fundamentally, the flood-control proposition is what most immediately concerns me.

"Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it away from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legislation in the sense that the acts carrying it out would result in appropriations by others. It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.

"Mr. Hayden. Mr. President, that is why we oppose the passage of a bill which authorizes large appropriations of money to construct a dam and other works which will inevitably lead to appropriations

cation of water among the Lower Basin main stream states, California argues:

> "The 'conform to' provision in section 5 was offered before the language of the second paragraph of section 4(a) was offered; the genesis of each was unrelated to the other." (Cal. Ans. Br. 127) (footnote omitted)

The footnote references in support of this statement create the erroneous impression that when Senator Phipps first offered the amendment to §5, requiring secretarial contracts to conform to §4(a), the second paragraph of §4(a) was not even before the Senate. A brief review of the evolution of these provisions establishes that the California contention is erroneous.

Senator Phipps did not offer his amendment in May, 1928, he merely had it printed.[15] The same is true of an amendment, printed by Senator Pittman, which later became the Hayden amendment.[16] Neither of these two suggestions was offered and therefore neither had any status as an amendment during the First Session of the 70th Congress.

On December 6, 1928, the second day of the Second Session of the 70th Congress, Senator Hayden offered his proposed amendment to §4(a), providing for a limitation of 4,200,000 acre-feet on California and containing the first

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of water which are adverse to the State of Arizona, unless and until there is an agreement between Arizona and California apportioning these waters. We desire an agreement so that if Arizona is not in position to use her share of the water immediately, it will be reserved for her. In other words, Arizona's position in this matter is exactly and identically on all fours with the position of the States of the upper basin. We ask no more and no less in the way of protection from immediate development in California than do the States of the upper basin." 70 Cong. Rec. 391-92 (1928).

[15] 69 Cong. Rec. 9144 (1928), Ariz. Legis. Hist. 20-21.

[16] 69 Cong. Rec. 10,259-60 (1928), Ariz. Legis. Hist. 21-26.

proposal for a tri-state compact and an interstate allocation of water.[17] Four days later, Senator Phipps stated his understanding that the pending amendment was the one offered by Senator Hayden and then proposed his amendment, which was substantially the same as the first paragraph of the Hayden amendment except that it fixed the California limitation at 4,600,000 acre-feet, provided for six-state ratification of the Compact and added the provision to §5 that the Secretary's contracts "shall conform to paragraph (a) of section 4 of this Act".[18] Thus, at the time Senator Phipps proposed this amendment to §5 both paragraphs of §4(a) were the subject of debate by the Senate.

On December 11th Senator Hayden pointed out that since the Phipps amendment to his amendment was in the second degree the Phipps amendment was not subject to amendment. He then asked for a ruling whether under parliamentary procedure he might withdraw his amendment in order that there might be a separate vote on three questions: (1) the division of water; (2) six or seven-state ratification of the Compact; and (3) a limitation on the authority of the Federal Power Commission to issue licenses. After a ruling that his suggested procedure was in order, he withdrew his amendment without prejudice and requested Senator Phipps to re-offer his amendment so that "we can proceed to debate it, to amend it, and to vote upon it". Senator Phipps then re-offered his amendment to §§4(a) and 5 with the obvious understanding that Senator Hayden's proposal for a tri-state compact and an interstate allocation of water would be reoffered subsequently.[19]

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[17] 70 Cong. Rec. 161-62 (1928), Ariz. Legis. Hist. 27-29.

[18] 70 Cong. Rec. 324 (1928), Ariz. Legis. Hist. 72.

[19] 70 Cong. Rec. 382 (1928), Ariz. Legis. Hist. 84-86.

After the California limitation was fixed at not to exceed 4,400,000 acre-feet per annum and six-state ratification of the Compact was accepted, Senator Hayden again offered his amendment which added the second paragraph to §4(a).[20]

Before the vote on the Hayden amendment, Senator Phipps stated:

> "Mr. President, as I understand, this amendment is to the one offered by myself and which is now the pending amendment. I desire to say that I am willing to accept the amendment."[21]

The Hayden amendment was then agreed to.[22] The Phipps amendment, as amended by the Hayden amendment, was then approved by the Senate.[23]

At that time, the second paragraph of §4(a) had been added and the provision in §5 requiring secretarial contracts to conform to §4(a) was approved simultaneously, so that at the time §5 was thus amended the complete water allocation to which the Secretary was required to conform was approved by the Senate.

All of these provisions were in the bill when it was approved as a whole by the Senate[24] and when the House approved the bill without further change.[25]

California's claim that the legislative history negates any congressional intent to make an interstate allocation of water is simply untenable. As the Special Master concluded:

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[20] 70 Cong. Rec. 387-88, 459 (1928), Ariz. Legis. Hist. 97-99, 101.

[21] 70 Cong. Rec. 472 (1928).

[22] 70 Cong. Rec. 472 (1928), Ariz. Legis. Hist. 132.

[23] 70 Cong. Rec. 473 (1928), Ariz. Legis. Hist. 132.

[24] 70 Cong. Rec. 603 (1928), Ariz. Legis. Hist. 132.

[25] 70 Cong. Rec. 837-38 (1928), Ariz. Legis. Hist. 132.

> "The congressional debates are almost unintelligible except on the premise that the legislators considered that they were providing, in the Project Act itself, the authority for the allocation of impounded water among the states." (Rep. 154)

B. As to the Main Stream Versus System Allocation Issue

We repeat what was demonstrated in Arizona's Opening Brief—that the historical background and legislative history of §4(a) show that Congress intended by the enactment of that section to deal with main stream water only (Ariz. Op. Br. 61-67; see also Ariz. Ans. Br. 61-67). In reviewing this legislative history we referred to the proposal made by the Governors of the states of the Upper Division at the 1927 Governors' Conference that, "of the average annual delivery of water to be provided by the States of the upper division at Lees Ferry, under the terms of the Colorado River Compact", there be apportioned to Nevada 300,000 acre-feet, to Arizona 3,000,000 acre-feet and to California 4,200,000 acre-feet. We then demonstrated that this recommendation of the Governors was the starting point for the compromise effectuated in §4(a) of the Project Act whereby California was limited to 4,400,000 acre-feet and Arizona was allotted 2,800,000 acre-feet of water from the main stream of the Colorado River (Ariz. Op. Br. 62-63).

California attacks as unsound (Cal. Ans. Br. 97-99) Arizona's contention that the legislative history of the Project Act supports the view that the Act authorized the apportionment among the Lower Basin main stream states of only main stream water because (1) a portion of the legislative history relied upon by Arizona is the recommendation of the Governors' Conference for the division

among the Lower Basin main stream states of the water delivered by the states of the Upper Division at Lee Ferry and (2) the Master construes the Project Act as authorizing the allocation of water among the Lower Basin main stream states in terms of diversions less returns measured at the points of diversion in the Lower Basin. California reasons that since a flow of 7,500,000 acre-feet at Lee Ferry cannot, because of natural losses, supply 7,500,000 acre-feet of water for consumptive use below Lake Mead, Arizona's legislative history of the Project Act is irrelevant to the construction of that Act. She relies upon the Special Master's statements regarding the part which the Governors' recommendation played in the deliberations of Congress in the enactment of the Project Act in support of her contention, notwithstanding the fact that the Special Master expressly found that the intent of Congress to authorize the allocation of main stream water only is clearly stated in the legislative history of the Project Act (Rep. 174).

A short answer to this California argument is that even if Arizona were mistaken in her belief that the Governors' recommendation throws light on the proper construction of the Project Act, that would not vitiate all the other phases of the legislative history which, as the Master holds, unmistakably evidence the intent of Congress to authorize the apportionment of only main stream water among the Lower Basin main stream states.

However, the Governors' recommendation is of assistance in determining the congressional intent. It is immaterial whether Congress appreciated that the Governors' proposal referred to Article III(d) water rather than III(a) water, as the Master finds, or whether Congress viewed that proposal as recognizing the correlation between Article

III(a) and III(d) of the Compact, as we believe. In either event, the subject matter of this proposal of the Governors was main stream water, and the deliberations of Congress concerning the limitation on California and the tri-state division of water approved by Congress started with and continued to deal with that same subject matter.

Moreover, the Master's discussion of the Governors' Conference relates only to his rejection of the contention, at one time urged by the United States, that uses should be measured at Lee Ferry (Rep. 187-94); it does not relate to the question of what water, *i.e.*, main stream or main stream and tributary, is dealt with in the Project Act. This latter question the Master had previously answered thus:

> "I have concluded that the limitation on California's consumption of water from the Colorado River contained in Section 4(a) of the Project Act and the correlative apportionment of this water among Arizona, California and Nevada effectuated by the water delivery contracts . . . apply only to water diverted from Lake Mead and from the mainstream of the Colorado River below Lake Mead. Hereafter, reference to the 'mainstream', except where otherwise specifically indicated, means Lake Mead and the Colorado River downstream from Lake Mead within the United States." (Rep. 185)

Thus, while Congress may not have understood that the Governors' proposal referred to Article III(d) water rather than to Article III(a) water (Rep. 189), Congress certainly understood that the Governors' recommendation referred to water of the main stream of the Colorado River to the exclusion of Lower Basin tributaries, since water to be delivered at Lee Ferry could mean nothing other than main stream water.

The fact that "the recommendation of the upper division governors did not exempt any lower basin tributaries from the Mexican Treaty burden" (Cal. Ans. Br. 89) is of no relevance to any issue presented by this case. The important point is that the Governors distinguished between water to be delivered at Lee Ferry—necessarily main stream water—and waters of the tributaries of the Colorado River "flowing in Arizona" or "emptying into the river below Lees Ferry" (Ariz. Op. Br. 63 and note 28).

The Master has not found nor even intimated that this distinction between main stream and tributary water, unmistakably made by the Governors, was not clearly understood by Congress in its use of the Governors' recommendations in the senatorial compromise effectuated by §4(a) of the Project Act (Rep. 188-93).

That the recommendations of the Governors' Conference were the basis of the discussion resulting in the compromise was recognized by both Senators Hayden and Johnson, the principal protagonists for Arizona and California, respectively:

> "Mr. Hayden. Is the Senator, then, to make it more specific, willing to use the recommendations of the governors of the States of Wyoming, Colorado, New Mexico, and Utah, as a basis for discussion.
>
> "Mr. Johnson. We can use them as a basis for discussion, but in the bill was inserted a reference to a certain amount of water, at the instance, I think, of the Senator from Wyoming, as the amount that should not be exceeded to the State of California, holding it to 4,600,000 acre-feet, I believe. That is in the bill.
>
> "Mr. Hayden. That is the amount of water which the State of California demanded at Denver and from which she would not recede.
>
> "Mr. Johnson. That is correct, is it?

> "Mr. Hayden. It is. The four governors awarded to the State of California, in their offer of mediation, 4,200,000 acre-feet of water. The State of California submitted a demand for 4,600,000 acre-feet, and has never receded by as much as one acre-foot from that demand."[26]

The Court's attention is invited to the fact that in the portion of Governor Dern's testimony excised by California (Cal. Ans. Br. 99-100), he stated in reference to the Governors' Conference:

> ". . . The State of Arizona made very material concessions toward accepting the proposals submitted by the governors. Arizona, for instance, accepted the amount of water the governors allocated to her *out of the main stream,* which was the most important item."[27]

Mr. Wilson, testifying at the same hearings, stated in the portion of his testimony immediately before that quoted by California:

> "But we took the position that, as regards the 75,000,000 acre-feet which the upper-basin States are obligated under the compact *to let go down by Lees Ferry* in any continuous period of 10 years, we could make a suggestion as to the division of those waters, which, after all, must necessarily be the bone of contention between California and Arizona, *because California had already at previous conferences between the two States conceded that the tributaries of Arizona should belong to that State.* So when we made the suggestion to them we said that all of the suggestions made should be subject and subservient

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[26] 70 Cong. Rec. 77 (1928).

[27] *Hearings on H. R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 264 (1928).

> to the provisions of the Santa Fe compact. Then we said: Of the average annual delivery of water to be provided by the States of the upper basin at Lees Ferry under the terms of the Colorado River compact, to the State of Nevada, 300,000 acre-feet; to the State of Arizona, 3,000,000 acre-feet; to the State of California, 4,200,000 acre-feet.''[28]

In any event, entirely independently of the Governors' conference and without any reference to it whatever, the Special Master found:

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. . . . This intention is clearly stated in the legislative history." (Rep. 174)

II

The fact that a delivery of 7,500,000 acre-feet of water at Lee Ferry cannot be precisely equated with a consumptive use of 7,500,000 acre-feet of water down stream does not warrant the conclusion that §4(a) of the Project Act deals with system water.

California argues that since a delivery of 7,500,000 acre-feet of water at Lee Ferry cannot supply consumptive uses in that amount (measured by diversions less returns) at the diversion points in the Lower Basin states, neither Article III(a) of the Compact nor §4(a) of the Project Act could have intended a division of main stream water at Lee Ferry (Cal. Ans. Br. 84-87).

Arizona has fully developed her reasons for concluding that Article III(a) of the Compact apportions main stream water at Lee Ferry (Ariz. Op. Br. 72-81). But even if Arizona's interpretation of Article III(a) is not accepted,

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[28] *Id.* at 291-92.

it is the congressional intent in employing Compact terminology which governs the construction of §4(a) of the Project Act, as the Master has held (Rep. 173-85).

California first assumes, for the purpose of her attack upon Arizona's position, an actual delivery of 7,500,000 acre-feet of water each year at Lee Ferry. She next assumes it to be Arizona's contention that Congress must have envisaged that this identical water was to be delivered at the points of diversion in the three Lower Basin states.

This is not the case. We agree with the Special Master that the 7,500,000 acre-feet divided among the Lower Basin main stream states is the first 7,500,000 acre-feet of water available each year for consumptive use from Lake Mead and below (Rep. 173-85, 232-33, 305). Quite obviously, this quantity of water is not made up solely of water delivered at Lee Ferry pursuant to the delivery obligation of Article III(d) of the Compact since a release of 7,500,000 acre-feet at Lee Ferry would not result in the identical water so released reaching Lake Mead. Moreover, the Article III(d) delivery obligation does not require the delivery of 7,500,000 acre-feet each year, but only an average of 7,500,000 acre-feet per year in any period of ten consecutive years. Congress was well aware of these facts.

Congress did not intend that the annual delivery at Lee Ferry was to be piloted through the reservoir and down the river for diversion by the states. Congress knew that in a reservoir of the magnitude of Lake Mead water delivered at its upper end would remain in storage for a substantial period of time before reaching Hoover Dam and did not equate the actual annual delivery at Lee Ferry with the water to be supplied to the states each year.

When members of Congress spoke in debate of dividing the 7,500,000 acre-feet let down at Lee Ferry, it is not to be supposed that they intended the impossible. Rather, the

true significance to be attributed to these statements is that in the matter of division of water Congress had its attention focused upon, was concerned with, and intended to deal only with main stream water, and that water of Lower Basin tributaries was not considered as a part of the water to be divided.

Congress was faced with the responsibility of providing authority for the allocation and use of water which would be stored in the exercise of its dominant servitude over navigable water. In discharging that responsibility Congress undoubtedly was influenced by the fact that the water supply flowing in the main stream from the Upper Basin would average not less than 7,500,000 acre-feet per annum. But this fact does not compel the conclusion that Congress, in providing for an allocation of water to be made available by the vast storage facilities contemplated by the Project Act, intended to provide for the allocation among the Lower Basin main stream states of only that portion of the water delivered at Lee Ferry pursuant to Article III(d) of the Compact as should actually reach the diversion points below Lake Mead.

In any event, the fact that 7,500,000 acre-feet of water delivered at Lee Ferry cannot be equated with 7,500,000 acre-feet delivered at Lake Mead or with 7,500,000 acre-feet of consumptive use within the Lower Basin states does not establish the California thesis that Congress in §4(a) of the Project Act was dealing with system water rather than with water of the main stream only. The legislative history of the Act simply precludes any such conclusion. Even apart from the legislative history, the provisions and general operative scheme of the statute lead inevitably to the conclusion, as the Master found, that both §4(a) of the Project Act and the Limitation Act refer only to main stream water—to water in Lake Mead and flowing in the main stream below Hoover Dam (Rep. 138, 151-52, 173-85).

III

California's assertion of an "automatic shortage" is unfounded.

California's claim of "automatic shortage" (Cal. Ans. Br. 1-29) is epitomized in the following statement:

> "The proposed decision [the Master's Report and Recommended Decree] would permit California to receive only *3.8 million acre-feet* even if the lower basin water supply were sufficient to sustain all of the Compact allocations in full, plus all Mexican Treaty requirements and all losses of every description." (Cal. Ans. Br. 8) (California's italics)

California's fundamental error lies in her assertion that the meaning of Article III of the Compact, as she construes it, controls the intent and purpose of Congress in enacting the Project Act and that the water dealt with in §§4(a) and 5 of the Project Act includes Lower Basin tributary water as well as water of the main stream.

The Master was right in rejecting the California contention that the California limitation covered tributary as well as main stream water and in holding:

> "For the reasons stated above, Section 4(a) of the Project Act cannot be given a literal interpretation. Such an interpretation would fly in the face of what must have been the congressional intention; it would make no practical sense whatsoever. This being the case, I have construed Section 4(a) so as to comport with the purposes of Congress in enacting it and to effectuate a result which makes sense when the section is applied to the factual situation existing in the Colorado River Basin.
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> • • • • • •
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> "Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the

water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries.

"It is clear that Congress intended Section 4(a) of the Project Act to apply only to the mainstream, where the works authorized by the Act were to be constructed. The United States cannot by its operation and control of Hoover Dam regulate the flow of water in the tributaries, nor can it deliver water on any of these streams" (Rep. 172-74) (footnote omitted; Master's italics).[29]

Subsidiary to California's fundamental error in reading her construction of the Compact into the provisions of the Project Act is the California concept that Article III(a) and (b) of the Compact impose an "embargo" or "ceiling" on the amount of water which the Lower Basin may legally put to beneficial consumptive use, regardless of the amount of water which is physically available for such use (Cal. Ans. Br. 19).

California says:

"Manifestly, if the Compact requires accounting for uses on the tributaries against the lower basin's III(a) ceiling of 7.5 million acre-feet, the lower basin states cannot claim against the upper basin (which is their major source of supply) the whole 7.5 million acre-feet out of the main stream as within that ceiling. Thus, if the limitation on California and the secretarial contracts effectuate an allocation of 7.5 million acre-feet from Lake Mead and below, this allocation exceeds the Compact 'ceiling' or 'embargo' (Rep. 140, 196). Since the Secretary is required by statute to operate Lake Mead (and each of the dams

[29] See Ariz. Op. Br. 32-46, 57-81; Ariz. Ans. Br. 58-72.

> above Lake Mead) in conformity with the Compact, shortage in the allocations made by the Master's 'contractual allocation scheme' is automatic and certain whenever the Secretary restricts either the inflow to, or releases from, Lake Mead to enforce the Compact 'ceiling.' " (Cal. Ans. Br. 19-20) (footnotes omitted)

And further:

> "If the Compact is enforced, the Master's formula produces a built-in shortage." (Cal. Ans. Br. 20) (footnote omitted)

This argument is frivolous. The Master held directly to the contrary:

> "... it is clear that the Lower Basin may utilize and consume more than the 8,500,000 acre-feet of water per annum apportioned to it by subdivisions (a) and (b) of Article III of the Compact, if the water is actually available, but against the Upper Basin it can acquire appropriative rights to no greater quantity than is sufficient to satisfy a consumptive use of that magnitude." (Rep. 140)

The language of the Compact not only fails to support California's assumptions, but points clearly to a contrary conclusion. Article III(e) of the Compact provides:

> "The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

California ignores realities and deals in computations using assumed figures which have no factual basis in the record. Her "legal drouth" is as mythical as her previously asserted "disaster" (Cal. Op. Br. 50). By her unrealistic computations and assumptions California produces her "built-in shortage" (Cal. Ans. Br. 20), despite the fact that, according to authoritative estimates, uses in

the Upper Basin will not exceed 4,800,000 acre-feet of its apportioned 7,500,000 acre-feet per annum in the foreseeable future (Ariz. Ans. Br. 128).

IV

The California contention that Hoover Dam and Lake Mead can and must be operated in satisfaction of prior appropriative rights is unsound.

We adhere to our position that the recognition and satisfaction of appropriative rights in point of quantity and priority date would be incompatible with the management of Hoover Dam and Lake Mead for the improvement of navigation and flood control pursuant to the mandate of the Project Act (Ariz. Op. Br. 41-42). This position is not inconsistent, as California asserts (Cal. Ans. Br. 111), with that which we have taken with respect to §18 of the Project Act.

The subject under consideration at page 99 of Arizona's Opening Brief, to which California refers for support of her statement that "Arizona agrees with the Master that section 18 of the Project Act requires 'that state law shall govern intrastate water rights and priorities'" (Cal. Ans. Br. 111), was Article 7(d) of the Arizona water delivery contract, which concerns tributary uses in Arizona above Lake Mead. It was and is our position that these provisions of the Arizona contract are invalid for the reason, among others, that they violate the direction of §18 of the Project Act that state law shall govern intrastate water rights and priorities. We contended that the provisions of §18 of the Project Act apply to the tributaries within the State of Arizona, but we did not contend that the provisions of §18

are applicable to water stored in Lake Mead. To the contrary, we stated in our Answering Brief:

> "In no event can §18 be construed as applying to the *interstate* allocation of water stored pursuant to the Project Act. Once that water is impounded by the United States, it ceases to be water subject to the sovereign dominion of any state. Otherwise, its release and delivery from Lake Mead would be controlled by state law and policy instead of by contracts which the Secretary of the Interior is authorized by §5 of the Project Act to make and without which 'no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid. . . .'" (Ariz. Ans. Br. 9) (italics in original)

The purpose of §18 was to insure that nothing in the Act or any water delivery contract should override the then existing rights of the states in the tributary streams within their borders or should prevent the states from controlling the use of such water in accordance with whatever policies they might deem appropriate (Ariz. Ans. Br. 159-60).

California attempts to identify the provisions of §6 of the Project Act with those of §2 of the Rivers and Harbors Act of 1937.[30] She then quotes from this Court's decision in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 734 (1950), thereby creating the erroneous impression that it was there held that a dam of the Central Valley Project in California had to be operated so as to satisfy existing rights under state law (Cal. Ans. Br. 112-14).

The *Gerlach* case did not so hold or even intimate. It held that in undertaking the project Congress recognized that state-created water rights would necessarily be taken from their owners but did not intend that the taking should be without compensation. 339 U. S. at 739. The situation in the case at bar is far different.

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[30] 50 Stat. 850.

Finally, California's assertion that "there is no evidence that Hoover Dam and Lake Mead have been operated without regard to appropriative rights, nor may any such inference be drawn from the evidence" (Cal. Ans. Br. 115) is flatly contradicted by the record.[31]

V

California's criticism of the Master's invalidation of Article 7(d) of the Arizona contract is predicated upon the erroneous claim that the United States concurs in California's position that the doctrine of prior appropriation survived the Project Act.

Answering the Opening Brief of the United States, California once again argues her thesis that principles of priority of appropriation and equitable apportionment are relevant and controlling in the determination of the rights of the Lower Basin main stream states in the water of the Colorado River. California attempts to distort the argument made by the United States in support of the validity of Article 7(d) of the Arizona water delivery contract and Article 5(a) of the Nevada contract into an asserted reliance on the doctrine of prior appropriation and the principles of equitable apportionment (Cal. Ans. Br. 36-46).

We do not understand the United States to rely on the doctrine of prior appropriation to support the validity of these provisions of the Arizona and Nevada contracts nor do we believe that the Government's argument is fairly susceptible of that interpretation. We cannot find any justification for the California assertion that the United States, by "implication, inference, and other interpretive techniques [attempts] to mold water delivery contracts

[31] Tr. 21,212-14; and see Tr. 828-29, 857-67, 876-78, 893-95.

into instruments having the effect of recreating equitable apportionment" (Cal. Ans. Br. 37). To the contrary, the briefs of the United States repeatedly assert its position that principles of priority of appropriation and equitable apportionment are not material to a determination of the entitlements of the Lower Basin main stream states to the use of Colorado River water. For example, the Answering Brief of the United States asserts:

> "The principles of priority of appropriation and equitable apportionment are irrelevant, therefore, once it is shown that Congress has made or authorized a federal allocation. Recognition of this proposition removes the underpinning from California's attack upon the decree recommended by the Special Master, for the essence of California's claim is that the principles of prior appropriation and equitable apportionment, when applied to the waters of the Colorado River, give her a right to a water supply adequate to permit full utilization of the capacities of her present projects, which should not be at the hazard of sharing shortages in the total main stream supply with future projects in Arizona and Nevada.
>
> "There is no merit in California's claim that her citizens could acquire 'prior rights' (Calif. Opening Br., p. 37) in the navigable waters of the Colorado River before the United States exercised its powers over the stream. Any claimed rights recognized under the State law were subject to, and could be displaced by, the exercise of the superior federal authority" (U. S. Ans. Br. 24-25).

Contrary to the California claim, the authority to charge tributary uses against contract entitlements in main stream water, for which the United States argues, is not predicated on the enforcement of claimed prior rights downstream, but is based upon the Government's interpretation of the Project Act (U. S. Op. Br. 4, 8-21). In fact the contention of the United States is that these contractual provisions

are necessary to avoid frustration of the purposes of the Act (U. S. Op. Br. 10-11).

Even if the United States were correct, the charge against the entitlements of the states to stored water resulting from the enforcement of these provisions of the Arizona and Nevada contracts would not be in recognition of claimed senior priorities below Lake Mead. The result would be to increase the supply available for apportionment under the authority of the Project Act without reference to claimed appropriative rights below Lake Mead. Since this is true, the "unworkable system of water rights" resulting from the example hypothesized in the California Answering Brief (Cal. Ans. Br. 44-45) would not and could not arise. The basic fallacy which underlies the California contention and her supposed example is that rights to the use of Colorado River water originate in and are predicated upon appropriative rights. This concept cannot be squared with an administration of the river predicated upon the premise that such rights are derived from the United States and are fixed by the allocation authorized by the Project Act. Any attempt to read principles of priority of appropriation into the Project Act or to reconcile the incompatible concept of appropriative rights with that of a statutory allocation is bound to produce "an unworkable system of water rights".

When it is appreciated that Congress elected to exercise its dominant servitude only over the water in the main stream of the Colorado River and to authorize an allocation among the Lower Basin main stream states of the main stream water stored by the United States in carrying out its powers under the Commerce Clause, the problems posed by California disappear. All rights to the use of water below Lake Mead are limited to the supply created under the authority of the Project Act and do not extend to the water of tributary streams, over which Congress did not attempt

to exercise any control and which Congress did not intend should constitute a part of the water included in the Project Act allocation (Ariz. Ans. Br. 156-57).

VI

California's criticism of Arizona's proposed amendment to Article II(B)(8) of the Special Master's Recommended Decree is unwarranted.

California takes exception to Arizona's suggested amendment (Ariz. Op. Br. 106-08) of Article II(B)(8) of the Special Master's Recommended Decree[32] and argues

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[32] California's assertion (Cal. Ans. Br. 129) that Arizona's proposal was "rejected by the Special Master" is incorrect. The proposed amendment set forth in Arizona's Opening Brief (108) was not presented to the Master. The proposal submitted to and rejected by him was substantially different and read as follows:

"ARIZONA'S SUGGESTED CHANGES TO SUBDIVISION (B)(6) OF ARTICLE II OF THE RECOMMENDED DECREE (DRAFT REPORT, pp. 306-309)

"(Deletions struck, additions underlined)

"II(B)(6) 'If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that users therein do not have delivery contracts for the full amount of the state's apportionment, or that they cannot apply all of such water to beneficial uses, or for any ~~another~~ other reason, ~~nothing in this decree shall be construed as prohibiting the the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof.~~ the Secretary of the Interior may, in his discretion and to the extent such storage will not be inconsistent with the objects and purposes of the Project Act, permit such state to accumulate and store such unused waters. Any losses occasioned by reason of such storage shall be a charge against the water so stored.' "

For the discussion of this suggestion before the Special Master see Reporter's Transcript, Conferences on Recommended Decree, New York, N. Y., August 19, 1960, pp. 85-122.

that should flood control require the release of water from Lake Mead the proposed amendment requires the Secretary "to compel the waste of that water to the ocean rather than to permit its use by a state thereby exceeding its allocation" (Cal. Ans. Br. 129).

California misunderstands the provisions of the Recommended Decree and the modification of Article II(B)(8) proposed by Arizona. The Recommended Decree enjoins the release of water for irrigation and domestic use in Arizona, California and Nevada, except in the quantities specified in Article II for consumptive use in the three states. Article II(B)(8) merely authorizes the release to one state of water which is apportioned to but will not be consumed in another. This exception has nothing to do with water released for flood control or other non-consumptive uses but is expressly limited to "water apportioned for consumptive use in a state".

Subdivisions (C) and (D) of Article III of the Recommended Decree enjoin each of the Lower Basin main stream states from diverting water from the main stream, the diversion of which has not been authorized by the United States for use in that state and from consuming water in excess of the quantities specified in Article II of the Recommended Decree.

Thus, even without the modification of Article II(B)(8) suggested by Arizona, the States of Arizona, California and Nevada are enjoined by the Recommended Decree as it now stands from diverting or consuming any main stream water in excess of that which is apportioned to them by the United States pursuant to Article II, or which has been apportioned to but will not be consumed by another state.

All that is intended by the proposed modification advocated by Arizona and all that may be properly attributed

to it is that the ceiling placed on consumptive uses in the Lower Basin main stream states by the Project Act, the Limitation Act and the water delivery contracts shall be observed and that this ceiling shall not be exceeded because of uses in one state of water apportioned to but unused in another.

Evasion of the ceiling placed on uses of Colorado River water by the Project and Limitation Acts and the water delivery contracts should not be sanctioned under the guise of prevention of waste. Glen Canyon Dam, together with existing and anticipated regulatory structures on the Colorado River, make it most likely that it will be possible to store and regulate the flow of the Colorado River so that the use requirements of the Lower Basin main stream states and the Mexican Treaty delivery obligations can be synchronized with releases required for flood control without the wasteful results predicted by California. The fact that the water available for use in the Lower Basin is not abundant leads all to deplore waste and to endorse any reasonable and lawful measure for its elimination. At the same time, we are mindful of California's relentless opposition to every Arizona effort to put to use Arizona's share of Colorado River water. Even though California attempts to disguise her true purpose by draping the "prevention of waste" cloak about it, we must oppose the incorporation into the Decree of provisions which would nullify the protection afforded by the limitations set by the Project and Limitation Acts and thereby supply California with the incentive to continue her opposition to Arizona's utilization of Colorado River water even after Arizona's legal entitlements in that stream are set at rest.

PART II

The Claims of the United States to Water

PART II

The United States attempts to support the Special Master's recommendations relating to its right to the use of main stream water for Indian Reservations and other federal establishments on either of two alternative theories:

First. That under the Project Act the Secretary of the Interior is empowered "to use, or to reserve the use of," a portion of "the waters of the mainstream of the Colorado River" for the lands of the United States (U. S. Ans. Br. 55).

Second. That the United States has "property rights" or "a proprietorship" in the use of the water of the Colorado River, which it exercised when the federal establishments were created by reserving such waters for use thereon in quantities sufficient to satisfy their ultimate needs (U. S. Ans. Br. 55-56).

The Master's recommendations cannot be sustained on either of these theories.

ARGUMENT

VII

The Master's recommendations regarding the right of the United States to use water of the Colorado River for federal establishments cannot be sustained on the basis of the authority given the Secretary by the Project Act.

The Special Master did not rely upon the Project Act as creating the rights which the United States claims to main stream water for use on federal establishments. He upheld these claims on the ground that the federal government has the inherent power to reserve water of both navi-

gable and non-navigable streams for the benefit of federal establishments and that the very creation of such establishments impliedly reserves in perpetuity sufficient water to satisfy their ultimate needs (Rep. 254-66).

Under the Master's theory, this reservation of water for the use of federal establishments was not effectuated by any act of the Secretary of the Interior in the exercise of the authority granted him by the Project Act, but rather by Congress or the President in creating the federal establishments, thereby automatically reserving water for their use.

Clearly, the priorities which the Master accorded these federal water rights do not and could not possibly originate in the Project Act, which did not become effective until June 25, 1929 (Rep. 152 note 20), since the priorities of all but three of the establishments are recognized by the Master as antedating the Project Act.[33]

The Master construed §6 of the Project Act as preserving whatever rights to main stream water were perfected when the Project Act became effective on June 25, 1929 (Rep. 152 note 20), and he held specifically that a reservation of water by the United States before June 25, 1929 is to be accorded the protection given by §6 to "present perfected rights", even though, as of that date, the rights were not perfected under state law and but a small fraction of

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[33] The priority dates found by the Master for the various establishments are as follows: Chemehuevi Indian Reservation, February 2, 1907 (Rep. 267); Cocopah Indian Reservation, September 27, 1917 (Rep. 268); Yuma Indian Reservation, January 9, 1884 (Rep. 269); Colorado River Indian Reservation, March 3, 1865, November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915 (Rep. 274); Fort Mohave Indian Reservation, September 18, 1890, and February 2, 1911 (Rep. 283); Lake Mead National Recreation Area, May 3, 1929, and April 25, 1930 (Rep. 295); Havasu Lake National Wildlife Refuge, January 22, 1941, and February 11, 1949 (Rep. 299); Imperial National Wildlife Refuge, February 14, 1941 (Rep. 300).

the water purportedly reserved had been put to beneficial use (Rep. 309-10). The Master's conclusion was based on the premise that

> "The water rights created by such a federal reservation do not depend upon state law or upon the actual diversion and beneficial use of a specific quantity of water." (Rep. 309)

This conclusion serves to emphasize the fact that the water rights of federal establishments were grounded by the Master not upon the Project Act but upon principles of decisional law,[34] which, he found, gave to those rights an existence, a special character and a priority wholly independent of the Project Act and which that Act only recognized and preserved.

Nor did the Special Master derive from the Project Act the quantities of water which he found had been reserved for federal establishments, *viz.*, quantities sufficient to irrigate all the irrigable acreage within the Indian Reservations (Rep. 254-66) or quantities reasonably necessary to fulfill the purposes and to meet the requirements of other federal establishments (Rep. 295, 299, 300).

It is thus too clear for dispute that the Project Act is not the basis of the Master's recommendations sustaining the claims of the United States to main stream water for the use of federal establishments. Rather, the entirely different, separate and independent "reservation" theory is the sole and exclusive foundation for those recommendations.

Indeed, the Master specifically held that the Project Act is not the origin of the rights claimed by the United States to main stream water for federal establishments. With

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[34] The Master relied on *Winters* v. *United States*, 207 U. S. 564 (1908).

respect to such a claim for the Coachella Indian Reservations, the Master stated:

> "The Boulder Canyon Project Act does not specifically invest the Coachella Reservations, or indeed any Indian Reservation, with rights to water from the Colorado River. Nor can any such rights be reasonably inferred from the Act's authorization of the Secretary of the Interior to deliver water to the Coachella Valley." (Rep. 289)

This holding, to which the United States did not except, is particularly significant in view of the facts found by the Master with respect to the claim.

The Indian Reservations referred to are located outside the drainage basin of the Colorado River—a fact which, as the Master found, "leaves no room for a presumption, absent a specific showing, that the United States intended to reserve water from the Colorado River for use on these Reservations" (Rep. 289). Perhaps this fact explains why the United States did not rely upon the "reservation" theory in claiming water for these Reservations, but rather based its claim on the Project Act, various federal statutes and several contracts between the Coachella Valley County Water District and the United States (Rep. 289). The Master found that none of these instruments created any rights in the United States to Colorado River water for the use of the Reservations concerned.

The 1934 contract between the Water District and the United States provided for the construction of Imperial Dam and the All-American Canal for the benefit, *inter alia*, of lands within the Coachella Valley. The 1947 contract provided for the construction of distribution and drainage works for the benefit of lands within the Coachella service area. As to these agreements the Master held:

> "Neither of these contracts purports in any manner to deal with water rights of the Coachella Indian Reservations and they cannot form the basis for assertion of such rights." (Rep. 290)

The Act of August 25, 1950[35] directed the Secretary of the Interior to designate the lands of the Coachella Reservations which could be irrigated by the facilities of the District and authorized him to enter into a contract with the District for the benefit of the designated Indian lands. As to this statute the Master held:

> "The Act does not create rights to water in favor of the Indians; it merely serves as a preliminary step towards possible acquisition of rights. It is apparent, therefore, that up to and including 1950 the Coachella Reservations had no enforceable right to water from the Colorado River." (Rep. 290)

Finally, in 1957 the District entered into an agreement with the Secretary of the Interior whereby he undertook to construct irrigation distribution works connected to the District's system to serve Indian lands designated by the Secretary. The contract provided, among other things, that after any major part of the irrigation system and drainage works were turned over to the District for care, operation and maintenance, the District should deliver water to specified lands within Improvement District No. 1 (including the Indian Reservation lands in question), which could be irrigated through such part of the system "under the same conditions, rules, and regulations, to the same extent, without discrimination, and for the same charges, . . . as water is delivered by the District to other lands similarly located within the District" (Rep. 290). This agreement was to become effective when Congress author-

[35] 64 Stat. 470.

ized the Secretary to fulfill the obligations undertaken by him and this authorization was given by the Act of August 28, 1958.[36] On the basis of these facts the Master concluded:

> "From the foregoing it is clear that rights of the Coachella Reservations to water from the Colorado River can be derived only from the 1957 contract between the Secretary and the District. But there has been no showing that the Indian distribution system has been constructed. Nor has it been established that 'any major part of such irrigation distribution system . . . has been turned over to the District. . . .' The obligation of the District to deliver water to the Coachella Reservations under the contract with the Secretary, therefore, cannot be said to have matured. Thus, there is no occasion on the facts and circumstances presented for a determination of what rights may accrue to the Coachella Reservations should the District become obligated to deliver water to them in the future." (Rep. 291)

The foregoing holdings of the Special Master regarding the claims of the United States on behalf of the Coachella Indian Reservations clearly indicate that, had the question been presented to him, the Special Master would have rejected as unsound the contention now made for the first time by the United States that, independent of the so-called "reservation" theory, rights to water of the Colorado River for use on federal establishments within Arizona may be derived from the Project Act or inferred from the Act's authorization to the Secretary of the Interior to deliver water for reclamation of "public lands" and other beneficial purposes (U. S. Ans. Br. 59-60).[37]

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[36] 72 Stat. 968.

[37] Elsewhere in its Answering Brief the United States correctly asserts that "reservations are not 'public lands' ", citing *FPC* v. *Oregon*, 349 U. S. 435, 448 (1955), and other cases (U. S. Ans. Br. 66).

The United States assertion that "since the Secretary of the Interior has the power to contract for the delivery of stored water 'for irrigation and domestic uses,' . . . he derives power from the same sources to use mainstream water for similar purposes on federal lands" (U. S. Ans. Br. 59) was in effect rejected as unsound by the Master's holding directly to the contrary in respect of the Coachella Indian Reservations (Rep. 289).

The Master's conclusions, reviewed immediately above, also indicate the unsoundness of the further contention of the United States that its claims on behalf of federal establishments may be sustained under Article 7(*l*) of the Arizona 1944 water delivery contract with the Secretary of the Interior (U. S. Ans. Br. 60). That portion of the contract provides in material part:

> "Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes *or to lands of the United States within Arizona.*"

The United States relies on the italicized phrase of the quoted provisions to sustain its position. But this is surely a weak straw to grasp in view of the Master's holding that rights to water in favor of the Indians were not created by the far more specific provisions of the 1934 and 1947 contracts between the United States and the Coachella Valley County Water District "for the benefit of lands within the Coachella Valley" (Rep. 289) and the 1957 contract between the District and the Secretary of the Interior which contained explicit references to "Indian lands designated by the Secretary". If those agreements were

ineffective to create rights for the benefit of the Coachella Indian Reservations, certainly the general language culled by the United States out of the Arizona water delivery contract is insufficient to create any existing and definite rights to water for use on federal establishments within Arizona.

VIII

The Master's recommendations regarding the right of the United States to use water of the Colorado River for federal establishments cannot be sustained on the basis of the so-called "reservation" theory.

A. Basic Fallacies Underlie the Position of the United States.

The alternative theory by which the United States attempts to support the Master's recommendations relating to its claims to main stream water for Indian Reservations and other federal establishments is that the United States had "property rights" or a "proprietorship" in the use of water of the Colorado River and that when the federal establishments were created it reserved for use thereon the quantities of water sufficient to satisfy the ultimate needs of the establishments (U. S. Ans. Br. 55-56).

The United States fails to recognize the essential difference between the principles applicable to navigable and those applicable to non-navigable streams. This fundamental error vitiates the entire position of the United States with respect to the alleged reservation of the use of main stream water for federal establishments. Although it concedes that water rights which are not "owned" by the federal government cannot be reserved by it (U. S. Ans. Br. 64), the Government will not accept the teaching of the

long and unbroken line of decisions of this Court that the federal government does not "own" any rights in navigable waters, has no "property rights" in them and exercises no "proprietorship" over them (Ariz. Op. Br. 121-29).

As Mr. Justice Douglas stated in *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224 (1956):

> "The interest of the United States in the flow of a navigable stream *originates* in the Commerce Clause. *That Clause speaks in terms of power, not of property.*"

The United States fails to give effect to fundamental principles of law repeatedly stated and applied by this Court:

1. Prior to statehood the rights of the United States in the navigable water of a territory, unlike its title to territorial land, are not absolute but are held for the benefit of the people and in trust for the future state (Ariz. Op. Br. 125-29).

2. Upon the admission of a territory to statehood sovereign rights in the water and beds of navigable streams become vested in the newly created state, which acquires absolute and complete sovereignty over them, subject only to the power of the United States over navigation under the Commerce Clause (Ariz. Op. Br. 121-29).

The United States also fails to recognize the corollary propositions which flow from these basic principles:

1. After statehood the United States has no power to reserve water of navigable streams within a state for federal establishments within the state (Ariz. Op. Br. 121-24).

2. Before statehood the power of the United States to reserve navigable water for use on federal establishments resides exclusively in Congress and no authority exists in

the Executive to dispose of navigable waters for federal purposes in the absence of an authorization from Congress (Ariz. Op. Br. 129-35).

3. The settled policy of the United States to hold navigable streams within federal territories in trust for future states raises a presumption against a disposal of those waters by the United States, which must be overcome in each case by a clear manifestation of an intention on the part of the United States to dispose of the waters (Ariz. Op. Br. 135-39).

Failure to recognize and apply the foregoing fundamentals and their corollaries has led the United States into a number of errors which permeate its Answering Brief. These will be considered in the discussion which follows.

B. Proprietary Rights to the Use of Navigable Water in Arizona Were Not Acquired by the United States Through Treaties With Mexico.

The United States argues that when it acquired the territory, part of which is now within the State of Arizona, by cession from Mexico, "it became the owner not only of the land itself, but of all rights pertaining thereto as well," and that the "right to use the appurtenant waters was one of the whole bundle of rights so acquired" (U. S. Ans. Br. 61) (footnote omitted). The Government thus fails to distinguish between the nature of its title to territorial *land,* which is absolute, and its rights in the navigable waters of a territory, which are held by the United States for the benefit of the people and in trust for future states. As this Court said in *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63 (1921):

> "The right of the United States in the navigable waters within the several states is limited to control

thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a state, the owner of the navigable water within its boundaries and of the land under same. . . . The character of the state's ownership in the land and in the water is the full proprietary right."

Similarly, in *Kean* v. *Calumet Canal & Improvement Co.*, 190 U. S. 452, 481 (1903), the Court said:

". . . by a consideration of the doctrine of public and private waters known to the common law, it was early decided, and has been repeatedly reiterated, that the navigable waters and the land under them belong to the states—as well the new as the old—in virtue of their sovereignty, to be held in trust for the people subject to the power of Congress to regulate commerce. And, in harmony with the principle just stated, it has been decided that such navigable waters and the land under them in the public domain of the United States within the territories, while subject to be disposed of by Congress, under the trust for public use, were yet held by the United States to be transmitted to the new states to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original states" (citing many cases).[38]

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[38] *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935), and *Knight* v. *United Land Ass'n*, 142 U. S. 161 (1891), cited by the United States (U. S. Ans. Br. 61), are not to the contrary. In both cases the Court held that title to the acquired territory vested in the United States, but also recognized that title to the tidelands were held "only in trust for the future states that might be erected out of that territory". 296 U. S. at 15.

United States v. *Grand River Dam Authority*, 363 U. S. 229 (1960), cited at U. S. Ans. Br. 62, is not in point because it involved the construction of a water power project on a non-navigable tributary of a navigable river.

The "see also" decisions of this Court, cited at U. S. Ans. Br. 62-63, are likewise inappropriate. All of them involved the dominant servitude of the United States over navigable waters in

C. Arizona's Rights In Navigable Water Are Not Dependent Upon a Transfer Thereof from the United States.

The United States makes reference to "the Desert Land Act of 1877, and its precursor Acts of 1866 and 1870" (U. S. Ans. Br. 63-66, 73-84). The Government's argument based upon this legislation runs as follows: In the Desert Land Act,[39] Congress provided for the acquisition from the United States of rights to use the surplus *non-navigable* waters on public lands by appropriation in accordance with local laws and customs. The Act did not authorize the appropriation of rights to use navigable waters on public lands. Therefore the "proprietary right" to use *navigable* water has never been "surrendered" by the United States. For this reason, the United States claims, it is still the "owner" of the right to use "the waters of the Colorado River appurtenant to its reservations" and this ownership

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exercise of its power to regulate navigation under the Commerce Clause, not the title of the states to the waters of navigable streams.

Winters v. *United States*, 207 U. S. 564 (1908), cited at U. S. Ans. Br. 64 is of course not relevant since it involved non-navigable water. *United States* v. *California*, 332 U. S. 19 (1947); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389 (1917), and *Van Brocklin* v. *Tennessee*, 117 U. S. 151 (1886) (U. S. Ans. Br. 64), are simply authority for the proposition that the United States owns property rights to *land* in its public domain.

The quotation from 1 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS, 692-93 (2d Ed. 1912), (U. S. Ans. Br. 62) is misleading, since the author was there referring to *non-navigable* waters. Speaking of navigable waters, the same author states:

> "[N]avigable waters and the land under them in the public domain of the United States within the Territories, while subject to be disposed of by Congress, under trust for the public use, were yet held by the United States to be transmitted to the new States to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original States." *Id.* at 539.

[39] 19 Stat. 377 (1877), as amended, 43 U. S. C. §§321-29 (1958).

did not pass to Arizona upon her admission into the Union (U. S. Ans. Br. 64-65, 84).

This entire line of reasoning is specious, because it is based on the false premise that the United States at one time owned absolutely the right to use both navigable and non-navigable streams on public lands. This premise, as we have seen, is contrary to the many decisions of this Court holding that rights in navigable streams within territories of the United States are held by the federal government in trust for future states and that title to those waters becomes vested in the newly created state on admission to the Union.

In view of this settled law, it is not difficult to understand why the Desert Land Act "does not authorize the appropriation of rights to use *navigable* waters anywhere" (U. S. Ans. Br. 65). Since the Government never acquired any "proprietary rights" to navigable waters, it could not give away what it did not have. Indeed, in view of *Martin* v. *Waddell's Lessee,* 41 U. S. (16 Pet.) 367 (1842), *Pollard* v. *Hagan,* 44 U. S. (3 How.) 212 (1845), and numerous other decisions concerning proprietary rights in navigable waters, with which Congress was undoubtedly familiar, it is clear that Congress limited the Desert Land Act to non-navigable waters because it knew that the United States had no title to, and hence no right to dispose of, any proprietary interest in navigable waters.

On the same false premises the United States, although confronted with overwhelming legal authority to the contrary, denies "that ownership of navigable waters passed to the States upon their admission to the Union along with title to the bed of the stream" (U. S. Ans. Br. 84). This proposition is denied because, the Government says, it is based upon a "distinction between navigable and non-

navigable waters" and "there is no merit to the distinction" (U. S. Ans. Br. 84). It is much too late, we submit, to argue the "merit" of a legal distinction which has been consistently and invariably recognized since the formation of the United States as a nation and indeed long before.

Confronted with this impressive body of authority, the United States attempts to distinguish the cases by stating that, of those cited by Arizona in her Opening Brief (Ariz. Op. Br. 124-29), "with one exception, each involved the question of ownership of the shores of, or lands beneath, navigable waters; none involved the question of ownership of the water itself" (U. S. Ans. Br. 85-86) (footnote omitted).

But this attempted distinction is without validity and unsupported by authority. The Court has never drawn a distinction between proprietary rights in navigable waters and those in the lands underlying them and, historically, none has existed. Thus, the cases speak without distinction of the states' "absolute right to all their navigable waters and the soils under them", *Martin* v. *Waddell's Lessee,* 41 U. S. (16 Pet.) 367, 410 (1842); of the state's ownership "of the navigable waters within its boundaries and of the land under same", of "the state's ownership in the land and in the waters"; and of the state as "the absolute owner of the tidelands and of the waters over them", *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63 (1921). In the last cited case it was said:

> "The character of the State's ownership in the land and the water is the full proprietary right" 255 U. S. at 63.

In *United States* v. *Oregon,* 295 U. S. 1, 14 (1935) it was said:

> "Dominion over navigable waters and property in the soil under them are so identified with the

> sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York*, 271 U. S. 65, 89. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce. But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State."

It is therefore obvious that the states acquire sovereignty over and title to lands under navigable water only because they acquire sovereignty over and title to the navigable water itself.

The extent to which the United States misconceives the essential nature of rights in navigable streams is sharply illustrated by its great reliance on the opinion of Mr. Justice Field in *Moore* v. *Smaw*, 17 Cal. 199 (1861), decided when he was Chief Justice of the Supreme Court of California. The holding of that case that ownership of minerals in land passed by the cession of the territory from Mexico to the United States is completely beside the point. The United States, having become absolute owner of the *land*, became absolute owner of the minerals in the land and did not, as was there claimed by the defendants, hold them in trust for the future State of California. Entirely different principles apply to rights in navigable streams. The attempt of the United States to substitute "navigable waters of the Colorado River" in place of minerals in lands within the scope of *Moore* v. *Smaw* (U. S. Ans. Br. 86-89)

manifests an unwillingness to recognize the true nature of rights in navigable streams.

The United States overlooks the fact that Mr. Justice Field had become a member of this Court when it handed down its unanimous decision in the leading case of *Shively* v. *Bowlby,* 152 U. S. 1 (1894), which traced the historical development and defined the nature of the respective rights of the federal and state governments in navigable waters. In fact, Justice Field wrote the opinion of the Court in *Weber* v. *State Harbor Comm'rs,* 85 U. S. (18 Wall.) 57 (1873), quoted in Arizona's Opening Brief (Ariz. Op. Br. 122-23). He also wrote the prevailing opinion in *Illinois Central R. R.* v. *Illinois,* 146 U. S. 387, 435 (1892), in which he said:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard* v. *Hagan,* 3 How. 212; *Weber* v. *Harbor Commissioners,* 18 Wall. 57."

Clearly, then, the states have sovereignty over and title to not only the beds of navigable streams but the water thereof as well. The rights of the states are, of course, subject to the "dominant servitude" or dominant "power" of the United States under the Commerce Clause. *United States* v. *Twin City Power Co.,* 350 U. S. 222, 224 (1956).

United States v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913), cited by the Government (U. S. Ans. Br. 86), is an example of the exercise of this dominant servitude. The Court there held that Congress has the power to decide conclusively, as a purely legislative question, whether the entire flow of a navigable stream should be conserved for navigation. Moreover, in that case the interest which conflicted with the dominant servitude of the United States was the claim of a private company—not that of a sovereign state—to the use of the flow of a navigable stream. State sovereignty over and title to the waters or to the land under them was not involved. Similarly, it was held in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 425 (1940), cited by the Government (U. S. Ans. Br. 86), that since "the flow of a navigable stream is in no sense private property", the United States, in the exercise of its powers over navigation, could take over without compensation a power project on a navigable river privately operated under state license.

State ownership of navigable waters and federal dominion over them under the Commerce Clause are not inconsistent or incompatible. Actually, it is because the United States does not own the water of a navigable stream that the Commerce Clause "speaks in terms of power, not of property". *United States* v. *Twin City Power Co.*, 350 U. S. at 224. The failure of the United States to recognize this distinction between the rights of the states and the dominant servitude of the federal government under the Commerce Clause leads it to confuse the two and to find "inconsistency" where it does not exist, *i.e.*, between the position of Arizona with respect to the power of Congress under the Commerce Clause to impound the water of the Colorado River and to apportion the stored water among the states and the power of the United States to reserve the

water of the Colorado River, whether impounded or not, for federal establishments (U. S. Ans. Br. 57-58). The two powers are entirely distinct and governed by wholly different principles and considerations. Significantly, the Master does not resort to the Commerce Clause to sustain the reservation of navigable water for federal establishments.

D. The Mere Creation of a Federal Establishment Does Not Operate to Reserve Navigable Water for Its Use.

Completely disregarding the considerations peculiar to navigable waters, the United States relies on *Winters* v. *United States*, 207 U. S. 564 (1908), to sustain its thesis that the very establishment of an Indian Reservation implies an intention to reserve the use "of all appurtenant waters" necessary for the fulfillment of the purposes for which the lands were reserved (U. S. Ans. Br. 65). The United States ignores the fact that the case involved water of a non-navigable stream reserved for use on an Indian Reservation created by treaty in the Territory of Montana. The Government again makes reference to the Desert Land Act and argues:

> "The only real difference in this respect between navigable and non-navigable waters may be that *as to the former there is no need for reservation to preserve* the rights against appropriation by others because there is no statute which provides for their transfer or appropriation." (U. S. Ans. Br. 66)

Thus, from its refusal to recognize rights of the states in navigable streams, the Government reaches the strange conclusion that in the case of navigable water there need

be no reservation for federal use. The argument proves too much. If sound, there is no necessity for the reservation of navigable water for use on any federal establishment.

E. In the Absence of Congressional Authority the Executive is Without Power to Reserve the Use of Navigable Water for Federal Establishments.

The United States asserts that the argument of Arizona questioning the authority of the President to reserve navigable water (Ariz. Op. Br. 129-35), "is really directed toward the authority of the President to establish federal reservations" (U. S. Ans. Br. 69). The Government misconceives our position. The misconception is caused by the false notion that "the reservation of the use of waters appurtenant to federal areas results from the reservation of the land" (U. S. Ans. Br. 69). Once again, the failure to distinguish between the title of the federal government in publicly owned *land* and its rights in *navigable water* on that land, leads the United States into error.

We do not question the power of the President to establish federal reservations. The constitutional doubts which beclouded his power were finally dispelled by *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915). However, we do contend that the power to reserve by executive order federally owned lands, title to which is in the United States as absolute owner, is one thing, and the power to reserve navigable territorial water, which is held by the United States in trust for future states, is quite another. As we said in Arizona's Opening Brief:

> "We have found no statute which authorizes the President to reserve navigable water for the benefit of federal establishments nor, so far as we have been able to determine, are there any cases which have

> passed upon the existence of such executive power in the absence of statute." (Ariz. Op. Br. 130-31) (footnote omitted)

The United States has not come forward with any authority supporting either the express or implied power of the Executive to reserve navigable water (U. S. Ans. Br. 69-72).[40] Actually, even the inferred presidential authority to establish Indian Reservations out of public lands, recognized in *United States* v. *Midwest Oil Co., supra,* was expressly terminated by Congress with regard to New Mexico and Arizona in 1918 (U. S. Ans. Br. 70).[41] The United States says that "these statutes constituted a clear change in the congressional policy with regard to the establishment of Indian Reservations by executive order" (U. S. Ans. Br. 70). We agree. But we see in this legislation a determination by Congress to severely restrict, indeed to abolish, as far as Arizona and New Mexico are concerned, the power of the President to reserve land for Indian Reservations which this Court in 1915 had recognized in the *Midwest Oil* case. Certainly this legislation cannot be construed as recognizing by inference any presidential power to reserve navigable streams for federal purposes. To the contrary, Congress would undoubtedly be opposed to presidential assumption of that power in view of the duties of trusteeship over navigable water with which Congress is charged.

Nor does Arizona contest the power of the President to establish by executive order, as he did, the Lake Mead

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[40] The General Indian Allotment Act, 24 Stat. 388 (1887), recognized and confirmed only "the power of the President to reserve public *lands* for the Indians" (U. S. Ans. Br. 69). By the Act of June 25, 1910, 36 Stat. 847, 43 U. S. C. §141 (1958), the President was "authorized to reserve public *lands*" for specified purposes (U. S. Ans. Br. 70).

[41] Act of May 25, 1918, 40 Stat. 570, 25 U. S. C. §211 (1958).

National Recreation Area, the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge. As the United States asserts, these federal establishments were created under the "powers of the President to deal with public *lands*" (U. S. Ans. Br. 71). We do, however, contest the power of the President to reserve navigable water for any Indian Reservation or other federal establishment in the absence of a delegation by Congress of the authority to do so. The United States has presented no authority to the contrary.

In discussing the federal establishments created by executive order, the United States makes no distinction between those established before and after Arizona became a state. The Cocopah Indian Reservation, the Lake Mead National Recreation Area and the Havasu Lake and Imperial Wildlife Refuges were all created after Arizona was admitted to statehood. Hence, regardless of whether the President has or has not the power to reserve navigable territorial waters, the federal government was without power to make any reservation of water of the Colorado River for the use of these establishments (Ariz. Op. Br. 121-24).

F. There Must Be a Clear Manifestation of Intent to Reserve Navigable Water.

The United States, still ignoring the distinction between rights in navigable and non-navigable water, can find "no logical reason . . . for requiring an express intent to reserve rights with respect to navigable waters when implied intent is sufficient for all others" (U. S. Ans. Br. 72-73). Again, Arizona's position is misconstrued. We do not urge that a stated "intent to reserve" is indispensable in the case of navigable water. We do assert, upon the authority of this Court's decision in *United States* v. *Holt*

State Bank, 270 U. S. 49, 55 (1926), that "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain".

We shall not review our analysis of the events surrounding the establishment, enlargement and maintenance of the Indian Reservations here involved which demonstrates that there is no justification for a finding or conclusion that the United States in establishing those Reservations intended to reserve water of the Colorado River for their use (Ariz. Op. Br. 139-53).

The United States refers to the various congressional appropriation Acts passed after 1910, which were designed to supply funds for the construction of irrigation works on the Colorado River Indian Reservation "for the purpose of securing an appropriation of water" (Ariz. Op. Br. 144-48). The plain language of these appropriation statutes is irreconcilable with the view that by the very creation of the Reservation water had been reserved for use upon it (Ariz. Op. Br. 144). Quite the contrary, the language discloses Congress' clear understanding that no water rights had been reserved by the mere creation of the Reservation.

The Government attempts to answer by asserting that this legislation shows "Congress' purpose through the years to develop an irrigation project on the Colorado River Indian Reservation of the magnitude of 150,000 acres" (U. S. Ans. Br. 75). But this legislation is significant, not as showing Congress' intention to develop an irrigation project for the Colorado River Indian Reservation, but as clearly demonstrating Congress' understanding of the manner in which water rights could be acquired for this project. Even accepting, arguendo, the Government's

contention that this legislation shows an intent on the part of Congress to establish an irrigation project of 150,000 acres exclusively for the Indians of the Colorado River Indian Reservation, the fact remains that Congress considered it necessary to acquire water for the project under the local law of prior appropriation. Congress would hardly have recognized such a necessity, if, as the Government urges, the mere creation of the Reservation had the effect of reserving the right to use whatever quantity of water should be required to meet the ultimate needs of the Reservation.

The suggestion made by the United States (U. S. Ans. Br. 75) that Congress intended that appropriative rights to the use of water should be for the purpose of supplementing the reserved right is frivolous. If, as the United States contends, the reserved right includes whatever quantity may be required to meet the ultimate needs of the Indians, there could be no occasion to "supplement" the reserved right with water available under the state law of prior appropriation.

Moreover, this series of enactments does not disclose a congressional purpose "to develop an irrigation project . . . of the magnitude of 150,000 acres" for exclusive use of the Indians, as the United States contends. The Act of April 21, 1904 provided for an allotment of five acres of irrigable land for each of the Indians on the Colorado River Indian Reservation, an allotment which was increased to ten acres by the Act of March 3, 1911.[42] In these statutes it was provided that the "remainder of the lands irrigable in said Reservation shall be disposed of to settlers under the provisions of the Reclamation Act"; and each of the appropriation Acts from 1910 through 1942 which are referred to by the Government provided that the funds

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[42] 33 Stat. 224; 36 Stat. 1063.

expended should be reimbursable from the sale of these surplus lands of the Reservation (Arizona Opening Brief 175-76).

G. Indian Need, Rather Than Irrigable Acreage, is the Correct Measure of Any Reserved Water Right.[43]

Assuming that there has been an effective reservation of main stream water for federal establishments, the Government asserts that in the case of an *Indian Reservation* "the measure [of the amount reserved] is the quantity required to satisfy the ultimate needs of the Indians of the reservation". It then attempts to support the Master's conclusion that this quantity consists of " 'sufficient water to irrigate all of the practicably irrigable land in a Reservation and to supply related stock and domestic uses' (Rep. 262)" (U. S. Ans. Br. 79-80) (footnote omitted).

As pointed out in Arizona's Opening Brief, the total irrigable acreage standard has no relationship to actual Indian needs. Under that formula it is immaterial whether the water reserved will ever be used by the Indians resident on the Reservation or whether any Indians occupy or will ever occupy the Reservation or make use of the water reserved (Ariz. Op. Br. 157).

We agree with the Special Master that "the water rights of the five Reservations in question cannot be fixed at present uses" and that the Indians' future needs should be taken into account (Rep. 263). We disagree, however, with his conclusion that the future needs of Reservation Indians cannot be ascertained with reasonable accuracy (Rep. 264).

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[43] In connection with this subject see an excellent article, Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 So. Cal. L. Rev. 1 (1960).

The regrettable fact is that the Government made no attempt to prove even the present needs of the Indians. All it did was to introduce evidence of "the present population of organized tribes entitled to reside on the several reservations" (U. S. Ans. Br. 82-83 notes 29, 31). Included in this tribal population are some who do not reside on any Reservation and some who do not even live in Arizona.

In addition, as we demonstrated in Arizona's Opening Brief, a number of Indians have in effect been counted twice, *once for the* Colorado River Indian Reservation and once again for other Reservations (Ariz. Op. Br. 170-79).

The unreasonableness of the Government's claims is demonstrated by its unrealistic estimate of "the expanding needs of the Indians of the Lower Colorado River Basin" (U. S. Ans. Br. 81). The total tribal population (not the unproved resident population of the Reservations) of the tribes presently entitled to occupy the five Reservations in question aggregates only 3,340 Indians (Ariz. Op. Br. 157). Yet, in measuring "expanding" Indian needs, the Government includes "in the neighborhood of 120,000" Indians in the Lower Basin which, it says, can be expected to increase to a total population of 130,000 by 1970 (U. S. Ans. Br. 81). The Government then apparently assumes that the five main stream Reservations are to be burdened with the water requirements of all these Lower Basin Indians regardless of where they presently reside or what their tribes may be, for it says:

> "The mainstream Indian reservations include 136,636 acres of irrigable land.[44] Certainly it cannot be said that water rights for 136,636 acres as the Special Master recommends is in excess of the future needs of the Indians of the reservations." (U. S. Ans. Br. 81-82) (footnote ours)

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[44] The source of this figure apparently is the Recommended Decree, Article II(C)(2)(a) through II(C)(2)(e) (Rep. 350-52).

Thus the United States contends that the "matter of need" is not to be measured even "by the present population of the organized tribes entitled to reside on the several reservations" (U. S. Ans. Br. 82 note 29), but by the total of all the Indians in the Lower Basin, regardless of whether they reside on or off the Reservations and regardless also of whether they reside in Arizona, California or Nevada, or elsewhere in the United States, or even abroad.

The unfairness of this approach will be appreciated even more when it is remembered that the Government also asserted before the Master claims on behalf of Lower Basin Reservations, other than main stream Reservations, to water of Lower Basin tributaries sufficient to irrigate a total of 127,532 acres.[45]

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[45]

United States Irrigable Acreage Claims
(Main Stream Reservations Excluded)

Reservation	Acres	U. S. Proposed Conclusion
Zuni	8,570	4.1
Navajo	8,490	4.2
Hopi	731	4.3
Coachella	9,348	4.9
Havasupai	204	4.10
Hualapai	83	4.11
Kaibab	84	4.12
Moapa	591	4.13
Salt River	12,625	4.14
Ft. McDowell	1,300	4.15
Camp Verde	187	4.16.1
	29	4.16.2
Ft. Apache	7,197	4.17.1
Papago	1,885	4.18
Ak Chin	12,998	4.19
San Xavier	3,825	4.20
Gila Bend	954	4.21
San Carlos	1,572	4.22.1
	1,903	4.22.2
Gila Bend and San Carlos Maricopa District	1,080	4.23.1
Gila Crossing	3,330	4.23.2
San Carlos	50,546	4.23.3
TOTAL	127,532	

The United States takes issue with Arizona's position that when the Colorado River Indian Reservation was initially created in 1865 the statutory phrase, "the Indians of said river and its tributaries", meant only those tribes which were found in the area of the Lower Basin near the main stream (Ariz. Op. Br. 170-74).

The administrative construction of the statute creating the Colorado River Indian Reservation accords with Arizona's view. Under date of September 15, 1936, the Solicitor of the Department of the Interior sent to the Commissioner of Indian Affairs a memorandum[46] in which he stated:

> ". . . The designation in the act of the Indians of the Colorado River and its tributaries is so general and vague as to be almost meaningless without reference to administrative action taken thereunder. It would be absurd today to say that this reservation belongs to all the Indians of the Colorado River and its tributaries, since that would embrace most of the Indians of the Southwest. The only practical solution of the situation is to refer to the administrative action which has been taken and completed many years ago in settling on this reservation the wandering Indians along the Colorado River, and to take the position that this action finally determined to which Indians the reservation belonged. This position is substantiated by the fact that the Indians of this reservation have long been officially known as the Colorado River Indian Tribes and have funds in the Treasury under that name."

In a subsequent memorandum dated November 24, 1936, the Solicitor stated:

> "The Colorado River Reservation was created by the act of March 3, 1865 (13 Stat. 559), and its bound-

[46] C 4571, Tr. 20,674.

aries were subsequently fixed and determined by various Executive orders. The act of 1865 declared that the reservation should be set apart 'for the Indians of said river (Colorado) and its tributaries.' The Annual Reports of the Commissioner of Indian Affairs for the years 1864 and 1866, at pages 21 and 27 respectively, show that the reservation was created with the object in view of placing thereon 'the Yumas, Mojaves, Yavapais, Hualapais, and Chemihuevis', numbering some 10,000 persons. This object failed of accomplishment, however. The principal reason for the failure, aside from the aridity of the soil of the Colorado River Reservation lands and hostilities among the Indians themselves (see Commissioner's Annual Report 1870, page 8) was the reluctance of some of the tribes to locate on the reservation.

* * * * * *

"The language of the act of 1865 and the Executive orders issued pursuant thereto to the effect that the reservation was set aside for Indians of the Colorado River and its tributaries obviously was not intended to vest all Indians coming within that descriptive phraseology with immediate rights in the reservation lands. The language used merely defines the class of Indians eligible for collection and colonization on the reservation and removal to and continued residence on the reservation necessarily were conditions essential to the acquisition of rights on the reservation. Clearly there was no intent to create or vest rights in Indians such as the Yumas, the Hualapais and the Navajos who refused to locate on the Colorado River Reservation, obtained reservations elsewhere and received allotments or other benefits there. Now to permit such Indians to receive tribal benefits on the Colorado River Reservation would be in direct contravention of the rule long recognized by this Department and recently

approved by the Tenth Circuit Court of Appeals in *Mandler* v. *United States,* 52 Fed. (2d) 713, that no Indian is entitled to receive dual tribal benefits.''[47]

Despite the fact that it is necessary in the instant litigation to determine for the indefinite future the rights of the parties litigant to the use of main stream water, the United States has failed to produce evidence which would enable the Court to ascertain the reasonable future water needs of the Government's Indian wards. The net result is an anomalous one indeed, for in effect the United States has been awarded the largest conceivable quantity of main stream water for future use on Reservations because it made no effort to produce any proof as to what those future needs will actually be.

The position of the Government regarding the Fort Mohave Indian Reservation typifies its indifferent attitude with respect to establishing the actual requirements of the Indians and its surprising willingness to waste an invaluable natural resource. That Reservation contains 18,974 irrigable acres for the irrigation of which there has been reserved, in accordance with the Government's contention, either 122,648 acre-feet per annum of diversions from the ''mainstream'', or the quantity of ''mainstream'' water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related needs, whichever of these two alternative quantities is less (Rep. 351). Yet, no Indians reside in the Arizona and California portions of this Reservation, and only one Indian family lives in the Nevada section. No land whatever is being irrigated on the Reservation and the maximum which has ever been irrigated is 23 acres. No major irrigation project has ever been developed for

[47] C 4574, Tr. 20,678.

the Reservation and it has long been recognized that any such project is impracticable (Ariz. Op. Br. 166-67).

Confronted with this history of inaction, the United States responds:

> "The fact that the United States has not gone forward with development does not support the argument that the rights reserved for the benefit of these Indians should now be foreclosed." (U. S. Ans. Br. 83)[48]

Certainly "these Indians" are not Indians resident on the Reservation, for there are almost none. The 450 members of the Fort Mohave tribe entitled to reside on the Fort Mojave Indian Reservation have shown no disposition to reside there. We submit that the United States should not be permitted, by a failure to perform its trust duties toward its Indian wards, to achieve for them a reservation of thousands of acre-feet of water to the prejudice of the needs of all citizens, Indian and non-Indian alike.

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[48] The Government seeks to explain its failure to develop irrigation on this Reservation by asserting:

> ". . . efforts to develop the valley lands of the Reservation were frustrated by the flood hazard prior to the closure of Hoover and Davis dams. With the completion of the dams referred to and channelization of the river through the lands of the Reservation, this hazard is *now* eliminated and development of the lands of the Reservation for irrigation can *now* go forward." (U. S. Ans. Br. 83 note 31)

Hoover Dam, which controls Colorado River floods, first impounded water on February 1, 1935. Davis Dam serves merely to reregulate releases from Hoover Dam (Rep. 32-33). The Government evidently regards the past 25 years as "now".

H. Principles of Equitable Apportionment May Be Applied to Measure Indian Water Rights.

In Arizona's Opening Brief we argued that should the Court find there has been no reservation of water on Indian Reservations, or should the Court find such a reservation of water but reject Indian needs as the test of the quantity reserved, the amount of water to which the Reservations are entitled should be determined in accordance with principles of equitable apportionment (Ariz. Op. Br. 181-92).

The Government sees inconsistency between this proposition and Arizona's contention that the Project Act renders principles of equitable apportionment inapplicable (U. S. Ans. Br. 91-92). No inconsistency exists. It is true that as to the *interstate* allocation of water Arizona took the position, with which the Master agreed, that the Project Act governs and renders principles of equitable apportionment inapplicable (Ariz. Op. Br. 32-41). The Project Act allocated or authorized the allocation for use annually in Arizona of a portion of the water impounded in Lake Mead. Nothing in the Act or its legislative history indicates any intention on the part of Congress to undertake the division of this fund of water allocated for use in Arizona as between non-Indian and Indian users.

There is therefore no inconsistency between Arizona's position that, as to water allocated under the Project Act between the three Lower Basin states of Nevada, California and Arizona, principles of equitable apportionment are inapplicable, and that as to the fund of water allocated to Arizona, but undivided by the Project Act, principles of equitable apportionment are applicable. When there is a conflict between sovereigns as to water rights, principles of equitable apportionment have been traditionally applied.

The United States argues further that even in an interstate allocation uncontrolled by statute its "reserved rights . . . are not subject to . . . apportionment between the states" (U. S. Ans. Br. 92). But no precedents are cited or reasons given supporting this position and we know of none. There appears to be no sound reason for a distinction between a case where both sovereigns appear as *parens patriae* for their citizens and a case in which one sovereign appears in that capacity and the other appears as guardian for its Indian wards.

Finally, the Government argues that even under principles of equitable apportionment it is entitled to all that the Master has awarded—sufficient water to irrigate every irrigable acre in each Reservation. This result is neither "realistic" nor "fair" (U. S. Ans. Br. 93). We do not suggest, as the United States asserts, "that use of water . . . should be subject to defeasance because of a claim that the water could be better used elsewhere within the State" (U. S. Ans. Br. 93). We do contend, however, that to reserve in perpetuity large quantities of water for Indian Reservations which have never used or demonstrated a need for any quantity approaching the amount reserved is unrealistic and inequitable. It is only in the effort to reach a just result that we have advanced the proposal that principles of equitable apportionment be applied.

IX

The United States has not reserved water from the Gila and San Francisco Rivers for the purposes of the Gila National Forest.

The United States predicates its asserted rights to the use of non-navigable water for the Gila National Forest upon its claim of a federal proprietorship of the usufruct of non-navigable water on the public domain.

It is argued that when the territory comprising the Lower Colorado River Basin was ceded by Mexico to the United States it became the owner not only of the land but also of "all rights pertaining thereto" and that the right to use "the appurtenant waters was one of the whole bundle of rights so acquired" (U. S. Ans. Br. 61) (footnote omitted).

This claim poses a perplexing and difficult problem as yet unresolved by this Court. The Government does not explain why the United States necessarily acquired the ownership of the use of the water within this territory. Mere ownership of land does not inevitably carry with it the ownership of the right to use the water to which the land is riparian. Whether the right to use water is a right pertaining to and accompanying the ownership of land depends upon the applicable law of property in that regard. Where the rule of prior appropriation is followed, the ownership of land, in and of itself, carries with it no rights to the use of water. The United States, while describing its claimed right to non-navigable water as a right pertaining to the public land, seems to envisage a water right in gross, which is not appurtenant to any particular lands within the public domain. The United States, however, asserts it has the right to attach a portion of this gross water right to

specific lands which are withdrawn from the public domain for designated federal purposes and establishments. In fact, it appears to be the position of the Government that neither the riparian nor the appropriative rights doctrine was applicable to this water when the United States became the owner of the lands in the territory (U. S. Ans. Br. 61-62 note 19).[49] Thus the water rights, as conceived and claimed by the United States, exist independently of any rule of property law. They apparently are based upon the notion that ownership of the right to the use of all water must rest somewhere and that, since there were no other "owners" in whom this proprietorship could vest, it necessarily vested in the United States when it became the proprietor of the lands.

An attempt to resolve the long-existing conflict between the United States and the public land states with respect to rights in non-navigable water by determining who "owns" that water serves only to complicate further an already difficult problem. The power of either the national or the

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[49] The riparian doctrine has never applied in the territory acquired from Mexico by the Treaty of Guadalupe Hidalgo and the Gadsden Purchase. The law of prior appropriation and not the riparian rights doctrine was in force in that area, from which Arizona and a part of New Mexico were later formed, when it was a part of Mexico. *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339 (1909). Congress enacted no legislation making the common law riparian doctrine applicable to this territory. One of the first acts of the United States after acquisition of the territory was to declare that "the laws heretofore in force concerning water courses . . . shall continue in force." H. R. Doc. No. 19, 29th Cong., 2d Sess. 72 (1846). The territorial legislatures of both New Mexico and Arizona, agents of Congress, kept in force the doctrine of prior appropriation which had maintained before the acquisition of the territory by the United States. *Boquillas Land & Cattle Co.* v. *Curtis, supra; Clough* v. *Wing*, 2 Ariz. 371, 17 Pac. 453 (1888). The laws and constitutions of both the States of Arizona and New Mexico continued the law of prior appropriation in force. ARIZ. CONST. art. XVII, §1; Ariz. Rev. Stat. §45-101 (1956); N. M. CONST. art. XVI, §2; N. M. Stat. §75-1-1 (1953).

local government to prescribe rules of property in the use of water and to establish principles governing the acquisition of specific rights in water is so essentially an exercise of sovereign power that it cannot be predicated on the basis of proprietorship of the rights to the use of water.

But, as we have stated in Arizona's Opening Brief, it is not necessary that this important and serious question be decided in this litigation in order to dispose of the claims of the United States to the use of water of the Gila and San Francisco Rivers on the Gila National Forest (Ariz. Op. Br. 194).

Even if it be assumed that the United States became the absolute proprietor of the right to use all non-navigable water on or appurtenant to the public lands within the territory acquired from Mexico, it does not necessarily follow from that assumption that by the creation of a national forest water was reserved for use on the forest reserve. Mere existence of power does not establish its exercise. In our Opening Brief we referred to the Acts of Congress, legislative history and administrative construction which negative the existence of any intent on the part of Congress that the mere creation of a national forest should operate to reserve water for the needs of the forest (Ariz. Op. Br. 192-98).

The United States disputes our conclusions. It claims that the Arizona argument based upon the Act of June 4, 1897[50] ignores the fact that the Act "expressly provides that water on the national forests may be used in accordance with state or *federal* law" (U. S. Ans. Br. 77) (footnote omitted; United States italics). But the United States contends that the very establishment of a national forest accomplishes a reservation of water for forest purposes (U. S. Ans. Br. 65). If this contention were correct, the

[50] 30 Stat. 36.

United States would have no possible reason for resorting to "federal law" to acquire by "reservation or otherwise" rights to use "unappropriated waters which pertain to the national forest lands" (U. S. Ans. Br. 78). Nor could any purpose be served by the provisions of the Act of June 4, 1897, that all water on forest reservations may be used "under the laws of the state wherein such forest reservations are situated".

The United States denies that there has been any consistent administrative interpretation that its rights to use water on the national forests must be obtained in accordance with state law. It is claimed that the rules and regulations quoted from the Forest Service Manual (Ariz. Op. Br. 197-98), which state the policy followed by the Department for more than fifty years, are robbed of all value and meaning by the statement of the Secretary of Agriculture made on June 21, 1961, and quoted at pages 78 and 79 of the Government's Answering Brief. Whatever may be the correct meaning of these very recent remarks of the Secretary of Agriculture, they do not warrant the Government's conclusion that the uniform and long-adhered to policy of the Department, specifically anchored in the Act of June 4, 1897, of making water filings with appropriate state agencies pursuant to state law is merely for the purpose of giving information and not of establishing legal rights to the use of water under state law.

The assertion of the Government that this uniform course of conduct over a fifty year period was for informational purposes only wholly lacks merit. Mere letters would have served this purpose. In fact, this course of conduct, if not intended to evidence a recognition that state laws control the acquisition of such rights, would have the effect of misleading state officials and those "seeking to

use the waters from the National Forest" rather than informing them.

The Government contention cannot be reconciled with the policy stated in the formal rules and regulations of the Department that *rights* to the use of water for national forest purposes *will be obtained* in accordance with state law and that the authority of the Department to *secure water rights* under state law is based on the Act of June 4, 1897, and confirmed by the Department of Agriculture Organic Act[51] (Ariz. Op. Br. 197-98).

The United States makes no effort to explain why, if Congress intended that the creation of national forests should result in a reservation of all water required to serve the purposes of the forests, it found it necessary repeatedly to appropriate funds for the purchase and establishment by the Forest Service of water rights for use on the national forests or why Congress was concerned that filings on water rights for national forests be made by the Government before filings were made "by adverse claimants" (Ariz. Op. Br. 195-96).

The United States at one point appears to argue that, entirely independent of any intent to reserve non-navigable water for any particular federal establishment, the mere withdrawal of public lands accomplishes an automatic withdrawal of the "sources of water supply" upon the land reserved. The reasoning in support of this claim is that since the United States owns all the unappropriated non-navigable water upon the public domain, rights to the use of such water cannot be acquired without the consent of the United States; that only by the Desert Land Act of 1877 and its precursor Acts of 1866 and 1870 has the United States granted such consent and that such consent

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[51] 58 Stat. 734 (1944).

is "restricted to sources of water supply upon the public lands". It is argued that since reserved lands cease to be public lands the sources of water supply upon the reserved lands cease to be available for "purposes of private acquisition" (U. S. Ans. Br. 64-66).

The argument of the United States, if pursued to its logical end, compels the conclusion that the only reservation of water accomplished by the withdrawal of public lands is the water originating on the land withdrawn. Yet the Government's claim of reserved water rights for use on federal establishments is limited only by the ultimate needs of the particular federal establishment and is not confined to the quantity of water available from sources of water supply actually existent on withdrawn lands. This leaves completely unexplained how such a withdrawal of the source of water supply on withdrawn lands operates to reserve the right to use waters having their source on other public lands not withdrawn.

The utter confusion and insurmountable obstacles which would result from the acceptance and application of the Government's theory are apparent. Rights to the use of water, both for federal establishments and by private appropriators, would depend on the ability to identify and segregate water as to its source, so that water which has its source on the public lands may be distinguished from that which has its source on reserved lands, as well as from that having its source on private lands and state-owned lands.

It is evident that Congress never contemplated or intended that the mere withdrawal of lands from the public domain should have these absurd consequences.

CONCLUSION

The Report and Recommended Decree of the Special Master should be adopted by the Court, with the modifications requested by Arizona.

Respectfully submitted,

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STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

In our preceding briefs we have explained our limited exceptions to the Report of the Special Master and our arguments in support of the Report, subject to those exceptions. Accordingly, there is no need now to reply in detail to all the arguments made in the answering briefs of the other parties wherein views different from those advanced in our previous briefs are expressed. A brief reply on the most fundamental points, however, may be of assistance to the Court.

ARGUMENT

I

UPHOLDING THE VALIDITY OF THE PROVISIONS IN THE ARIZONA AND NEVADA CONTRACTS DIMINISHING THE OBLIGATION TO DELIVER STORED WATER TO THE EXTENT OF ANY DEPLETIONS OF THE RESERVOIR SUPPLY THROUGH UPSTREAM USES IS NOT INCONSISTENT WITH INTERPRETING SECTION 4(a) OF THE PROJECT ACT AS APPLICABLE ONLY TO MAINSTREAM WATERS

Arizona, Nevada and California, all disagree with our argument in support of our first and second exceptions to the Report. Arizona's and Nevada's disagreement arises from the benefit to each of those States from the Master's holding that each may receive its full allocation of the stored waters without regard to any depletion of the project water supply by uses in that State from the mainstream and the tributaries above Lake Mead. Each of those States argues, as does the Special Master, that it is only those waters which physically arrive in the reservoir which the Secretary of the Interior has authority to take into account in contracting for the disposition of and administering the project water supply. California, which would receive substantial benefit from modification of the Recommended Decree in accordance with our first and second exceptions, takes issue with the exceptions and our argument in support on the ground that our position "is irreconcilable with the Master's conclusions."

The Master's exclusion of the mainstream and tributary uses above Lake Mead is not a necessary consequence of the language of the Project Act or its legislative history. Nor does it necessarily follow

from the fact that water taken from above the reservoir does not pass into the physical control of the United States as a result of the construction and operation of Hoover Dam and related project facilities. We think it equally plain that a ruling that the Secretary of the Interior has full authority in his administration of the Boulder Canyon Project water supply to protect that supply by conditioning the amounts to be delivered for use in Arizona and Nevada upon the quantities of reservoir depletion as a result of upstream diversions in those States would not be inconsistent with the Master's determination that in the enactment of Section 4(a) of the Project Act Congress contemplated an allocation of the first 7,500,000 acre feet of mainstream water available in the Lower Basin and of the surplus mainstream water over that amount.

The Master's conclusion that Section 4(a) of the Project Act applies only to uses of mainstream water is fundamentally derived from the legislative history, which shows clearly that it was water passing through the mainstream that was the subject of Congressional consideration when that language was adopted. The issue concerning deductions for uses above Lake Mead rests upon different considerations. As noted in our opening brief, page 11, the predicate for the Master's conclusion that mainstream and tributary uses above Lake Mead are to be excluded from the Project Act accounting is the fact that "Hoover Dam gives the United States physical control of the water stored in Lake Mead and over the use of substantially all of the water in the mainstream below, but it does not enable

the United States physically to control the use of water from above Lake Mead." Consequently, to reject the view that the Secretary, in making allocations, can take into account only the water that actually passes into his physical control does not affect the foundation of the Master's interpretation of Section 4(a).

In our view the Master put too much weight upon the fact of actual physical control in considering the risk of upstream diversions which, unlike the use of tributaries below Lake Mead, would diminish the water available for storage and subsequent distribution. We submit that when Congress authorized the construction of Hoover Dam and related project facilities and the various facilities were constructed in accordance with such authorization, the United States, subject to the compact apportionment for use in the Upper Basin, preempted the waters of the Colorado River capable of being stored and regulated by those facilities for administration in accordance with the authorizing legislation and any other applicable acts of Congress. Obviously, the location of Hoover Dam, the principal project facility, means that waters which would pass through the mainstream and be regulated by Hoover Dam do not come under the *physical control* of the United States if they are diverted and used, either from the tributaries or the mainstream, above the reservoir. But this does not mean that Congress intended the successful operation of this great reservoir project and the successful administration of a statutory plan for distribution of the stored waters

under contract made with the Secretary of the Interior to be at the hazard of depletion of the mainstream supply by diversions above the reservoir. Cf. *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690; *United States* v. *Appalachian Power Co.*, 311 U.S. 377.

The reservoir, which Congress authorized for construction, was of sufficient size to impound and regulate the entire flow of the river undiminished by upstream tributary and mainstream depletions. Congress specified the purposes for which the stored waters might be used and placed the Secretary of the Interior in charge of distribution of the water supply so created. Surely, under the broad authority given to him by the Project Act, the Secretary is authorized in contracting for distribution of the project supply to assure that the purposes of the Project Act and of the facilities constructed thereunder will not be frustrated by diversions of the waters away from the project before they arrive in the reservoir. We submit that he would be remiss in the performance of his duties if he failed to take such action.

The situation here, although technically dissimilar, is substantially analogous to the appropriation of waters for federal reclamation projects. Frequently, when a reservoir for the storage of water is constructed under the reclamation law of the United States, the Secretary of the Interior does file the papers with State authority which are prescribed by State law for making an appropriation of the waters which the reservoir will impound and control. (See

Nebraska v. *Wyoming,* 325 U.S. 589.) When such procedure is followed, a State-recognized appropriation of the waters results which protects the project water supply against depletion as a result of later appropriations by others.

In the case of Hoover Dam and the related facilities of the Boulder Canyon Project, the United States has not chosen to follow this procedure. Some of the reasons are obvious. The Colorado River is a navigable stream, and the first and primary purpose of the project was, and is, flood control, improvement of navigation, and river regulation. The dam and reservoir, which were intended to impound water for use in the States of California, Arizona, and Nevada, is located in Nevada and Arizona, and no single state could purport to authorize an appropriation for the reservoir project. It is plain that, had such an application been made to the State of Arizona, it would have been refused. (See *Arizona* v. *California,* 283 U.S. 423.)

But the fact that the United States did not choose to go through the formalities of State-prescribed procedures for making an appropriation for the project does not mean that hundreds of millions of dollars of federal funds have been expended for the construction of great works, the usefulness of which might be impaired as a result of upstream diversions. By authorization and construction of the project for the purposes which Congress has specified, the United States has effectively "appropriated" for those purposes the waters which the project was built to control. Subsequent State-authorized appropriations above the

reservoir should not defeat accomplishment of those purposes just as they could not when an appropriation has been made in accordance with State procedure.

It was to prevent the defeat of this "appropriation" of mainstream waters that the Secretary stipulated that his obligation to deliver stored waters for use in Arizona and Nevada should be diminished to the extent that uses in those States from above the reservoir would deplete the reservoir supply. His action was in accordance with his responsibilities and fully consistent with Congress' plan for the allocation of the reservoir supply.

II

CALIFORNIA'S CONTENTION THAT THE SPECIAL MASTER'S INTERPRETATION OF SECTION 4(a) OF THE PROJECT ACT PRODUCES AN "INCREDIBLE RESULT" NEGLECTS FUNDAMENTAL INTER-BASIN ISSUES RESPECTING MEASUREMENT OF USE AND ACCOUNTABILITY FOR EVAPORATION LOSSES

In its answering brief, California attacks the Special Master's interpretation of Section 4(a) of the Project Act because it reaches what is described as "this incredible result: Even if the lower basin enjoys the use of the full quantities aggregating 8.5 million acre-feet under Article III(a) and III(b) of the Compact, and Mexico is satisfied from surplus without invasion of that quantity, California would receive only 3.8 million acre-feet—not even the 4.4 million acre-feet to which the first part of the limitation on California refers." (California Answering Brief, p.

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1.) The "incredible result" is neither so clear nor so simple as the argument suggests.

In the first place, California assumes that in determining the compact apportionment all tributary uses are to be measured by diversions less return flow at the various sites of use. This assumption as to measurement is subject to the most serious question even if it be assumed, contrary to Arizona's argument, that the compact apportionment includes Lower Basin tributary uses. Most of the tributaries of the Lower Basin, and particularly the Gila River, are wasting streams. Much of the water in their upper reaches would never arrive in the mainstream of the Colorado even if there were no upstream diversions from the tributaries for beneficial consumptive use.

By agreement between themselves the States of the Upper Basin have provided for allocation of that Basin's apportionment under the Colorado River Compact in terms of "man-made depletions of the virgin flow at Lee Ferry." Upper Colorado River Compact, Article VI, 63 Stat. 31. If Lower Basin tributary uses are to be included and measured for compact accounting purposes in terms of depletion of the virgin flow at one or more significant mainstream points, the California argument as to "incredibility" loses any force. The evidence before the Special Master indicates that the Lower Basin tributary uses measured by diversions less return flows at the respective sites of use are materially larger than if measured by depletion of the mainstream at significant downstream points. If, in the California hypothesis, the tributary uses are calculated by the latter method,

the quantity of mainstream water "adequate for all components of the Compact in the lower basin, after satisfaction of the treaty requirements" (California Answering Brief, p. 11), is not 6.5 million acre-feet but a substantially larger amount. California would not be compelled, under the Master's interpretation, to accept only 3.8 million acre-feet of the available mainstream water upon its assumption of full satisfaction of the Lower Basin's apportionment under Article III(a) and III(b) of the Compact.

On the other hand, if, as California contends, the Master erroneously referred to the legislative history to determine what Congress meant when it used the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," then he is equally in error in having referred to the legislative history to determine what Congress meant when it used the words "plus not more than one-half of any excess or surplus waters unapportioned by said compact." And in that event the Article III(b) component of the mainstream water would not be available for use in California.

The foregoing demonstrates one fallacy in California's charge that the Master's interpretation of the Project Act produces an "incredible result." Further brief analysis of the hypothesis is sufficient to demonstrate its inadmissibility, and the utter futility of attempting in this case to make an interstate allocation upon an hypothesis supposed to be consistent with the interbasin apportionment effected by the Colorado River Compact is demonstrated by the questions which it raises but leaves unanswered. In the compact by

which the states of the Upper Basin agreed respecting allocation between themselves of the Upper Basin apportionment, reservoir losses of water in storage for use in the Upper Basin are accepted as charges against the interbasin apportionment and as charges against the respective State allocations. See Upper Colorado River Compact, Article V. The logic of this treatment of reservoir losses is plain enough. It seems equally plain that in any interbasin accounting the losses of water in storage for use in the Lower Basin are chargeable against the Lower Basin apportionment. But California's hypothesis assumes that under the Colorado River Compact the Lower Basin may have 8.5 million acre-feet in satisfaction of the Article III(a) and III(b) apportionments, "plus all evaporation and other losses, whatever those losses may be" (California Answering Brief, pp. 8–9). She makes no suggestions as to how the interbasin charge for such losses can be disregarded in her hypothesis of "full service" of the Lower Basin allocation of 8.5 million acre-feet. Neither does her argument suggest how such charge is to be allocated among the Lower Basin States,[1] nor is there any indication of the disposition to be made of the excess water in the assumed

[1] California's postulate in footnote 6, page 9, of her Answering Brief that these losses are "diminutions of supply" is acceptable under the solution which the Special Master's Recommended Decree proposes. It could not be accepted if the effort in this case were to assure that the interstate allocations here to be approved can be squared at every corner with the apportionment to the Lower Basin effected by Article III of the Colorado River Compact.

8.5 million acre-feet which would result from the charge so to be made against the Basin apportionment. The Special Master's interpretation of the Project Act eliminates such questions from the case. If the California hypothesis were to be otherwise accepted, they would have to be answered. Any effort to ascertain Congress' intention in enacting Section 4(a) of the Project Act by attempting to assure that the interstate allocation therein provided accords in all respects with the highly uncertain requirements for interbasin accounting under the Colorado River Compact leaves the issues in this case as obscure as they were at the outset of the litigation, and insoluble in the absence of the Upper Basin States.

Second, even if California's hypothesis were valid, the argument does not demonstrate that the Master erred in concluding that, when Congress adopted the critical language of Section 4(a) of the Project Act, it was thinking in terms of the first 7.5 million acre-feet of mainstream water available for use in the Lower Basin in the States of California, Arizona and Nevada and the available mainstream waters in excess of the first 7.5 million acre-feet. The evidence that such was Congress' intention is reviewed at pages 27–46 of our answering brief. The fact that Congress may not have fully foreseen the consequences of what it did intend does not mean that its intention was different from what the language of the Act and the legislative history indicates. There is no evidence whatever that Congress intended, as California seems

to argue, the limitation of California's future use to 4.4 million acre-feet plus one-half of the surplus or excess as a guarantee of any quantity of water for use in that State. The limitation is a limitation and nothing more. The only guarantee of the Project Act is that to be found in the Section 6 requirement for satisfaction of "present perfected rights." Under the Master's interpretation of that provision, the Act does guarantee the satisfaction of California's claimed rights which were perfected as of the effective date of the Project Act in the order of their priority with relationship to all other "present perfected rights." But beyond this the Act makes no guarantee and in the extremely unlikely event of water insufficient to satisfy all "present perfected rights" California's claims of such rights would have to yield to others in accordance with their respective priority dates.

III

THE PROJECT ACT DOES NOT PROVIDE FOR PRIORITIES INTERSTATE EXCEPT IN ITS REQUIREMENT FOR SATISFACTION OF "PRESENT PERFECTED RIGHTS"; PRIORITIES INTRASTATE ARE GOVERNED BY APPLICABLE FEDERAL LAW AND CONTRACTS MADE UNDER THE PROJECT ACT

California's answering brief in arguing for a system of interstate priorities appears to misconceive the government's arguments in its opening brief in support of its exceptions; to misapply Section 8 of the Reclamation Act; and to misread some of the decisions of this Court on which reliance is placed. In order that there may be no misunderstanding of our position with respect to priority of right under the

Boulder Canyon Project Act in distribution of the water supply which that Act directs the Secretary of the Interior to administer, we summarize it here.

We support the Master's determination that principles of priority of appropriation in accordance with the laws of the several States having access to the mainstream of the Colorado River and principles of equitable apportionment as enunciated in prior decisions of this Court are inapplicable with respect to the controversy relating to the mainstream of the Colorado River. We agree with the Special Master that such principles are inapplicable here because Congress, in exercise of its exclusive power to control the waters of the Colorado River, has provided its own procedure for effecting an interstate allocation.

Congress has authorized the construction of a dam capable of impounding and controlling substantially the entire flow of the River in the Lower Basin. The dam and related facilities through which much of the impounded water may be put to use have been constructed. Under authority of the Project Act, and in accordance with its command that "[n]o person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated," contracts have been made for delivery of much of the waters which the reservoir was constructed to impound and regulate and, by contract with the States of Arizona and Nevada, commitments have been made for the future delivery of additional quantities for use in those States.

Under the statutory and contractual plan for allocation intrastate as well as interstate, there is no provision for priority except as it may be found in the Section 6 requirement for satisfaction of "present perfected rights" and as it may be incorporated into the contracts which have been and may be made under the Project Act and other applicable laws. Insofar as claims of appropriative rights recognized under State law prior to the effective date of the Project Act are concerned, Congress indicated, in Section 6, its intention to recognize only those which were perfected at that date by the actual application of water to specific areas. Since the reserved rights of the United States were perfect without the application of water to specific areas, they are entitled to recognition under Section 6 without regard to when water may be or may have been applied to accomplishment of the purposes of the reservations. To the extent that California's claimed prior rights meet the test for "present perfected rights," the recommended decree recognizes the priorities which that State so strenuously asserts. To the extent, however, that California's uses do not meet that test, its rights must depend upon contracts made by its agencies with the Secretary. California's attempt to distinguish between claims of right to "natural flow" and uses of stored water is invalid. The Project Act recognizes no "natural flow rights" except those which qualified as "present perfected rights."

1. It is plain that the Project Act does not contemplate the recognition of interstate priorities in the contracts made under the Project Act. Otherwise,

Congress' obvious intention that the first seven and a half million acre-feet of mainstream water available be allocated in specified proportions would not be accomplished. For reasons stated at pages 21 to 47 of our Brief in Support of Exceptions to the Special Master's Report, we think it is also plain that Congress did not delegate to State authorities, acting under State law, the extremely important problem of determining, intrastate, either the amounts of stored water to be delivered to the various users within a State or the relative priorities between them. These are determinations which must be made by the Secretary of the Interior in his administration of the project water supply, in accordance with the provisions of applicable laws of the United States and the many factual considerations which must be taken into account in the administration of that supply.

The problem of quantities and relative priorities within the California allocation has been resolved by incorporation into each of the contracts with the California agencies of the priority schedule established by the California Seven Party Agreement. So far as we know, there is no challenge to the authority of the Secretary so to establish priorities as between uses within the California allocation. Accordingly, it is assumed that deliveries for use in California will, if shortage occurs, be made in accordance with the priority schedule adopted by the several California contracts, subject only to the requirements of the decree respecting the reserved rights of the United States and the further requirements for satisfaction of "present perfected rights."

With respect to the making of contracts for the delivery of stored water for use in Arizona and Nevada, the necessity for consideration of relative priorities as between various contract users has arisen only in connection with the Secretary's relatively recent contract with the city of Yuma. See footnote 11, page 31, Brief in Support of the Exceptions of the United States to the Special Master's Report. This is because the contracts which have thus far been made for the delivery of water for use in those States, together with the reserved rights of the United States, have not even approached the minimum limits of the aggregate quantities of stored water regularly available for use in those States. In the case of the contract with the City of Yuma, the Secretary deemed it advisable to condition the contract on the City's agreement that its right to receive the quantity specified in the contract shall be subordinate to the satisfaction of commitments previously made for uses within the Arizona allocation.[2] It may be assumed that future contracts

[2] Contrary to the implication of California's comment at pages 60–61 of its answering brief, the subordination provision in this agreement imposes no hardship or injustice on the City of Yuma. What California refers to as "an appropriation senior to those agricultural districts under which she had been continuously using 'mainstream' water for more than half a century" was for a much lesser quantity of water than that for which the contract provides. To the extent that Yuma's claim under that "appropriation" qualifies as a "present perfected right" the City will, under a decree as recommended by the Special Master, be entitled to continue to receive water in priority with other holders of "present perfected rights." However, to receive the additional water for which the contract provides, the City must properly abide by its agreement, just as the several California agencies must abide by their agreements

for the delivery of water for use in Arizona, as well as future contracts for use in Nevada when the need arises, will contain the same condition unless Congress directs otherwise.

The inclusion of this condition is consistent with the practices which the Secretary of the Interior has followed in other areas. For example, the waters controlled by Friant Dam for the Friant unit of the Central Valley Project in California have been divided into class I and class II. The aggregate quantity of class I water is the quantity which it is anticipated will be available on a firm basis annually. The class II water comprises that supply which becomes available in addition to class I water and is recognized to be undependable in character. The contracts in this area generally include commitments for both class I and class II water. The class I supply is limited contractually in the aggregate to 800,000 acre feet annually. All class I commitments have a priority over class II commitments, but in the event that less water is available in either class than that for which there are commitments, the water avail-

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respecting priority within the California allocation. Nor do we share California's concern about the Valley Division of the Yuma Project in Arizona, as expressed in footnote 5 on page 62 of the California answering brief. The use of water on that Project had been largely "perfected" in 1929. With respect to expanded uses there since that date, it is our position that the authority vested in the Secretary of the Interior includes the authority to provide in future contracts for subordination just as he has done in the contract with the City of Yuma. For this reason, we do not consider that either the Valley Division of the Yuma Project or the other projects in the Yuma area are in a "perilous situation."

able in each class is apportioned ratably to the amount committed to each contractor.

The fact that the Secretary has made some contracts under which the users will share ratably in times of shortages, while he has made others which prescribe priorities between users in the same State, does not aid California's argument for a system of interstate priorities under the Project Act over and beyond the Section 6 requirement for the satisfaction of "present perfected rights." As noted above, the principle of parity as between interstate allocations appears clearly to follow from Congress' obvious intention that the aggregate project water supply be allocated for use in the several States in specified proportions. The limit on California's use to 4.4 million acre-feet cannot be divorced from the plain intention to make another 3.1 acre-feet available for use in Arizona and Nevada. Likewise, limiting California to use of one-half of the surplus or excess waters plainly contemplates the existence of another one-half, to round out the whole. The universe with which Congress dealt was 7.5 million acre-feet plus the available mainstream waters over and above that amount. There is nothing to indicate that Congress intended, if the universe should prove to be less than 7.5 million acre-feet, to divide it in proportions different from those applied to the size assumed except for the satisfaction of "present perfected rights."

2. California suggests that our reasoning at pages 15–21 of our Brief in Support of Exceptions to the Special Master's Report supports its argument for

a broader system of interstate priorities, but the suggestion misconceives the reasoning. Our argument was addressed to the Special Master's determination that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract violate the Project Act insofar as they condition the quantities of mainstream water to be delivered upon the extent to which uses in those States upstream from Lake Mead deplete the reservoir supply. We simply assumed, *arguendo,* as did the Special Master, that in a contest between an appropriator on an upstream tributary and a contract user of stored water, the appropriator's claim would be junior under State law if it post-dated the contract claim. This *arguendo* assumption does not bear on the question of relative priorities between contract users under the Project Act.

3. California's arguments respecting Section 8 of the Reclamation Act and Section 18 of the Project Act likewise misinterpret those provisions and appear to misconceive the nature of the Boulder Canyon Project.

Section 8 of the Reclamation Act provides that nothing in the Act be construed as affecting State laws relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and it directs the Secretary of the Interior, in carrying out the provisions of the Act, to proceed in conformity with such laws. (43 U.S.C. 383.) Section 8 also provides that nothing in the Act shall affect the rights of any State, the Federal Government, or any landowner, in any inter-

state stream or the waters thereof. It further specifies that the right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and that beneficial use shall be the basis, measure, and the limit of the right (43 U.S.C. 372). It does not specify that waters brought under the control of the United States by the construction of a reclamation project shall be distributed by the Secretary in accordance with the determination of State authorities made under State law. Neither does it specify that such waters shall be distributed within the project in accordance with principles of priority of appropriation. Section 8 has never been construed by the Secretary of the Interior as prescribing any rules as to priority between users of the water supply created by construction of a storage project. All questions of priority as between users within a project, and as between separate divisions of a project receiving water from the same project supply, have been determined by contract between the Secretary and the project landowners or water-distributing organizations made under authority of the various provisions of reclamation law. In the absence of specific statutory or contractual provisions to the contrary, ratability in the event of shortage in the project supply has been the rule.

It is not pertinent to this controversy to argue the question of relative priorities between completely separate federal reclamation projects on the same stream system, either in the light of, or regardless of, the provisions of Section 8 of the Reclamation Act. That is not the question which is before the Court in this

case. The Boulder Canyon Project is a single project. Hoover Dam creates a reservoir having an original unsilted storage capacity of over 32,000,000 acre-feet. The great quantity of water thus brought under control is distributed for use in an extensive area through a considerable number of related sub-projects, some of which have been constructed under federal law and some of which have been privately financed. But notwithstanding the extensive and varied facilities which are required for utilization of all the waters which Hoover Dam impounds, there is no room for any argument that principles applicable to the resolution of conflicts between separate projects claiming rights under separate appropriations under State law on the same stream system are applicable to distribution of the water supply created by the great storage project with which we are here concerned.[3]

There is nothing in any of the decisions of this Court which California cites in support of her contentions respecting Section 8 which supports that argument. On the contrary, each of those cases shows the fallacy of the argument.

In *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 291–292, the Court said with unmistakable clarity:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation

[3] We have dealt quite extensively with Section 18 of the Project Act in Point III of our Brief in Support of Exceptions to the Special Master's Report. We see nothing in California's arguments respecting that section requiring amplification of the analysis previously made.

> project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

The fact that in *Nebraska* v. *Wyoming,* 325 U.S. 589, the Court held that on the record in that case title to the appropriative natural flow rights was in the project landowners rather than in the United States has nothing to do with the questions here presented. We emphasize that it was from the opinion in *Nebraska* v. *Wyoming* that the Court in *Ivanhoe* quoted, in support of its statement that the acquisition of water rights must not be confused with the operation of federal projects, the sentence: "We do not suggest that where Congress has provided a system of regulation for federal projects, it must give way before an inconsistent state system."

Likewise, as noted in footnote 19, at page 43, of our Brief in Support of Exceptions to the Special Master's Report, there is nothing in the Court's opinion in *Ickes* v. *Fox,* 300 U.S. 82, which supports California's argument that under the Boulder Canyon Project Act priorities are to be observed interstate over and beyond the Act's specific requirement for satisfaction of "present perfected rights." In that

case the Court simply held that under the undenied allegations of the petition, the Secretary of the Interior exceeded his authority when he sought to require from landowners within a reclamation project, who held fully paid water right application contracts, additional payments to reimburse the cost of an addition to the project from which they would receive no benefit. The Court expressly predicated its decision on "the terms of the ~~new~~ law [i.e., the Reclamation Act] and of the contract already referred to * * *."

We respectfully submit that, as determined by the Special Master, Congress has specifically provided for the recognition of interstate priorities to the extent of the satisfaction of "present perfected rights." There is nothing in the general language of Section 8 of the Reclamation Act or in Section 18 of the Project Act or in any other provision of applicable law to justify extending this express but limited provision so that principles of priority of appropriation would apply as a matter of law, interstate or intrastate, with respect to uses under contract which had not been perfected when the Project Act became effective.

Respectfully submitted.

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STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Reply Brief of the California Defendants to the Answering Briefs of the United States, Arizona, and Nevada

(See list of attorneys on next page.)

October 2, 1961

(Legislative History Appendix, etc., to be in accompanying volume.)

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REPLY BRIEF OF THE CALIFORNIA DEFENDANTS TO THE ANSWERING BRIEFS OF THE UNITED STATES, ARIZONA, AND NEVADA

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REPLY BRIEF

This consolidated reply brief of all eight California defendants, together with accompanying appendixes in a separate volume, is filed in reply to the answering briefs of the United States, Arizona, and Nevada pursuant to the notice accompanying the Court's order of January 16, 1961.[1]

THE BASIC CONTROVERSY

The United States says that "so long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met" (U.S. Ans. Br. 51). But the decree which our opponents endorse does not do this. Under the Special Master's decree, California would receive no more than 3,800,000 acre-feet whenever the Colorado River Compact's "ceiling on appropriations" is enforced against the lower basin. It is fatuous to assume that it will not be enforced.

If the Compact is not enforced against the lower basin, there is no justiciable controversy now, because all of the claims for the future here presented by Arizona, California, and Nevada can be readily satisfied if past recorded flow at Lee Ferry continues without further depletion. It is only because the Compact permits the upper basin to further diminish that flow, and to correspondingly restrict satisfaction of lower basin

[1]364 U.S. 940. Abbreviations used in citations are the same as in our previous brief filed August 14, 1961. See Calif. Ans. Br. 1 n.1.

appropriations of it, that the claims exceed the dependable supply which is the subject matter of the controversy. Only on this basis is the case justiciable. On the premises of the Master's Report it is not.

The United States, endorsing the Master's recommended decree, invites every state and Congress to proceed on a collision course, with expansion in both basins relying on a supply already largely committed to constructed or authorized projects.

We challenge, basically, two elements of the decree: (1) the severance of the Compact from the California limitation agreement, and (2) the proration of the resulting shortage in disregard of the priorities of California's long-established projects.

The United States says that California seeks a decree protecting her future at the expense of Arizona's present (U.S. Ans. Br. 54). This is not so. The decree we seek would not deny water to any existing project in any state, nor indeed to the proposed Central Arizona Project, if the gamble on the water supply is taken by the new project. The priorities of California's existing projects up to our agreed limitation of 4.4 million acre-feet must be respected, just as we respect our agreement that beyond 4.4 million acre-feet our rights are limited to one half of any "excess or surplus" waters. This is the agreement between Congress and California that our opponents would break.

The United States apparently concedes that California's existing projects will be impaired if the decree takes effect, perhaps by 1990. This is less than 30 years from now, a span of time shorter than that since enact-

ment of the Project Act. (The Reclamation Bureau has published plans which would result in reducing California's present uses within 14 years.)

But, the United States argues: Shortages which will occur in 30 years are too remote to be given any consideration now; it is "undesirable to abandon needed development in Arizona and Nevada" (U.S. Ans. Br. 19) and in the upper basin merely because the water supply will not sustain all the projects that are built; California's projects and, indeed, projects in every other Colorado River basin state should depend for their security upon scientific advances not yet discovered which will save or create water. See U.S. Ans. Br. 53-54. No decree has yet been entered by this Court based upon such speculation. The Project Act did not require California to underwrite the cost of Hoover Dam in order to dedicate to Arizona most of the additional waters it would make available, while relegating California to finding ways to use the Pacific Ocean to supply our cities and farms.

Before or after a decree in this case is entered, its effect on present projects and the prospects of future projects must be appraised. We urge that this be done before, rather than afterward. The purpose is not to persuade the Court to rewrite the law of the river to avoid a harsh result, but to persuade the Court that the Master's proposed rewriting of that law frustrates its intent and purpose.

The Metropolitan Water District's Colorado River Aqueduct would be wholly deprived of water by the decree recommended, even if new projects are not built

to divert from the main stream above Lake Mead. This is not because of drouth, which everyone in California recognizes has diminished the supply. Disaster is in prospect because the Master proposes to write a decree which reverses both the clear language of the Project Act and the California Limitation Act, and an interpretation of those acts accepted and asserted by both Arizona and California in the decades since 1928, both in this Court and in every other forum: (1) the limitation on California incorporates the Colorado River Compact; (2) priority interstate characterizes water rights within the limitation.

Water rights are property rights, and these two positions, correct in the first instance, have become rules of property.

SUMMARY OF THE ARGUMENT

I. California Claims

California seeks only the 4.4 million acre-feet annually plus the one half of excess or surplus to which her appropriative and contract rights are restricted by the California limitation.

The two major errors in the Master's Report are (1) severance of the Colorado River Compact from the limitation and (2) abrogation of priorities in "Article III(a) waters" (considered *infra* parts II and III, respectively). The combined effect of these errors is to restrict California to less than the 4.4 million acre-feet specified in the first component of the limitation. California can receive no more than 3.8 million acre-feet within the lower basin's Compact ceiling of 8.5 million acre-feet imposed by Article III(a) and (b).

California can receive no more than 3.5 million acre-feet on any realistic appraisal of the permanent water supply.

Reversal of either one of the Master's errors would probably assure California of at least 4.4 million acre-feet. We do not oppose full development of present projects in Arizona and Nevada, or initiation of any new projects if the priorities of our long-established projects to 4.4 million acre-feet are protected, and our rights to one half of excess or surplus are recognized.

II. The Severance Issue

The answering briefs of the other parties invoke a legislative history which cannot itself serve as the basis for any construction of the limitation, and much less as the basis for the Master's severance of the Colorado River Compact from the limitation.

That legislative history would relate the "Article III(a) waters" in the limitation to 7.5 million acre-feet of flow of water at Lee Ferry, 275 miles above Lake Mead. The Master himself rejected this legislative history for compelling reasons about which the opposing briefs are silent. That legislative history could not bear its plain meaning, even had it been expressly incorporated in the statute, because of the immutable laws of nature which neither Congress nor this Court can alter, amend, or revoke: The 7.5 million acre-feet of flow at Lee Ferry cannot produce 7.5 million acre-feet of consumptive use (diversions less returns) below Lee Ferry, because of nonbeneficial losses such as evaporation and transpiration which occur before water is diverted for consumptive use. Attempted allocation of those nonbeneficial losses presents almost insuperable legal and

administrative difficulties, the solution of which no one has attempted.

The Master construes the limitation's reference to "Article III(a) waters" apportioned by the Compact to mean 7.5 million acre-feet of consumptive use of water from the "mainstream," Lake Mead and below. If this legislative history selected by Arizona and the United States were to be the attempted basis for a decree, that decree would not resemble the one recommended by the Master. His decree is based on a "contractual allocation scheme" deduced from Lake Mead contracts. Nothing the Secretary may conceivably be authorized to do by such contracts can allocate waters "let down" at Lee Ferry, 275 miles above the headwaters of Lake Mead.

III. The Priority Issue

The answering briefs of the other parties give almost cavalier treatment to this major issue: Does any provision in the law of the river provide that priorities in "Article III(a) waters" are arrested at state lines? Part III is long because we must prove a negative. the provision destroying priority does not exist, whatever may be the basis of the water right—appropriation or contract, or both.

The Master recognizes that *intra*state priorities apply to "Article III(a) waters." He recognizes that *inter*state priorities prevailed throughout the lower basin prior to the Project Act and continue effective since the Project Act (within the ceilings imposed by the Compact on the lower basin) in every part of the lower basin except the "mainstream." No party seriously chal-

lenges these conclusions. The law of the river confirms that interstate priorities in "Article III(a) waters" have not been abrogated either expressly or by implication.

These conclusions, we believe, are unchallengeable:

(1) The principles underlying the law of prior appropriation, which have prevailed throughout the arid West for 100 years both interstate and intrastate, dictate priority except where priority principles have been expressly and unmistakably modified.

(2) The Colorado River Compact, essentially an *inter*basin agreement, expressly recognizes priority as the only basis of *intra*basin water rights, except where modified by agreement.

(3) Section 5 of the Project Act authorizes the Secretary to contract for the storage of water in Lake Mead and for its delivery to water users at agreed points below Lake Mead, but no word suggests priority between two contractees on one side of the river, but proration if they are on opposite banks. The Project Act's preservation of interstate priorities among contractees, which is supported by sections 8(a), 14, and 18, is conclusively established by two prior decisions of this Court.[2]

Contrary to the extended argument in Arizona's answering brief, the legislative history does not prove that the Project Act either made or authorized any federal interstate allocation of Colorado River waters within the lower basin. In a separate volume of appen-

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[2]Arizona v. California, 283 U.S. 423, 464 (1931); United States v. Arizona, 295 U.S. 174, 183 (1935).

dixes accompanying this reply brief, we supply the relevant legislative history which Arizona omits and the context for that which Arizona includes.

(4) The limitation on California is correctly recognized by the Master as a limit and not a grant. The limitation cannot be a pro rata allocation, since it is not an allocation of any kind. If the Master is correct that the Colorado River Compact is merely a limitation on appropriations, then the quantities specified for Arizona and Nevada in the proposed tri-state allocation in the second paragraph of section 4(a) (which proposed no allocation for California) are also no more than limitations—certainly not allocations, pro rata or otherwise.

(5) The 1944 water delivery "contract" with Arizona, an essential part of the "contractual allocation scheme," expressly negatives any intent on the part of the Secretary to create a pro rata allocation.

(6) The asserted administrative practice, custom, or usage supporting proration—never pleaded, proved, or otherwise supported—is nonexistent.

IV. The Jurisdictional Issue

The jurisdictional issue is raised by two aspects of the proposed decision: (1) truncation of the river at Lake Mead and a decree confined to Lake Mead and below; (2) failure to determine water supply or to give any effect to the Colorado River Compact.

If Arizona had sought to quiet an alleged title to water from Lake Mead or below, and had alleged a determination to build the Central Arizona Project

from a still undecided location, possibly above Lake Mead and possibly below, her complaint would have disclosed on its face the absence of a justiciable controversy.

If Arizona and California had alleged in their respective complaint and answer that there is water for Arizona's immediate demands and enough for California's existing uses "unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed" (Rep. 115), the pleadings would have disclosed on their face the absence of a justiciable controversy.

Yet this is the posture of the "controversy" which the Master's Report describes. We believe that he is wrong. The controversy which the parties brought to this Court, and tried, relates to the dependable water supply in the lower basin. That controversy is justiciable. That controversy the Master declines to decide.

The effect of the premises on which the Master bases his recommended decree is to encourage both upper and lower basins to continue to develop economies on the same very small margin of presently uncommitted water. The end result would not only be the destruction of the water supply of one of California's great existing projects (the Colorado River Aqueduct of the Metropolitan Water District) within the near future; it would also be a regional disaster, seriously injuring every part of the Colorado River basin.

ARGUMENT

I. CALIFORNIA SEEKS ONLY TO PRESERVE RIGHTS OF CALIFORNIA USERS TO 4.4 MILLION ACRE-FEET PER ANNUM PLUS ONE HALF OF "EXCESS OR SURPLUS WATERS"

A. The Decision Proposed by the Special Master Would Restrict California to No More Than 3.8 Million Acre-Feet Annually of the Lower Basin's Compact Waters

The briefs of our adversaries misstate the effect of the Special Master's recommended decision and California's reasons for opposing it. Arizona has said that California is bound by the covenant of the limitation and "should be estopped from repudiating her act." (Ariz. Op. Br. 72.) The United States says (U.S. Ans. Br. 51):

> "So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met."

California claims no greater right to Colorado River system waters than is permitted by the California limitation:

(1) 4.4 million acre-feet from the 7.5 million acre-feet of "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," plus

(2) one half of any "excess or surplus waters unapportioned by said compact" over and above that 7.5 million.

The major issue is: Will California receive the 4.4 million acre-feet specified in the first component of the limitation?

The decree recommended by the Special Master would, in effect, erase the figure 4.4 million acre-feet and substitute a figure of no more than 3.8 million. That decree would also, in effect, erase totally the second limitation component which stipulates one half of any "excess or surplus waters." These consequences flow inevitably from the joint operation of two separable aspects of the Master's proposed decision:

1. *The "severance issue"*

The Colorado River Compact confers upon the lower basin a right to a total consumptive use from the Colorado River system in the lower basin (the main stream from Lee Ferry and below plus all tributaries) of no more than 8.5 million acre-feet per annum, characterized by the Master as a "ceiling" or "embargo" on lower basin appropriations. (See Rep. 142-44.) About 2 million acre-feet of that 8.5 million acre-feet is now used from the dependable supply of the lower basin tributaries (Calif. Op. Br. 20, 22-23; Calif. Ans. Br. 10 n.7), leaving not more than 6.5 million acre-feet to be claimed within the Compact "ceiling" from the main stream.

Section 4(a) of the Project Act (the first paragraph of which specifies the terms of the limitation accepted by California) refers to (1) the waters apportioned to the lower basin by Article III(a) of the Colorado River Compact and (2) any excess or surplus waters unapportioned by the Compact. The Master severs these express references to the Compact from section 4(a) as "inap-

propriate" (Rep. 173) and relates both funds of water solely to "mainstream" waters (Lake Mead and below). All uses made by projects diverting from the lower basin tributaries or from the main Colorado River between Lee Ferry and Lake Mead are excluded from consideration. See Rep. 173, 183.

That severance produces the following disparity in the "mainstream" between supply and demand: Against a "mainstream" supply which cannot exceed 6.5 million acre-feet when the Compact ceiling is enforced (because 2 million acre-feet of the lower basin's 8.5 million acre-foot Compact allocation is accounted for by present uses on lower basin tributaries[1]), the effect of the Master's construction of section 4(a) of the Project Act is to marshal demands which vastly exceed that supply. The demands which the Master regards as assertable solely against the "mainstream" supply are: (1) Demands to 7.5 million acre-feet of "Article III(a) waters," *i.e.*, the 4.4 million acre-feet to which California agreed her claims are limited and the 3.1 million acre-feet which may be claimed only by Arizona and Nevada; plus (2) demands to all "excess or surplus waters" over and above that 7.5 million acre-feet.

The issue then arises whether the shortage of at least one million acre-feet to supply the III(a) demands recognized by the Master against the "mainstream" (7.5 less 6.5) is to be borne by the 3.1 million acre-feet

[1]At present, uses from the main Colorado River between Lee Ferry and Lake Mead are minimal. However, if any new project, such as the Central Arizona Project, is authorized to divert from that upper reach of the river, the present figure of 2 million acre-feet of uses on "tributaries" would increase accordingly and the "mainstream" supply in Lake Mead and below within the Compact ceiling would shrink correspondingly.

of claims (to the extent their priorities, over one half now unused, are junior to our own) from which we are excluded, or whether that shortage may invade the priorities of our long-established projects to 4.4 million acre-feet.[1a]

2. *The "priority issue"*

The Special Master's recommended decree would allocate to California 44/75 of the "Article III(a) waters" (defined as the first 7.5 million acre-feet (or less) of "mainstream" waters available for consumptive use annually), not a firm 4.4 million acre-feet thereof. If the Master's formula is confirmed, California's right to "mainstream" waters shrinks to no more than 3.8 million acre-feet annually (44/75 of 6.5 million acre-feet[2]) whenever the Compact ceiling of 8.5 million acre-feet is enforced against the lower basin.[2a] Yet, Cali-

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[1a]Within the Compact's ceiling of no more than 6.5 million acre-feet from the main river from Lee Ferry to Mexico, there is obviously no water to supply demands to "excess or surplus" above 7.5 million acre-feet.

[2]The Master derives the fractions 44/75, 28/75, and 3/75 (Rep. 233) from a "contractual allocation scheme" (or "system") (Rep. 221, 232) which he "deduced" (Rep. 237) from the Secretary's water delivery contracts construed with the following gloss: that the Secretary intended to effectuate substantially (although not precisely) the allocation set forth in the second paragraph of § 4(a) of the Project Act (authorizing an interstate compact which no state ratified) in conjunction with the limitation specified in the first paragraph of that section (Rep. 222-25). We deny that any "contractual allocation scheme" exists (Calif. Op. Br. 138-94). But if it does exist, we deny that it is the scheme described by the Master (Calif. Op. Br. 195-206) or that it abrogated priorities in "Article III(a) waters" and substituted parity (Calif. Op. Br. 206-31). See also Calif. Ans. Br. 36-75, 106-29, 136-40.

[2a]If, as we believe, the permanently dependable supply will support less than 6 million acre-feet of consumptive use from the Master's "mainstream," California's share, under the Master's formula, would not exceed 3.5 million, unless "present perfected rights" exceeded that quantity. The decree proposed would postpone determination of their magnitude to later proceedings.

fornia's annual consumption as of the date of the trial was 4.6 million acre-feet. By 1960 California uses had increased to about 4.9 million acre-feet. (See Calif. Op. Br. 14, 15.)

B. The Decision Proposed by the Special Master Should Be Modified To Preserve California's Firm Right to 4.4 Million Acre-Feet

It is improbable on anybody's theory that the dependable supply of the main river will furnish any substantial quantities of "excess or surplus."[2b] Therefore, we are concerned primarily with protecting the rights of California's long-established projects to 4.4 million acre-feet per annum as against proposed new projects in Arizona and Nevada. California's rights to 4.4 million acre-feet are clearly protected if the Court reverses the Master on both issues (the "severance" issue and the "priority" issue).

If the Court reverses only the Master's excision of the express reference in the limitation to the Colorado River Compact (the "severance issue"), California will probably receive her 4.4 million acre-feet. If the Court reverses only the Master's substitution of proration for priority in "Article III(a) waters," California's 4.4 million acre-feet is assured.

[2b]The permanently dependable supply in the main river, we believe, will sustain not more than 6 million acre-feet of consumptive use. Of this use, 5.5 million acre-feet would be identified, on California's contentions, with the water apportioned by Article III(a) of the Compact, the remaining 2 million being accounted for by presently existing uses of the dependable supply on the tributaries under long-established appropriations which were "rights which may now exist" in 1929. The "excess or surplus" in the main stream dependable supply thus would be not over 500,000 acre-feet (6 minus 5.5), and California's share not over 250,000 thereof, or 4.65 million acre-feet in all.

The reasons which compel reversal at least in one respect or the other (and we think in both respects) are discussed below in parts II and III, respectively. In part IV we deal with the overriding considerations of justiciability and water supply.

There can be no doubt that California has rights to at least 4.4 million acre-feet annually, plus one half of "excess or surplus waters" up to 978,000 acre-feet.[3]

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[3]The United States, in its answering brief, seems to say that it does not understand why, if California is limited to one half of excess or surplus, we can claim 978,000 acre feet of it, while conceding to Arizona and Nevada only 180,000. (U.S. Ans. Br. 32 n.9.) We do not so contend. We say that if existing projects in California were fully served to the extent of 5.378 million acre-feet of constructed capacity, they would be dependent to the extent of 978,000 acre-feet on the existence of excess or surplus, whereas existing projects in Arizona and Nevada, which will require when fully developed about 1.3 million, would be dependent on excess or surplus to the extent of 180,000 acre-feet of that requirement. (That 180,000 acre-feet consists of 152,000 in Arizona plus 28,000 in Nevada; see Calif. Findings and Conclusions (April 1, 1959), table, p. XII-16.) Since Arizona and Nevada, even with their junior priorities, can claim a quantity of excess or surplus equal to California's one half, it follows that in the happy but unlikely event that the water supply will support use by California of that surplus to the extent of 978,000 acre-feet, it must do so for Arizona and Nevada, enabling them to expand by about 800,000 acre-feet (978,000 minus the 180,000 acre-feet of surplus which existing projects will need when fully developed). But if the water supply, as we believe, will support substantially less than the 6.5 million acre-feet of consumptive use from the main stream which will be permitted by the Compact ceiling whenever that ceiling is enforced, the "surplus" to be equally divided will not exceed, on a permanent basis, the million acre-feet referred to in Article III(b). Of this, on our contentions, California could use 4.9 (4.4 plus one half of the 1 million of III(b) water), and Arizona and Nevada 1.6 (1.1 plus one half of this 1 million). The true expectancy for all three states would be somewhat less because the dependable supply is about 6 million, thus less than the Compact ceiling of 6.5 million. See note 2b, *supra*.

Cf. Arizona's erroneous statement (Ariz. Ans. Br. 139): "[T]he California protestation that unless she receives 5,378,000 acre-feet of Colorado River water each and every year she will be visited with disaster is without substance." Arizona attempts to disprove a contention that we have never made.

However, it has been said that bases on which we claim our rights have not been made clear. The Government says (U.S. Ans. Br. Br. 16 n.3):

> "Throughout the trial of the case, and in the briefing for the Special Master, California's presentation has involved a number of alternative positions."

We have always asserted clearly and consistently the same two bases for our rights. In the phraseology used in the first paragraph of section 4(a) of the Project Act, the twofold bases of California's rights are: (1) "rights which may now exist," that is, appropriations made prior to and subsisting as of the effective date of the Project Act (June 25, 1929) which could be satisfied from the unregulated flow without Hoover Dam; and (2) "contracts made under the provisions of this Act," that is, appropriations initiated after the Project Act by contracts for the incremental supply ("waters stored" in the language of section 5 of the Project Act) made available by Hoover Dam. Our rights in both categories have been validly initiated and diligently pursued (Calif. Op. Br. 10-14 and appendix at A1-37), establishing our priorities upon both bases.

California has clearly and consistently asserted these same twin bases—existing rights and contracts—in 1953 in our pleadings,[4] in 1956 in our statement of position[5] and in our opening statement,[6] in 1959 in

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[4]Calif. Answer to Ariz. Bill of Complaint, First and Third Affirmative Defenses (pp. 1-38, 46-53, respectively).

[5]Statement on Behalf of Calif. Defendants 4-5 (Feb. 29, 1956).

[6]Tr. 6197, 6198-205, 6208, 6215-18 (Mr. Ely).

our briefs and proposed findings and conclusions,[7] and finally, in 1960 in our opening brief before this Court.[8] We reassert them now.

C. The Adoption of California's Contentions Would Not Halt Further Development in Arizona and Nevada

The answering briefs of the other parties reveal this misunderstanding of California's position, manifested in its most extreme form in the Government's answering brief (U.S. Ans. Br. 3):

> "[T]o follow the solution proposed by California would stymie further development in Arizona and Nevada, including the effectuation of present federal projects, and permit California, by default, to exceed the limitation on use in that State which, as a condition precedent to authorization of the Boulder Canyon Project, Congress imposed[9] in anticipation of California's ability to expand its uses of mainstream waters more rapidly than the other States."[10]

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[7] *E.g.*, Calif. Findings and Conclusions (April 1, 1959), introduction, p. iii; Calif. Rebuttal Brief 13-15 (June 30, 1959).

[8] *E.g.*, Calif. Op. Br. 37.

[9] (Footnote ours.) It is clear that the limitation was imposed not by congressional fiat (as the United States seems to suggest) but rather by the consent of California in her Limitation Act. See Calif. Op. Br. 128-29, 193-94.

[10] *Accord*, U.S. Ans. Br. 19: "It would be undesirable to abandon needed development in Arizona and Nevada in order to protect against possible future shortages which by reason of scientific discoveries or other factors may never occur." *Id.* at 54: "California would go too far in mortgaging the present to protect the remote future, perhaps because it is Arizona's present that will be sacrificed as security for California's future." See also Nev. Ans. Br. 26: "Nothing in the theory of judicial apportionment justifies what is, in effect, an economic block, or which, as California states, in effect, to Nevada: 'We will let you complete the projects presently existing, but beyond that you can never go.'"

See also Rep. 135.

This assertion is wholly wrong. California neither seeks such results nor makes any contention which would produce such results.

1. *As to presently authorized projects*

Under California's contentions, all existing main stream projects in Arizona and Nevada can proceed to full development. Our opening brief is explicit (p. 292): "The decree which California seeks . . . would fully protect all existing main stream projects in Arizona and Nevada, to the full extent of their ultimate development." More specifically, that development (with a very minor exception) would be assured water from the dependable and permanent supply of the main Colorado River in the lower basin (Calif. Op. Br. 16-19, 20-22, tables 2 and 3). Nevada, at least, recognizes this concession. (Nev. Ans. Br. 26; *cf.* Ariz. Ans. Br. 139-41.)

2. *As to proposed new projects, such as the Central Arizona Project*

Proposed new projects in Arizona and Nevada are not prohibited if California's contentions are accepted. Again, our opening brief is explicit (p. 292): "We do not oppose any such [new] projects [in Arizona and Nevada], if the risk of miscalculation of the water supply rests (as it does in every state of the arid West) on the new ventures, rather than on the existing projects built on the basis of decisions not now reversible and by investments not now recoverable." This principle is most conducive to "optimum development" (U.S. Ans. Br. 3) of the water resources of the lower Colorado River basin. (*Infra* part III-A, pp. 38-44). If Arizona believes her own contentions about the abundant water supply, the risk of accepting junior priorities for such new ventures is negligible.

II. THE LEGISLATIVE HISTORY OF THE PROJECT ACT DOES NOT SUPPORT SEVERANCE OF THE "COLORADO RIVER COMPACT" FROM THE CALIFORNIA LIMITATION AGREEMENT

A. The Legislative History of the California Limitation on Which Our Opponents Rely Cannot Be Read Literally

If there were any point to the quip that only when the legislative history is ambiguous do we turn to the language of the statute, here is that case!

We shall not restate the argument from our opening brief. (Calif. Op. Br. part Two, pp. 69-137.) We shall confine ourselves to the significance to be attached to the legislative history presented by the United States, Arizona, and Nevada to buttress the Master's conclusions. That history in fact contradicts the conclusion of the Master, who says he has considered it and rejected it, and for compelling reasons to which none of the other parties even refer. If the decree were to be written from that history, the Master's decree would have to be altered at least as drastically as the Master has altered the literal meaning of the limitation.

All of the other parties ignore (as does the Master) all contradictory indications in the legislative history, in the terms of section 4(a) of the Project Act, and in all other provisions of the Project Act which recognize that the Compact applies to the Colorado River system including tributaries. Instead, they rely upon statements of some Senators that the first term of the limitation restricts California to 4.4 million acre-feet of the average annual flow of 7.5 million

acre-feet at Lee Ferry which Article III(d) obligates the upper states to "let down" or which "went down" at Lee Ferry to the lower states.[1] On the same assumptions, the tri-state compact which was authorized in the second paragraph of section 4(a) would refer to that 7.5 million acre-feet at Lee Ferry and would have apportioned 2.8 million acre-feet of this flow to Arizona and .3 million acre-feet to Nevada. This is the whole message of the Senators' statements that the United States, Arizona, and Nevada reply upon in the opening and answering briefs.

Thus, the California limitation would be read as if it limited California to the "aggregate annual consumptive use (diversions less returns to the river)" of 4.4 million acre-feet "of the waters apportioned to the lower basin States by paragraph (*d*) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact." If so read, Senator Phipps when he inserted the perfecting amendment which specifies "paragraph (*a*)" and Senator Hayden when he expressed approval were both colossally mistaken.[2] In the second paragraph (tri-state compact) of section 4(a), "paragraph (a) of Article III" must likewise be rewritten.

The Master gives two reasons why this legislative history cannot be followed, and one why it should not be followed. It cannot be followed because:

(1) Physically, the 7.5 million acre-feet of Lee Ferry

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[1]U.S. Ans. Br. 38-46; Ariz. Ans. Br. 62-67; Nev. Ans. Br. 55-57. *Accord,* Ariz. Op. Br. 63-67, 71-72.

[2]70 CONG. REC. 459 (1928), quoted in Calif. Ex. 2015 (Tr. 11,173), at 54.

flow cannot sustain 7.5 million acre-feet of consumptive use (diversions less returns) at any point below Lee Ferry (Rep. 144, 188).

(2) Almost insuperable administrative difficulties would attend tracing water downstream from Lee Ferry to points of diversion and assigning the non-beneficial losses among users thereof (Rep. 187, 193). No one has yet attempted even to suggest the terms which would go into such a decree, let alone how it would be administered.

These two "cannots" overshadow the tremendous "should not" which would otherwise be compelling even if it stood alone. The legislative history thus relied on results, as the Master concedes (Rep. 188-93), from the failure of Senators Pittman and Hayden to understand the proposal of the upper division Governors' Conference in 1927 to divide the flow of the river at Lee Ferry.[3] This confusion should not be permitted to frustrate the clear intent and purpose of Congress, undeviatingly expressed in both the text of the Project

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[3]The United States (U.S. Ans. Br. 39), Arizona (Ariz. Ans. Br. 66-67), and Nevada (Nev. Ans. Br. 56-57) all rely upon the recommendation of the upper division governors in 1927 for a tri-state allocation of the Article III(d) flow at Lee Ferry. The Master states that "Congress never clearly understood" that the governors' recommendation related to their states' Article III(d) obligation. Senator Pittman "did not adopt, or perhaps failed to grasp, that portion of the governors' resolution which expressly found the source of the allocated waters in the Article III(d) obligation of the Upper Division" so that he described the governors' proposal "in apparent misunderstanding of the governors' recommendation." Finally, the Master concludes that "all subsequent discussion in the Senate flowed in the same channel." (Rep. 189-90.)

Act[4] and throughout the legislative history, that the Compact, whatever it meant,[5] must control the Project Act, the limitation, the contracts, and all rights arising under or recognized by any of these inseparable documents.[6]

One can speculate here about what other term in the limitation must yield if "paragraph (*a*)" were to be written "paragraph (*d*)." Speculation is not useful, however, except to demonstrate one thing: Any of the modifications which suggest themselves would yield a

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[4]The Master writes (Rep. 173 n.32): "It is true that certain sections of the Project Act apply to the Colorado River System. The explanation for this is that in those sections Congress was dealing with problems which had system-wide application. . . . But it is clear that many other sections of the Project Act apply only to the mainstream, and this is understandable because in them Congress was dealing only with mainstream problems." The Project Act references in explicit terms in §§ 6, 13(b), 13(c), 13(d), 15, 16, and 20 to "tributaries" or Colorado River "system" in fact show that Congress recognized that the Compact applies to tributaries. Moreover, the cause of concern in the limitation provision, § 4(a), was water rights, and specifically water rights in the event of only six-state ratification of the Colorado River Compact. No reason is suggested, and none can be discovered, why if Congress was concerned with subjecting the *system* to the Compact, it was interested with respect to the limitation only in the water rights in the "mainstream."

[5]The Government contends that the Compact should not be construed in this suit in the absence of the upper states. (U.S. Ans. Br. 30-31 n.7.) The law of this case to the contrary was established by this Court's per curiam order denying California's motion to join the upper states. 350 U.S. 114 (1955), *rehearing denied,* 350 U.S. 955 (1956). *Accord,* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110-11 (1938). The pleadings ask for construction of the Colorado River Compact, and all parties including the United States explicitly recognized in those pleadings the necessity that it be construed.

[6]Arizona asserts that California has "bottomed her position upon an over-simplified and purely theoretical equation: Project Act = Compact = System water (main stream + tributary)" (Ariz. Ans. Br. 60). Arizona misses the point; the reference to the Compact is compelled by the purposes of the limitation. See Calif. Op. Br. 112-17; see also p. 29 *infra.*

total net result to California substantially more favorable than the Master's recommended decree.

If the statements of some Senators that they were dividing the Lee Ferry III(d) delivery is accepted as a premise, the consequence is to eradicate the term "consumptive use," expressly defined in the limitation as "diversions less returns to the river," as the thing divided. Conceivably, this eradication of the term "consumptive use" might produce a decree specifying 44/75 of the gross diversions to California, 28/75 to Arizona, and 3/75 to Nevada. Because only the smallest of the three California projects (Palo Verde) has significant return flow and because all of the large existing Arizona projects have return flow, this would provide much more water proportionately for California.

There is legislative history to support this view. Senator Hayden told the Senate expressly that the 2.8 million acre-feet that Arizona would receive upon ratification of the tri-state compact which his amendment authorized (the second paragraph of section 4(a)) would allow Arizona gross diversions of that quantity, leaving nearly one million acre-feet of return flow available to satisfy Mexico (70 CONG. REC. 463, 464, 465). In terms of consumptive use ("diversions less returns to the river"), the 2.8 million acre-feet would provide 1.8 million acre-feet only for Arizona.[7] This is the only explanation which even partially[8] squares his

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[7]The language of the second paragraph which provides 2.8 million acre-feet "for [not "of"] exclusive beneficial consumptive use" (not defined) in Arizona would easily yield to this construction.

[8]We say "partially" because 7.5 million acre-feet of flow at Lee Ferry would not produce 7.5 million acre-feet of gross diversions (much less diversions less returns) at points downstream from Lee Ferry.

proposed allocation of 7.5 million acre-feet with his explanation of where the water so divided was to come from—the III(d) delivery at Lee Ferry.

B. No Legislative History Supports the Master's Construction of the Limitation

The Master's decree is not supported by any legislative history at all. He rejects the literal language of the debates which would equate "Project Act III(a)" with "Compact III(d),"[9] as clearly as he does the literal language of the statute which would equate "Project III(a)" with "Compact III(a)." His synthesis of a third equation of "Project Act III(a)" with "7.5 million available from Lake Mead and below" cannot be justified on any view that it conforms to what any member of Congress thought the Colorado River Compact means. No one in Congress, directly or indirectly, expressly or impliedly, suggested that the Colorado River Compact in any of its provisions refers to a cate-

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[9]The United States, Arizona, and Nevada also reject the literal meaning of the debates.

The United States includes in the scope of § 4(a) the depletions on lower basin tributaries, such as the Little Colorado, above Lake Mead. These tributary waters rise in the lower basin and never pass Lee Ferry (Calif. Op. Br. plate 11). See, *e.g.*, U.S. Op. Br. 20: "We suggest that the 100,000 acre-feet of Little Colorado depletions is part of the total mainstream supply available for allocation. This is necessary to achieve Congress' purpose to impound and regulate 'substantially all of the mainstream water' and to accomplish the interstate allocation established by the Section 4(a) limitation on California . . . . We urge the Court to adopt this view."

Cf. Rep. 187: "The United States at one time urged . . . that Section 4(a) limits California to a part of the water flowing at Lee Ferry."

Nevada, and sometimes Arizona, endorse the Master's definition of the "mainstream," by necessary implication rejecting the legislative history which is quoted equating Articles III(a) and III(d) of the Colorado River Compact. (See Calif. Ans. Br. 77-78, 96-106, 135.)

gory of uses from the "mainstream" which begins at Lake Mead.[10] The site of Hoover Dam was undecided when the Compact was negotiated. The Compact is deliberately written to encompass the possibility of construction of the proposed dam "within or *for the benefit of* the Lower Basin" (Art. VIII; emphasis added), *e.g.*, at Glen Canyon in the upper basin.

Even today, there is no contention by any party that Article III(a) of the Colorado River Compact is restricted to the "mainstream," Lake Mead to Mexico.

The case against the Master's construction, however, is far stronger than a total absence of legislative history to support it. His construction would totally frustrate the purposes of the limitation about which there can be no dispute.[1] His construction is based upon rewriting statutory language to give it a meaning which no rational legislative body would have accepted if express language incorporating that meaning had been presented. This can be simply demonstrated:

(1) Suppose that a limitation had been presented which said: "California agrees to be limited to 4.4 million acre-feet of the first 7.5 million acre-feet plus

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[10]We understand Arizona to argue that the Compact and limitation are reconcilable only on Arizona's alternative argument that the Compact applies to the main stream beginning at Lee Ferry but excludes all lower basin tributaries, or that Congress so construed it.

[1]Rep. 165. "Absent seven-state ratification of the Compact, the Upper Basin required protection against appropriations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the non-ratifying state." *Accord*, U.S. Ans. Br. 38-41.

not more than one half of all waters available in excess of that quantity from the main Colorado River from Lake Mead to the Mexican boundary; California is not limited with respect to any diversion made above Lake Mead."

Obviously, this would not serve the purpose of the limitation, which was to protect the upper basin from the consequences of Arizona's failure to ratify the Colorado River Compact. When the Project Act was passed, Metropolitan Water District was exploring diversion routes for its aqueduct from the main stream above the site of Lake Mead. The Parker Dam route from below Lake Mead was not selected until more than a year after the Project Act passed. (Calif. Op. Br. 125-26.) A limitation on California to stated quantities of water in addition to what it might divert from above Lake Mead would have been as irrational as a decree in this case omitting from its scope Central Arizona Project diversions above Lake Mead. That is what this decree omits.

(2) The Master says that the secretarial contracts substantially effectuated the allocation contemplated by the tri-state compact, authorized by section 4(a) of the Project Act, but never ratified by any state. Suppose that Congress had been invited to authorize such a compact, rewritten to state what the Master finds in the second paragraph. It would say, in substance: "There is hereby allocated from the first 7.5 million acre-feet of consumptive use from the main stream of the Colorado River from Lake Mead to the international boundary 2.8 million acre-feet to Arizona and .3 million acre-feet to Nevada.[2] These quantities

[2]The tri-state compact would have made no allocation to California.

are not to be diminished by reason of whatever uses may be made by or in Arizona or Nevada of water from the main stream or tributaries above Lake Mead or from tributaries which supply water to that portion of the main Colorado River from which these allocations are made."

Such a proposal would never have received a moment's serious consideration. No decree, no contract, no compact, no appropriation, no water right, whether belonging to an individual or a state, has ever had these characteristics: (a) The parties whose agreement or consensual acts established the right are under no obligation to permit the water to continue to flow to the points of diversion agreed upon; (b) owners of the right may themselves divert the water before it has reached the points of diversion agreed upon without, however, diminishing their rights at the points of diversion.

Yet these are the irrational and self-defeating consequences which the Master's decree produces. The consequences flow from a disregard of a term in section 4(a) which language could not make more clear.

The most striking feature of the Master's decree is the liberation of the Central Arizona Project from the adjudication if that project diverts water above Lake Mead. The existence of a dependable water supply for a Central Arizona Project was the question which precipitated this suit. We have already called to the Court's attention the current studies of the United States and Arizona, given impetus by the circulation of the draft report, to make the diversion for a Central Arizona Project from the main stream above Lake Mead. (Thirteenth Annual Report of the Arizona Interstate

Stream Commission (1960), p. 31, quoted Calif. Op. Br. 125.) On March 17, 1961, Arizona enacted emergency legislation appropriating funds to be used "under contract with the bureau of reclamation for the purpose of making investigations and studies of a dam at the Bridge Canyon site on the Colorado River and of works necessary for the diversion and transportation of water *from the Colorado river* to areas in Arizona . . . . ."[3] (Emphasis added.) We assume that the "Colorado river" as used in Arizona's statute includes the main stream from Lee Ferry to Lake Mead. On April 24, 1961, the United States and Arizona entered into the contract authorized by that legislation.

The recommended decree constitutes judicial legislation rather than construction. For convenience we have at times used the word "construction" in discussing the Special Master's treatment of the California Limitation Act. In fact, the Special Master does not construe the words used by the Congress and the California Legislature. He does not ascribe some shade of meaning to those words or adopt the more reasonable as between two or more possible meanings. Instead he strikes the controlling words entirely as an "inappropriate reference to the Compact" (Rep. 173), and substitutes different words having a completely different meaning. Under the constitutional division of powers, it is the function of the legislative branch, not the judicial, to rewrite or amend statutory language. The adoption of

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[3]ARIZ. LAWS 1961, ch. 39, § 2, at 107. Reference is also made to diversion "to the Central Arizona Project area," § 2, at 108; see also the title, referring to "diversion and transportation of water to Central Arizona Project and other areas." *Id.* at 107. Text of this Arizona statute is quoted at 133-35 *infra*.

the Special Master's Report would constitute judicial legislation.

The law of contract applies to the statutory compact. Furthermore, our adversaries completely overlook the contractual nature of the "statutory compact" between the United States and California resulting from the Boulder Canyon Project Act and the California Limitation Act. That statutory compact should be construed under the law of contract. The words used should be accorded their ordinary meaning and not be modified by any intent on the part of one of the parties, not disclosed by the words used.[4]

C. The Legislative History, Like the Language of the Statute, Must Be Read in the Light of the Plain Purpose of Section 4(a)

None of the other parties or the Special Master consider the construction of the limitation in light of the most persuasive form of legislative history: the purposes of the limitation set forth in the first paragraph of section 4(a) of the Project Act. The transcendent purpose of the limitation was to provide protection to the upper basin substantially equivalent to the protection that would be afforded by seven-state ratification of the Colorado River Compact, as both the Master and the United States recognize.[5]

Achievement of that purpose required exact integration of the proposed tri-state compact with the Colorado River Compact to which it was made "subject in all particulars."

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[4]Hotchkiss v. National City Bank, 200 Fed. 287 (S.D.N.Y. 1911), *aff'd*, 201 Fed. 664 (2d Cir. 1912), 231 U.S. 50 (1913).
[5]Rep. 165, quoted *supra* p. 25 note 1; U.S. Ans. Br. 38-41.

The Master's construction of section 4(a) would permit diversions above Lake Mead by all three states, circumventing and frustrating the purposes of the limitation and the tri-state compact.

The Master, supported by our opponents, says that the Senate, in enacting section 4(a) of the Project Act, employed the reference therein to Article III(a) of the Compact as "shorthand" for 7.5 million acre-feet of consumptive use from Lake Mead and below. (Rep. 173, 190.) If so, the Senate (1) authorized the allocation in perpetuity among Arizona, California, and Nevada, from this segment of the river, of a quantity which is at least 1 million acre-feet in excess of the ceiling which the Compact imposed on appropriations from the whole main river, including the reach between Lee Ferry and Lake Mead, but (2) directed the Secretary to conform to the Compact in operating the reservoir from which their delivery should be made, and (3) therefore intended that whenever the Compact ceiling on lower basin appropriations was enforced, California should receive, not 4.4 million acre-feet, but 3.8 million of "Article III(a) water" and no "excess or surplus."

We believe that Congress intended that California should be permitted to appropriate and use 4.4 million acre-feet, not 3.8 million, of the waters within the Compact III(a) ceiling. This means that the 3.1 million from which Congress intended to exclude California must be found where Congress said it should be found, *i.e.*, in the waters of the system apportioned by Article III(a) of the Compact, and not merely in the waters of the main river or in the Master's still more restricted "mainstream."

It is unrealistic to believe that Congress, in writing

section 4(a) of the Project Act and under the anxious eyes of the upper basin Senators, either (1) proposed an allocation in perpetuity among Arizona, California, and Nevada of a million acre-feet in excess of the Compact ceiling, or (2) misled California to limit her rights to 44/75 of a quantity which could never come within 600,000 acre-feet of the agreed 4.4 million if the Compact ceiling were enforced, or (3) did not mean it when it directed that the Compact should be enforced in administering all contracts "anything in this Act to the contrary notwithstanding" (Project Act section 8 (a)).

D. California Is Not Excluded From Participation in Article III(b) Waters Under Any Construction of the Limitation

The answering briefs of all the other parties join the Master (Rep. 168-69, 180 n.40) in chiding California for the following purported inconsistency in our argument: We are charged with arguing that the limitation reference to "Article III(a) waters" should be read literally, but that the limitation to one half of the "excess or surplus waters" should not be read literally (supposedly the "literal" reading excludes California from the Article III(b) waters).

This misstates our argument, and is based on a premise which is utterly unsupportable. We say that "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" can only be read as a reference to Article III(a) of the Compact. More explicit language to effectuate that intention could not be devised.

We say that "excess or surplus waters unapportioned by said compact" must be read as referring to the Colorado River Compact and to Compact categories of water. Again, this is a necessary conclusion unless the word "compact" is to be erased altogether. That conclusion follows from a literal reading of the word "compact" wherever it appears, but it does not by itself answer two further questions about "excess or surplus":

1. To what Compact categories did Congress and the California Legislature intend to refer?

2. Is the one million acre-feet referred to by Article III(b) "apportioned" or "unapportioned" by the Compact?

This second question, while it may shed light on the answer to the first, cannot be conclusive. It is obvious that the Compact negotiators, whether they regarded III(b) as apportioned or unapportioned, did not intend to exclude California from its use.

The Master, in effect, answers the first question in our favor when he finds that Congress had no intent to exclude California from sharing in that one million acre-feet (Rep. 196-200); he answers the second against us. We think he was right in answering the first question, which is decisive, and wrong in answering the second, which is not. Only by inference is the second question answered against us: In Article III(f) reference is made to waters "unapportioned by paragraphs (a), (b), and (c)." This reference, the Master says, overrides the language of Article III(b) which avoids the words "apportioned in perpetuity" (used in Article III(a)) and substitutes the awkward phrase, "is hereby given the

right to increase its use."[6] Why did the Compact not expressly apportion 8.5 million acre-feet to the lower basin, if that was the intent? The Master attempts no explanation; there is none.[7]

If, however, there were a rule of "ambiguous in one is ambiguous in all," our choice is still clear. California would be hurt by exclusion from III(b) water, but ruined by rewriting the III(a) limitation based on the III(b) ambiguity.

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[6]Arizona's counsel in Arizona v. California, 283 U.S. 423 (1931), completely demolished the argument that the Compact "apportioned" the III(b) water. See quotation in Calif. Op. Br. 108-09.

The assumption of the Master and the other parties that a "literal reading" of the limitation and the Compact would exclude California from Article III(b) waters is wrong. The Master's Report itself states or implies at least three contradictory "literal" meanings of "excess or surplus waters," under one of which California would share in Article III(b) waters (Calif. Op. Br. 107 n.9). The Government purports to assert this "literal" meaning of the Compact (U.S. Ans. Br. 32) while simultaneously contending (erroneously, *supra* p. 22 note 5) that the Compact cannot be construed in the absence of the upper basin states (*id.* at 30 n.7).

[7]Arizona erroneously says that this argument modifies our position before the Master; we made the identical argument to the Master (Calif. Op. Br. 82-83 (April 1, 1959)).

III. THE PRIORITIES OF CALIFORNIA'S ESTABLISHED PROJECTS UP TO 4.4 MILLION ACRE-FEET ANNUALLY SHOULD BE PROTECTED FROM IMPAIRMENT BY NEW PROJECTS IN ARIZONA AND NEVADA

Statement of the Issue

The issue is: Do the priorities in "Article III(a) water"[1] (however defined) stop at state lines?

The issue relates only to "Article III(a) water."[2] It relates not to a general question of priority versus parity with respect to water rights under Project Act or reclamation law contracts, since there is no substantial argument with the Master's conclusion that priori-

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[1]We use "Article III(a) water" as a convenient term to refer to what the California limitation calls "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," however that descriptive term in the limitation may be defined.

[2]Allocation of shortages in "excess or surplus waters unapportioned" by the Colorado River Compact is not in issue for two reasons: (1) Because California's priorities absent the limitation would entitle California to more than one half, this term of the limitation has the effect of proration. It does not, however, prescribe proration, because priority would clearly apply to all rights in "excess or surplus" if the aggregate rights of states other than California in excess or surplus totaled more than one half. (2) If the Master's severance of the Compact from the limitation is upheld, "excess or surplus" is nonexistent, except on a short-term temporary basis, and unavailable to everyone as a basis for project planning, which requires a dependable supply (Rep. 133, 239). There can be no shortages in "Article III(a) water" until "excess or surplus waters unapportioned" by the Compact are exhausted; from that time all water rights must be satisfied, if at all, from "Article III(a) water."

ties prevail intrastate until a state line is reached.[3] It relates only to water used from the Master's "mainstream," since no alternative basis other than equitable apportionment and priority of appropriation for water rights from the rest of the river system is suggested.[4]

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[3]"Section 18 [of the Project Act] . . . directs that state law shall govern intrastate water rights and priorities . . . ." (Rep. 237.) Recommended decree art. II(C)(1), Rep. 350.

"We agree [with the Master] . . . that state law shall govern intrastate water rights and priorities . . . ." (Ariz. Op. Br. 99.) *Contra*, "The same considerations which led the Master to conclude that the Project Act envisions a ratable sharing of water between the states in the event of shortage impels the conclusion that Congress contemplated that ratable sharing among the users within a state should also obtain in times of shortage." Ariz. Ans. Br. 165. Compare the Arizona Act of March 17, 1961 (ARIZ. LAWS 1961, ch. 39, p. 107), subordinating Central Arizona Project rights to contracts of all water users in Arizona, quoted in part, pp. 92-93 *infra*. Nevada does not object to the Master's upholding of intrastate priority. The United States argument in its opening brief was directed to excising the word "state" and inserting the word "applicable" in the provisions of the Master's Report recognizing intrastate priorities, an exercise which may make no difference to the result, however the semantic problem is resolved. U.S. Op. Br. 24 n.5.

[4]The Master so concludes (Rep. 316).

Arizona's alternative argument is that "Article III(a) water" in the limitation refers to a Colorado River Compact applicable to the lower basin main stream only, beginning, however, at Lee Ferry, but no explanation is offered about the basis, under that construction, of any rights at all from the main stream above Lake Mead, where the Secretary cannot contract to store and deliver Lake Mead water.

Nevada's argument that we misuse the term "equitable apportionment" is disposed of by the Special Master. See Rep. 326-27 and cases there cited. "Equitable apportionment" is the Court's term employed in Wyoming v. Colorado, 259 U.S. 419, 464 (1922), the first interstate water rights case in the original jurisdiction to result in a decree. That decree applied priority of appropriation across state lines, as the Court had earlier done in its appellate jurisdiction. Bean v. Morris, 221 U.S. 485 (1911). *Cf.* Washington v. Oregon, 297 U.S. 517, 526 (1936): "The question remains whether the Oregon irrigators as a result of all their acts are taking to themselves more than their *equitable proportion* of the waters of the river, priority of appropriation being the basis of division." (Emphasis added.)

It relates only to the legal effect of the Colorado River Compact, the Project Act, the Limitation Act, and water delivery contracts which became effective on or after June 25, 1929, since it is clear that priority characterized all water rights interstate and intrastate prior to that date. (Rep. 316.)

Furthermore, it is an issue which perhaps need not be decided at all if the Master's conclusion severing the Compact from the limitation, considered in part II of this brief, is reversed. If "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" refers to the lower basin's Article III(a) Compact apportionment, the possibility of a shortage is sufficiently small that decision as to how that shortage might be allocated may be presently unnecessary. The dependable supply of the main river below Lee Ferry, *plus* that available for use on the tributaries, exceeds the Compact III(a) apportionment of 7.5 million acre-feet. (See Calif. Op. Br. 20-21.)

If, however, the Master's severance conclusion is sustained, the priority issue is critical. In that event, the priority issue means more than 600,000 acre-feet of annual consumptive use to California. Proration as applied by the Master to the quantity of water which the lower basin may use from the main river when the Compact ceiling of 8.5 million acre-feet is enforced would give California about 3.8 million acre-feet[5] (44/75 of 6.5 million available from the main river

[5]California would receive less than 3.8 million if the dependable supply will sustain less than the Compact ceiling of 6.5 million acre-feet of consumptive use from the main river. If that supply is 6 million or less, as we believe, California's share under the formula would be 3.5 million or less.

within that ceiling) whereas priority would probably give California 4.4 million acre-feet from the same supply.

The priority issue appears to be of urgent concern to only one party—California. Our adversaries insist that the shortage of which we complain is ephemeral and remote. If they are right, California is in any case assured of the 4.4 million acre-feet which the first term of the limitation specifies.[6] The issue is unique in adversary litigation, because its resolution in California's favor permits California at least 600,000 acre-feet on California's contention, without any other state losing anything on its own contentions.[7]

The basis for the conclusion that interstate priorities do not exist in "Article III(a) water" has never been clearly identified. The Master describes the principle as "sovereign parity" (Rep. 236), and suggests that it is gleaned from the periphery of a Colorado River Compact which he holds otherwise to be irrelevant. The Master applies "parity" only to the "mainstream," and there only to "mainstream" rights with respect to each other, although no one suggests that sov-

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[6]"California cannot complain that these [present perfected] rights are not given sufficient recognition because in its Limitation Act it specifically accepted, as the Project Act required, the 4,400,000 acre-foot allocation, plus one half of the surplus, in satisfaction of 'any rights that may now exist.' So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met." (U.S. Ans. Br. 51.)

[7]Priority would also protect California if the water supply physically available is less than the 8.5 million acre-foot Compact ceiling, 6.5 million of which is from the main river. The "mainstream" supply could drop to about 5.5 million acre-feet before California's priorities up to the 4.4 million acre-feet could be challenged by priorities in Arizona. Calif. Conclusion 7A:201(3), p. VII-4, and table 2, p. VII-6.

ereignty or the Compact under anyone's construction is so confined. The other parties, who support the Master, are not much more specific. Therefore, since the source of "sovereign parity" appears to be a general but otherwise unidentified principle, we turn first to the principles which should control either in the absence of applicable statute or agreement, or if there is a hiatus in the applicable statutes or agreements.

A. In Any Competition of Principles, 100 Years of Experience Has Proved That Parity Must Yield to Priority

If it were clear that Congress had not legislated or the parties had not agreed how interstate shortages in Article III(a) waters are to be allocated, the rule of priority which governed all interstate rights prior to June 25, 1929,[8] must apply: Shortages in "Article III(a) water" are allocated by priority.

If it were clear that Congress had left to this Court the rule to be fashioned with respect to how these interstate shortages are to be allocated, the principles of priority which this Court and other federal and state courts have consistently applied[9] supply the answer: Shortages in "Article III(a) water" are allocated by priority.

If it were concluded that Congress by legislation or the parties by agreement had provided a rule as to how interstate shortages are to be allocated, but so am-

[8]June 25, 1929, is the date of the presidential proclamation which made effective simultaneously the Colorado River Compact (among six states), the Project Act, and the California limitation. (Rep. 26-27.)

[9]See, *e.g.*, Weiland v. Pioneer Irr. Co., 259 U.S. 498 (1922), and cases cited in Wyoming v. Colorado, 259 U.S. 419, 470-71 (1922).

biguously as to leave in doubt what rule they had attempted to state, the experience plus the legislative and judicial wisdom of more than 100 years of western water law provide the answer: Shortages in "Article III(a) water" are allocated by priority.

The cardinal element of priority of appropriation is first in time, first in right. The purpose of priority of appropriation is to protect existing projects. Where its strict application in interstate adjudications does not best serve that purpose, the strict application is modified to suit the purpose.[10]

The proration principle protects no one: Every project exists at the hazard of every other project.

The disagreement in this case relating to the source of title to water rights does not affect the priority issue. The resolution of this issue does not, and should not, turn upon abstract legal concepts concerning source of title.[1] So far as the resolution of the issue depends on principle, the principle comes from the physi-

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[10]Nebraska v. Wyoming, 325 U.S. 589, 618-19, 621-22 (1945). Rep. 326-27.

[1]Endless mischief has been created by mechanically applying legal doctrines in resolving western water controversies. An outstanding example is Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886), in which the majority of the court decided that riparian concepts imported from humid England controlled water rights in arid California. A constitutional amendment, numerous statutes, and extensive litigation have not yet entirely succeeded in rectifying the court's mistake. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 742-55 (1950), for a review of the development of California water law. In sharp contrast to Lux v. Haggin is Mr. Justice Holmes' opinion in Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 345 (1909). Mr. Justice Holmes crisply disposed of an argument that riparian concepts were transported to Arizona by statutory importation of the common law: "[I]t is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."

cal conditions of the region where the principle must be applied.[2] Priority responds to the prevailing conditions, proration does not.

The principles of priority of appropriation make possible the optimum development of the Colorado River system in the lower basin. In the absence of those principles, there would have been no development throughout the area regarded more than a century ago as uninhabitable desert. The fundamental ingredients of that law—first in time is first in right,[3] relation back,[4] and beneficial use[5]—have been adopted by every western state as the essential part of its internal law. They also are an essential part of the reclamation law, with the result that federal-state jurisdictional conflicts, while highly publicized, have been infrequent and incon-

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[2]"The miner's need was more than a convenience—it was a necessity; and necessity knows no law. But conditions were favorable for necessity to make law, and it did—law unlike any that had been known in any part of the Western world." United States v. Gerlach Live Stock Co., 339 U.S. 725, 746 (1950), reviewing the genesis of the priority principle.

[3]One who first initiates a project to put water to beneficial use and proceeds thereafter with due diligence has priority over rights later initiated. In the event of water shortage, its burden is visited in inverse order of the priorities established by the dates of initiation of their respective rights.

[4]A water user is entitled to the full requirement of his project upon its diligent completion with his priority dated back to the first initiation of his right.

[5]Beneficial use is the basis, the measure, and the limit of the appropriation right in every state, as § 8 of the Reclamation Act of 1902 declares shall be true of rights served by federal reclamation projects.

sequential.[6] With one possible exception, it is not neces-

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[6]The most widely noticed case is Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955), approving the Federal Power Commission's license for a hydroelectric development on a non-navigable stream in Oregon over opposition of Oregon. But, with respect to priorities versus proration, article 28 of the approved FPC license provided:

"Any rights to the use of waters in the Deschutes River and its tributaries in connection with the licensee's project under this license shall be subordinate to:

"(i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries for domestic, stock, municipal and irrigation purposes, including the right to store any such waters in the proposed Benham Falls, Post and Prineville reservoirs and in the existing Crane Prairie, Crescent Lake, and Wickiup reservoirs; and

"(ii) The use of additional flows of the Deschutes River and its tributaries pursuant to rights which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock, and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto) the amounts of water to be used under the additional rights, together with the uses under existing rights whatever they may be, not, by reason of the additional right, to exceed these quantities:

"(a) Deschutes River and its tributaries above Cline Falls—entire flow; (b) Squaw Creek—all flows during the non-irrigation season; (c) Lake Creek—20,000 acre-feet annually; (d) Crooked River and its tributaries—all the flows above the highway bridge at the place where U.S. highway 97 crosses the Crooked River Canyon; (e) Crooked River below the highway bridge not to exceed 2,500 acre-feet annually for the proposed Deschutes project domestic water system; and (f) an additional 400 second-feet that may be taken above the licensee's project either from the Deschutes River below Cline Falls or the Crooked River below the highway bridge during the irrigation season." Portland Gen. Elec. Co., 10 F.P.C. 445, 458-59 (1951).

sary to resolve such conflicts here.[7] Necessity created and shaped this body of law; no legislative body has changed it, or ratified any agreement to change it, and no agreement has changed it with respect to "Article III(a) water."

The rationale for the creation of each element in priority of appropriation has been stated in our opening brief;[8] the reasons for the rules have not been and cannot be successfully challenged by any party. One hundred years of history cannot be ignored.

Priority principles do not stop projects from being built. They do permit risk of shortage to be calculated by placing risks primarily upon new projects rather than old ones.

If any doubt remained as to the choice of priority or proration, the foundation principle of equitable apportionment should resolve that doubt. This Court in *Wyoming v. Colorado,* 259 U.S. 419, 465 (1922), adopted the policy of the United States: "to recognize and give its sanction to the policy which each [state] has adopted." In the Colorado River basin the policy

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[7]The only dissent from the principles here stated which requires notice is the apparent contention of the United States that navigable waters are not subject to appropriation (U.S. Ans. Br. 64-65). That gratuitous contention cannot be taken seriously, since most waters of the West are legally navigable, or tributary to navigable waters to which the commerce power of the United States clearly extends. The evidence in this case should have put that contention to rest forever. The Secretary of the Interior has issued several thousand patents of desert land under the Desert Land Act based on express secretarial determinations, repeatedly made, that appropriations from the Colorado River main stream are valid. Such patents have been issued on these determinations in both Arizona and California before and since the enactment of the Project Act. See Calif. Op. Br. A5-6, A10-11; Calif. Finding 6E:101, pp. VI-14 through 16.

[8]Calif. Op. Br. 54-68.

which each state has adopted in its own law is priority (Rep. 22).

With respect to shortages in "Article III(a) water" no reason has been offered for curtailing priorities at state lines. Interstate proration is an anomalous exception to the general rule of priority. Priority prevails, under the Master's decision, (1) in all parts of the lower basin except the "mainstream," (2) on the "mainstream" to determine conflicts between rights below Lake Mead and competing rights above Lake Mead, (3) within each state throughout the lower basin as determined by state law, (4) with respect to federal "mainstream" reservations intrastate, and (5) with respect to "present perfected rights," interstate and intrastate. The United States, Arizona, and Nevada argue to support proration interstate of rights to "Article III(a) water," but none of them have offered any reasonable explanation of who did it, how it was done, or why.

It is conceded that no statute, federal or state, and no agreement, federal or state, expressly abrogated priority or expressly imposed proration in allocating shortages in "Article III(a) water." The parties endorsing proration rest their contention on inference, but they agree neither with the Master nor with each other upon the source of that inference.

Sources for the inference of proration variously relied upon by the Special Master, the United States, Arizona, and Nevada are these: (1) The Colorado River Compact, (2) some of the terms of the Boulder Canyon Project Act, (3) part of the background and history of the Boulder Canyon Project Act, (4) si-

lence (congressional, secretarial, or both), (5) assumed custom, usage, and administrative practice. None of these sources sustain any inference of proration of shortages in "Article III(a) water" interstate.

B. The Colorado River Compact Confirms Priority as the Characteristic of Rights to "Article III(a) Water"

1. *The terms of the Compact explicitly recognize and preserve appropriative priorities as the basis of water rights within each basin*

There are two provisions which are explicit:

(1) *Article III(a).* The Compact provides that the apportionment of 7.5 million acre-feet of consumptive use to each basin from the Colorado River system "shall include all water necessary for the supply of any rights which may now exist." When the Compact was negotiated there were only three kinds of rights in existence in the Colorado River basin:

(a) Appropriative rights;

(b) Rights of federal reservations (characterized by priority at the date of creation of the reservation (Rep. 350-53));

(c) Riparian rights, limited to California, which alone had any riparian elements in its law, and which were and are of no quantitative significance on the Colorado River.

(2) *Article VI.* The Compact provides:

> "Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to *the waters of the Colorado River System not covered by the terms of this compact;*

. . . the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

"Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States." (Emphasis added.)

The Master explains as follows the words which we have emphasized above in Article VI (Rep. 144):

"As between Lower Basin states 'the waters of the Colorado River System [are] not covered by the terms' of the Compact. (Colorado River Compact, Art. VI(a); see Ariz. Exs. 46, 49.)" (Bracketed word inserted by Master.)

"The adjustment of any such claim or controversy by any present method" is a clear reference to the law of equitable apportionment, applied by this Court in the exercise of its original jurisdiction (Rep. 140-41):

"Throughout the Colorado River Basin, when the Compact was negotiated, the law of prior appropriation governed the acquisition of water rights. In 1922, before the opening of the Sante [*sic*] Fe meetings of the Compact commissioners, the Supreme Court had applied the law of prior appropriation as the guiding principle in an equitable apportionment suit on an interstate stream. *Wyoming v. Colorado,* 259 U.S. 419, decided June 5, 1922. As appears from the commissioners' re-

ports, Article III(a) and (b) is intended to prevent the application of the priority rule between the two Basins, a result accomplished by placing limits on the acquisition of appropriative or other water rights in each Basin (Ariz. Exs. 49, 51)."

These express terms of the Compact conclusively negative any contrary inference. So also does the obviously catastrophic consequence of any inference that interstate rights within each basin were destroyed. Even if no express language in the Compact could be found, it is irrational to infer an intent to destroy both existing rights and the basis for acquisition of rights within each basin, leaving nothing to take the place of that which is destroyed.

2. *The Compact provides no "background" principle of parity*

The Master writes:

"[T]he Project Act approved the Colorado River Compact, and thus the Compact provides the background for the enactment of the Project Act. The Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water; priority of appropriation is not an operative factor under the Compact." (Rep. 235.)

The Master himself recognizes that this is not true. "Although Article III(a) and (b) is not expressed in terms of appropriative rights, this is the purport of that Article." Rep. 140.[9] Article III(d), described

[9]To the same effect, see Rep. 196: "The Compact puts an embargo upon the acquisition of appropriative rights in excess of the limits set by Article III(a) and (b). The first call upon any remaining water goes to supply Mexico. . . . In effect, Article III(a) and (b) establishes quotas of allowable appropriations."

as the "guarantee of the Compact" (Rep. 144), established a priority in favor of requirements below Lee Ferry for the purpose obviously of satisfying "rights which may now exist" recognized in both the Compact and California limitation in identical terms.

The Compact is instinct with the principle of priority. Article III(c) recognizes a priority in the rights covered by the III(a) and (b) quantities, as against rights dependent on existence of a surplus in excess of those quantities. This III(c) surplus is to be sacrificed to Mexico before rights in the other two categories are to be diminished.

The Master himself recognizes that priority, not parity, characterizes rights in "Article III(a) water" when he finds in both Compact and limitation a word clearly there, although unstated—"first." He says these words mean the "first" 7.5 million acre-feet. Rep. 305-06.

"First" as used by the Master takes its meaning from principles of priority. It does not mean the "first" 7.5 million acre-feet used in the first months of the year, but "first" referring to the first or prior rights. The water used by a long-established project in December is within the "first" 7.5 million acre-feet, although the water used earlier in January by a new project is not. The Master has thus proved, without conceding, that priority principles are implicit and unavoidable, and that these principles are the essential background against which every document in the law of the river must be read if the documents are to make sense.

C. The Project Act Did Not Substitute Proration for Priority in Interstate Rights to "Article III(a) Waters" nor Did It Authorize the Secretary of the Interior To Do So

The Master and all parties who have filed briefs substantially agree that priorities control all intrastate water rights. The only material disagreements relate to the source of the right (federal or state) and whether priority is determined by a state appropriation or by a federal contract. These differences have no apparent interstate consequences. In terms of the recommended decree, the major controversy appears to be whether article II(C)(1) should specify "state law" (the Master's term) or "applicable law" (the United States term). The United States does not say what substantive difference this amendment would make.[1]

Are priorities in "Article III(a) water" limited to their intrastate effect? The Compact can have no such effect within the lower basin. Neither can the Project Act.

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[1]The Master concludes that § 18 of the Project Act "provides in effect that state law shall govern water rights and priorities intrastate." Rep. 240. Arizona sometimes agrees (Ariz. Op. Br. 99) and sometimes disagrees with this result (Ariz. Ans. Br. 165), but offers no objection to article II(C)(1) of the recommended decree. Rep. 350. Neither does Nevada. The United States objects to the provision of article II(C)(1) which enjoins the United States from releasing water for "any use or user in violation of state law" but indicates that the prejudicial effect of this asserted error would be cured by substituting "applicable law" for "state law." U.S. Op. Br. 24 & n.5. The United States by footnote suggests that "presumably" the "rule of ratability would apply" as between contracts with Arizona projects since they make no provision as to relative priority. *Id.* at 30 n.10. The United States urges that priorities attaching at the date of execution of contracts determine relative rights of appropriators above Lake Mead and contractees below Lake Mead, at least intrastate, but fails to explain how water rights of contractees who have priorities vis-a-vis upstream appropriators are to be prorated vis-a-vis each other. See Calif. Ans. Br. 44-45.

1. *Section 5 provides no basis for a pro rata interstate "contractual allocation scheme"*

The search focuses on section 5. If the Project Act authorized the Secretary to create a "contractual allocation scheme" which stops priorities in "Article III-(a) water" at state lines, it did so in section 5 (first paragraph), or not at all. Section 5 is the source and the measure of whatever authority Congress delegated to the Secretary to affect water rights—intrastate or interstate—by contracts. Simply reading its text establishes that section 5 cannot support even a reasonable argument that Congress conferred on the Secretary a power it disclaimed in itself to allocate water or water shortages by a "contractual allocation scheme" with the attributes of an interstate compact.[1a] The other sections of the Project Act, its legislative history, and its administrative construction overwhelmingly reinforce the conclusion from the textual analysis.

The terms of section 5 of the Project Act are simple and straightforward. Section 5 authorizes the Secretary to contract with water users for storage of water

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[1a]Water delivery contracts authorized by § 5 of the Project Act do not create any interstate "allocation." We here use the word "allocation" to describe the creation of any interstate right (whether characterized by parity or priority) like that created by an interstate compact. Article III(a) of the Colorado River Compact is an "allocation" in this sense. In a different sense, an appropriation made under state law and given recognition across state lines by the doctrine of Wyoming v. Colorado, 259 U.S. 419 (1922), may be an "allocation" both to the appropriator and to the state whose rights are recognized in the original jurisdiction. Likewise a contract with a water user who thereby acquires a right to water stored in Lake Mead may be called an "allocation." However, it is only the assertion that the Secretary made compact-like "allocations" by secretarial "commitments" to states which creates any issue in this case.

in Lake Mead and delivery of the water stored at agreed points on the river on charges that will defray expenses of the United States. The contracts shall be "for permanent service" and shall "conform to" section 4(a) of the Project Act. No person may have the use of water stored without a secretarial contract.[2]

The "permanent service" requirement was undoubtedly designed to assure, so far as humanly possible, the stability of deliveries from Lake Mead storage (see Rep. 238-40). The need for stable water deliveries shaped the law of prior appropriation (*supra* pp. 39-42). Parity impairs stability of water deliveries and thus tends to defeat permanent service. Contracts for permanent service should not be transmuted to contracts for impermanent service by permitting "commitments" for future section 5 contracts to dilute existing contracts for "Article III(a) waters."

Section 5 presents no difficult questions of construction in the absence of an effort to convert it to a pur-

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[2]Section 5: "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

pose for which it manifestly was not intended. It is impossible to find in it the authorization for a contractual allocation scheme which establishes proration—interstate only—of shortages in "Article III(a) water." There are at least three major obstacles.

a. The "contracts" asserted to create the "contractual allocation scheme" are not contracts authorized by section 5

The scheme derives, in essential part, from the 1944 Arizona contract, concerning which the United States says (U.S. Ans. Br. 47-48):

> "It is our understanding that this contract with Arizona does not by itself authorize the actual delivery of water in compliance with Section 5 of the Project Act, since that Section requires that the contracts be entered into with the actual users of the water. Rather, this contract is in the nature of a commitment by the Secretary to enter into contracts with users in Arizona up to the limit of 2,800,000 acre-feet. In this sense it is an allocation by the Secretary of that amount of water for future contractual use."

The United States is manifestly correct that the "contract" fails to meet the requirements of section 5, but the United States cannot find in the statute or anywhere else authority for a "commitment" which is "in this sense" an "allocation."

Even if the "commitment" is a binding obligation, to which this Court should give full effect, it cannot be a commitment to do more than to write section 5 water

delivery contracts.[3] These contracts are characterized by priority, not parity. A commitment to do any act cannot have greater consequences than the act itself.

b. No term in section 5 curtails priorities at state lines

Section 5 authorizes contracts for storage and delivery at agreed points of stored water. Nothing in the language suggests a difference between two contracts to serve two users, both of which are on the Arizona side of the river, and two contracts to serve two users, one of which is in California and the other in Arizona. If intrastate priority becomes interstate parity in "Article III(a) water," nothing in section 5 prescribes that result.

Nor does the requirement of section 5 that contracts shall "conform to paragraph (a) of section 4" produce that result. We agree with the Master's construction of that quoted phrase (Rep. 163): "In so far as Section 5 refers to the second [tri-state compact] paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the [three] states." The Master rejects Arizona's contention that this paragraph established a mandatory formula controlling the Secretary's contractual authority.[4]

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[3]"Commitment" is not an apt description for the 1944 Arizona contract since the Secretary does not purport to commit himself to do anything at all. He might do nothing, or he might dispose of all waters covered by his "commitment" by creating one or more federal reservations, which, by the terms of article 7(*l*) of the 1944 contract would discharge *pro tanto* the obligations under the commitment. The Secretary has never been asked to write a contract for the proposed Central Arizona Project, and indeed, if the diversion for the project is above Lake Mead, he could write no such contract under the authority of the Project Act.

[4]Rep. 162-63, 202. We treat the legislative history refuting Arizona's argument in appendix E in our separate appendix volume.

Had there been a seven-state Colorado River Compact ratified within six months of passage of the Project Act with neither the tri-state compact nor California limitation, "conform to section 4(a)" in section 5 would have meant "conform to the Colorado River Compact" and nothing more. If the limitation is effective,[5] it means "conform to the Colorado River Compact" (a mandate repeated in section 8(a)) and "conform to the California limitation."

"Conform to" the limitation does not mean parity. The limitation is not a grant to California (Rep. 231) or to any other state. The limitation is written in the unmistakable language of appropriation—not parity. The limitation places a ceiling on the aggregate of California's "rights which may now [June 25, 1929] exist" and California's rights to "initiate" or "perfect" rights thereafter.[5a] The aborted tri-state compact, even if effective, could not be construed to make an allocation to three states on a parity, since no allocation is stated or

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[5]We excepted to the Master's determination "that the limitation upon use of water in California set out in the first paragraph of section 4(a) of the Project Act and accepted by the reciprocal California Limitation Act continues operative despite the Report's conclusion that Arizona effectively ratified the Compact on February 24, 1944, thereby effecting seven-state ratification of the Compact (Report, pp. 27, 166-67)." Calif. Exception IV-3, p. 24. We have not argued this exception, since it would not appear to result in a more favorable treatment for California than acceptance of the limitation and a seven-state Compact, both properly construed. Our contracts were all executed when the limitation was clearly applicable to California rights.

[5a]Consistently with the Master's construction of the Colorado River Compact (Rep. 141-42, 149) and the limitation on California (Rep. 231), the quantities specified with respect to Arizona and Nevada in the second paragraph of § 4(a)—if the "conform to" language in § 5 has any relation at all to that paragraph—can mean no more than limitations on appropriations of those states, not "a source of rights as against the other Lower Basin States" (*ibid.*).

intended to any states other than Arizona and Nevada. Priority of appropriation would still be the basis of California's right.

c. The contracts authorized by section 5 are limited to "water stored" in Lake Mead

The "contractual allocation scheme," of which the "commitment" to Arizona is an essential part, is an invention which requires "water stored" in Lake Mead to be coextensive with the water to be allocated. This is an impossibility for at least two reasons relating to the definition of "water stored" in section 5:

(1) "Water stored" in Lake Mead cannot be the "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" to which the California limitation refers. This is true whether Article III(a) of the Compact includes both the main river and tributaries in the lower basin, as the Master holds, or whether it is applicable only to the main river in the lower basin beginning at Lee Ferry, as Arizona argues. The Master seeks to hurdle this obstacle to the "contractual allocation scheme" by construing the limitation to refer to 7.5 million acre-feet from a newly defined "mainstream" which begins at Lake Mead. This is a formidable hurdle. No one can imagine any compact which would divide waters between two basins or territories which are not contiguous by 275 miles, the length of the Colorado River between Lee Ferry and Lake Mead.

Although the Master breaks the "conform to" link between section 5 and the tri-state compact authorization in section 4(a) (Rep. 162-63), he nevertheless welds the tri-state compact into section 5 by a discovery that the Secretary voluntarily did what neither section

5 nor 4(a) commands him to do: The Secretary imposed on the states an allocation that Congress authorized the states to impose upon themselves, substantially effectuating by contracts the unratified tri-state compact. Rep. 222-24.

That tri-state compact, if ratified as the Master has rewritten it, would be the strangest interstate agreement ever executed. None of the three compacting states are obligated to respect the compact apportionments, but all are left free to make diversions unlimited by the compact from above the "mainstream" to which the compact alone applies. The compact would lay the foundation only for litigation, since it would settle no interstate right except as the states might choose "mainstream" points of diversion. Can anyone seriously suggest that if the tri-state compact actually authorized by section 4(a) had been accepted by the states, the Central Arizona Project diverting above Lake Mead would be exempt from its scope? This analysis proves that section 5 and section 4(a) were never intended to be and were never conceived to be coextensive. Section 5 applies to "water stored" in Lake Mead, section 4(a) to the 7.5 million acre-feet apportioned to the lower basin by the Colorado River Compact and the "excess or surplus" above that apportionment. The attempt to make sections 5 and 4(a) mirror images of each other does violence to the language and the purpose of both sections.

(2) "Water stored" in Lake Mead cannot include all the water used from the Master's "mainstream" (Lake Mead and below). By no one's definition of "water stored," which section 5 authorizes the Secretary to contract to deliver to users, does it include either inflow from tributaries which reach the main

stream below Lake Mead, or water required to satisfy natural flow rights which existed before Hoover Dam was authorized.

Nevertheless, the Master's "mainstream" invention is essential to the "contractual allocation." Without his invention the resource to be allocated cannot be coextensive with the contract device which is the exclusive basis of his allocation.

The Master justifies including the inflow from the Bill Williams in the "water stored" and subjecting it to secretarial allocation because (in part) he says, the Project Act treated it as *de minimis*. Rep. 184. In fact, its inflow has averaged about 117,800 acre-feet per year (see Rep. 121), which is almost twice the amount of the combined diversion requirements of three of the five main stream Indian reservations adjudicated by the Master (Decree art. II(C)(2)(a)-(c), Rep. 350-51).

The Master's inclusion of the water required to satisfy natural flow rights with "water stored" has no justification whatever. That "water stored" does not include water required to satisfy natural flow rights is firmly established by (1) the law of water rights; (2) the administration of the Project Act; (3) the construction of that act by this Court.

Stored water is the water made available for use by a storage reservoir, not available for use from the previously unregulated natural flow.[5b] See *Gila Valley Irr.*

[5b]See S. REP. No. 592, 70th Cong., 1st Sess., pt. 1 (March 20, 1928), on the fourth Swing-Johnson bill at 4: "The . . . amendment to the effect that no charge shall be made for irrigation water through the all-American canal is to avoid duplication of charge on the lands. *These lands already have a water right,* and since they are to reimburse the Government under the reclamation law the act should be perfectly clear that the lands are not to pay additional charges for water service." (Emphasis added.)

Dist. v. United States, 118 F.2d 507, 508-09 (9th Cir. 1941). The definition of stored water there stated is from the decree entitled Globe Equity No. 59 (Ariz. Ex. 103 (Tr. 382)), where it is applied to the San Carlos Reservoir on the Gila River.[6]

The same meaning was given to the term by the Acting Secretary of the Interior when he advised Palo Verde Irrigation District (Calif. Ex. 351, Tr. 9929):

> "Section 5 of the Boulder Canyon Project Act approved December 21, 1928 (45 Stat. 1057), provides that the Secretary of the Interior is authorized, under such general regulations as he may prescribe, to contract for the storage of water and for its delivery at such points on the river as may be agreed upon, to be used for irrigation and domestic purposes. Contracts for the purchase of stored water for the uses stated shall be for permanent service. No person, irrigation district, or other entity shall have, or be entitled to, the use of stored water for any purpose, except upon execution of the necessary contract.
>
> "If no stored water is required by the Palo Verde Irrigation District, no contract between that district and the United States will be required. Those possessed of prior rights to the unregulated flow of the river will be privileged to continue the

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[6]The Court employed a somewhat different definition of stored water in Nebraska v. Wyoming, 325 U.S. 589, 631 (1945). The Court recognized, however, that "stored water" is not all the water which flows through a dam impounding a storage reservoir. After citing the *Gila Valley* case, the Court indicated that the definition employed on the North Platte was "perhaps a departure from the ordinary meaning of storage." *Ibid.*

enjoyment of those rights without interference by storage in the Boulder Canyon reservoir."

On August 25, 1931, Dr. Elwood Mead, Commissioner of Reclamation, wrote to W. P. Whitsett, Director, Metropolitan Water District, as follows:[6a]

> "My attention has been called to the use of certain extracts from my letter of February 28 to Mr. S. C. Evans, Executive Director, Boulder Dam Association, in reply to his letter of February 3, which, taken separate from their context, are being construed by opponents of the Metropolitan District as casting doubt on the water right conferred by your contract with the United States. The interpretation which apparently is being attributed to these extracts was not intended. The letter of February 3 from Mr. Evans and my reply of February 28 relate chiefly to the design and construction of Hoover Dam. The matter of storage and distribution of water is involved only incidentally.
>
> "The extracts to which reference is made read as follows:
>
> " 'You will, however, realize that authoritative answers to the various phases of the matter can only be given by the courts. It might not be amiss also to bear in mind that the Secretary of the Interior has no authority to designate the

[6a]The letter is Calif. Ex. 7703, incorporated in the California Offer of Proof, the documents which are before the Court as volume 25 of the California exhibits. Arizona faults us for referring "to these excluded documents as if they had been admitted in evidence as competent." Ariz. Ans. Br. 26. All of the documents are certified; their contents are judicially noticeable. United States v. Louisiana, 363 U.S. 1, 12-13 (1960).

ownership of waters released from the Hoover Dam.'

"The last sentence above quoted was intended to apply to vested and inchoate rights in the unregulated flow of the Colorado River, with which it had been suggested storage in the Hoover Dam might interfere. My letter intended to convey the view that determination of such vested and inchoate rights in the unregulated flow of the river is a matter for the administrative officers of the State and the courts. The disposition of water stored in Hoover Dam, however, stands upon an entirely different basis. Section 5 of the Boulder Canyon Project Act expressly authorizes the Secretary of the Interior to contract for the storage of water in the reservoir and for the delivery thereof at such points as may be agreed upon. Accordingly there can be no doubt of the right of the Government to dispose of waters stored in the reservoir.[6b]

"Secretary Wilbur has heretofore requested the State to recommend an allocation of water designed to cover the natural flow as well as the floods stored in the reservoir in order that the whole subject-matter may be covered.

"This letter is written in order that you and others interested may be more fully informed regarding what was intended by the quoted portion of my letter of February 28.

Sincerely yours,

ELWOOD MEAD, *Commissioner.*"

[6b](Footnote ours.) Metropolitan's 1930 contract (art. 6) had been "without prejudice to any additional rights which the District may have or acquire in or to the waters of the Colorado River . . . ." Ariz. Ex. 38, Tr. 251.

The judicial definition by this Court is found in *Arizona v. California,* 298 U.S. 558, 570 (1936):

> "Without more detailed statement of the facts disclosed, it is evident that the United States, by Congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated.[7] The defendant states contend, and Arizona does not deny, that the natural dependable flow of the river is already over-appropriated, and it does not appear that without the storage of the impounded water any substantial amount of water would be available for appropriation."[8]

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[7](Footnote ours.) The Master sometimes recognizes the distinction between the water subject to contracts and the water not so subject: "[T]he [Project] Act clearly contemplates that *water unappropriated* as of that date [June 25, 1929] is to be made available for use within a state only if the Secretary, within his discretion, contracts for the delivery of the water to that state." (Rep. 153; emphasis added.) He also refers to the Secretary's power "to allocate the *unappropriated water* impounded in Lake Mead." (Rep. 210; emphasis added.) He inconsistently disregards the distinction when he asserts that "the Project Act was designed by Congress to establish the authority for an allocation of *all of the available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead*" (Rep. 152; emphasis added), and it is the latter concept which is embodied in his recommended decree.

[8]It is inconceivable that Mr. Justice Stone misspoke himself when he said "appropriation" or intended to use the term to describe a right devoid of priority. He defined the term in the same opinion (298 U.S. at 565-66):

> "It is conceded both by the bill of complaint and the returns that all the states in the Colorado River basin except California, and California so far as material to the present case, apply the doctrine of appropriation to the waters of flowing streams in their respective territories. Under this

Arizona does not dispute the Secretary's definition of "water stored" as the term stood in the statute in 1930 when the Secretary interpreted section 5. See pp. 57-58 *supra*. She seems to argue that the Palo Verde contract of 1933 somehow amended the statute. Arizona points to the recital in that contract that it was to the mutual interest of the parties that "the rights of the District in and to waters of the river be hereby defined." Arizona says that the district's "rights thus defined were to *stored* water, not to *natural flow*." Ariz. Ans. Br. 23.

The Palo Verde contract itself refutes this argument. In it the Secretary undertakes, as in the other contracts, to deliver to the district from storage "so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows . . . ." Rep. app. 424.

"All other waters diverted for use of the District from the Colorado River" refers to water diverted by

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doctrine, diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence."

Palo Verde which is not "water stored" and delivered from Lake Mead; "all other waters" are waters which Palo Verde receives by virtue of its preexisting right in natural flow. Arizona says that the phrase "all other waters" was "inserted in the Palo Verde contract (and the other California water delivery contracts) to make certain that all Colorado River water diverted by the District, whether consisting solely of water released for delivery by the United States at the diversion point specified in the Palo Verde contract or made up in part of water released for other purposes or diverted by the District at other diversion points, should be charged to the District under its contract." Ariz. Ans. Br. 29.

Arizona's assertion is clearly wrong; it cannot bear any logical analysis. How could "water stored" in Lake Mead become "other waters" not stored in Lake Mead because diverted at a point other than that specified in the Palo Verde contract? Or, to put a harder question, how do "other waters" from the Bill Williams River, whose confluence with the main river is below Lake Mead, become "water stored" in that reservoir whatever may be the point of diversion?

Finally, the consequences of treating "water stored" as all water in the river from Lake Mead to Mexico have violently inequitable results, quite the converse of anything appropriately described as "sovereign parity."[9]

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[9]The principle of sovereign parity has received expression in two interstate cases: "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." Kansas v. Colorado, 206 U.S. 46, 97

Arizona conceded to California 2.9 million acre-feet of natural flow rights as of 1929.[10] Our uncontroverted evidence shows our 1929 rights were much greater than Arizona conceded,[10a] but in any case if California now uses 4.4 of "III(a) water" no more than 1.5 million acre-feet of that quantity is stored water. Arizona's natural flow rights were about 250,000 acre-feet, and if she receives 2.8 million acre-feet, 2.55 million acre-feet of this quantity is "water stored as aforesaid."

Thus, while the Master's formula gives to California 44/75 of the first 7.5 million acre-feet of all water available for consumptive use from the "mainstream," or 58.6 per cent, most of this (at least 29/44) is represented by natural flow rights. But of the incremental or stored water, he gives Arizona approximately 58.6 per cent if the total supply reaches 7.5 million acre-feet for allocation. If, more realistically, the main stream supply is only 6 million acre-feet, Arizona's share of this stored

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(1907). In Wyoming v. Colorado, 259 U.S. 419, 465 (1922), the Court explained its statement in Kansas v. Colorado: "What was there said about 'equality of right' refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system." The rule then applied was priority of appropriation across state lines. 259 U.S. at 470.

[10]Arizona alleged "that on June 25, 1929, projects had been constructed and were in operation in California for the irrigation of no more than 473,500 acres of land which required a net main stream depletion of about 2,902,000 acre-feet of water per annum." Ariz. Reply to Calif. Answer, par. 28(b), p. 26. Arizona calls this an "argumentative allegation" which we misinterpret and to which Arizona, because this is an original case, should not be held. Ariz. Ans. Br. 103 n.116.

In Colorado v. Kansas, 320 U.S. 383, 396 (1943), the Court said the force of Kansas' evidence was weakened by Kansas' allegations in Kansas v. Colorado, 206 U.S. 46 (1907).

[10a]See Calif. Op. Br. 12 n.5.

water under the decree is 69.8 per cent and California's only 21.8 per cent.[11]

No one has offered any explanation whatever of why the Arizona delegation in Congress opposed the Project Act, why Arizona sought to upset it in this Court, if this is truly its consequence.

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[11]See Calif. Op. Br. 265:

ALLOCATIONS OF BENEFITS OF STORAGE RESULTING FROM THE MASTER'S FORMULA

A. If the supply will sustain only 6 million acre-feet of consumptive use:

State	Allocation	Use of natural flow	Incremental use of new water	Percentage of total incremental use of new water
Arizona	2,240,000	250,000	1,990,000	69.8
California	3,520,000	2,900,000	620,000	21.8
Nevada	240,000	0	240,000	8.4
Total	6,000,000	3,150,000	2,850,000	100

B. If the supply will sustain 7.5 million acre-feet of consumptive use:

State	Allocation	Use of natural flow	Incremental use of new water	Percentage of total incremental use of new water
Arizona	2,800,000	250,000	2,550,000	58.6
California	4,400,000	2,900,000	1,500,000	34.5
Nevada	300,000	0	300,000	6.9
Total	7,500,000	3,150,000	4,350,000	100

ALLOCATION OF SHORTAGES IN STORED WATER, CONTRASTED WITH ALLOCATION OF BENEFITS OF STORAGE, RESULTING FROM MASTER'S FORMULA

State	Percentage of shortage borne	Contrasting percentage of allocation of new water: If supply is 6 million	Contrasting percentage of allocation of new water: If supply is 7.5 million
Arizona	37⅓ (28/75)	69.8	58.6
California	58⅔ (44/75)	21.8	34.5
Nevada	4 (3/75)	8.4	6.9
Total	100	100	100

2. *Provisions of the Project Act other than section 5 negative proration in any "contractual allocation scheme"*

The arguments of the opposing parties center on various attempts (1) to explain away sections 18, 14, and 8(a) of the Project Act; (2) to draw inferences from sections 8(b) and 6 to support the Master's conclusions.

a. Sections 18, 14, and 8(a) of the Project Act are irreconcilable with a pro rata "contractual allocation scheme"

Section 18 of the Project Act was the basis of this Court's holding, expressly identified by Mr. Justice Brandeis as holding, "that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries," *Arizona v. California,* 283 U.S. 423, 464 (1931). Arizona and the United States insist that this is not the holding, although Mr. Justice Brandeis said it was.

It is only useful to reenter this argument to reiterate that the Court called it a holding, and that this statement is the Court's stated reason for its decision. Section 18 was quoted and relied on for that result. If the Court were wrong, can anyone explain any conceivable function for the final provision of section 18: "except as modified by the Colorado River compact or other interstate agreement"? What provision in the Colorado River Compact determines *intrastate* rights, or what prompted the odd notion that any other interstate agreement might do so? If the Master's view that sec-

tion 18 has only intrastate effect is correct, the Court erred in finding it even relevant to the problem.[12]

The unanswered question remains: If section 18 is not to be given the construction accorded it by the Court in the first Colorado River suit brought by Arizona, what is the function of that section?

There is an equally significant silence on the part of our opponents about section 14, which makes the Project Act a supplement to the Reclamation Act of 1902 and its amendments and supplements.[13] Section 8 of the Reclamation Act of 1902 is quoted by the Master and relied upon, along with section 18 of the Project Act, for the conclusion (incorporated in the recommended decree) that state law governs rights and priorities among intrastate users. Rep. 217-18.

Two cases in this Court, one before and one after passage of the Project Act, expressly take the view that section 8 has interstate effect: *Wyoming v. Colorado,* 259 U.S. 419, 463 (1922); *Nebraska v. Wyoming,* 325 U.S. 589, 612-14 (1945).

Section 8(a) of the Project Act is perhaps even more significant, since it leads Arizona and California to something close to agreement about its purpose. Sec-

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[12]Arizona castigates us for relying on Senator King, the author of § 18, "who bitterly opposed the Swing-Johnson bills as providing for an interstate allocation of water in violation of state sovereignty, when California's Congressman Swing and Senator Johnson, the bills' authors, never denied this would be their effect, never attempted to modify those provisions which Senator King found obnoxious, but instead pushed the legislation through to final passage." Ariz. Ans. Br. 10. In fairness Arizona should have added that Senator King voted for the Project Act. 70 CONG. REC. 603 (1928).

[13]United States v. Arizona, 295 U.S. 174, 183 (1935), applies this rule to the Project Act. See Calif. Op. Br. 144-45.

tion 8(a) subjects, *inter alia,* "all users and appropriators" to the Colorado River Compact, anything to the contrary in the act notwithstanding. The term "appropriators" suggests at least an apprehension that there might be appropriators. Arizona says that this upper basin amendment was designed to protect the upper basin against "persons claiming rights" to more water than specified in the Compact. Ariz. Ans. Br. 16.

Arizona is correct, but she misses the important point. There was never any doubt, at least after the decision in *Wyoming v. Colorado,* 259 U.S. 419 (1922), that there were appropriators, and that there would be additional appropriators, particularly in Arizona. The easy solution would have been to provide that appropriation was abolished, but the Project Act did not say so, and what is said in section 8(a) is inconsistent with any notion that the Project Act had somehow inferentially prescribed that abolition.

b. No inference from sections 8(b) and 6 supports any "contractual allocation scheme"

The inference Arizona and the United States would draw from section 8(b) is unwarranted. This section provides that a future two-state or three-state compact relating to division of the benefits from the use of water, including power, shall be subject to earlier executed contracts under section 5. The inference they would have the Court draw is that Congress thus recognized that section 5 authorizes an interstate allocation based on proration.

In fact, section 8(b) is a wise, proper, and necessary provision. A compact should not attempt to alter property rights earlier established by section 5 con-

tracts with water users, but this does not by any inference conceivable convert the authorization to write section 5 contracts into authority to create a compact-like interstate allocation.

Section 8(b) has never been recognized as having the effect which our adversaries seek to give it. If they were correct, the secretarial "commitment" to execute water delivery contracts is beyond the power even of an interstate compact to alter. Yet both the Master and the United States note that this suit is here because efforts at settlement have been unsuccessful. No one has supposed that settlement by compact was statutorily foreclosed ever since secretarial "commitments" were executed.

The United States and Arizona emphasize an argument based on section 6 of the Project Act: Satisfaction of "present perfected rights in pursuance of Article VIII of said Colorado River compact" as a function to be served by Hoover Dam implies a refusal to recognize rights which do not satisfy the definition of "present perfected rights." U.S. Ans. Br. 49-50; Ariz. Ans. Br. 53-57.

"Present perfected rights" was written into section 6 as an amendment insisted upon by the upper basin. The purpose is clear: the provision says, in effect, that Lake Mead is *the* reservoir to which Article VIII of the Compact refers, and it is to be used for the purpose Article VIII describes—that is, to satisfy lower basin present perfected rights to the end that they

may not be asserted against the upper basin.[14] Thus, it is perfectly clear that section 6 means what it says, and is a direction that Lake Mead is to be used to honor present perfected rights. Section 6 supports no inference whatever that perfected rights or any other rights within the lower basin are destroyed or impaired.

The Master's conclusion permits a dubious inference to override a clear mandate, which is anything but inferential. The mandate, in section 18, is described by the Master with complete accuracy except for his discovery of the word "intrastate" (Rep. 218):

> "The fact that the Project Act is denominated as a supplement to the Reclamation Acts buttresses the conclusion, apparent from the plain language of Section 18 itself, that state law governs rights and priorities among *intrastate* users." (Emphasis added.)

The inference, however, leads the Master to qualify this mandate, preferring a junior right, "perfected" on June 25, 1929, to a senior right not "perfected" on that date. This is, as he says, "in certain particulars inconsistent with principles of priority of appropriation." Rep. 234. The inference thus overrides the

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[14]Article VIII (first paragraph) of the Compact provides (Rep. app. 376):

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. *Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.*" (Emphasis added.)

mandate of section 18 which is prefaced: "Nothing herein shall be construed . . . ."

Should Congress have said, "Nothing herein, including inferences subsequently discovered, shall be construed . . . ."?

The inference which our adversaries would draw from section 6, insofar as it is offered to support the Master's conclusion, falls far short of achieving that purpose even if valid. The Master does not hold that all priorities except "present perfected rights" are abolished. To the contrary, he holds that priorities of rights other than "perfected rights" survive but are operative only intrastate. The abolition of their interstate effect is accomplished, say our opponents, by a provision (section 6) which Arizona elsewhere stoutly argues has only interbasin and not intrabasin significance. See Ariz. Op. Br. 46-56; Ariz. Ans. Br. 55-57. The argument disproves this inference.

3. *The legislative history of the Project Act confirms the nonexistence of the "contractual allocation scheme"*

Reference to the legislative history of the Project Act confirms that (1) Congress did not make an interstate allocation of "Article III(a) waters" and did not authorize the Secretary to do so; (2) Congress did not abrogate priority principles interstate and did not authorize the Secretary to substitute proration for priority as the guiding principle for distributing shortages of "Article III(a) waters" interstate.

a. No federal allocation was authorized

The legislative history of the Project Act leaves no room for Arizona's argument that Congress intended

to impose a federal apportionment of III(a) waters upon the states, either directly or by authority delegated to the Secretary.[1]

Members of Congress who shaped the Project Act were agreed that interstate compact or equitable apportionment by this Court were the only ways in which an interstate allocation could be accomplished. The assumption of the states and of Congress was made explicit in the closing debates by Senator Bratton, one of the principal architects of the provisions of section 4(a):[2]

> "There are only two ways known to me through which title to water of an interstate stream, either for purposes of irrigation or development of power, may be adjudicated. One is by a compact or agreement—the method sought to be followed in this case—and the other is by a decree rendered in a suit instituted originally in the Supreme Court of the United States."

The Arizona assertion that "no one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states" (Ariz. Ans. Br. 35) is demonstrably wrong.[3] Supporters of the bills consistently and often pointed out that the bills did not

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[1]Ariz. Ans. Br. 35, 43-44.

[2]70 CONG. REC. 330-31 (1928). Senator Bratton's view was shared by all of his contemporaries in Congress who spoke upon the subject. We collect pertinent legislative references on this point in appendix A in our separate appendix volume.

[3]In our answering brief we cited representative statements of authors and proponents of the bills refuting Arizona's statements. See Calif. Ans. Br. 51-56. Appendix B to this brief is a compilation of pertinent legislative history on this subject.

purport to make or authorize any kind of federal allocation.[4]

Arizona's assertions to the contrary are based upon extracts from the legislative history which, in context, are not relevant to the points for which Arizona cites them. Arizona says that the Project Act was passed over the "bitter cry of the opposition" that "this federal allocation" was unconstitutional (Ariz. Ans. Br. 35). She implies that "this federal allocation" was the California limitation and the tri-state compact authorized by section 4(a) transported into federal water delivery contracts by the "conform to" language of section 5. But the numerous extracts Arizona cites (Ariz. Ans. Br. 35-43) are wholly unrelated to those provisions of sections 4(a) and 5. No one found Arizona's "federal allocation" in the limitation provision, the tri-state compact authorization, or the future water delivery contracts. The conversation Arizona cites was primarily about congressional approval of the Colorado River Compact without seven-state ratification.[5]

Senator Hayden's "bitter cry" was not about a "federal allocation" by the limitation, the tri-state compact, or the water delivery contracts. His cry was that any attempt to effectuate the Colorado River Compact

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[4]Provisions of the bills which made the Colorado River Compact effective without seven-state ratification were attacked on the ground that congressional approval of the Compact without unanimous ratification amounted to a "federal allocation" of water. Sponsors of the legislation refuted that objection by repeating the truism that no state could be bound by a compact without its consent, an answer affirmed by Mr. Justice Brandeis in Arizona v. California, 283 U.S. 423, 462 (1931). See app. B.

[5]In appendix C to this brief we put a representative number of Arizona's selections in their context.

without Arizona's ratification amounted to a federal allocation and as such was unconstitutional. Senator Hayden fought every effort to condition the effectiveness of the act upon less than seven-state Compact ratification[5a] because Arizona could thus stop authorization for the dam by withholding her own ratification of the Compact. Arizona could retain her favorable bargaining position in negotiating an intra-lower basin compact only so long as California's efforts to obtain Hoover Dam were thwarted.

Senator Hayden knew that the limitation provision and the tri-state compact authorization did not impose a federal allocation upon the states directly or indirectly. He voted against the bill after the mandatory tri-state compact authorization was withdrawn.[6]

If Congress in the Project Act had abrogated priorities in the lower basin and had apportioned lower basin waters or authorized the Secretary to institute a pro rata apportionment of those waters, Senator Hayden should have announced a great Arizona victory. He did no such thing. In 1930, he pleaded with Congress not to appropriate funds for the construction of Hoover

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[5a]See, *e.g.*, 70 CONG. REC. 388-94 (1928).

[6]70 CONG. REC. 603 (1928). The rejected version of the tri-state compact (Calif. Ex. 2011, Tr. 11,173) would indirectly have effected an allocation because the Project Act would not have become effective without ratification of the tri-state compact. Even as it was originally drafted, however, it did not impose a federal allocation. By its terms ratification by the states of the tri-state compact, as well as the Colorado River Compact, was a condition to effectiveness of the act; those allocations (to Arizona and Nevada only, with no allocation to California) were not imposed unilaterally by Congress, but were to become operative only by the action of the state legislatures. See Calif. Op. Br. 183-85.

Dam,[7] explaining that if the dam were built, California's accelerated appropriations would give California an undue share of the waters of the river. Senator Hayden told the Senate committee which held hearings on the appropriation bill why the negotiation of an interstate compact dividing lower basin waters was necessary to Arizona after the Project Act had been enacted:[8]

> "Senator GLASS. Do you construe the provision of the law which you have just read so as to make the whole plan contingent upon the completion of the agreement?[9]

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[7]Pursuant to § 4(b) of the Project Act, the Secretary of the Interior had executed power contracts to provide adequate revenue to insure reimbursement to the United States for the cost of the dam. The contracts were expressly conditioned upon the appropriation of funds by Congress for construction of the dam and were to become effective "as soon as the first Act of Congress appropriating funds for commencement of construction of Boulder Canyon Dam has become law." See arts. 26 and 20 in the Secretary's contracts with Los Angeles and Metropolitan Water District, respectively, in HOOVER DAM POWER AND WATER CONTRACTS, Sp. M. Ex. 2 for iden. (Tr. 212) at 309, 336.

[8]*Hearings on H.R. 12902 Before a Subcommittee of the Senate Committee on Appropriations,* 71st Cong., 2d Sess. 170-71 (1930).

On the Senate floor, Senator Hayden later stated that "constitutional lawyers in this body said that it was impossible for the Congress of the United States to divide the waters of rivers." 72 CONG. REC. 11770 (1930).

Similarly, he told the Senate (*id.* at 11755):

> "[I]f the dam shall be built at Boulder Canyon and if Congress shall appropriate the money to build the all-American canal, and the cities of southern California do divert the water, as they contemplate doing, out of the Colorado River over on to the coastal plain—if those things shall be done first without an agreement between Arizona and California, California will acquire a *prior vested right* to the greater and an unfair proportion of the waters of the Colorado River." (Emphasis added.)

[9](Footnote ours.) Senator Hayden had just read the language of the second paragraph of § 4(a) of the Project Act, authorizing a tri-state compact among Arizona, California, and Nevada.

"Senator HAYDEN. No. I say to you, Senator, very frankly, that that is not true. It could not be true, because the Congress of the United States does not possess the power to divide the waters of rivers among States. That is a result which could only be accomplished by the States through compacts.

"Senator MCKELLAR. Senator Hayden, suppose the agreement is not made; suppose Arizona and Nevada and California are unable to agree. Then what happens?

"Senator HAYDEN. What will happen is that the waters of the Colorado River will be impounded in the Boulder Canyon Reservoir and made available for use; large quantities of water will be taken out of the Colorado River into the great all-American canal; over 1,000,000 acre-feet will be further taken out of the river by a pumping plant, and taken over into the coastal plain of California in the vicinity of Los Angeles; they will be put to beneficial use; and, once having acquired a prior right to its use, no other State can obtain the use of those waters.

"Senator MCKELLAR. What are the chances of an agreement? How far apart are you?

"Senator HAYDEN. That is why I asked Colonel Donovan to come here to testify regarding the negotiations between the States of Arizona and California.

"In answer to the question asked by Senator Glass—and then I shall ask Colonel Donovan to

proceed—you will remember that the Senators from Arizona strenuously opposed the enactment of the Boulder Canyon project act. After many days of discussion we were approached, principally through the Senator from Wyoming, Mr. Kendrick, who said to us, 'If we can work out in this bill a fair division of the waters of the lower Colorado River Basin, will you cease your opposition?' Senator Ashurst and I answered, 'That is exactly what it is all about. If you can do that, we are ready to quit right now.' The Senator from Wyoming said, 'I shall see what can be done.' Senator Kendrick afterwards came back and reported to us that it was impossible for Congress to make such an apportionment, because it is not within the power constitutional [*sic*] of Congress to divide waters. The Senator, however, said, 'We will come the nearest thing to it. Congress will limit California to 4,400,000 acre-feet of water out of the primary apportionment of lower basin water, and will indicate in advance the kind of an agreement which ought to be made by the three lower basin States in dividing the water among them.'

"That is what was done in the Boulder Canyon project act. It was thoroughly understood at the time that there was no legal way of imposing such an agreement on the three States by an act of Congress. But the Arizona contention is that it was contemplated in the act that such an agreement would be made, and it was clearly indicated how it should be made; and I state to you that the Arizona and Colorado River Commission has earnestly and

in good faith sought to make that very kind of an agreement.

"Senator GLASS. Your proposition now is to enforce agreement by witholding appropriation?

"Senator HAYDEN. Exactly."

b. Priorities were not abrogated

The legislative history of the Project Act contradicts Arizona's contention that the act was intended to supersede equitable apportionment and priority principles interstate within the lower basin (Ariz. Ans. Br. 17-18). What the legislative history does reveal is that both friend and foe of the Swing-Johnson bills were in agreement that priority of appropriation would survive enactment of the Project Act and retain its interstate applicability in the lower basin except as modified by interstate agreement.[1]

Extracts from legislative history cited by Arizona do not relate to a congressional attempt to modify or destroy priorities and equitable apportionment within the lower basin. In context, the cited remarks relate to the modification of *interbasin* priorities by the Colorado River Compact.[2]

Arizona particularly relies upon a colloquy between Senators Walsh and Johnson which she argues clearly established Senator Johnson's intent to substitute secretarial water delivery contracts for the principles of ap-

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[1]In appendix D to this brief we collect representative extracts from the legislative history conclusively tablishing this proposition.

[2]Appendix D includes a compilation of those extracts presented in the context in which the remarks occurred.

propriation and equitable apportionment as the basis for division of "mainstream" waters. Ariz. Ans. Br. 45-46. Read in the context in which this colloquy occurred it is apparent that Senator Johnson did not entertain any such intention and that his colleagues in the Senate did not attribute that intention to Senator Johnson.[3]

Any collection of clippings from congressional hearings and debates is far less revealing of congressional intent than the purpose which Congress intended to serve in enacting the limitation provision. The structure of the Project Act does not make sense if it is assumed that Congress really intended to impose a federal allocation upon the states in disregard of their rejection of the suggested allocation and in demolition of priority principles, notwithstanding the meticulous care with which Congress repeatedly established consensual compacts, not coercion, as the statutory pattern.

The objective of the upper basin was seven-state ratification of the Compact. Arizona refused to ratify, however, unless she secured similar protection against California's priorities in the lower basin through a tri-state compact. The Special Master has accurately identified the considerations which prompted Congress to require California to agree to limit her uses. Here is his description of the genesis of the California limitation provision in section 4(a) (Rep. 165):

> "Absent seven-state ratification of the Compact, the Upper Basin required protection against appro-

[3]The Walsh-Johnson colloquy is set in context with explanatory materials in appendix D, pp. 127-31.

priations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the non-ratifying state.

"Similarly, Arizona and Nevada were concerned that *California's rapid development would enable that state to appropriate most of the mainstream water available in the Lower Basin.* The California limitation afforded these states protection against this eventuality. . . ." (Emphasis added.)

Why would the upper basin and Arizona have feared California's appropriations if interstate priority principles were either (a) totally abrogated or (b) limited to waters put to use prior to 1929? Obviously, waters which had been put to use prior to the time the dam was built did not depend upon the creation of storage; rights to those waters, whatever their quantity, were nevertheless insufficiently large, of themselves, to preempt most of the lower basin allocations, thus forcing Arizona to encroach upon the upper basin's apportionment. The limitation must therefore have been premised on the assumption that the Project Act would not restrict the interstate applicability of priority principles absent interstate agreement to the contrary.

Failing seven-state agreement, the resulting compromise was approval of the Compact upon six-state rati-

fication and enactment by California of the limitation specified in section 4(a). That the compromise left priority principles unimpaired in Arizona and limited only quantitatively in California was the view supplied to the Congress by Senator Hayden in 1930 in opposing the initial appropriations for Hoover Dam (*supra* pp. 74-77); it was the decision of this Court in 1931 in *Arizona v. California,* 283 U.S. 423.[4]

D. The Secretary Has Not Purported To Abrogate Interstate Priority in Article III(a) Water

If the Project Act authorized a "contractual allocation scheme" with interstate parity in "Article III(a) water," an indispensable element of that scheme is the 1944 Arizona contract. Ariz. Ex. 32, Tr. 248. Here is what that contract says about priorities (Rep. app. 403, 405):

Article 7(l): "Present [1944] perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract."

Article 10: "Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to . . . (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system . . . ."

This express language leaves beyond argument an absence of secretarial intent to create the scheme which

[4]See Calif. Op. Br. 139, and this brief at 65-66 *supra.*

the Master constructs from the Secretary's contracts. It negates any implication that "silence" substituted interstate proration for interstate priorities; article 10(5) is not silent. Furthermore, it does not reserve the question of whether interstate priorities or interstate parity shall govern; it obviously reserves contentions as to all relative priorities.

E. No Congressional or Secretarial Silence Supports Any Inference That Priorities in "Article III(a) Water" Have Been Supplanted by Proration

No operative provision in the Project Act or in the contracts expressly provides for proration of shortages in "Article III(a) water."[1] Project Act sections 12 and 14 (incorporating by reference section 8 of the Reclamation Act) and Project Act section 18 command the application of priority principles to such shortages both interstate and intrastate (*supra* pp. 65-66).

However, even if the statute and the contracts were completely silent, the same conclusion would follow. Priority in "Article III(a) water" is compelled because priority is the law throughout the West except where priority has been clearly and expressly abrogated. The necessity which has shaped that law would compel the adoption of priority here, even if this case required the judicial construction of a rule for allocation of shortages.

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[1]Clause (4) of the proposed tri-state compact in the second paragraph of § 4(a) of the Project Act set forth a different proration formula (and one more favorable to California) than the Master's proration formula. It dealt solely with the impact of the Mexican burden. However, that tri-state compact was never ratified by any state; hence, none of its provisions became operative. See discussion *infra* pp. 82-83.

Neither statute, Compact, nor contract prescribes, expressly or by implication, interstate parity in "Article III(a) water."

Alleged silence is the only common denominator of the arguments of the other parties that proration was substituted for priority by implication. However, no party endorsing proration is able to agree with any other party either about whose silence is relevant or about what other factors, if any, are coupled with silence to bring about that result. None of their arguments can be sustained.

1. *Arizona's contention that section 4(a) supports the Master's proration formula is unsound*

Arizona seems to rely solely upon section 4(a) of the Project Act to support interstate parity, on the following reasoning:[2] Congress in section 4(a) did not consider the problem of shortages expressly. However, proration is "implicit in the basic purpose [of section 4(a)] to make an equitable division of water." Therefore, "Congress must be presumed to have intended that a lesser quantity than 7,500,000 acre-feet should be divided among the states in the same proportions as those which it specified for the division of the 7,500,000 acre-feet," that is, 28/75 (37%) to Arizona, 44/75 (59%) to California, and 3/75 (4%) to Nevada. Ariz. Ans. Br. 95-96.

First, Arizona's major premise—that section 4(a) is silent concerning shortages in "Article III(a) water"

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[2]In her new argument to support *intrastate* proration, Arizona relies upon "the same considerations which led the Master to conclude that the Project Act envisions a ratable sharing of water between the states." Ariz. Ans. Br. 165.

—fails. Clause (4) of the proposed tri-state compact in the second paragraph of section 4(a) expressly provides that shortages to supply any Mexican Treaty burden, if the surplus proves insufficient, should be met equally by Arizona and California from the main stream.[3] That section 4(a) proration formula (which requires California to bear 50% of any shortage) is not espoused by the Master, Arizona (although her argument logically should require that result), or by any other party, but it is more favorable to California than the Master's formula (which requires California to bear 44/75 (about 59%) of any shortage).

Second, Arizona disregards secretarial intent. The Secretary was not required precisely to follow the authorized allocation set forth in section 4(a) (Rep. 162-63; Calif. Ans. Br. 126-27) and he plainly did not do so. Rep. 222-24. If secretarial contracts make some kind of allocation, the secretarial intention is germane. Secretarial contracts and "commitments" expressly prorate "excess or surplus waters" only. The Secretary has

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[3]Clause (4) provides in part "That . . . if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin."

Clause (4) also confirms that the lower basin's share of the Mexican Treaty deficiency is calculated by reference to "paragraph (c) of Article III of the Colorado River compact." We take it that this reference to the Compact is not "inappropriate" (see Rep. 173). The systemwide scope of Article III(c) of the Compact is explained in Calif. Ans. Br. 22-24. The lower basin's share of the Mexican Treaty burden cannot be calculated under the Colorado River Compact and clause (4) of the tri-state compact solely by reference to consumptive use of "mainstream" waters.

rejected the proration provision of clause (4); his contracts contain no provisions specifying proration of "Article III(a) waters." The inescapable inference is that the Secretary thus intended to preserve priority and not to substitute proration among contractees sharing "Article III(a) water." See Calif. Op. Br. 216-17, 222-25.

2. *The United States contention that administrative practice supports the Master's proration formula is unsound*

Although the interstate priority issue is one of two vital questions now presented in this suit, the United States in its major brief on the merits (U.S. Ans. Br. 1) devotes to that issue only this one short paragraph (*id.* at 52-53):

> "The decree orders a pro rata reduction of these quantities[4] if insufficient water is available to meet the full allotments. Although it might have been argued that the Secretary of the Interior is authorized by the Project Act to determine how deficiencies should be met, just as he is authorized to make the allotments in the first place, the pro rata reduction of allotments in the case of deficiencies has been the practice generally followed by the Secretary of the Interior for 59 years in his administration of reclamation projects. It is reasonable to construe these contracts in the light of this history."

[4](Footnote ours.) *I.e.*, of "the apportionment from the first 7,500,000 acre-feet available in the mainstream of the Colorado River of 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada" (U.S. Ans. Br. 52).

The Government does not clearly say whether it relies upon the silence of Congress or of the Secretary, or of both. In any event, the Government's argument is unsound because there is no practice in the administration of reclamation projects to support the Master's interstate proration of "mainstream" waters.

The United States answering brief never identifies nor attempts to prove the administrative practice on which it relies. No such administrative practice has been pleaded, proved, argued, or briefed. The Government provides not one citation of authority, not one reference to the record or to facts which may be judicially noticed, and not one cross reference to some other writing.

Time has not permitted an investigation of this newly asserted but unexplained practice "generally followed by the Secretary of the Interior for 59 years in his administration of reclamation projects." We doubt that much relevant administrative practice can be found: First, the several water users diverting from Lake Mead and the main Colorado River below are not in any sense one project.[5] Those users are very different. See Rep. 32-39, 50-71, 73-75. Some, like the Yuma Project with divisions in both Arizona and California (Rep. 50-51, 60-61), are federal reclamation projects, and some, like the Indian projects (Rep. 85-88), are federal reservations (but not reclamation projects). Some are not federal projects at all but are water districts created under state law (like Palo Verde Irrigation District and the Metropolitan Water District in California

[5]See United States v. Arizona, 295 U.S. 174, 185-87 (1935); *cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 737-39 (1950).

(Rep. 58-60, 61-69)), municipalities (like Henderson or Boulder City, Nevada (Rep. 73, 74-75)), or private businesses (like Basic Management Industries, Nevada (Rep. 74)). Second, we know of no "contract" executed by the Secretary of the Interior under the reclamation laws which resembles in any way the "commitments" to the states of Arizona and Nevada upon which the Master's interstate proration scheme rests. See *supra* pp. 51-52. Third, we know of no reclamation project where different rules regarding shortages apply interstate than apply intrastate. See *supra* pp. 34-35 & note 3.

However, the decisions of this Court have dealt with two instances involving secretarial administrative practice outside the Colorado River basin,[6] each of which reinforces the applicability of priority principles to uses of "mainstream" water from Lake Mead and below.

In *Nebraska v. Wyoming,* 325 U.S. 589, 633 (1945), the Court, in a somewhat comparable situation, recognized the interstate priority of the North Platte Project

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[6]Note at least two instances of secretarial administrative practice with respect to the "mainstream" of the Colorado River:

General Regulations for the Storage of Water in Boulder Canyon Reservoir and the Delivery Thereof in Arizona, issued Feb. 7, 1933 (Ariz. Ex. 28, Tr. 244): Art. 10(c) of the proposed annexed contract provides in part that "this [proposed] contract is without prejudice to relative claims of priorities as between the State of Arizona and other contractors with the United States, and shall not otherwise impair any contract heretofore authorized by said regulations" pursuant to which the California contracts were executed.

Gila Project Finding of Feasibility, approved by the President on June 21, 1937 (Ariz. Ex. 60, Tr. 269): "In all sales of water rights it will be necessary to prescribe that the water supply of the [Gila] project is subject to the Colorado River compact, and to the Boulder Canyon Project Act and to the sales of water under the compact and said act" and to any treaty with Mexico.

See also Calif. Op. Br. 162-65, 227-28.

in Wyoming and Nebraska over the Kendrick Project (formerly known as the Casper-Alcova Project) in Wyoming. Both are federal reclamation projects on the North Platte River. That priority was required by an express provision in the 1935 contract between the United States and the Casper-Alcova Irrigation District serving the Kendrick Project.[7] This administrative practice is significant because the authorization for the Kendrick Project is apparently silent on how deficiencies should be borne as against other reclamation projects.[8] Subsequently, in 1937, Congress provided that the Kendrick Project should be junior to future projects in Colorado,[9] apparently in recognition that without such legislation future Colorado projects would be subordinate.

In *Ickes v. Fox,* 300 U.S. 82 (1937), this Court rejected an effort by the Secretary of the Interior to

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[7]325 U.S. at 633 n.18:

"The contract provides:

"'It is expressly agreed that the development of the Casper-Alcova Project and the irrigation of lands under it is in no way to impair the water rights for the Federal North Platte Reclamation Project in Wyoming and Nebraska, and the said North Platte Project, and Warren Act contractors under it are to receive a water supply of the same quantity as would have been received if the Casper-Alcova Project had not been constructed and operated.'"

[8]See U.S. BUREAU OF RECLAMATION, DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION PROJECT FEASIBILITIES AND AUTHORIZATIONS 499 (1957).

[9]See Interior Department Appropriation Act for 1938, ch. 570, 50 Stat. 595 (Aug. 9, 1937): "[N]either the construction, maintenance, nor operation of said [Kendrick] project shall ever interfere with the present vested rights or *the fullest use hereafter* for all beneficial purposes of the waters of said [North Platte] stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado, and *the Secretary of the Interior is hereby authorized and directed to reserve the power by contract to enforce such provisions at all times . . . .*" (Emphasis added.)

reduce water deliveries to landowners in the Sunnyside Division of the Yakima Project in the State of Washington in violation of the landowners' vested appropriative rights under state law based on actual beneficial use. The Secretary had attempted to charge those landowners additional rental for all water delivered in excess of three acre-feet per acre per annum in order to meet a deficiency in the cost of construction of Cle Elum dam and reservoir serving Kittitas Reclamation District and other lands which are other divisions of the Yakima Project in Washington. See lower court's opinion, *Ickes v. Fox*, 85 F.2d 294, 296, 297 (D.C. Cir. 1936). In a later installment of the same litigation, the Court of Appeals for the District of Columbia restated the basis of the Supreme Court's decision:[10]

> "Reading the Reclamation Act in the light of the decision in Ickes v. Fox, we find the situation in this case to be as follows: The water-rights of appellants are not determined by contract but by beneficial use. The Secretary of the Interior in operating the project is in the position of a carrier of water to all entrymen in the Reclamation project. He is not obligated to furnish any more water than is available. Under the Reclamation Act he is not authorized to furnish any water at all except for beneficial use. He must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington. He has no concern in disputes between the various entrymen which concern their respective priorities, other than as a stakeholder."

[10]Fox v. Ickes, 137 F.2d 30, 33 (D.C. Cir. 1943), *cert. denied*, 320 U.S. 792 (1943).

3. *Nevada's contention that equitable apportionment principles, administrative practice, and custom and usage support the Master's proration formula is unsound*

Nevada appears to rely upon the sum of congressional and secretarial silence[1] in conjunction with what she conceives to be equitable apportionment principles, administrative practice, and custom and usage to support the Master's proration formula. In each instance, her reliance is misplaced. Somewhat inconsistently, Nevada asks for a "floor," in reality a super-priority, below which her uses can never be reduced (Nev. Op. Br. 58).

Nevada's contention that equitable apportionment principles support the Master's proration formula[2] is unsupportable. Where the Master applies equitable apportionment principles, *e.g.*, on the upper Gila, he applies priorities, not proration, subject to the protection of existing economies (Rep. 324-28, 331). It is beyond question that the basic elements of any equitable interstate apportionment are priority of appropriation and protection of existing projects (Rep. 326-28; Calif. Op. Br. 64-65; Calif. Ans. Br. 136-40; *supra* p. 35 note 4). Both are the antithesis of proration.

Nevada's contention that administrative practice sup-

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[1]Nev. Ans. Br. 28: "Neither the Project Act nor any of the contracts provide for proration in years of short water supply."

[2]*Id.* at 29: "The provisions [in the recommended decree] for proration in short water years . . . is a concrete expression of this rule of parity between States. It is a very effective and proper method of exercising the power of equitable apportionment by judicial decree."

ports the Master's proration formula[3] is in error for the same reasons given above concerning the United States similar contention (*supra* pp. 84-88).

Nevada argues that there is some uniform custom and usage for prorating stored water which supports the Master's proration formula.[4] Nevada is wrong. No such custom or usage has been pleaded, proved, argued, or briefed. In support, Nevada provides not one citation of authority, not one reference to the record or to facts which may be judicially noticed, and not one cross reference to any other writing.

The laws of Arizona and Nevada, in 1929 (when the Project Act became effective), in 1944 (when the purported Arizona and Nevada "contracts" were executed), and now, do not establish any uniform general practice of prorating shortages.

The Arizona law

A 1921 Arizona statute, consistent with the emphasis given to principles of priority in an early leading case,[5] subjected the distribution of water by irri-

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[3]*Id.* at 38-39: "All of these rights [in California] being for water stored by the Secretary would be, under the generally accepted pattern of Western water law and under the practice of the general Reclamation Law, of equal priority with other storage contracts executed by the Secretary for uses in either of the States of Arizona or Nevada."

[4]Nev. Ans. Br. 32: "In every instance, it has been the universal custom that contracts for storage water for any given reservoir are of equal priority, and in times of shortage the owners of storage space share pro-rata."

Id. at 40: "We mention again the universal rule that contracts for storage water out of any given reservoir stand on a parity."

See also *id.* at 38-39, quoted *supra* note 3.

[5]Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598 (1904), *appeals dismissed,* 195 U.S. 639 (1904), in which the court declared that all landowners under a canal who had irrigated therefrom "became appropriators, and possessed of rights of appropriation in the order of their priority." 8 Ariz. at 447, 76 Pac. at 601.

gation districts to the "law of priorities."[6] In case of shortage, the "laws of priorities" controlled over proration.[7] This was the law of Arizona in 1929 when the Project Act became effective.

Between 1929 and 1944, Arizona adhered to those principles of priority, as evidenced not only by decisions of her supreme court,[8] but also by the retention of that 1921 legislation.[9]

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[6]ARIZ. LAWS 1921, ch. 149, § 6, at 331: "Subject to the law of priorities all water of the district available for distribution shall be apportioned to the lands thereof pro rata . . . ." The remainder of the section, not material here, related to withholding of water deliveries for nonpayment of charges. The statute remained unamended through 1928. ARIZ. REV. CODE OF 1928, § 3344 (Struckmeyer).

[7]ARIZ. LAWS 1921, ch. 149, § 24, at 350: "In case the water available in any district shall be insufficient at any time to supply all lands of the district susceptible of irrigation therefrom and otherwise entitled to water, it shall then be the duty of the board of directors to provide for the distribution of all available water upon certain or alternate days to different localities as the board in its judgment may deem to be for the best interests of all parties concerned, and so that such available water shall be distributed in *as nearly equal proportions as possible* to all such lands of the district *subject to the laws of priorities.*" (Emphasis added.) See also ARIZ. REV. CODE OF 1928, § 3395 (Struckmeyer).

[8]Olsen v. Union Canal & Irr. Co., 58 Ariz. 306, 119 P.2d 569 (1941), held that canal companies are under a duty to carry the water of appropriators "in the order of the priority of the land served, and upon equal terms. This also has been the law of Arizona for nearly forty years, affirmed by both this court and the legislature of the state." *Id.* at 317, 119 P.2d at 573. The *Olsen* holding was summarized in Whiting v. Lyman Water Co., 59 Ariz. 121, 124 P.2d 316 (1942), as meaning "that the right to the delivery of water by the owners of a canal and reservoir system depends *entirely upon the right of appropriation* held by the water user, and is not in any manner dependent upon his owning stock in such a corporation." *Id.* at 124, 124 P.2d at 317. (Emphasis added.)

[9]The first clause of § 6, *supra* note 6, reappears in ARIZ. LAWS 1931-1932, 1st Spec. Sess., ch. 8, § 1, at 20 with "priorities" changed to "priority." It remained unamended through 1939. ARIZ. CODE 1939, § 75-222.

For § 24 of the 1921 act, *supra* note 7, see ARIZ. CODE 1939, § 75-424.

The present law of Arizona appears to be substantially the same as in 1944.[10] The burden of shortages is borne in inverse order of priorities unless there is some express provision to the contrary.[1] A recent Arizona statute appropriating funds to study the Central Arizona Project under contract with the Bureau of Reclamation subordinates that project's rights to those of all existing contractees and users of main stream water in Arizona:[2]

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[10]The first clause of the section relating to distribution generally is the same as in § 75-222 of the 1939 code, *supra* note 9. ARIZ. REV. STATS. ANN. § 45-1588(A) (West 1956).

Section 24 of the 1921 act, *supra* notes 7 and 9, relating to distribution in case of insufficient supply, has been condensed somewhat; but the changes are in form rather than substance, and the last clause, from "distributed in as nearly equal proportions as possible" to the end, has not been changed. ARIZ. REV. STATS. ANN. § 45-1589 (West 1956).

[1]*E.g.*, in Adams v. Salt River Valley Water Users' Ass'n, 53 Ariz. 374, 89 P.2d 1060 (1939), the charter of the association provided in article V, § 6, for delivery of "that proportionate part of all stored and developed water," *id.* at 381, 89 P.2d at 1063, evidently referring to storage expected to be made available by Roosevelt Dam. See Calif. Op. Br. 120. Since article 1 of the 1904 contract between the Government and the association (Calif. Ex. 3, Tr. 1816, at 3-4) provided that rights of shareholders to the use of water should be determined under "said act" (referring to the Reclamation Act of 1902) and "the rules and principles set out in said articles of incorporation," the basis was established for proration of the stored water, and this would seem to explain why the Kent decree of 1910 (Ariz. Ex. 101, Tr. 380), quoted in part in the *Adams* case *supra*, 53 Ariz. at 380, 381, 89 P.2d at 1063, so provided.

Cf. State v. Laramie Rivers Co., 59 Wyo. 9, 43, 136 P.2d 487, 498 (1943): "An appropriation by the water user from a canal, then, is just as essential for the purpose of acquiring a water right as it is for an appropriator from a stream. Even the doctrine of *priority obtains in such case, as in others . . . unless, perchance, modified by provisions for pro-rating. . . .*" (Emphasis added.)

[2]ARIZ. LAWS 1961, ch. 39, § 2, at 108. Text of the act is at 133-35 *infra*.

"[T]he contract with the bureau of reclamation shall provide that the investigations and studies shall be restricted to only that quantity of water which may be available for use in Arizona, after the satisfaction of all existing water delivery contracts between the secretary of the interior and users in Arizona for the delivery of main stream water, and that nothing shall be done thereunder which will impair existing rights in Arizona for the diversion and use of Colorado River water."

The city of Yuma's federal water contract, signed after the close of the trial in this case, does not provide for proration; to the contrary, it subordinates Yuma's rights to stored waters to all diversions at Imperial Dam for agricultural uses in Arizona.[3]

The Nevada law

Allocation of shortages according to inverse order of priorities appears to be the only practice consistent with *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 Pac. 720, 144 Pac. 744 (1914), in which defendant company was enjoined from reducing deliveries to plaintiffs below the 50 inches of water which the company had delivered for about 19 years. The court held that plaintiffs were appropriators in the same sense as if they had diverted directly from a public stream, and that the canal company was under an implied contractual obligation to continue deliveries at the previous rate, physical availability permitting, so long as there was no interference with rights of appropriators under the same system who were prior in time. *Id.* at 165,

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[3]Calif. Ex. 7611 for iden. (Tr. 22,760), art. 6(a)(1), p. 4 of second pagination.

140 Pac. at 724.[4] The *Prosole* case has been treated as settling the law of Nevada that the right to the use of water is appurtenant to the land irrigated.[5]

No Nevada statute has been discovered relating to the division of shortages in stored water.[6]

F. The Master's Proration Formula Would Provide an Illogical and Impractical Hybrid System of Water Rights in the Lower Basin

The hybrid system of water rights recommended by the Special Master and supported to differing extents by the United States, Arizona, and Nevada reaches results which cannot be defended either logically or practically.

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[4]The court summed up its decision in this significant language (37 Nev. at 166, 140 Pac. at 724):

> "It is the duty of the diverting corporation in cases of this kind, where a consumer has once established a right to the use of water by acquiring the same and applying it to a beneficial purpose, to continue to furnish him water *in preference to latter* [later] *applicants,* provided he has never waived his rights nor forfeited the same. The company has the right, and *it is its duty, to discriminate* between appropriators of water from their irrigation system, *giving the preference to those appropriators who are oldest in point of time.*" (Emphasis added.)

[5]See, *e.g.,* RFC v. Schmitt, 20 F. Supp. 816, 819 (D. Nev. 1937), *rev'd on other grounds sub nom.* Pacific States Sav. & Loan Corp. v. Schmitt, 103 F.2d 1002 (9th Cir. 1939), in which the *Prosole* case is said to recognize the "intimate relationship between land and water beneficially applied upon it, whether the water is directly appropriated or obtained through the intermediary of a canal company . . . ." *Id.* at 1004. RFC v. Schmitt involved lands which were dependent on stored water (20 F. Supp. at 818), but no issue of proration versus priority was considered.

[6]*Cf.* Interior Department Appropriation Act for 1926, ch. 462, 43 Stat. 1168 (March 3, 1925), providing that existing uses in the Newlands Project, Nevada, should be prior to the rights of a proposed new division of that project: *"Provided further,* That the existing water rights of the present water users of the Newlands project shall have priority over the water rights of the proposed Spanish Springs division . . . ."

We have already seen the unfair results of the dual system of interstate water rights proposed by the Special Master wherein priorities still apply to competing rights of "mainstream" users against "tributary" users above Lake Mead in other states (and presumably against those in the same state) but proration controls competing interstate rights of "mainstream" users *inter sese*. See Calif. Op. Br. 228-31. We have also seen the impossible situation created by the application of such a dual system intrastate, as advocated by the United States (Calif. Ans. Br. 39-46).[1]

A further example is presented by the Master's conclusion that priorities must be observed intrastate, but not interstate except for "present perfected rights." The consequence of such blunted priority is strikingly illustrated by the plight of wildlife refuges. These refuges are astride the main stream of the Colorado River where it forms the Arizona-California boundary. They have a priority date, on both sides of the river, of 1941. See Decree art II(C)(2)(g) and (h), Rep. 352-53. On the Arizona side of the river, those refuges have an abundant water supply under almost any conceivable condition; the 1941 priority date is superior to the priorities of a number of existing projects in

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[1]Suppose, under the Government's theory, a senior contract user in Arizona below Lake Mead sues a junior appropriator in Arizona above Lake Mead. Among the unresolved and unresolvable problems of the Arizona contractee are these: (a) In what court should he seek redress? (b) Is the United States an indispensable party? (c) If the United States is indispensable, has it waived its sovereign immunity? (d) How can the contractee, if otherwise successful, establish that the Secretary would release any water from Lake Mead for his use? (e) If the contractee prevails, how can he obtain more than 28/75 of whatever water he is held entitled to?

Arizona and to any future Central Arizona Project. In California, however, there is no reasonable expectancy of any water supply for those refuges; the 1941 priority date is junior to all rights in California. The Master's decision requires not only the states, but the ducks, to fix the boundary line with precision. Enforcement of the Master's decree requires an advance in technology which will enable those charged with its enforcement to dry up the California one half of a duck marsh.

G. The Relevant Interstate Priorities for Existing Main Stream Projects Can Readily Be Determined and Incorporated in Any Decree

The priorities for existing projects in Arizona, California, and Nevada diverting from the main Colorado River can be easily determined, without unduly delaying or complicating the resolution of this controversy. The Court, at this time, may decide only to establish that such rights (with California's priorities limited to 4.4 million acre-feet annually by the limitation) are senior to any rights for new projects.

There are fewer than 30 such existing projects using waters from the main river, in all states.[2] The priorities for eight of these, the federal reservations, are already adjudicated in the recommended decree (Decree art. II(C)(2), Rep. 350-53). The other existing projects are also identified by the Master. Rep. 50-71, 73-75; see also Calif. Op. Br. app., tables 1-3.

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[2]Excluding miscellaneous small uses in Arizona and California outside organized districts or federal projects and reservations. See Tr. 11,977-12,002 (Rowe); Calif. Op. Br. app., tables 1, 2.

There are a number of alternative procedures available to the Court to make the requisite determinations of whatever interstate priorities are recognized by this Court:

(1) The Court may utilize the machinery proposed by the Special Master for determination of "present perfected rights," to determine the magnitude and priorities of rights of existing projects. See Decree arts. II(B)(5) and (6) (Rep. 348-49) and VI (Rep. 359).

(2) The Court may refer the matter to a Special Master to make those determinations from the record with authority to supplement the record as may be necessary or desirable and to report his findings of fact, conclusions of law, and recommendations to the Court.

(3) The Court may make those determinations from the record. See Calif. Op. Br. app., tables 1-3.

Finally, it should be noted that priority principles can readily be made a part of any "contractual allocation scheme," even if the Master's recommended decision were not reversed in any other respect. This is demonstrated by the Master's scheme itself in which "priority of 'present perfected rights' regardless of state lines" controls the allocation of water "in the extremely improbable event that releases [from Lake Mead] do not satisfy the rights perfected in any of the states [of Arizona, California, and Nevada] as of the effective date of the Act" (Rep. 312). We simply propose that a broader but no more difficult priority system be incorporated into any decree for the protection of projects existing at the date of the decision.

IV. IF THE CONCLUSIONS REACHED BY THE SPECIAL MASTER AND URGED BY THE OTHER PARTIES ARE CORRECT, THIS CONTROVERSY IS NOT JUSTICIABLE

Statement of the Issue

Arizona initiated this suit to quiet an alleged title to 3.8 million acre-feet per annum (subject to the rights of New Mexico and Utah) from the 8.5 million acre-feet available to the lower basin from the Colorado River system under the Colorado River Compact.[1] Arizona alleged that more than 1.7 million acre-feet of the claimed 3.8 million acre-feet from main stream and tributaries was unused by Arizona and required for the proposed Central Arizona Project and other proposed projects, unidentified.[2] Arizona alleged that California was using Arizona's water.[3]

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[1]Arizona's first prayer was that "1. Its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted, subject only to the rights of the States of Utah and New Mexico and to the availability of such water under the Colorado River Compact." Ariz. Bill of Complaint, p. 30, tendered August 13, 1952.

[2]"Arizona is not now presently using all of the aforesaid 3,800,000 acre-feet of water to which it is entitled annually. In excess of 1,700,000 acre-feet out of the said 3,800,000 acre-feet is not being presently used and consumed in Arizona, and is available for such use and consumption under the Arizona Projects hereinafter mentioned." *Id.* at 21.

[3]"Defendants and each of them have threatened for many years to use and consume, and are now actually using and consuming, quantities of Colorado River water in excess of 4,400,000 acre-feet annually. . . . Defendants have no firm right to divert and take annual quantities of Colorado River water in excess of 4,400,000 acre-feet, and their use of such quantities of

California welcomed the opportunity for a resolution by this Court of that controversy.[4]

The controversy which the parties thus brought before this Court in 1952 and 1953 did not involve a present shortage of water. It involved an acknowledged shortage of the dependable supply, permanently available to the lower basin states under the Colorado River Compact.[5]

The Master accurately describes the reasons why a resolution of the controversy is necessary. First, new projects cannot be built if their water supply is subject to major uncertainty (Rep. 130-32). Second, existing projects on which whole communities have come to depend cannot serve their functions if their future is uncertain (Rep. 133-35). The Master is demonstrably correct in the principles he thus states. He is demonstrably wrong in their application.

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water in derogation of the rights of Arizona should be enjoined and forever restrained." *Id.* at 29.

Arizona's second prayer was that "The title of the State of California to the annual beneficial consumptive use of the waters of the Colorado River System apportioned to the Lower Basin by the Colorado River Compact be fixed at and forever limited to 4,400,000 acre-feet and be made subject to the availability of such water under the Colorado River Compact." *Id.* at 30.

[4]Return of Defendants to Rule To Show Cause and Brief in Support of Return, filed December 8, 1952.

[5]The Secretary of the Interior in 1948 reported to Congress with respect to the Central Arizona Project: "If the contentions of the State of Arizona are correct, there is an ample water supply for this project. If the contentions of California are correct, there will be no *dependable water supply* available from the Colorado River for this diversion. *While the necessary water supply is physically available at the present time in the Colorado River,* the importance of the questions raised by the divergent views and claims of the States is apparent. . . . It [the controversy] can be resolved only by agreement among the States, by court action, or by an agency having jurisdiction." (Emphasis added.) Ariz. Ex. 70 (Tr. 308), at 141 in Arizona's bound exhibits; quoted at Rep. 30-31.

A. The Proposed Decree Does Not Apply to a Proposed Central Arizona Project Diverting Above Lake Mead

There is only a contingent possibility that the decree would apply to the water which Arizona would divert for the Central Arizona Project—the water supply for which was the object of Arizona's lawsuit. Arizona's evidence and the record before four Congresses disclose that Arizona has never decided whether she wants a Central Arizona Project diverting from Marble Canyon, from Bridge Canyon, or from Parker Dam. See Calif. Op. Br. 7. The first two points named are on the main Colorado River above Lake Mead, to which the decree does not apply. The Thirteenth Annual Report of the Arizona Interstate Stream Commission to the Governor of Arizona (1960) discloses that circulation of the Special Master's draft report prompted cooperative surveys by the stream commission and the United States Geological Survey of the Marble Canyon diversion route. See Calif. Op. Br. 125.

If a Central Arizona Project is authorized diverting from the Colorado River above Lake Mead, the decree recommended by the Master, which allocates only "mainstream" water in Lake Mead and below, is worse than useless. The Master's Report clouds the problems which the decree fails to solve. The Report first asserts that if Congress authorizes a Central Arizona Project to divert above Lake Mead, "at that time Congress can determine whether or not Arizona's diversions above Lake Mead shall be chargeable to her under the present

contractual apportionment." Rep. 228. Obviously, this Court cannot base a decree upon a prediction of what, if anything, Congress will do in the future. Then, in a footnote to this quoted statement, the Report says that "the doctrine of equitable apportionment *may* affect diversions in this reach of the River [above Lake Mead]. See pages 316-318, *infra*." Rep. 228 n.86. (Emphasis added.) The reference *infra* is to the determination in the Report that "the conclusion is *inescapable* that principles of equitable apportionment still control rights of mainstream states [diverting from Lake Mead and below] in waters of the tributaries of the Colorado River in the Lower Basin [including the main stream above Lake Mead]." Rep. 317. (Emphasis added.) The Master adds, however, that "the mainstream rights to tributary inflow ought not now be adjudicated." Rep. 319.[6]

B. On the Master's Water Supply Premises, the Proposed Decree Resolves No Real Case or Controversy Even if a Proposed Project Diverts From the "Mainstream"—Lake Mead and Below

1. Physical availability: water supply

In the prior interstate water cases dependable water supply has been determined. Rep. 100. The necessity

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[6]" 'Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.' New York v. New Jersey, 256 U.S. 296, 309; North Dakota v. Minnesota, 263 U.S. 365, 374; Connecticut v. Massachusetts, 282 U.S. 660, 669; Missouri v. Illinois, 200 U.S. 496, 521." Washington v. Oregon, 297 U.S. 517, 522 (1936), quoted at Rep. 319-20.

for the Court to do so, despite greater difficulties than this case presents, has not been questioned. The determination is necessary in the first instance to determine the jurisdictional issue. The original jurisdiction is invoked only if it is shown that there is a basic necessity for a decision. That necessity does not exist unless the claims in fact exceed the supply.[7] Furthermore, as we shall see (*infra* pp. 105-27), that same water supply determination is necessary to test the effect of any proposed decree.

The Master says (Rep. 115): "Existing California uses[8] are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed."[9] If this is so, the controversy with Arizona is illusory.

The necessity for a water supply determination is shown by the fact that the sharpest controversy is over

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[7]Arizona challenges application of the "claims-exceed-the-supply" test of justiciability, asserting that this is a case in the nature of interpleader, over which the Court has exercised jurisdiction in the past. Arizona's citation of Texas v. Florida, 306 U.S. 398 (1939), Ariz. Ans. Br. 100, exposes the error in her argument. Original jurisdiction in that case rested on the fact that the death tax claims against a decedent's estate by the federal government and the states of Texas, Florida, New York, and Massachusetts totaled a sum greater than the net value of the estate. 306 U.S. at 405-12, especially 409 & n.2. The case illustrates the "claims-exceed-the-supply" test.

[8](Footnote ours.) We sought a decree which would allocate California 4.6 million acre-feet from the dependable supply, almost identical in quantity to our then existing uses. See Rep. 128 & n.73.

[9]Contrast: "But, despite a present unsatisfied demand for water in the Lower Basin, it is impossible to develop further uses of the water because of the cloud on its legal availability." Rep. 132-33.

what the effect of the decree is. The United States says: "So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met." U.S. Ans. Br. 51. We complain because the decree permits us far less than 4.4 million acre-feet, and far less than enough to satisfy the known requirements of the California projects which Congress knew and intended were to be served. The fact, as between these contentions, is unascertainable without a water supply determination. Surely, no one can seriously contend that the determination is irrelevant.

2. *Legal availability: the Compact*

This case is not justiciable unless effect is given to the Colorado River Compact's restrictions on the quantity of water available from the main stream[10] (6.5 million acre-feet)[1] to satisfy the claims of Arizona, California, and Nevada. Justiciability of the controversy among Arizona, California, and Nevada depends upon a determination that their claims to the waters of the entire main stream exceed the supply which will be available to satisfy them. On the basis of historical main stream supply, this test has not been met. The total claims of all three states from the main stream do not exceed 9 million acre-feet of consumptive use for their

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[10]We use the expression "main stream" to denote the Colorado River between Lee Ferry and the Mexican boundary, as distinguished from the Master's word of art, "mainstream," which he coins to describe Lake Mead and the main Colorado river below. The "mainstream" waters thus include the inflow from the Bill Williams River.

[1]See p. 11 *supra*.

existing and proposed projects.[2] The flow at Lee Ferry required to supply all these claims, in addition to supplying Mexico its guaranteed 1.5 million acre-feet and all losses between Lee Ferry and the boundary (these losses are about 1 million in excess of offsetting contributions of tributary inflow), is slightly less than 11.5 million acre-feet.[2a] The average annual historic flow at Lee

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[2]"The contracts which the Secretary of the Interior entered into . . . provide for the delivery annually of 8,462,000 acre-feet of water stored at Hoover Dam." U.S. Petition of Intervention, par. XX, p. 18. This does not include any quantitative value for the one half of "excess or surplus" which the Master awards to Arizona from the "mainstream." In the United States view, the contract quantity is less than that stated, by the amount of lower basin depletions above Lake Mead. See U.S. Exception II.

[2a]The loss figures on which we rely are those supported by testimony of California witness Stetson and Arizona witness Erickson. See Calif. Op. Br. A45-A46, plates 7 and 8 and the table preceding plate 7 for comparison of comparable loss figures in other studies in evidence.

Arizona attempts to show that all figures relating to losses and gains should be ignored, by tabulating (1) "greatest loss" plus "least gain" compared to (2) "least loss" plus "greatest gain." Ariz. Ans. Br. 122. Arizona's tabulation is meaningless, but the water supply studies of which it is a hopeless mixture are not meaningless. The impression Arizona seeks to convey is that (1) the most pessimistic expert view results in a net loss (not including Mexican Treaty deliveries) of 1,325,000 acre-feet, while (2) the most optimistic expert view results in a gain of 165,000 acre-feet. Each view, pessimistic or optimistic, is a composite of figures from a number of studies in evidence, plus some figures that cannot be found in the record. These composite figures were not even suggested by any witness. Valid comparisons are found by examining the end results of comparable water supply studies, not in comparing a mixture of components of various water supply studies created by counsel. The Arizona techniques can be illustrated: Reservoir evaporation can be eliminated by the expedient of keeping reservoirs empty, but passing all water through the reservoir as spill under such operation naturally wastes all the water otherwise available for storage. Had there been one such operational study in evidence, Arizona would compound the following mixture: (1) Zero reservoir loss for the optimistic column of the tabulation; (2) astronomical spill for the pessimistic side. The only point proved: The isolated components of separate reservoir operation studies cannot be selected and combined in this way to prove anything at all.

Ferry for any of the 10-, 20-, or 30-year periods reported by the Master was not less than about 11.7 million acre-feet and for the last four decades the historical average has been about 12.7 million acre-feet.[3] Rep. 109.

The supply historically available has thus exceeded the aggregate of the claims for all future use tendered for adjudication here, and if the certainty of further depletion of this supply by expanding upper basin uses were not the unspoken premise of the Master's Report, this case would not be presently justiciable.

C. Tested by the Realities of Water Supply, the Proposed Decree Destroys California's Existing Projects

A water supply determination is necessary not only to establish the jurisdiction of this Court but also to test the effect of any proposed decree. That effect is now the focus of this controversy. We say that the proposed decree would be ruinous to California projects. These are its manifest results:

(1) With a full lower basin Compact supply—8.5 million acre-feet of consumptive use from the Colorado River *system*—the decree would limit California to about 3.8 million acre-feet of consumptive use within the

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[3]Calif. Op. Br. 232 n.1. Records at Lee Ferry began just prior to the water year 1921-1922. Ariz. Ex. 98 (Tr. 363), at 520.

"Historic flow" is the actual flow, recorded or estimated, for any specified past period of time at a specific point on a river.

Compact "ceiling."[4] That 3.8 million acre-feet is not enough to satisfy the California rights which are prior to Metropolitan Water District. If a Central Arizona Project or other project is built to divert water from above Lake Mead, California's figure may be even smaller than 3.8 million acre-feet.

(2) With the 6 million acre-foot dependable supply from the main stream actually available for consumptive use in Arizona, California, and Nevada (requiring a flow of about 2.5 million acre-feet greater at Lee Ferry to supply Mexico and all losses),[4a] California would receive about 3.5 million acre-feet. Again, the 3.5 figure, based on the water supply evidence introduced before the Master's truncated "mainstream" beginning at Lake Mead had been invented, may be smaller if a major project is built to divert above Lake Mead.

Either result manifestly defeats the intent and purpose of Congress with respect to the specific projects whose requirements were known and intended to be satisfied under the Boulder Canyon Project Act. The result is demonstrably contrary to the purposes of every Secretary of the Interior who has administered the Project Act.

The focus of the controversy is not whether the result which we have described can be squared with the statute, as of course it cannot, but whether such a result will truly take place. The Master and our opponents deny

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[4]44/75 of 6.5 million acre-feet, the quantity which may be appropriated from the main river under the 8.5 million acre-foot ceiling after accounting for 2 million acre-feet of uses on the tributaries under that ceiling. See p. 11 *supra*.

[4a]See p. 104 note 2a *supra*.

that it will for a variety of reasons which require brief but separate examination:

(1) The upper basin will not use all water apportioned to it under the Colorado River Compact, or anything approaching that quantity.

(2) An increase in upper basin use that would seriously impair the water supply for California's existing projects is so remote that the possibility now merits no serious consideration.

(3) It is possible that technology may solve all water problems of California before the decree restricts California uses.

(4) California is now wasting water, and hence her present uses are in excess of her legitimate requirements.

None can be sustained.

1. *The assertion that the upper basin will not use its apportionment*

The United States says (U.S. Ans. Br. 53):

> "The very foundation of California's argument is that the Upper Basin States will in the near future utilize the entire 7,500,000 acre-feet allotted to them by the Compact. . . . But even the California argument does not predict this result before 1990 (California Opening Br., p. 261) . . . ."

This is completely wrong. The "foundation of California's argument" is that the Compact ceiling on lower basin appropriations will be enforced in favor of expanding upper basin uses. It must be enforced if there is to be any substantial expansion above presently authorized

projects in the upper basin. If it is enforced, the lower basin's consumptive use *from the main stream* will be limited to 6.5 million acre-feet, long before upper basin uses are anywhere near 7.5 million. The Colorado River Storage Project Act of 1956 declares the purpose of Congress to make it possible for the upper basin states to utilize their full Compact apportionment. See Calif. Op. Br. 252-53.

California does not contend, has never contended, and is aware of no other party's contention that "the Upper Basin States will in the near future utilize the entire 7,500,000 acre-feet allotted to them by the Compact." Indeed, California's evidence leads to the conclusion that the upper basin may never physically be able to do so if it respects the upper division delivery obligation under III(d) of the Colorado River Compact.[5]

At page 261 of our opening brief, which the United States cites, we said, referring to our water supply motion:

"We offered to establish that the upper basin

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[5]Upper basin annual depletion of 7.5 million acre-feet per annum at Lee Ferry requires 52 million acre-feet of effective storage in the upper basin (Calif. Exs. 2206, 2206A, Tr. 11,737) or about 75 million acre-feet of total storage capacity. Tr. 11,736 (Stetson). This is double the total presently existing and authorized upper basin reservoir capacity of 37.6 million acre-feet. Calif. Ex. 2203A (Tr. 11,720). It is doubtful that upper basin reservoir sites for 75 million acre-feet of storage can be found (Tr. 11,736 (Stetson)), and, if this storage were constructed, the added reservoir evaporation would offset the added conservation. Calif. Ex. 5610 (Tr. 22,469).

If reservoir losses are not a component of beneficial consumptive use, 7.5 million acre-feet of upper basin depletion at Lee Ferry is the equivalent of about 6 million acre-feet of beneficial consumptive use, contrasted with the 7.5 million acre-foot Article III(a) apportionment.

depletion would expand at such a rate that Metropolitan would lose its entire supply not later than 1990. The Master denies our motion for opportunity to do so (Rep. 112 n.41)."

We referred to permanent upper basin depletion at Lee Ferry of 6.19 million acre-feet per annum, which we believe is foreseeable by 1990 (Calif. Op. Br. A59). This, subtracted from the *maximum* undepleted or virgin flow average for any period ending with the present, would leave a residue at Lee Ferry too small to yield any water at all to Metropolitan under the Master's decree.[6]

2. *The assertion that upper basin use is remote*

As stated by the United States (U.S. Ans. Br. 53):

"The dangers depicted by California must be discounted on the basis of remoteness."

The United States seriously misunderstands our position. Our position is that rapidity of upper basin development was not put in issue by the pleadings, was not tried, and was not treated as relevant until oral argument on the Master's draft report. See Calif. Op. Br. A47-48, A55. If it is relevant, we are entitled to present evidence. We asked the Master for leave to do

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[6]The maximum annual average virgin flow for any period ending with the latest year reported by the Master (Rep. 118) was 15.21 million acre-feet per year. Subtracting upper basin depletion of 6.19 million acre-feet would leave a flow of 9 million at Lee Ferry. Even if perfect regulation of this inflow is assumed, only 6.5 million would be available for beneficial consumptive use in the United States. See pp. 111-12 & note 2 *infra*.

so, and our motion was denied. We have renewed that motion to this Court.[7]

The Bureau of Reclamation's current plan for operation of upper and lower basin reservoirs contemplates firm annual releases of 9.8 million acre-feet from Lake Mead under 1975 conditions and 8.5 million acre-feet under year 2020 conditions of upper basin depletion (plus unusable spill in both instances).[8] After deduction of deliveries which must be made to Mexico and the losses below Hoover Dam, the Master's formula would permit California about 4.4 million acre-feet in 1975 and less than 3.7 million acre-feet 45 years later. (Calculations are in table 6 in the appendix of our opening brief.) We believe, and offered to prove, that the Bureau errs in predicting too slow an increase in use in the upper basin.

Arizona protests that the Bureau study is a power study, and therefore is not relevant to a determination of the water supply available for consumptive use (Ariz. Ans. Br. 130). Arizona overlooks that the objective of a power study is to determine the maximum quantity of water which can be made available in equal annual amounts. The objective and procedure of a study to determine the dependable annual supply available for consumptive use is identical.

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[7]Calif. Op. Br. A39.

[8]U.S. Bureau of Reclamation, Regional Office, Region 4, Dep't of the Interior, Financial and Power Rate Analysis, Colorado River Storage Project and Participating Projects (September 1960). Copies have been made available to the Court, with our opening brief. Relevant portions of the data are tabulated in tables 4 and 5 in the appendix to California's opening brief.

Arizona also says that if water is required for consumptive use in the lower basin, the upper basin reservoirs will not be filled, and hence the water required for filling them will be available to the lower basin in addition to the releases that the Bureau plans.[1] We hope that Arizona's contention (in which the United States thus far has not joined) will prove to be true. However, any study of water supply available to the lower basin should be made on the assumption, until the contrary is established, that the Colorado River Storage Project reservoirs now under construction will be filled, and will serve the purpose which Congress intended for them in the 1956 Colorado River Storage Project Act.

The Bureau study rather conclusively establishes two things: (1) that water supply can and must be determined; (2) that there can be no reasonable contention that the destruction of California projects rendered inevitable by the decree is a distant possibility.

If there is to be even 7.5 million acre-feet of consumptive use available from the main stream in the lower basin (far less than the Master's comfortable prophecy, Rep. 115) there must be at least 10 million

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[1]Ariz. Ans. Br. 131-32.
Compare Arizona's assumption that for a long period of time California may rely upon the use of large quantities of unused upper basin water (Ariz. Ans. Br. 125, 128-29) *with* Arizona's contention that California should not be permitted to consume unused Arizona water (apparently even though that water might otherwise waste into the Gulf of California) (Ariz. Op. Br. 106-08).

acre-feet of flow "let down" at Lee Ferry. That quantity is necessary to supply consumptive uses (7.5 million acre-feet), the Mexican Treaty obligation (1.5 million acre-feet), and to allow for the inevitable losses in excess of tributary inflow between Lee Ferry and the Mexican boundary (at least 1 million acre-feet).[2] A Lee Ferry flow of 10 million acre-feet annually is a full one third more than the average annual delivery guaranteed by the upper division to the lower division under the terms of Article III(d) of the Colorado River Compact. It is 1 million acre-feet in excess of the sum of the Article III(d) obligation and the entire Mexican burden imposed upon both basins.

There is not enough water in the river to sustain 10 million acre-feet of flow at Lee Ferry (thus 7.5 million acre-feet of consumptive use in the main stream below) unless (1) upper basin development is virtually halted (a prospect which Congress has unmistakably said shall not occur[3]), or (2) stream flow shall unaccountably increase far beyond the long-term average of any period ending with the present.

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[2]Losses plus treaty deliveries to Mexico would be somewhat larger than 2.5 million acre-feet from a 10 million acre-foot flow at Lee Ferry. The Stetson and Erickson loss figures on which we rely to show that net losses plus Mexican deliveries are about 2.5 million acre-feet (Calif. Op. Br. app. A46) are associated with Lee Ferry flows smaller than 10 million acre-feet. Calif. Ex. 2216A (Tr. 11,825); Ariz. Ex. 366 (Tr. 18,097). See p. 104 note 2a *supra*.

[3]Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958).

The demonstration is simple. The average virgin (undepleted) flow at Lee Ferry for the 35-year period from 1922 through 1956 during which flow has actually been gaged[4] was 14 million acre-feet annually (Rep. 118).[5] If there is to be 10 million acre-feet of flow averaged annually, the depletions above Lee Ferry must not exceed 4 million acre-feet. *Present* depletions of the "virgin" flow above Lee Ferry are about 2.55 million acre-feet annually.[6] The upper basin can thus deplete no more than 1.45 million acre-feet in addition to existing depletions within that 4 million acre-foot margin.

Upper basin projects are now authorized by Congress which, when combined with existing uses, will deplete the flow at Lee Ferry by 3.9 million acre-feet.[7] This means that the upper basin has only 100,000 acre-feet to go in future authorizations before the 4 million acre-foot margin totally disappears. The Secretary of the Interior and congressional committees have reported favorably on new upper basin projects, nearly any one of

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[4]Figures prior to 1922 are calculated from estimated historical flow.

[5]The period from water year 1922 to water year 1956 is the most reliable record available at Lee Ferry. See Tr. 11,820 (Stetson). These years also include the critical drouth period. Calif. Ex. 2202-A, (Tr. 11,713A), at 2. *Cf.* Rep. 109: "It might be that over a short period of less than ten years Hoover Dam could be operated flexibly enough to translate the total flow into an average yearly release. But it is most unlikely that this can be done over a longer period."

[6]See table, p. 115 & note 9 *infra*.

[7]See note 8 *infra*.

which, if authorized and constructed, would far exceed that 100,000 acre-foot margin.[8] The following tabula-

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[8] *Hearings on H.R. 2206, H.R. 2207, H.R. 2208, and H.R. 2209 Before the Subcommittee on Irrigation and Reclamation of the House Committe on Interior and Insular Affairs,* 87th Cong., 1st Sess. 83(1961), in testimony of William I. Palmer, Asst. Commissioner of Reclamation:

Item	Average annual depletion at Lee Ferry in 1,000's of acre-feet
Existing and authorized prior to 1949:	2,550
Authorized by Public Law 485 [Colorado River Storage Project Act of April 11, 1956, 70 Stat. 105, 43 U.S.C. §§ 620-620*o* (1958)]:	
Evaporation by storage units	691
Participating projects	404
Section 11 (Blue River settlement)	190
Other authorizations:	
Collbran project, Colorado	7
Utah Construction Co., New Mexico	39
Private developments, Wyoming	17
Subtotal, existing and authorized	3,898
Proposed in S. 107:	
Navajo Indian irrigation	252
San Juan-Chama initial phase	110
Subtotal with S. 107	4,260
Animas-La Plata project	130
Subtotal	4.390
Other proposals before the Congress:	
Fryingpan-Arkansas project, Colorado	75
Savery-Pot Hook, Colorado-Wyoming	38
Subtotal, existing, authorized, and proposed	4,503
Mentioned in sec. 2, Public Law 485 [Colorado River Storage Project Act]:	
Preliminary data on 21 projects (excluding San Juan-Chama, Navajo, Animas-La Plata, and Savery-Pot Hook)	800
Total	5,303

tion demonstrates the calculation of the margin for future upper basin development:

DEPLETION AVAILABLE TO UPPER BASIN IF LOWER BASIN IS TO HAVE 7.5 MILLION ACRE-FEET OF CONSUMPTIVE USE FROM ENTIRE MAIN STREAM

	Millions of acre-feet
1. Average annual "virgin" flow at Lee Ferry, 1922-1956 (Rep. 118)	14.0
2. Required flow at Lee Ferry to satisfy lower basin consumptive use of 7.5 million acre-feet from main stream	10.0
3. Margin available for all upper basin depletions (1 minus 2)	4.0[9]
4. Depletions by all existing and authorized upper basin projects	3.9[10]
5. Margin remaining for future upper basin projects available without invading 7.5 million acre-feet of consumptive use from lower basin main stream (3 minus 4)	0.1

Moreover, the disappearance of that 100,000 acre-foot cushion will not await future authorizations for future upper basin projects. There is now 35 million acre-feet of new reservoir storage under construction in the upper basin.[11] Filling of these new reservoirs will begin with the closing of Glen Canyon Dam, scheduled

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[9]Depletions by existing upper basin projects total 2.55 million acre-feet. Calif. Ex. 5536 for iden. (Tr. 21,354) (extract from a 1958 Bureau of Reclamation study of the Colorado River Storage Project, published as S. Doc. No. 101, 85th Cong., 2d Sess.) at 13.

This leaves a margin of only 1.45 million acre-feet (4.0 minus 2.55) for depletion by future upper basin projects, including about 1.35 million acre-feet which are now authorized (*supra* note 8).

The United States argues (U.S. Ans. Br. 53) that S. Doc. No. 101 forecasts the time at which the upper basin will use its *full* Compact apportionment. S. Doc. No. 101 does not do so.

[10]See *supra* note 8, subtotal, existing and authorized, 3,898,000 acre-feet per annum.

[11]See Calif. Ex. 2203A, Tr. 11,720.

for 1962.[1] Filling criteria have not yet been finally determined, but it is obvious that water to fill the new storage reservoirs will deplete the flow at Lee Ferry very substantially. For example, if reservoirs were filled at a regular annual rate over a period as long as 1962 to 1990, the average supply withheld from Lee Ferry would be 1.2 million acre-feet yearly.[2]

It is manifest that a reduction of California's supply under the recommended decree to 3.8 million acre-feet or less is neither remote nor avoidable unless the purposes of the Colorado River Compact, the congressional purpose of the Colorado River Storage Project Act of 1956, and the expectations of every upper basin state are frustrated.

The day the decree is entered, every state and every project in the lower basin will begin a study to determine the consequences of that decree.[2a] We again sug-

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[1]Tr. 21,351-52 (Riter).

[2]If there is any doubt about this, evidence should be taken to establish the facts. See Calif. Op. Br. A39-A62.

[2a]Nevada does a complete about-face on the issue of water supply. She went to great lengths in her findings of fact and conclusions of law to show that water supply should be determined and that it should be based on the period 1930 through 1956. Nev. Findings XXVIII-XLVI and Conclusions 29, 30, pp. 63-75. Nevada asserted that "In determining the amount of water available for allocation among the Lower Basin States, the proper amount to be assumed as passing Lee Ferry is the minimum amount required to be permitted to pass that point by the States of the Upper Division, under Article III(d) of the Compact, namely, an average of 7,500,000 acre-feet." Nev. Finding XXX, p. 63.

In her answering brief before the Special Master (June 1, 1959), Nevada asserted: "If any concrete, definite, and worthwhile result is to be obtained from the vast expenditure of money and effort that has gone into this hearing, it would seem that there should be some determinations made with respect to the

gest that the consequences in terms of water supply should be known to the Court before the decree is entered.[8]

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water supply upon which the Court is to act in its decree herein." Nev. Ans. Br. 70 (June 1, 1959).

Now just two years later in her answering brief of August 7, 1961, Nevada says that a finding as to the dependable water supply is not necessary and, in fact, cannot be made. Nev. Ans. Br. 47-48.

[3]Arizona's criticisms of our water supply studies (Ariz. Ans. Br. 112-27) are completely unfounded. They demonstrate a distortion, or lack of comprehension, of the water supply evidence.

Typical is Arizona's assertion that our water supply studies require "the *assumption* that suitable reservoir sites are available in the Upper Basin; that Congress will provide the effective storage capacity hypothesized by California's experts . . . ." Ariz. Ans. Br. 114. (Emphasis added.) See also *id.* at 119.

These are facts—not assumptions. Calif. Exs. 2203 and 2203A (Tr. 11,720) show and document that the Stetson water supply study is based upon presently existing or authorized reservoirs in the upper basin. Obviously those reservoirs are located at sites which are in use or have been fully investigated.

Three of the four major authorized upper basin reservoirs will soon begin filling, and the fourth will soon begin construction: Reservoir filling is planned to begin in Navajo Reservoir in the fall of this year, in Lake Powell (the reservoir behind Glen Canyon Dam) in the fall of 1962, and in Flaming Gorge Reservoir in the spring of 1963. On the Curecanti unit, highway relocation is now underway, and a prime construction contract will be awarded in early spring 1962. See Remarks of Frank M. Clinton, Regional Director, Region 4, Bureau of Reclamation, Before the Upper Colorado River Commission, on May 11, 1961, at Denver, Colorado, inserted in the appendix of the *Congressional Record,* June 14, 1961, as part of the extension of remarks of Hon. Wayne N. Aspinall, Colorado, pp. A4357-58. Lake Powell behind Glen Canyon Dam will provide about two thirds of the total existing and authorized upper basin storage. Calif. Ex. 2203A, *supra.*

Similarly, Arizona erroneously asserts that California water supply studies ignore "the fact that existing reservoir capacities will be reduced by future accumulations of silt." Ariz. Ans. Br. 118. In fact, California witness Stetson testified that silt accumulation was taken into account in the operational study of Lake Mead (Tr. 11,748) and is reflected in Calif. Ex. 2208A (Tr. 11,747). To the extent that "future accumulations of silt" decrease reservoir capacity, this decreases the safe annual yield which can be controlled by storage.

The recommended decree is an invitation to Congress to authorize simultaneous development in both the upper and lower basins upon the same small margin of unused water. The decree would set the basins on a collision course the outcome of which is disaster, not only to California, but to the entire Colorado River basin.

The interpretation of the "law of the river" may be sufficiently elastic, legally, to permit simultaneous development. The water supply is not. The assumption of the Master, endorsed by the United States,[4] Arizona, and Nevada, of abundant water to sustain all existing projects until "many vast new projects" are approved by Congress and constructed (Rep. 115) is demonstrably

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[4]We find the United States argued position (U.S. Ans. Br. 19) impossible to reconcile with the position taken by the Department of the Interior and the Bureau of Reclamation in recent hearings on the Fryingpan-Arkansas Project. In May 1961, Assistant Commissioner of Reclamation William I. Palmer presented a Bureau study depicting conditions in the year 2020 in which the *total* annual scheduled releases from Lake Mead are 8.5 million acre-feet (plus unusable spills separated by long intervals of years). *Hearings on H.R. 2206, H.R. 2207, H.R. 2208, and H.R. 2209 Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs,* 87th Cong., 1st Sess., ser. 4, at 86-87, col. 18 (1961). Under such conditions, the total water available for consumptive use in California, Arizona, and Nevada would be 6.225 million acre-feet annually. See Calif. Op. Br. table 6.

Contrast the argument of the attorneys for the United States: "California's assertions that the decree will result in disaster for the Metropolitan Water District are based on the assumption that the Upper Basin States will utilize their entire allotment [7.5 million acre-feet?] in the near future. The right of the Upper Basin to all the water apportioned by the compact is not to be questioned but, as a practical matter, it is at best uncertain when Upper Basin developments will reach this point. It would be undesirable to abandon needed development in Arizona and Nevada in order to protect against possible future shortgages which by reason of scientific discoveries or other factors may never occur." U.S. Ans. Br. 19. (Bracketed material ours.)

wrong. The water supply of the Colorado River basin will permit some further development in each basin. It will not permit "vast new projects" in both.

3. *The assertion that technology will solve water problems*

We hope, of course, that the optimism asserted will be shown to be justified. No one in this case, however, has testified that there is any such prospect.[5] Overdevelopment predicated on the possibility of rescue by a technology not in being is a risk which we believe it would be irresponsible to undertake.[6] In any event, the risk should be assumed by those who find it attractive. Needless to say, the Project Act was not written on the theory that science would one day find a way to permit Californians to drink and irrigate with the waters of the ocean.

4. *The assertion that California is wasting water*

This has been thoroughly disproved in the evidence. It rests on the undisputed fact that large quantities of Colorado River water flow into the Salton Sea, a sea nearly as saline as the ocean. This discharge must carry out of the irrigated lands into Salton Sea at least as much salt as is deposited by irrigation or the lands will ultimately be rendered useless. The waters of the

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[5]Nor has anyone suggested a way to salvage a half billion dollars of public investment by the people of California in the facilities which the decree will render useless. Calf. Op. Br. A27, A29, A33-34.

[6]The U.S. Geological Survey has estimated that about 40 million acre-feet of annual precipitation falls on the drainage basins of the Gila River and its tributaries, but only 3 million of this is recovered in runoff. Calif. Ex. 16 (Tr. 2718), at 24. The 37 million acre-feet of lost precipitation is likely to be available to Arizona as soon as the Pacific Ocean is available to California.

Colorado River at Imperial Dam contain materially over 1 ton of salt per acre-foot of water and salt content is increasing.[7] As more than 3.5 million acre-feet are diverted into the Imperial and Coachella valleys,[7a] nearly 4 million tons of salt enter and must be discharged from the irrigated area. This equivalent to 1000 trains of 80 carloads of 50 tons each is removed hydraulically instead of mechanically. If not so removed, this salt would render the soil useless.

Water discharged to maintain "salt balance" is not waste, in any pejorative sense, any more than sewage is waste. It is, indeed, agricultural sewage.

Arizona's answering brief speaks of California's "inefficient water uses and gross waste"—"a shameful waste of a precious commodity." Ariz. Ans. Br. 135. California's claim of 5.5 acre-feet per acre which must be diverted for the All-American Canal project "even after making use of reasonable conservation practices, is wholly unrealistic and grossly inflated." *Id.* at 133 n.185, 134. Eight numbered paragraphs in Arizona's footnote purport to provide specifics and documentation of this charge.

We shall not reply here in detail to these assertions: we have already done so. Arizona made the same assertions in her answering brief to the Special Master, and we replied in detail in appendix A to the Cali-

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[7]Calif. Finding 4C:106(1) & n.5, at IV-21 through 22, citing testimony and exhibits in evidence by outstanding experts on the chemistry of soils and of irrigation water.

[7a]Calif. Finding 4C:105(2), at IV-20.

fornia Rebuttal Brief filed with him on June 30, 1959.[8]

However, we think that the following brief comments alone answer Arizona's contentions:

Arizona presented evidence relating to alleged waste of water by California projects in her initial case presented in 1956. Arizona presented more evidence on the same subject in rebuttal in 1958. Our evidence met both attacks fully.

The Master directed that the parties submit findings of fact and conclusions of law supporting not only their own cases (Arizona had made this a part of hers) but meeting those of her adversaries.[1] We responded to that direction. Arizona presented neither findings, conclusions, nor a brief which touched this subject. In her answering brief, Arizona made the assertions now made before the Court, based on evidence which had been fully refuted. Arizona objected to California's request for opportunity to file a rebuttal brief,[2] but the Master overruled the Arizona objection.

Our evidence with respect to Imperial Irrigation District established three things, none of which any Arizona evidence contradicted:

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[8]These are the allegations specifically made in separately numbered paragraphs in Ariz. Ans. Br. 133 n.185:

1. Effective precipitation. Answered Calif. Rebuttal Brief submitted to the Master, June 30, 1959, p. A-13.
2. Salt content. Answered, *id.* at A-15.
3. Leaching requirement. Answered, *id.* at A-17.
4. Imperviousness of soil. Answered, *id.* at A-18.
5. Seepage losses. Answered, *id.* at A-21.
6. Pump recovery. Answered, *id.* at A-26.
7. Regulation loss. Answered, *id.* at A-28.
8. Domestic requirement. Answered, *id.* at A-30.

[1]Tr. 21,691.

[2]Letter of Arizona counsel of June 5, 1959. Nevada and New Mexico also sought leave to file rebuttal briefs.

(1) The irrigation efficiency of Imperial Irrigation District places Imperial toward the top of the list of Bureau of Reclamation Projects in the United States. This was the testimony of J. R. Riter, Chief Development Engineer of the Bureau of Reclamation. (Tr. 21,313.)

(2) The efficiency of Imperial is superior to that of the Arizona projects which divert at Imperial Dam on the Arizona side of the river.[3]

(3) The efficiency which Arizona would require of Imperial Irrigation District after elimination of "waste" is greater than that planned for the Central Arizona Project which Arizona sought to have Congress authorize.[4]

If the Court has any doubt on this score, we would suggest a decree which specifies minimum standards of efficiency applicable on both sides of the river. We are in favor of conservation. We will go as far as Arizona wishes in furthering conservation, so long as the standards are identical for similarly situated projects on both banks of the river.

D. In the Absence of Any Attempt To Determine the Consequences of the Decision Before It Is Made the Court Should Not Exercise Jurisdiction

The most fundamental difference which exists among the parties relates to the consequences of what the Master recommends the Court decide. We have iterated and reiterated that to California the consequences must

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[3]Calif. Ex. 5106 (Tr. 20,768). This shows, for example, that Imperial diverts 7.11 acre-feet per acre per year. The Gila Project in Arizona diverts 10.32 acre-feet per acre per year.
[4]Calif. Ex. 3047 (Tr. 19,860).

be described by the word "disaster." Our adversaries insist we are wrong.

There can be no reasonable argument that to reduce California's rights to 3.5 million acre-feet (our expectancy on the basis of the water supply evidence) or 3.8 million acre-feet (our expectancy if there is a full Compact supply available to the lower basin) means disaster.[5] California was beneficially using about 4.6 million acre-feet of water at the close of the trial, and is beneficially using nearly 5 million acre-feet today.

Our adversaries answer arguments we have not made. The United States writes that "California would go too far in mortgaging the present to protect the remote future, perhaps because it is Arizona's present that will be sacrificed as security for California's future." U.S. Ans. Br. 54. Arizona charges us with including in our "existing needs" and "present requirements" water to irrigate 175,000 acres of new land never before irrigated. Ariz. Ans. Br. 133. Arizona says:

> "[T]he California protestation that unless she receives 5,378,000 acre-feet of Colorado River water each and every year she will be visited with disaster is without substance." Ariz. Ans. Br. 139.

Irrigation of 175,000 acres of new land in California is not in prospect. There is no issue in the case whose resolution would conceivably give California 5,378,000 acre-feet of water each and every year.

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[5]California's 3.5 and 3.8 million acre-feet referred to in text may be further reduced if a Central Arizona Project or other project is built to divert water from the main stream above Lake Mead.

It is California's *present,* not California's future, which we defend. We defend it against projects for the future in the other states only because those future projects would be given, by the Master's decree, water rights which would impair our present projects.

The facts are tabulated on page 128 of the Master's Report where he lists present consumptive use by each California project. At the close of trial, California agricultural projects used 3.994 million acre-feet of water. Of that quantity, about 200,000 acre-feet was junior in right to (1) the Indian reservation rights in California which the decree would establish, and (2) Metropolitan's entire right of 1.212 million acre-feet. This 200,000 acre-feet now used will be unavailable to those agricultural projects on a permanent basis. There can be no question of expansion in California under anyone's view. The issue is, how much contraction?

The attack on Metropolitan Water District is equally unfounded. Arizona asserts that Metropolitan's entitlement, if confined to domestic use, is adequate to satisfy a population of the district expanded by 80 per cent (Ariz. Ans. Br. 133); that Metropolitan can look to alternate sources of water: the Feather River Project or the Pacific Ocean (*id.* at 137-39).

Neither assertion is justification for wiping out Metropolitan's entire supply. The unavoidable fact, as has been demonstrated, is that under the proposed decree there would be no water available for diversion from the Colorado by the great Colorado River Aqueduct.[6] No issue as to alternate sources of water for any California area was pleaded. Evidence with re-

[6]Calif. Op. Br. 266-67.

spect thereto was rejected as irrelevant.[7] If the issue were tried, the evidence would show that there is no plan in being or in prospect which could replace Metropolitan's Colorado River supply. The testimony shows without contradiction that the full quantity of contract water will be in use in the district by 1970.[8]

Neither Metropolitan's water nor that of any other project affected by the decree is limited to domestic use. Metropolitan's contract specifies "beneficial consumptive use" on the coastal plain of southern California.[9] Both irrigation and prevention of salt water intrusion which would otherwise destroy large ground water basins are beneficial uses. No one has thought that California water users are paying to pump Colorado River water over the mountains into southern California when it is not required.

The question before the Court is whether Metropolitan's contract for "permanent service" (subject, of course, to the vagaries of nature and the California Limitation Act) shall be respected, and not be subjected to destruction by projects not yet in existence.

Before or after a decree in this case is entered, its effect on present projects and the prospects of future projects must be appraised. We urge that this be done before, rather than afterward. The purpose is not to persuade the Court to rewrite the law of the river to avoid a harsh result, but to persuade the Court that the Master's proposed rewriting of that law frustrates its intent and purpose.

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[7]Calif. Ans. Br. 140-42.
[8]Tr. 9829-31, 9834 (Morris).
[9]Ariz. Ex. 39, Tr. 252, art. 6.

These are the compelling facts:

(1) Every member of Congress recognized that the purpose and intent of the Project Act and all its associated documents was to serve California's three projects: Palo Verde, the All-American Canal, the Metropolitan Water District.[10]

The Committee reports on the Swing-Johnson (Project Act) bills contain explicit and detailed statements about the purpose of the Boulder Canyon Project to make possible a water supply for the growing population of the Metropolitan Water District's area.[11]

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[10]Senator Hayden's declaration that the Project Act would provide for California 3.5 million acre-feet for the All-American Canal, .5 million acre-feet for Palo Verde and the Yuma Project, and 1 million acre-feet for the vicinity of Los Angeles out of a supply of 9.5 million acre-feet at the site of Hoover Dam (Calif. Op. Br. 236-37) was never contradicted. Senator Hayden left no doubt that he was against the act, but in 1930, during hearings on appropriations for Hoover Dam he reiterated the statement that the act, then passed, provided over one million acre-feet for the vicinity of Los Angeles. See pp. 74-77 *supra*.

[11]"The formation of a large public district, comprising the cities of Los Angeles, Pasadena, Glendale, Orange County cities, and such other cities as desire to join, is in process of formation for the purpose of building the necessary aqueduct from the river to the coast to supply these cities with domestic water. . . .

"The amount of water required by these cities is 1,500 second-feet [equivalent to about 1,100,000 acre-feet per annum]. This, of course, will not all be necessary at once, but as these cities are growing rapidly, they must look to the future and provide for their vital necessities.

". . . .

"Large storage at Boulder Canyon is ideally fitted to make it possible for these cities to procure a domestic water supply. . . ." H. REP. No. 918, 70th Cong., 1st Sess., to accompany H. R. 5773, pt. 1 (1928), Calif. Ex. No. 444 (Tr. 9,395).

See, to similar effect: S. REP. No. 654, 69th Cong., 1st Sess., to accompany S. 3331, pt. 1 (1926), Calif. Ex. 441 (Tr. 9395); H. REP. No. 1657, 69th Cong., 2d Sess., to accompany H. R. 9826, pt. 1 (1926), Calif. Ex. 442 (Tr. 9395); S. REP. No. 592, 70th Cong., 1st Sess., to accompany S. 728, pt. 1 (1928), Calif. Ex. 443 (Tr. 9395).

(2) The California Legislature, the Congress of the United States, every Secretary of the Interior, and the people of California who depend on these projects have acted on that hypothesis for more than three decades since the Project Act became law.

(3) One of California's three projects cannot survive under the decree recommended, even if new projects are not built to divert from the main stream above Lake Mead. This is not because of drouth, which everyone in California recognizes has diminished the supply. Disaster is in prospect because the Master proposes to write a decree which reverses both the clear language of the Project Act and the California Limitation Act, and an interpretation of those acts accepted and asserted by both Arizona and California in the decades since 1928, both in this Court and in every other forum: (1) the limitation on California incorporates the Colorado River Compact; (2) priority interstate characterizes water rights within the limitation.

Water rights are property rights, and these two positions, correct in the first instance, have become rules of property.[12]

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[12]See Bristor v. Cheatham, 75 Ariz. 227, 231, 255 P.2d 173, 175 (1953):

> "It is generally so well known that we take judicial notice that, with faith in the foregoing declaration and assurance of this court [concerning the ground water law], many and large investments have been made in the development of ground waters. Under these circumstances the court's announcement of the rule becomes a rule of property, and rights acquired thereunder should not be disturbed 'unless the law is such as to leave the court no alternative' [citation]; and when a decision does become a rule of property, the rights acquired thereunder are entitled to protection under the law as declared. . . ."

Accord, City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 122, 287 Pac. 475, 483-84 (1930).

CONCLUSION

For these reasons the California defendants urge that (1) their exceptions which they have jointly made to the Report of the Special Master be sustained by this Court, and (2) the decree to be entered in this case be in conformity with those exceptions and the views presented in this brief and the California defendants' opening brief and answering brief.

October 2, 1961

Respectfully submitted,

[Signatures follow.]

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TEXT OF STATUTES

1. Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958):

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

2. Section 14 of the Boulder Canyon Project Adjustment Act, 54 Stat. 779 (1940), 43 U.S.C. § 618m (1958):

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement. Neither the promulgation of charges, or the basis of charges,

nor anything contained in this Act, or done thereunder, shall in anywise affect, limit, or prejudice any right of any State in or to the waters of the Colorado River system under the Colorado River compact. Sections 13 (b), 13 (c), and 13 (d) of the Project Act and all other provisions of said Project Act not inconsistent with the terms of this Act shall remain in full force and effect.

3. Extracts from the Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958):

(a) Section 7, 70 Stat. 109, 43 U.S.C. § 620f:

The hydroelectric powerplants and transmission lines authorized by this Act to be constructed, operated, and maintained by the Secretary shall be operated in conjunction with other Federal powerplants, present and potential, so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates, but in the exercise of the authority hereby granted he shall not affect or interfere with the operation of the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act and any contract lawfully entered unto [*sic*] under said Compacts and Acts. Subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the plants of the Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable State law.

(b) Section 14, 70 Stat. 110, 43 U.S.C. § 620m:

In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise.

4. ARIZ. LAWS 1961, Act of March 17, 1961, ch. 39, p. 107:

CHAPTER 39

Senate Bill No. 189

AN ACT

Making Appropriations to Arizona Interstate Stream Commission; Providing for Contract With Reclamation Bureau to Make Investigations and Studies of Bridge Canyon Dam and Works for Diversion and Transportation of Water to Central Arizona Project and Other Areas; Limita-

tion of Such Expenditures; Restrictions; Preventing Impairment of Existing Arizona Colorado River Rights; Providing for Annual Report Disclosing Amounts Expended and Results of Investigations.

Be it enacted by the Legislature of the State of Arizona:

Section 1. APPROPRIATION

The sum of one hundred fifty thousand dollars is appropriated to the Arizona interstate stream commission.

Sec. 2. PURPOSE

The sum appropriated under the provisions of section 1 shall be used under contract with the bureau of reclamation for the purpose of making investigations and studies of a dam at the Bridge Canyon site on the Colorado River and of works necessary for the diversion and transportation of water from the Colorado river to areas in Arizona; provided that not to exceed the sum of one hundred thousand dollars shall be used [108] for the investigation of Bridge Canyon Dam and of works necessary for the diversion of Colorado river water to the Central Arizona Project area; and provided further that the contract with the bureau of reclamation shall provide that the investigations and studies shall be restricted to only that quantity of water which may be available for use in Arizona, after the satisfaction of all existing water delivery contracts between the secretary of interior and users in Arizona for the delivery of main stream water, and that nothing shall be done thereunder which

will impair existing rights in Arizona for the diversion and use of Colorado river water. The commission shall make an annual report to the legislature and the governor on the 15th of January of each year, showing the amounts expended, and the results of their investigations and studies in all categories, coming under the provisions of this act.

Sec. 3. EXEMPTION

The appropriation made by this act is exempt from the provisions of sections 35-173 and 35-190, Arizona Revised Statutes, relating to quarterly allotments and lapsing appropriations.

Sec. 4. EMERGENCY

To preserve the public peace, health and safety, it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure to take effect as provided by law.

Approved by the Governor—March 17, 1961.

Filed in the Office of the Secretary of State—March 17, 1961.

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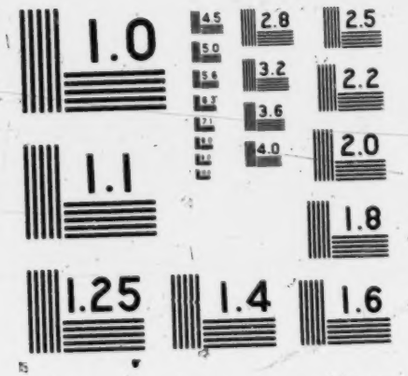

SUPREME COURT, U. S.

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FILED
OCT 2 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 8 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Legislative History Appendixes Accompanying the Reply Brief of the California Defendants to the Answering Briefs of the United States, Arizona, and Nevada

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October 2, 1961

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LEGISLATIVE HISTORY APPENDIXES
ACCOMPANYING CALIFORNIA REPLY BRIEF

October 2, 1961

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LEGISLATIVE HISTORY APPENDIXES ACCOMPANYING CALIFORNIA REPLY BRIEF

Introduction

Arizona's answering brief disputes the following two California contentions:

(1) "[O]ne of the major areas of legislative agreement expressed throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) by proponents and opponents of the measure alike" was that "Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished." Calif. Op. Br. 181.

(2) "The Project Act preserved priority of appropriation and equitable apportionment in the 'mainstream' and in every other part of the Colorado River system in the lower basin." *Id.* at 159.

Arizona asserts that the legislative history does not support either contention:

> (1) "The legislative history is directly to the contrary. It unequivocally discloses that one of the major areas of *disagreement* between proponents and opponents of the bills was whether Congress had the constitutional authority to make such an interstate allocation of water. We repeat, no one denied that the various Swing-Johnson bills

provided for a federal allocation of water among the states. The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states. On the other hand, the defenders of the bills argued vigorously for their constitutionality." Ariz. Ans. Br. 35.

(2) "[T]he true legislative history shows overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation in the Lower Basin of the doctrines of prior appropriation and equitable apportionment." *Id.* at 17-18.

In these appendixes we demonstrate that Arizona's interpretation of the legislative history is wholly erroneous or misleading in five important respects.[1]

Appendix A

There was no disagreement between proponents and opponents of the Swing-Johnson bills that Congress did not possess the power to make an interstate allocation of water.[2] The Senators and Representatives who played key roles either in support of or in opposition to the Swing-Johnson bills were in agreement that an inter-

[1]To some extent, we repeat the legislative history presented in our opening and answering briefs in order that all legislative history on this issue may be gathered in one place for convenient reference.

[2]Arizona does not accurately identify the major area of disagreement. The issue was not whether Congress possessed the power to make an allocation of the waters of the Colorado River system; it was whether the Swing-Johnson bills purported to make any such allocation. We treat that issue in appendix B.

state division of water could be accomplished only by allocation by an interstate compact or litigation in this Court.

We here use the word "allocation" to describe the creation of any interstate right (whether characterized by parity or priority) like that created by an interstate compact. Article III(a) of the Colorado River Compact is an "allocation" in this sense. In a different sense, an appropriation made under state law and given recognition across state lines by the doctrine of *Wyoming v. Colorado,* 259 U.S. 419 (1922), may be an "allocation" both to the appropriator and to the state whose rights are recognized in the original jurisdiction. Likewise a contract with a water user who thereby acquires a right to water stored in Lake Mead may be called an "allocation." However, it is only the assertion that the Secretary made compact-like "allocations" to states which creates any issue in this case.

In appendix A, we present representative statements which demonstrate Congress' view that it could neither make nor authorize the Secretary to make any compact-like allocation.

Appendix B

Arizona's assertion that "no one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states" (Ariz. Ans. Br. 35) is demonstrably wrong. The authors and proponents of the Swing-Johnson bills consistently pointed out that the bills did not purport to make or authorize a federal

allocation of any kind.[3] The charge by the Arizona and Utah opponents that approval of the Colorado River Compact without ratification by all seven basin states would constitute a "federal allocation" was repeatedly denied.[4] In appendix B, we detail the refutations of the arguments of the Utah and Arizona opponents that the bills purported to effect a kind of compact-like "federal allocation."[5]

Appendix C

The "bitter cry of the opposition" to which Arizona refers[5a] was not directed to any purported *intra*-lower basin allocation which Arizona argues Congress authorized in sections 5 and 4(a) of the Project Act. Rather, numerous statements Arizona quotes and cites in support of her argument relate primarily to the "federal allocation" which Arizona and Utah opponents of the bills argued Congress was attempting by approval of the Colorado River Compact with less than seven-state ratification.[6] The remainder of the citations provided by Arizona relate to two issues: (1) whether the alleged

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[3]It was pointed out by the bill's proponents that no state could be bound by the Compact without its consent, a truism subsequently acknowledged by Mr. Justice Brandeis in Arizona v. California, 283 U.S. 423, 462 (1931).

[4]We have pointed out in our answering brief (Calif. Ans. Br. 50-56) that the arguments of the Arizona and Utah opponents of the bills with respect to § 5 (see Ariz. Ans. Br. 33-34) were thoroughly and repeatedly refuted by the authors and other proponents of the measure.

[5]Views expressed by opponents of an act are not persuasive legislative history. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 & n.22 (1956).

[5a]Ariz. Ans. Br. 35, quoted *supra* p. 2.

[6]Arizona had not ratified the Compact; in 1927 Utah had withdrawn her earlier six-state ratification. See Rep. 24-25.

federal ownership of the unappropriated, nonnavigable waters of the western states obviated the necessity for a compact among the seven states (an assertion which Congress rejected); and (2) whether Congress should use its power to condition the use of federal facilities and public lands to substantially effectuate the *inter*basin allocations of the Colorado River Compact. In appendix C, we provide this context for Arizona's extracts from the legislative history.

Appendix D

Whatever any member of Congress may have thought about the function of the contracts authorized by section 5 of the Swing-Johnson bills, both "friend and foe" assumed that the Project Act would not supersede the doctrine of priority of appropriation among the states of the lower basin as Arizona argues. All but one of the statements of the authors of the bill quoted by Arizona in support of her argument related solely to *inter*basin, not *intra*basin, matters. The context of the other statement quoted by Arizona (Senator Johnson in debate with Senator Walsh) demonstrates that Senator Johnson intended that priority principles would guide the Secretary of the Interior in executing contracts under the act. The views of the "foes" of the Swing-Johnson proposals, which Arizona does not cite, show that Arizona refused to ratify the Colorado River Compact and opposed all four Swing-Johnson bills because she feared that California appropriations would preempt most of the lower basin Compact allocation in the absence of an interstate agreement in the lower basin expressly limiting those priorities. In appendix D, we

present this view that priority principles were unimpaired by the Project Act.

Appendix E

In her answering brief (pp. 12-13, 31 n.35, 34 n.41) Arizona reiterates a basic argument presented in her opening brief (pp. 84-99): The requirement of section 5 of the Project Act that contracts shall "conform to" section 4(a) manifests a congressional intention to impose a federal allocation upon "mainstream" waters. The Master has rejected Arizona's argument that by the "conform to" language Congress required that the Secretary's contracts allocate "mainstream" waters to Arizona and Nevada precisely as specified in the unratified and inoperative tri-state compact specified in the second paragraph of section 4(a). See Rep. 162-63, 202. The legislative history of the "conform to" language demonstrates that Congress did not intend thereby to authorize or make any federal allocation; Congress intended to require the Secretary's contracts to conform to any interstate agreement specified in section 4(a) if it were ratified and thus became operative. In appendix E, we present the legislative history of the "conform to" language.

APPENDIX A

STATEMENTS BY PROPONENTS AND OPPONENTS OF THE SWING-JOHNSON BILLS EVIDENCE CONGRESS' VIEW THAT CONGRESS HAD NO POWER TO ALLOCATE THE WATERS OF THE COLORADO RIVER SYSTEM

Proponents*

Senator Bratton of New Mexico

Senator (and later Judge) Bratton was "one of the principal architects of Section 4(a)." Rep. 175 & n.34.

Speaking on the necessity of ratification of the Colorado River Compact, Senator Bratton made this assertion during debates on the fourth Swing-Johnson bill on December 10, 1928 (70 CONG. REC. 330-31):

> "There are only two ways known to me through which title to water of an interstate stream, either for purposes of irrigation or development of power, may be adjudicated. One is by a compact or agreement—the method sought to be followed in this case—and the other is by a [331] decree rendered in a suit instituted originally in the Supreme Court of the United States."

As Arizona recognizes (Ariz. Ans. Br. 46-47), Senator Bratton objected to imposing a tri-state compact on the states. There can be no dispute on this, as the following exchange between Senators Pittman and

---

*We categorize as proponents of the Swing-Johnson bills those Senators and Representatives who favored passage of the bill as evidenced by their recorded votes. See 69 CONG. REC. 9989 (1928) (House of Representatives vote on motion to recommit H.R. 5773, which would, in effect, have defeated the bill); 70 CONG. REC. 603 (1928) (Senate vote on H.R. 5773); *id.* at 837 (House vote on H.R. 5773 as amended by the Senate).

Bratton on this point during debates two days later on the proposed tri-state compact authorization clearly reveals. Senator Pittman, referring to the amendment, had just explained the situation as follows (70 CONG. REC. 470):

> "The amendment is in its present form because it has been modified by the Senator from Arizona. I can not see why any one of the three lower States should object to such an amendment. *It is not imposed as a condition of ratification. It is purely optional with them whether they want to agree to it or not.*" (Emphasis added.)

Senator Bratton then explained that he was opposed to the Pittman-Hayden tri-state compact amendment, even though permissive, because it might hamper and restrict state sovereignty (70 CONG. REC. 470-71):

> "Mr. President, I want to ask the Senator from Nevada whether, in his opinion, it is good policy, assuming that we have the power so to do, to provide in advance what shall be embodied in an interstate or tri-State agreement? In other words, the Federal Government is a sovereign government. Each State is a sovereign State. I seriously doubt the wisdom of the Congress embarking upon the policy of consenting in advance to the execution of an agreement or compact between States with such conditions, provisions, or limitations implied. In other words, I think what the Constitution contemplates is that when States desire to negotiate and agree among themselves, the Congress shall give its consent in advance that they may do so, and when they have done so and

submit the agreement here, the Congress shall either approve or disapprove what the States have done.

"But I seriously question the wisdom of the policy. No one in this body is more anxious than I am to see the three States in the lower basin agree mutually among themselves, but I doubt whether we can afford to embark upon such a policy in order to secure that result and that outcome. Unless the suggestion is mutually satisfactory to the three States I doubt very much the wisdom of our doing such a thing.

"I simply suggest that. I do not want to delay action on the bill. I want to expedite it in every way. But I am unwilling to have us take the step without pointing out the inherent danger that I believe I see in the establishment of such a precedent. *We ought to consent that the three States treat among themselves, unhampered and unrestricted by the Federal Government.* Then when they have reached an agreement let them submit it here for the consent of the Federal Government. *It partakes too much of hampering the States in the exercise of sovereignty. That alone would cause me to vote against the amendment, because I shall never give my consent to the Federal Government undertaking to control the States in negotiating with each other by saying, 'We point out in advance what you must do; you must put this and that in your agreement; you must embody this and that in your agreement.'*

"When we are dealing with sovereignties we should be exceedingly careful to keep within the

scope of our authority. So far as I know, the Federal Government has never done such a thing. I may be in error about it, but I think the usual course is to [471] consent that the States may enter into a compact without even indicating what shall be contained in the agreement, and then when it has been executed and reflects the combined agreement of the parties thereto and is submitted to Congress, we either approve or disapprove it. *To say that they may negotiate and agree under limitations of this kind, in my judgment, transcends the proper functions of the Federal Government.* This alone would control my vote upon the amendment if all other considerations were waved aside. I do not believe we can afford to pay this price in order to bring the three States into agreement." (Emphasis added.)

Senator King of Utah

Senator King, author of section 18 of the Project Act, opposed the Swing-Johnson proposals until the final debates on the fourth and final bill. After the adoption of his amendment which became section 18 of the act, he voted for the bill. See 70 CONG. REC. 593, 603.

On April 18, 1927, Senator King wrote Hon. Hubert Work, Secretary of the Interior, in connection with the Secretary's appointment of special advisors to report to him on various matters relating to the proposed development of the Colorado River. One of the principal objections raised by Senator King concerned what he believed was an implied assertion of federal ownership or control of all unappropriated waters in the

Colorado River basin. He forcefully asserted his opposition to this view as follows:[1]

> "I respectfully submit that no course should be taken by the Interior Department that would tend to prevent the six States from reaching an amicable and satisfactory agreement among themselves with respect to the development of the Colorado River and the utilization of the waters thereof. These States and their inhabitants are the ones who are principally concerned in the development of the Colorado River. They own the bed and banks of the stream; and the States referred to, not the Federal Government, control the waters of the Colorado River and its tributaries. The laws of these States determine how appropriations of water shall be made; and the control of the waters of the river, including its tributaries, is exclusively within the States through which the river and its tributaries flow. The Federal Government, as I shall show, has no control over these waters, except if the Colorado River is navigable, to prevent interference with navigation.
>
> "I respectfully submit that the instructions given to the advisers will be calculated to prevent the ratification of the compact by all the States. They will be regarded as an expression of the purpose of the Interior Department to take control of the waters of the river, regardless of the rights of the States, and to allocate them to the States without reference to the compact, and to construct

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[1] *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 441, 443-44 (1928).

a dam at Boulder Canyon and carry out the essential provisions of the so-called Swing-Johnson bill. Certainly these instructions will be regarded as an expression of a desire on the part of the Interior Department that advice shall be given that will tend to relegate the States to a subordinate position and assign to the National Government the undisputed control and ownership of all unappropriated waters of the Colorado River." (P. 441.)

"The most serious and important provision in the [Secretary of the Interior's] letters of instructions given to the advisors is found in the provision which, in effect, assumes that the Federal Government controls the waters of the Colorado River, or the water rights in the Colorado River. The language employed is as follows:

> Some of the major questions to be determined include the following: "Whether the Federal Government, by control of water rights, has power to allocate the unappropriated waters of the Colorado River to the basin States and make unnecessary a compact between the States."

"If it had not been for this instruction I would not have troubled you with this communication, but my interpretation of these words has constrained me to submit this letter. As I interpret these words, it seems that you take the position that the Federal Government 'controls the water rights' of the Colorado River. Obviously the waters of the Colorado River are referred to, and, of course, if the Federal Government has control of the waters of this river, or the 'water rights' therein, it possesses the same authority over the

waters of all other streams, navigable and unnavigable, in the United States. It seems to me that the position taken in these instructions is a challenge to a doctrine and policy which has prevailed in the United States from the beginning of the Republic. The meaning of these words can not be mistaken. The words assume that the Federal Government 'controls the water rights' of the Colorado River. The words 'water rights' undoubtedly mean the waters, certainly the unappropriated waters, of the river. That this is the interpretation intended to be placed upon these words is clear when the concluding words of the sentence are examined.

"The position boldly stated in this sentence is this:

> The Federal Government controls the waters of the Colorado River, and that being true, it has the power to allocate unappropriated waters to the States interested therein and therefore no compact among them is necessary.

"The premise of the sentence is that the Federal Government 'controls the water rights' of the river. So controlling them, the Interior Department is willing to have the opinion of the persons named upon the question of the power of the Government to allocate the unappropriated waters among the States of Utah, Nevada, Colorado, Wyoming, Arizona, and California, thus making unnecessary any compact. Of course, if the Government owns and controls the unappropriated waters of the river, it would seem that it would have the right to make disposition of the same and the States would have no voice in their allocation.

"I can place no other interpretation upon these words than an intent upon the part of the Interior Department to deny to the States the right to enter into an agreement among themselves with respect to the waters of the Colorado River and the tributaries thereof. If not, why are the advisers not permitted to investigate and pass upon the question as to the rights of the States in and to the waters of the Colorado River and the tributaries thereof? Why assume that they have no control over or rights in these waters, and that the Federal Government alone has the authority to control them? It would seem as though the Interior Department was making it impossible to obtain any other opinion from the advisers than that which is apparently desired; namely, [444] that the Federal Government can allocate all unappropriated waters of the river as it pleases, to individuals or to States, and that the latter have no voice in the matter.[2]

---

[2](Footnote ours.) Senator King's fears were not realized. Only two of the advisers appointed by the Secretary (Calif. Op. Br. 181 n.3) directly responded to the question, and their answers were in the negative. The answer submitted in the report of Hon. Frank C. Emerson, Governor of Wyoming (and Wyoming's Compact Commissioner), is set out in our opening brief. *Ibid.* Hon. James G. Scrugham, former Governor of Nevada (and Nevada's Compact Commissioner), replied to the Secretary as follows:

"(*c*) It is the opinion of eminent constitutional authorities that the Congress of the United States, through its constitutional prerogative of regulating commerce among the several States, has full authority to construct such works of river control without further permission from the interested States. The Supreme Court of the United States has held that such constitutional authority carries with it the power to control and equate the flow of navigable streams such as the lower Colorado River. While the beds and banks of a navigable stream are owned by the State through which the stream flows, or by the States abutting upon such streams, and while the States have sovereignty over

"I respectfully protest against this position of the Interior Department and its officials. I protest against the proposition that the Federal Government controls the unappropriated waters, or any of the waters or water rights of the Colorado River." (Pp. 443-44.)

Subsequently, in debates upon the fourth Swing-Johnson bill on May 28, 1928, Senator King explained to the Senate the position he had taken in his letter to the Secretary (69 CONG. REC. 10262):

"In my letter I contested the position of the Secretary of the Interior which in effect was that the Federal Government has the authority to control the waters of the Colorado River and the right to 'allocate the unappropriated waters of the basin States so as to make unnecessary any compact between them.' This position is taken by some of the officials of the Interior Department. They contend that the States have no authority over the streams, whether navigable or nonnavigable, or the waters thereof, found within their borders. This position indicates the progress being made by bureaucracy in the United States. It seeks to superimpose the Federal Government upon the States and to concentrate not only all political

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the waters within and upon their borders, they can not use such title and sovereignty to prevent the Congress of the United States from exercising a constitutional authority that has been specifically delegated to it by the States. *The right of the United States Government to construct works of control does not appear to carry with it the right to allocate the unappropriated waters of the Colorado River to the interested basin States. Such allocations should properly be made through compacts between the interested States, approved by Congress.*" (Emphasis added.)

Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 515 (1928).

power but economic power in the National Government."

Again, on December 6, 1928, Senator King made his position abundantly clear in an exchange with Senator Hayden during discussion of Senator Hayden's proposed amendment to the fourth Swing-Johnson bill specifying the terms of a tri-state compact among Arizona, California, and Nevada which California would have been required to ratify as a condition precedent to the effectiveness of the Project Act (70 CONG. REC. 169):

> "Mr. HAYDEN. . . . The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.
>
> "Mr. KING. If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes.
>
> "Mr. HAYDEN. The amendment that I have offered contemplates no such possibility."

And, finally, it is clear that Senator King did not consider that section 5, taken in conjunction with section 4(a), authorized the Secretary of the Interior to

make a contractual allocation among Arizona, California, and Nevada. On December 14, 1928, shortly before he offered the amendment which became section 18 of the Project Act, Senator King engaged in an exchange with Senator Pittman over the significance of the limitation on California and the tri-state compact authorization previously added to section 4(a) which makes clear that both Senators were fully aware of the permissive nature of the tri-state compact authorization (70 CONG. REC. 576):

"Mr. KING. But, as I understand, that limitation of 4,400,000 acre-feet exists only in the event of a 6-State compact, not a 7-State compact. We hope, of course, that there will be a 7-State compact, because, if not, the upper States will not be fully protected.

"Mr. PITTMAN. But now, under the so-called Hayden amendment, there is exactly the same apportionment of the water.

"Mr. KING. Assuming that that shall be accepted by California and Arizona?

"Mr. PITTMAN. Exactly.

"Mr. KING. But, of course, we may not coerce either of those States into an acceptance of the so-called Hayden-Pittman amendment.

"Mr. PITTMAN. If there is a 7-State compact, it will be in accordance with the treaty which the Senate consented to, which gives the same amount of water to California that she would get under a 6-State compact, and it provides also that the 6-State compact ratification holds, unless all three of those States do ratify."

Senator Phipps of Colorado

Senator Phipps was chairman of the committee which held hearings on and favorably reported the fourth Swing-Johnson bill. See Calif. Op. Br. 119-20 & n.7.

On February 23, 1927, during debate on the third Swing-Johnson bill, Senator Phipps asserted that interstate agreement or litigation were the only alternatives available to settle the interstate controversy between the upper and lower basins (68 CONG. REC. 4515):

> "As I said in a statement recently made in Denver, Colorado, regarding this interstate agreement, I am firmly convinced that there must be voluntary ratification on the part of each interested State in order to make the compact effective. This is the only method of settling possible controversies permanently and of putting the water of the stream to its highest beneficial use. It is the only satisfactory method; it is the only legal method to avoid proceedings in the courts which would prove costly and almost interminable."

On December 7, 1928, speaking on the fourth Swing-Johnson bill, Senator Phipps discussed the stalemate between Arizona and California over a tri-state compact as it related to the larger problem of seven-state ratification of the Colorado River Compact. His discussion of the possible resolution of these problems mentions only interstate agreement or litigation, and does not suggest that Congress could resolve the problem by making a compact-like allocation (70 CONG. REC. 244, 245):

> "Mr. President, there seems to be an unfortu-

nate difference of opinion between two of the States, the two that are chiefly interested in this enterprise; the two to which it is most important, much more important than it is to the other five States of the basin. California and Arizona are not very far apart in the matter of water allocation. That difference should be composed.

". . . .

"The upper basin States—perhaps I might more properly speak for Colorado alone—have only this selfish interest in the Boulder Dam proposal, other than a naturally friendly one. Their selfish interest is that, coincident with the authorization of the dam, must be an agreement under the compact of the seven States for division of the water of the Colorado River, which will prevent, for all time, discussions, disputes, and lawsuits which would go to every court up to the Supreme Court of the United States before they were determined. There are so many points which come in that even one lawsuit as between Colorado and Kansas does not decide all of the points involved, and, as the Senator from Kansas who sits before me [Mr. CURTIS] knows, our two States are to-day in the Supreme Court of the United States, and have just argued another case involving a water dispute.

"We have had our differences with Wyoming, unfortunately, and while we have come into compact for division of the water of one of the streams that is interstate, and are endeavoring to cover the waters of another stream that flows through Colorado, through Wyoming, and into Nebraska, we have not yet been able to get to-

gether in an amicable settlement as to that river.

"We are also endeavoring to arrange and have progressed in arranging for agreed divisions of water of the interstate streams flowing between Colorado and New Mexico. On one stream we have already agreed. As to others we are in negotiation.

"It does seem reasonable, fair, and proper that where there is this God-given opportunity to use the waters of a stream to the best advantage, the States should use every endeavor to get together and agree amicably upon the division of those waters, rather than resort to struggles in the courts of the United States to settle their differences."

Senator Pittman of Nevada

Senator Pittman was influential in the final debates on the fourth Swing-Johnson bill and was the moving force in converting Senator Hayden's proposed amendment requiring a tri-state compact as a condition precedent to the effectiveness of the act into a permissive authorization to enter into that compact. Rep. 162-63; Calif. Op. Br. 186-87. He was also a member of the Senate Committee on Irrigation and Reclamation which held hearings on and favorably reported the fourth Swing-Johnson bill.

Senator Pittman was a staunch advocate of states' rights in water resource development. This is well illustrated by the so-called Pittman resolution, prepared by Senator Pittman for, and approved by, the Governors' Conference at Denver in August 1927, which Senator Pittman inserted in the *Congressional Record* on April 28, 1928, during debate on the fourth Swing-

Johnson bill (69 CONG. REC. 7392-93). The text of the resolution follows (*id.* at 7393):

> "Resolution offered by Senator KEY PITTMAN on behalf of the Nevada commission to the Conference of Governors and the Commissioners of the Colorado Basin States in session at Denver, Colo., August 29, 1927.
>
> "Whereas it is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by navigable waters within the limits of the several States of the Union belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interests of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States; and
>
> "Whereas it is the settled law of this country that subject to the settlement of controversies between them by interstate compact or decision of the Supreme Court of the United States and subject always to the paramount right of Congress to control the navigation of navigable streams so far as may be necessary for the regulation of commerce with foreign nations and among the States, the exclusive sovereignty over all of the waters within the limits of the several States belongs to the respective States within which they are found, and the sovereignty over waters constituting the

boundary between two States is equal in each of such respective States; and

"Whereas it is the sense of this conference that the exercise by the United States Government of the delegated constitutional authority to control navigation for the regulation of interstate and foreign commerce does not confer upon such Government the use of waters for any other purposes which are not plainly adapted to that end, and does not divest the States of their sovereignty over such waters for any other public purpose that will not interfere with navigation: Therefore be it

"*Resolved,* That it is the sense of this conference of governors and duly authorized and appointed commissioners of the States of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming, constituting the Colorado River Basin States, assembled at Denver, Colo., this 23d day of September, 1927, that:

"The rights of the States under such settled law shall be maintained.

"The States have a legal right to demand and receive compensation for the use of their lands and waters, except from the United States, for the use of such lands and waters to regulate interstate and foreign commerce.

"The State or States upon whose land a dam and reservoir is built by the United States Government, or whose waters are used in connection with a dam built by the United States Government to generate hydroelectric energy, are entitled to the

preferred right to acquire the hydroelectric energy so generated or to acquire the use of such dam and reservoir for the generation of hydroelectric energy upon undertaking to pay to the United States Government the charges that may be made for such hydroelectric energy or for the use of such dam and reservoir to amortize the Government investment, together with interest thereon, or in lieu thereof agree upon any other method of compensation for the use of their waters.

"We, the undersigned committee, to which has been referred the foregoing resolution, as presented to the conference on August 29, 1927, by Senator KEY PITTMAN, having adopted certain amendments unanimously, which are now incorporated therein, we recommend that the resolution set out above be adopted.

KEY PITTMAN,
FRANCIS C. WILSON,
WM. R. WALLACE,
CHARLES E. WINTER,
A. H. FAVOUR,
DELPH E. CARPENTER."

During debate on the third Swing-Johnson bill, Senator Pittman unqualifiedly asserted (68 CONG. REC. 4410):

"The bill does not grant any water to anyone. *The bill can not grant any water to anyone.* . . .

"Under the law which gives the States sovereignty over the water within their borders, the water can not be removed without permission of the States." (Emphasis added.)

During debate on December 11, 1928, on the Phipps amendment to section 4(a) of the fourth Swing-Johnson bill providing for the California limitation, Senator Pittman clearly stated that Congress could not impose that allocation on California without her consent (70 CONG REC. 386):

> "The Phipps amendment does not do anything else except that it states how California shall ratify. The Congress of the United States could not impose it upon California unless California assented to it, because California already has sovereign rights over the water, and the law recognizes her right to use as much as she can put to beneficial use. . . ."

Similarly, Senator Pittman made it clear in an exchange with Senator King of Utah that the terms of the tri-state compact authorization which he had successfully urged be made permissive could not be imposed on Arizona or California by Congress without the consent of those states. 70 CONG. REC. 576. See *supra* p. 17.

Representative Taylor of Colorado

Representative Taylor was a leading supporter of the Swing-Johnson bills in the House of Representatives.

In testimony in 1928 during the House Rules Committee hearings on H.R. 5773, Representative Taylor asserted that there were only two ways of apportioning the waters of the Colorado River system among the seven basin states: by compact or litigation in this Court. Failing that, he asserted that the only way to assure to the upper basin states the protection they desired was to enact the Swing-Johnson proposal

providing for federal approval of the Compact upon six-state ratification, and containing the numerous upper basin amendments designed to subject the use of the proposed dam and public domain to the Compact:[2a]

> "Now, what the four upper States are afraid of is this: There are only three ways of protecting our rights. One is by an interstate agreement, authorized by Congress and consummated by the States and approved by Congress. . . .
>
> ". . . . But we have no way of coercing Arizona or Utah. They, or either of them, can prevent that agreement as long as they want to. The next way to ascertain or protect our rights would be by bringing a suit in the United States Supreme Court, which I have always favored, to have the Supreme Court adjudicate the respective water rights between these seven States. That is the orderly, honest, fair, decent, practical, just, and proper way of settling this matter.
>
> ". . . . That suit ought to be brought; the States ought to take this matter into the United States Supreme Court and have that court determine, adjudge, apportion, and allocate the division of those waters and their use by each of those seven States. But they have not agreed to that, and they will not agree to that.
>
> "So those two best ways of determining our respective rights and settling this controversy are lost and gone.

[2a] *Hearings on H.R. 5773 Before the House Committee on Rules*, 70th Cong., 1st Sess. 15, 16, 17 (1928). *Accord*, 69 CONG. REC. 9764-65 (1928). See also pp. 135-36 *infra*.

". . . . Now, there is only one other way of protecting the upper States, and the rights of the lower States, too, for the future development of the waters of that stream.

". . . .

". . . . When those seven States are unable or unwilling to come to an interstate agreement, and are unwilling to take the matter into the United States Supreme Court to settle it, then by this bill is the only other way those upper States can protect their rights; by having Congress enact a law making those lower appropriations subject to and subordinate to the conditions and provisions of an agreement that all of those States have acknowledged was a fair apportionment between the upper basin of four States and the lower basin of three States. . . ."[2b]

Opponents*

Representative Colton of Utah

During House hearings on the fourth Swing-Johnson bill, Representative Colton commented as follows on the question of federal power to allocate water:[3]

[2b]For an analysis of the upper basin's proposals to protect its apportionment under the Colorado River Compact failing seven-state ratification, which were embodied in the bill under discussion, see appendix C.

[3]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. 414 (1928).

*The primary opposition to the Swing-Johnson proposals came from the Arizona and Utah delegations: Senators Hayden and Ashurst of Arizona, King and Smoot of Utah; Reps. Douglas of Arizona, Colton and Leatherwood of Utah. As we point out *supra* p. 10, however, Senator King voted for the bill after his amendment which became § 18 of the act was accepted. The basis of the Arizona and Utah opposition, as it related to federal approval of the Colorado River Compact with less than seven-state ratification, is discussed in appendix C *infra*.

"I have been informed that an attorney for the Reclamation Service of the United States claims that Congress has the power to allocate and apportion all of the Colorado River among the States regardless of their wishes in the matter. Such a theory is abhorrent to our whole plan of government and particularly to the theory on which our whole system of water rights has been built up."

Subsequently, during debate on the bill on May 23, 1928, he made these unqualified assertions (69 CONG. REC. 9648, 9650):

"Congress can not allocate water. . . .

". . . .

". . . . There are only two ways by which this water may be allocated—by a compact between the States and by decision of the Supreme Court."

Representative Douglas of Arizona

In his testimony in 1928 during the House Rules Committee hearings on H.R. 5773 Mr. Douglas asserted:[4]

"I think, sir, the Federal Government has no right whatsoever to go into the boundaries of a State against its will and against its laws and appropriate, either for its use or for any of its beneficiaries, or allocate the waters of that State."

Senator Hayden of Arizona

During hearings on the third Swing-Johnson bill be-

[4] *Hearings on H.R. 5773 Before the House Committee on Rules*, 70th Cong., 1st Sess. 67 (1928).

fore the House Committee on Rules in 1927, Senator (then Representative) Hayden asserted:[5]

> "Mr. HAYDEN. There are only two ways in which this controversy can be settled. Either the States can agree upon an equitable apportionment of waters of the Colorado River or, in the absence of a compact, the Supreme Court of the United States can determine what the rights of the various States are on that stream.
>
> ". . . .
>
> ". . . . Arizona denies that it is within the power of Congress to apportion the waters of an interstate stream among the States. The States themselves must do that by agreement, or it must be done by the Supreme Court of the United States. The withdrawal of the State of Utah from the six-State compact, merely emphasizes the position of Arizona that the Federal Government and any three States or four States or six States can not apportion the waters of the Colorado River. Nor can anything less than all of the seven States apportion the water in which they are all interested."

Representative Leatherwood of Utah

During hearings in 1927 on the third Swing-Johnson bill before the House Committee on Rules Mr. Leatherwood testified:[6]

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[5] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 75, 76 (1927). *Accord,* H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 3, at 1 (1927), quoted *infra* p. 41 note 10. See also *supra* p. 16.

[6] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 31 (1928). Rep. Leatherwood reasserted his views. *Id.* at 55.

"May I say here, incidentally, gentlemen, that there are only two agencies that can allocate the waters of this great river, the States themselves by treaty ratified by the Congress of the United States, or by the judicial branch of the Government; for the Congress has no power to allocate any of the waters of this river or any other river where the doctrine of prior appropriation is in force.

"Let me say again, that you may follow me, that every one of these States, if they will be true to their conviction, will tell you that they deny, and deny emphatically, that the United States Government owns and controls the unappropriated waters within their boundaries."

Rep. Leatherwood reiterated his convictions the following year during the House Rules Committee hearings on H.R. 5773:[7]

"In substance, I understood the gentleman from Colorado to say that there were but two ways by which this question of the allocation of the waters of the Colorado River could be settled, under the theory of the doctrine of prior appropriation, which we all hold the Supreme Court of the United States has never rejected; first by a compact or a contract between the States ratified by the Congress of the United States; and secondly by a decree of a court of competent jurisdiction.[8]

"That, Mr. Chairman, raises the question that has been raised before, that Congress does not

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[7] *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 41 (1928).

[8] (Footnote ours.) The remarks referred to are those of Rep. Taylor of Colorado, set out *supra* pp. 24-26.

have power to allocate the waters, the unappropriated waters of a stream, where the law of prior appropriation governs.

"And I still maintain that the Congress of the United States has no power to allocate these waters, and what I understood the gentleman from Colorado to say was that there were the two ways which I have referred to."

APPENDIX B

PROPONENTS AND SUPPORTERS OF THE SWING-JOHNSON BILLS CLEARLY AND CONSISTENTLY DENIED THAT THE BILLS PURPORTED TO MAKE OR TO AUTHORIZE ANY FEDERAL ALLOCATION OF WATER AMONG THE STATES

In this appendix we marshal legislative history directed to the following Arizona assertion (Ariz. Ans. Br. 35):

> "[N]o one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states. The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states. On the other hand, the defenders of the bills argued vigorously for their constitutionality."

The legislative history conclusively refutes Arizona's assertion. It is factually correct that the Arizona and Utah opponents of the bills did vigorously argue that the bills attempted to make an unconstitutional interstate allocation.[1] But the authors and other proponents of the bills repeatedly and consistently replied that the bills presented no constitutional questions because the bills did not purport to make or to authorize an interstate allocation of any kind. In fact, the pro-

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[1]As noted in appendix C *infra*, the Arizona and Utah opponents were concerned primarily about a purported "federal allocation" imposing the interbasin allocation of the Colorado River Compact upon nonratifying states, not about any interstate allocation among Arizona, California, and Nevada.

ponents denied that Congress had any such power (appendix A *supra*).

Arizona bases her argument that Congress provided for a federal allocation upon language in section 5 which appeared for the first time in the third Swing-Johnson bill. Hence, we begin our review of the legislative history at that point.

A. The Third Swing-Johnson Bill

1. *House of Representatives*

Representative Swing introduced H.R. 6251, the third Swing-Johnson bill, on December 21, 1925.[2]

The hearings, begun on February 5, 1926, were barely underway when Representative Hayden of Arizona sounded the keynote of the Arizona theme in opposition to the bill:[3]

> "The bill, in its latest form, however, is based upon the fallacious idea that Arizona can be absolutely ignored; that my State has no rights which must be recognized.
>
> ". . . .
>
> "Then there is another question which to my mind is of much greater importance that will also have to be decided by the Supreme Court; the question of the jurisdiction of the States over appropriations of water within their limits. I doubt very much whether Representatives in Congress

[2]H.R. 6251, 69th Cong., 1st Sess., is Calif. Ex. 196 (Tr. 7709). On February 27, 1926, Mr. Swing introduced H.R. 9826 (Calif. Ex. 197, Tr. 7760), containing a revised financing plan.

[3]*Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 15, 16 (1926).

from the arid West, where the doctrine of riparian rights does not and has never prevailed, will be in any hurry to accept the theory of this bill that Congress can make appropriations of water; that Congress, without the consent of the State, can take water for beneficial use for power or irrigation or other purposes.

"Mr. LEATHERWOOD. Without the consent of the State?

"Mr. HAYDEN. Not only without the consent of the State but utterly ignoring the State, yet such are the terms of this bill. It represents the first attempt to pass legislation by Congress whereby the Federal Government is assumed to have that power.

"Members of Congress from the West have always contended that the United States has no jurisdiction over appropriations of water for irrigation, power, or other uses. There is no law upon the Federal statute books asserting such a right, and Congress has in many instances declined to interfere with the laws of any State relating to the appropriation, use, or distribution of water. Two good examples of an acknowledgement that the States, and the States alone, have control over appropriations of water are to be found in the reclamation act and the Federal water power act.

"Jurisdiction over appropriations of the waters of streams is one of the highest attributes of sovereignty in the States of the arid region. Water to them means life. Their entire future is bound up in its conservation and beneficial use. To strip

them of their exclusive control over it by a transfer of authority to the Federal Government would leave the States of the West a mere aggregation of dependencies subject to the whims of Congress controlled by a majority membership from States where the value of water for irrigation is little known and slightly appreciated.

"I am sure that the serious minded Congressmen from the West will not fail to realize that the passage of a law which denies the right of Arizona to control appropriations of water within her borders would be but the first step toward the nationalization of every stream where the Federal Government may desire to take charge. Self protection will compel every one who is jealous of the rights of his State to oppose the adoption of so far reaching and such an evil precedent. After the Colorado River is nationalized, what river in the West will next be arbitrarily taken over from the States?"

Representative Leatherwood of Utah, who was to become an opponent of the bill, urged that Mr. Hayden's position as to the bill's purported assertion of overriding federal authority presented a question "to which every member of the committee, every western representative who hails from a Simon-pure appropriation State, should give very careful consideration and study."[4]

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[4] *Id.* at 19. The committee numbered 11 western Representatives among its 17 members: Chairman Smith (Idaho), and Congressmen Sinnott (Oregon), Leatherwood (Utah), Leavitt (Montana), Winter (Wyoming), Swing (California), Arentz (Nevada), Hayden (Arizona), Hudspeth (Texas), Hill (Washington), and Morrow (New Mexico). *Id.* pt. 1, facing p. 1.

Dr. Elwood Mead, Commissioner of Reclamation, was the first witness. During his testimony in support of the bill, Representative Sinnott of Oregon asked Dr. Mead to state his "position towards the views advanced by Mr. Hayden as to the rights of the State."[5] We set forth Dr. Mead's reply and the ensuing colloquy in which the basic conflict between the views of Mr. Hayden, representing the Arizona opponents, and Mr. Swing, author of the bill, as to the effect of Mr. Swing's bill is presented:[6]

> "Doctor MEAD. As far as the bill is concerned, I do not see where this bill treats Arizona any differently from Nevada and California, the three States that are concerned. They are all on the Colorado. What Mr. Hayden speaks of there is, as he states—it is a difficult question, and it is a question that I think is unsettled, as to just what are the respective rights of the State and the Federal Government in determining a matter of this kind. Here is the State of Arizona with a certain kind of water law. Here is the State of California on the other side, or Nevada, with a different water law, and there must be some way to reconcile and adjust this matter.
>
> "Mr. LEAVITT. They all have the principle of appropriation, do they not?
>
> "Mr. ARENTZ. But the Government does not.
>
> "Mr. HAYDEN. The theory of the bill—and it is perfectly plain—is that whatever the water law of Arizona or California or Nevada may be, the

[5] *Id.* at 31.
[6] *Id.* at 32.

United States proposes to commence this construction and prosecute it regardless of State law.

"Mr. SINNOTT. But to distribute the water equally between you.

"Mr. HAYDEN. There is no proposal in the bill for an equal distribution of water between the States.

"Mr. SINNOTT. The doctor says you are all treated the same.

"Mr. HAYDEN. The bill provides that the distribution of water shall be as the Secretary of the Interior may arrange by contracts. It is entirely in his hands.

"Mr. SWING. *But the distribution will either be by agreement between the States or under their respective laws, as they may avail themselves.*

"Mr. HAYDEN. No; the bill states that the Secretary may make any kind of contract with anybody he pleases, to furnish water at any place.

"Mr. SWING. Other things being equal, Arizona is treated equally here. Those that are on the same footing are treated equally, are they not?

"Mr. HAYDEN. The bill absolutely ignores the water laws of all three States. In that sense Arizona, Nevada, and California are on an equality."

Mr. Hayden refused to accept Mr. Swing's explanation that the distribution of water from the project would "either be by agreement between the States or under their respective laws, as they may avail them-

selves," a position later amplified by Mr. Swing's assertion that his bill did not authorize the Secretary to create water rights and that any rights acquired under the project would derive from beneficial use in accordance with state law. See *infra* pp. 42-43, 55-57.

Later in the hearings, an amendment to the bill was proposed to add what is now the last sentence of the first paragraph of section 5 (Rep. app. 385):

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

That sentence is improperly relied upon by the Master and the other parties to prove that the Project Act imposed a federal allocation upon the "mainstream" waters. It was an upper basin amendment, presented and explained to the committee (and to Mr. Hayden of Arizona, in particular) by Delph E. Carpenter, the upper basin spokesman. That explanation, which conclusively disproves the Master's construction, is as follows:[7]

> "Mr. HAYDEN. The purpose of this amendment is that no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.
>
> "Mr. CARPENTER. 'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any per-

[7] *Id.* at 163.

son in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water.

"Mr. SWING. The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California.

"Mr. HAYDEN. How tight would you tie Arizona?

"Mr. CARPENTER. *The thought of this amendment* is that any water stored in this reservoir under the terms of the compact, when released from storage shall be burdened by the compact wherever it goes. As far as water is concerned, existing claims of the lower States are protected by the compact. Water must pass through this reservoir to take care of the present existing lower claims.

"As to future development from the main river, we insist that water stored in this structure by the United States be stored and released upon the express condition that the persons who receive the

water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California.*" (Emphasis added.)

When Mr. Carpenter concluded that "it has nothing to do with the interstate relations between Arizona and California," he meant "it" to refer to "the thought of this amendment" adding the last sentence to the first paragraph of section 5.

Neither the Master nor the United States attempts to explain this legislative history; each argues only on the basis of the language of the sentence. Rep. 151; U.S. Ans. Br. 27. Arizona, however, asserts that by "it" Mr. Carpenter meant only to refer to the Colorado River Compact. Ariz. Ans. Br. 31. Arizona is only partly correct. Mr. Carpenter would have said, had he written out his statement: *"Our amendment (the last sentence of the first paragraph of section 5), which would subject all uses of stored water to the Colorado River Compact and thus afford some measure of protection to the upper basin's Compact apportionment against a non-ratifying Arizona,* has nothing to do with the interstate relations between Arizona and California." Our emphasized interpolation identifies what, from the context, Mr. Carpenter meant by "it."

Mr. Carpenter made equally clear that the proposed amendment to section 5 was designed to protect the upper basin's allocation under the Colorado River Compact, and was not to supplant interstate agreement as the basis for resolution of any controversy in the lower basin:[8]

[8] *Id.* at 161, 164-65.

"That amendment is proposed by the upper States for the fundamental reason I assigned at the outset of my statement to-day, which is that we insist that no use occur by reason of this structure which may later be said to be independent of the compact and be asserted as adverse to the upper States. . . .

". . . .

". . . . Her [Arizona's] quarrel is not with the upper States, but is a fear of future conditions between herself and California. It is a local situation. Under the compact we make no attempt to allocate between those three lower States. We allocate to the lower group so much water. We do the same with the four upper States.

"In the upper country we had a controversy between New Mexico and Colorado over the La Platte [Plata] River. We settled that by a local **[165]** compact entered into immediately after and in harmony with the main compact. It is intended that these local problems, involving only two or more States, shall be settled by supplemental compacts. And so here we would leave to Arizona, California, and Nevada, the disposition of the water given to the lower basin under the Colorado River compact."

Arizona asserts that "much has been omitted from California's version of Mr. Carpenter's testimony which makes clear his recognition that § 5, even as it then stood, authorized the Secretary to contract for the delivery of stored water *regardless of any alleged prior appropriative rights.*" Ariz. Ans. Br. 31-32. (Emphasis

added.) We treat that argument in appendix D *infra* pp. 108-11.

Throughout the hearings Mr. Hayden adhered to his contention that the bill was an assault on the rights of the states, particularly Arizona, to control the unappropriated waters within their borders.

However, the bill was favorably reported out by the committee on December 22, 1926, by a vote of 12 to 3.[9] Representative Hayden submitted his minority views on January 12, 1927, reiterating his opposition to the bill for, among others, substantially the same reasons urged before the committee.[10]

The House Rules Committee held three days of hearings on the bill on January 20-22, 1927, receiving testimony from the proponents and opponents of the meas-

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[9]H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1 (1926); 68 CONG. REC. 2633 (Rep. Swing); *id.* at 3076 (Rep. Smith).

[10]H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 3, at 1 (1927):

"On behalf of the State of Arizona I recommend that the bill H.R. 9826 do not pass for the following reasons:

"1. The bill violates the law, as established by the constitutions or laws of all of the States of the arid West, and the consent of Congress, that the right to appropriate water for irrigation, power, and other beneficial uses shall be obtained from the State and not from the Federal Government. For the first time in the history of Federal irrigation and water power legislation Congress by this bill proposes to assert the right of the United States to appropriate water for the generation of hydroelectric power and for irrigation and domestic purposes regardless of State law. The avowed object of the bill is to use the power of the Federal Government to seize the waters of the Colorado River in defiance of the State of Arizona.

"2. It is not within the power of Congress or the legislatures of the six States to divide and apportion the waters of the Colorado River and its tributaries in which seven States are interested, as proposed in this bill. Such apportionment or allocation of the waters of an interstate stream can only be accomplished by a decision of the Supreme Court of the United States or by a complete agreement among the seven States and the United States."

ure. Representative Hayden and Representatives Leatherwood and Colton of Utah led the opposition. Representative Swing's statement in support of the bill met the opponents' objections head on. Here is how he explained the effect of his bill on interstate water rights as among Arizona, California, and Nevada:[11]

> "On the question of Arizona's rights in and to the water of the river, let me say that the Government is not undertaking to create or to assert or to deal in or to dispose of water rights. It proposes to go in and construct a dam and store water for reasons which have been set out, and then it turns the water loose. The Secretary's power, as given by this act is not to sell water. The act says 'The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water.' Whose water? It does not say. It might be a community like Imperial Valley that has already acquired a water right, and wants its water stored, or it may be someone who hereafter will acquire a water right, but that right will not be acquired under this bill; not from the United States Government. He will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use. There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State. As a matter of fact, the reclamation law is adopted by section 13 [now 14] of this bill, and

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[11] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 116 (1927).

section 8 of the reclamation act says that what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.

"If the water is used in Arizona, the water right must be acquired under the laws of Arizona; if in Nevada, under the laws of Nevada; if in California, under the laws of California."

Representatives Hayden and Leatherwood renewed their arguments during debate on the bill while it was still before the Rules Committee. On February 5, 1927, Mr. Leatherwood explained why Utah had rescinded her ratification of the Compact on a six-state basis, stressing his fear that the bill's purported attempt to "allocate" the waters of the basin by approving the Compact without seven-state ratification was invalid and hence could not adequately protect Utah's interests (68 CONG. REC. 3065):

"Mr. PERKINS. Will the gentleman tell us why Utah withdrew from the compact?

"Mr. LEATHERWOOD. Yes; if the gentleman will follow me I think he will get an answer from my remarks, and if I do not cover the matter fully I will be glad to yield later; but, briefly, we withdrew from the compact because it was sought to put this legislation through Congress and accomplish all that our sister State of California wanted, and by so doing and with only a six-State compact we would be left at the mercy of any State that failed to ratify the agreement, and under the law applicable to the appropriation of unappropriated waters in those western streams

any appropriation made by a State in the lower basin not bound by the agreement would create a priority as against my State and the other upper-basin States in the compact. Briefly, that is why we withdrew. . . .

". . . .

"It should be clearly understood that in the absence of consent on the part of the States to Federal control of the waters to the extent here proposed there is no power in the Congress to exercise that control. The rights of the seven States in the waters of the Colorado River can only be finally determined by the Supreme Court of the United States.

"May I say here, gentlemen, that you must bear in mind that there are only two sources from which an allocation of the unappropriated waters of these western streams can be had; one by the States themselves entering into a voluntary agreement or treaty by and with the consent of the Congress; and the other through a court of competent jurisdiction. But Congress has no power to allocate the waters of one of these western streams where the doctrine of prior appropriation applies. Action by Congress at this time would only result in forcing this issue into the Supreme Court."

Representative Smith of Idaho, chairman of the reporting committee, rose in response to Mr. Leatherwood's remarks. In answer to a question from Mr. Hayden, Mr. Smith clearly asserted that the bill did not purport to divide the waters of the river or make any kind of federal allocation (*id.* at 3076):

"Mr. HAYDEN. *Does the gentleman believe it is within the power of the Congress of the United States to divide the waters of the Colorado River or any other river by definite allocations to the States?*

"Mr. SMITH. *We are not trying to do that.* We propose to let the States agree among themselves, if possible; but the Federal Government certainly has the right to construct a dam on its own property upon a stream which is not navigable without the consent of either of the States. Otherwise, the Federal Government would have to acknowledge that it is not superior to the States.

"Mr. HAYDEN. Does not this bill propose to ratify on the part of Congress an allocation and apportionment of waters amongst the States?

"Mr. SMITH. Absolutely not; except as between the upper basin States and the lower basin States.

"Mr. HAYDEN. The States have not yet agreed upon that, and is it within the power of the Congress to make that kind of division when the States do not agree?

"Mr. SMITH. I think it is competent for Congress in advance to consent to the States so agreeing, and it is certainly competent for Congress to provide that the United States shall be subject to the provisions of this compact.

"Mr. HAYDEN. That is exactly what the situation is.

"Mr. SMITH. There is one thing I can not understand. If the gentlemen opposed to this legis-

lation think their position is so well taken and can be so ably fortified, why do they not allow this bill to come up on the floor of the House? When we had the special rule under consideration before the Committee on Rules to give this bill a privileged status on the floor of the House of Representatives, whom did we find there opposing it? *Only the gentleman from Utah* [Mr. LEATHERWOOD] *and the gentleman from Arizona* [Mr. HAYDEN]. *They were the only two Members from the entire western country who are opposing the bringing out of this bill.*

"We feel very confident of our position, and we believe if the bill is brought out on the floor of the House of Representatives the Members are capable of weighing all the arguments, and we are sure that the conclusion you will reach will be a wise one. In any event that is our manner of enacting legislation. When there is a controversy over measures they are brought into the open House, and arguments are presented for and against, and a conclusion reached by a vote. *But for two men to attempt to prevent the Committee on Rules from bringing out this piece of legislation supported by practically all the people in the western country is unfair and unreasonable.* [Applause.]" (Emphasis added.)[1]

In further response to the Hayden and Leatherwood arguments, Mr. Swing inserted his statement before the Rules Committee in the *Congressional Record,*[2] which

[1]See *supra* p. 34, referencing Rep. Leatherwood's admonition to all western Representatives to resist the bill's purported encroachment on western water law.

[2]68 CONG. REC. 3082-88 (1927).

included his explanation that "the Government is not undertaking to create or to assert or to deal in or to dispose of water rights" and that, under the reclamation law adopted by the bill, all water rights would be acquired under the laws of the state in which the water was put to beneficial use.[3]

On February 8, 1927, Representative Winter of Wyoming spoke in support of the bill.[4] With obvious reference to the Arizona arguments, Mr. Winter asserted that a federal-state controversy was nonexistent, since Congress was only exercising its recognized control of the public lands to subject subsequent Arizona uses to the Compact (68 CONG. REC. 3292, 3294):

> "It is impossible in 15 minutes or 50 minutes to begin an attempt to cover this subject. I am therefore going to try to cover but a few outstanding features of the situation.
>
> "It has been said that this bill presents to the Congress and to the country two new radical propositions, the first one being that it involves the country in Government ownership and operation of a public utility, more particularly referring to the power element; and the other proposition is that it is an attempt to extend Federal authority over rights and realms that have been recognized up

[3] *Id.* at 3087.

[4] Mr. Winter was a member of the committee which held hearings on the bill. See p. 34 *supra* note 4. In response to Mr. Hayden's views on the bill, he had stated that Wyoming would stand "on the rights of the State to control the waters within its boundaries and shall insist upon the necessity of securing the consent of the State in any appropriation thereof." *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 20 (1926). After hearing the arguments of the Arizona and Utah opponents, he had nevertheless voted to report the bill.

to this point as State rights, involving, of course, the interstate-commerce clause of the Constitution and the relative rights of the States and of the Federal Government to a navigable river and the uses of its water.

". . . .

"Regardless of the theories of State rights as to the bed of the stream and control of the use of the water of this stream by the States, it being navigable, with which I agree, the Government controls the public lands above high-water mark, where the dam will be built and the land flooded by a storage of the water, and the public lands over which the canals must run to divert the water around the dam for power, or to distant areas for reclamation in California and Arizona. Hence, the Government can require Arizona, before she perfects any water rights, even though she is out of and not bound by the compact, to conform therewith, which means that the rights of the upper States to their equitable division of the water will be protected. . . .

". . . .

". . . . Under this, whether the Government has a proprietary interest in the water or not, it is enabled to control the way and the extent to and in which the Government land in Arizona may be used for the purpose of storing water thereon or transporting it thereover."

The House Rules Committee granted the bill a rule on February 23, 1927,[5] but the Congress adjourned

[5]H.R. REP. No. 2212, 69th Cong., 2d Sess. (1927).

shortly thereafter without any action having been taken on the measure.

2. *Senate*

Senator Johnson introduced S. 1868 on December 21, 1925.[6] No hearing was held on that bill, presumably because the Senate Committee on Irrigation and Reclamation, at the direction of the Senate, had concluded extensive general hearings on Colorado River basin problems the day after the bill was introduced.[7]

Senator Johnson favorably reported his bill from the Senate Committee on Irrigation and Reclamation on April 24, 1926.[8] The vote was 12 to 3, Senators Ashurst and Cameron of Arizona, and Phipps of Colorado, opposing the bill.[9] Senator Ashurst filed minority views.[10] However, the first session of the 69th Congress ended without any action having been taken on the bill. Following the reconvening of Congress for the second session in December 1926, the bill met with determined Arizona resistance. Senator Johnson, asserting that he believed the Arizona opposition "not to be well founded at all" (68 CONG. REC. 4228), answered the Arizona argument that the bill authorized a "federal allocation" invading Arizona's sovereign interests in the waters of the system. Speaking in support of

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[6]S. 1868, 69th Cong., 1st Sess., is Calif. Ex. 2054 for iden. (Tr. 11,177). On February 27, 1926, Senator Johnson introduced S. 3331 (Calif. Ex. 198, Tr. 7760), containing a revised financing plan.

[7]*Hearings Pursuant to S. Res. 320, 68th Cong., 2d Sess., Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1925).

[8]S. REP. No. 654, 69th Cong., 1st Sess., pt. 1 (1926).

[9]67 CONG. REC. 8020 (1926).

[10]S. REP. No. 654, 69th Cong., 1st Sess., pt. 2 (1926).

the bill on February 21, 1927, he stressed that the Arizona assertions were groundless (*id.* at 4290-91):

> "It is utterly erroneous to assert that there is any endeavor by this measure, sir, to take anything that belongs to the State of Arizona or to interfere in any degree with the [4291] laws of Arizona or the property to which Arizona may claim title. State rights are as far from this bill as is the transit of Venus itself; that doctrine has no more relation to the particular matter than any other irrelevant or any other detached proposition. The property of Arizona is taken by this bill not at all; rights of Arizona are invaded not in the slightest degree by this measure; and when the Senator from Maryland [Mr. BRUCE] asked the other evening of the Senator from Arizona if it is not a fact that California proposes to take Arizona's water without her consent, and the Senator from Arizona answered quickly that is the fact, both were absolutely and wholly in error, for this measure does not in the slightest degree impinge upon the rights of the State of Arizona; nor does California propose by this bill to take any water or anything else that belongs to Arizona of any kind or of any character at all. I can not overemphasize this fact, and a reading of the measure and an understanding of the situation and the law will demonstrate that I am entirely accurate in the assertion that I make. This bill is in accord with the constitution of the State of Arizona; it follows the enabling act of Arizona; it follows the reclamation law from which Arizona has derived so much benefit so generously extended by the United States of America; and it

does naught of any kind or of any character at which Arizona really can cavil or concerning which Arizona can in the slightest degree complain.

". . . .

"Under this bill, sir, we make the entire project a part of the reclamation law. This is a reclamation measure; and by section 13[11] of the bill it is distinctly provided:

> This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

"The very first section to the act provides for what purposes the act is presented and what are its designs. The act itself says:

> That for the purpose of controlling the floods and regulating the flow of the lower Colorado River, providing for storage and delivery of the waters thereof for reclamation of public lands and other beneficial uses within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior is hereby authorized—

"And so forth.

"First, we provide for flood control and river regulation.

"Secondly, we provide for irrigation and domestic use.

"And, thirdly, after providing for these, we provide for the byproduct of the bill—power out of which the project may be paid for.

"I repeat to you that this is a reclamation measure, made so by section 13 of the bill. Adverting,

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[11](Footnote ours.) This provision is now § 14 of the Project Act. Rep. app. 394.

then, to section 8 of the reclamation law, let us see how much there is in this statement that is made about appropriating the water of Arizona and taking the property of that State.

"Section 8 of the reclamation act provides:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

"So, first, our act is a reclamation act.

"Secondly, under the reclamation law we can no more affect the rights of Arizona in the waters that flow through Arizona than we could affect the title of any Arizona resident to any particular property. In passing, I may remark that it is entirely a misnomer to say that Arizona or any other State in the West, after all, has title to water. Under western law, the appropriator of water has a title to the use when the application is beneficially made of the water that he thus appropriates; but to talk of title of the State to water is entirely a misapprehension and misapplication of terms."

Senator Pittman later pointed out to the Senate that the bill could not make an allocation of water to any state and did not purport to do so (68 CONG. REC. 4410, 4412):

"The bill does not grant any water to anyone. The bill can not grant any water to anyone. It

does make the water in existence available for irrigation and power, because it provides for the storage of the flood waters for use in irrigation during the irrigation season.

"Under the law which gives the States sovereignty over the water within their borders, the water can not be removed without permission of the States. But of course a peculiar situation is met where there is a river forming the dividing line between two States. In such case both States have an equal sovereignty in the water running between them, each of them, possibly, to the middle of the river. But how can one of them control the amount of water the other may take out of that river? California may take out of the Colorado River all the water that has not been appropriated when the river reaches a point in California, and so Arizona may, on its side of the river, take out of the river all the water that has not been appropriated.

". . . .

"Mr. KENDRICK. I desire to ask the Senator whether he believes in case this bill should be enacted into law and Arizona should remain out of the compact, as she is out of the compact at the present time, that it would in any way adversely affect her rights to her water in the Colorado River or its tributaries?

"Mr. PITTMAN. *It would not do so in the slightest degree. I have no doubt about it.* If a dam shall be built at Boulder Canyon it will impound certain waters and equate the flow be-

low. The water below will be subject to appropriation and use by both California and Arizona, and Arizona, according to the evidence, can use water for 298,000 acres by gravity, and she can irrigate 600,000 acres additional by pumping; that is all; and in California there can be an additional three hundred or four hundred thousand acres irrigated. That is all.

"Mr. KENDRICK. In other words, the compact between the States which ratified deals only with such equities as the respective States have in the water and will not interfere in any way whatsoever with the right of those States which failed to ratify?

"Mr. PITTMAN. *In other words, there is nothing in this proposed legislation that could prevent Arizona from appropriating from the Colorado River within her borders all of the water she could use for irrigation.*" (Emphasis added.)

However, because of the parliamentary maneuvers of the Arizona Senators, capped by a successful filibuster just before adjournment,[12] the Swing-Johnson bill was not acted on by the Senate in the second session.

B. The Fourth Swing-Johnson Bill

1. *House of Representatives*

The fourth Swing-Johnson bill, H.R. 5773, was introduced by Mr. Swing on December 5, 1927.[1] During the hearings on the bill in January 1928, Arizona and Utah renewed their opposition to the bill.[2] Ari-

[12]68 CONG. REC. 4896-900 (1927).

[1]Calif. Ex. 200, Tr. 7712.

[2]Arizona was now represented in the House of Representatives by Lewis W. Douglas, succeeding Mr. Hayden who had been elected to the Senate.

zona's position was again put before the committee by Mulford Winsor, representing the Colorado River Commission and Governor Hunt of Arizona.[3] During Mr. Winsor's presentation, Representative Swing reiterated his assertions that his bill neither created water rights in any state nor authorized the Secretary of the Interior to do so, and that any water rights acquired under the act would "only come into existence by reason and under and by virtue of the laws of the State in which the water is put to beneficial use":[4]

> "Mr. SWING. May I ask, as to the item with which you have just gotten through, that the appropriation laws of the State of Arizona shall govern the water rights within the State of Arizona. If I should give it as my interpretation of this bill that the Secretary of the Interior here is not authorized to deal in water rights, that this law does not undertake to create water rights for the Secretary to sell, nor does it undertake to sell water or water rights, but that he merely contracts for the service of storing water, perhaps for the benefit of communities that now have a right already acquired, [57] based upon beneficial use; or if a right is to be hereafter acquired under this bill, as I interpret it, it must be acquired under the appropriation laws of the State in which the water benefits are to be used, I do not see where there is any violation of the No. 3 point that you have now made.

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[3] *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 19-86 (1928).

[4] *Id.* at 56-58.

"Mr. WINSOR. Yes; the right of the State to control the appropriation, use, and distribution of water within the State, coupled with the other rights that the States have as to the ownership of the lands over which navigable waters flow, undoubtedly would be violated.

"Mr. SWING. *The water rights that are already in existence are created under and by virtue of the water laws of the States in which the water is being used, and that will still be true under this bill as to any future water rights hereafter acquired. The water right itself can only come into existence by reason and under and by virtue of the laws of the State in which the water is put to beneficial use.*

"Mr. WINSOR. It is your theory, then, that if the Secretary of the Interior, under the provisions of this law, should store all of the waters that are allocated by the compact to the lower-basin States, that then, without any violation of the rights of the State, California under California law could appropriate all of that water so stored and made available to the lower-basin States? Is that your theory?

"Mr. SWING. *My theory is this: That the water after it is stored by the Secretary of the Interior is equally available on identical terms for use by the citizens in any State, whether it is Arizona, Nevada, or California, and that their water rights from this reservoir or from the stream after the water is let out of the reservoir is acquired solely and only by virtue of the water laws in the State where it has to be put to use.*

"Mr. WINSOR. And it would be put to use in the State of California.

"Mr. SWING. Or Arizona or Nevada, yes.

"Mr. HUDSPETH. Would that mean, Mr. Swing, the waters impounded?

"Mr. SWING. Yes.

"Mr. HUDSPETH. Then Arizona could control all the water, couldn't they? Isn't the dam in Arizona?

"Mr. SWING. Between Arizona and Nevada.

"Mr. HUDSPETH. I thought it was in the State of Arizona.

"Mr. WINSOR. No, Mr. Swing's idea is that after the water is stored in Arizona and Nevada, and flows on down the river, it might thereafter be appropriated, all of it appropriated by the State of California under California water laws, and thereby not violate the right of the States to control the appropriation of water, as I understand it.

"Mr. HUDSPETH. I did not so understand him. I understood him this way, that the water that flowed through Arizona, Arizona would have its proportion under its laws.

"Mr. WINSOR. Of course, the theory that Mr. Swing has advanced, as I understand him, sets forth the very situation that Arizona is afraid of.

"Mr. SWING. Well, there is nothing in the bill that you know of, is there, which would prevent you from taking water, getting water [58] from the Secretary of the Interior and from this reservoir on identically the same terms that the citizens of any other State do?" (Emphasis added.)

The committee favorably reported the bill on March 15, 1928.[5] Representatives Douglas and Leatherwood subsequently submitted minority views.[6] Mr. Douglas reiterated the Arizona contention that the bill was an unconstitutional attempt to impose the Compact on Arizona without her consent and thus nullify Arizona's right to control the use and appropriation of water within her boundaries.[7] Mr. Leatherwood also asserted that the bill provided for a federal allocation of the waters of the basin which was beyond the power of Congress.[8]

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[5]H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1 (1928).

[6]*Id.* pts. 2 (Douglas) and 3 (Leatherwood).

[7]*Id.* pt. 2, at 39:

"The Swing-Johnson bill in its ratification of the six-State compact and in its elimination of the State of Arizona completely ignores and nullifies the well-established doctrine that a State has the right to control the use and appropriation of water within its boundaries, at least in so far as the State of Arizona is concerned.

"The Swing-Johnson bill, in effect, then proposes to transcend the Constitution in that it provides for legislation by six States and the Federal Government for a seventh State antagonistic to such legislation. I contend that six States can not constitutionally so legislate."

[8]*Id.* pt. 3, at 30, 31:

"It is often represented that this bill has as one of its purposes the completion of the Colorado River compact, yet the bill undertakes to provide that the United States may proceed with the construction of this dam and reservoir when six of the seven States have ratified this interstate compact. In other words, it undertakes to impose this inchoate contract upon a State which has not agreed to it, if and when the other parties thereto have agreed. That this is beyond the power of the Congress of the United States must follow from the fact that it does not control the Colorado River for any such purpose.

". . . .

"Once this bill is enacted into law, Congress has declared that it has the right and power to allocate the waters of the Colorado, to determine how they shall be divided between the States, and to what use they shall be put. . . ."

On April 24 and May 2, 1928, the House Rules Committee held hearings on H.R. 5773.[1] Representatives Leatherwood and Douglas restated their objections to the proposal to approve the Compact without Arizona's ratification, contending that this purported "federal allocation" was invalid.[2]

On May 15, 1928, the Rules Committee favorably reported H.R. Res. 208, providing for eight hours of general debate on H.R. 5773 to be divided equally between opponents and proponents of the bill.[3] The res-

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[1] *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. (1928).

[2] Mr. Leatherwood explained his position as follows (*id.* at 44):

> "The question, and the serious question which arises in this case, is whether a less number than all of the States in the basin can by contract settle any of the rights of the nonratifying State, assuming that the doctrine that the States own and control the unappropriated waters of the river, is the law of the land out there. We contend that it is, and it never has been set aside by the courts. In other words, I contend that this bill could not traffick or barter away or in any way bind a nonratifying State as to its rights in the river, and that a lesser number as between themselves might bind themselves but could not traffick in the property in which the nonratifying State has a common interest."

Mr. Douglas agreed (*id.* at 65, 67):

> "If you, and you must concede that States have control over, with the exception of the constitutional authority of the Federal Government to regulate commerce, and are sovereigns of the unappropriated waters flowing within their boundaries, then, Mr. Chairman, you must, and the members of this committee must, conclude that the Federal Government in conjunction with six States, can not allocate waters among seven, and yet, Mr. Chairman, that is exactly what this bill in effect would do. It contemplates a ratification of a 6-State Colorado River compact to which 7 States are parties, but to which only 6 are signatories.
>
> . . . . . .
>
> "I think, sir, the Federal Government has no right whatsoever to go into the boundaries of a State against its will and against its laws and appropriate, either for its use or for any of its beneficiaries, or allocate the waters of that State."

[3] H.R. REP. No. 1666, 70th Cong., 1st Sess. (1928).

olution was agreed to on May 22, 1928,[4] and the bill came on for debate.

On May 23, 1928, Representative Douglas spoke at length in opposition to the bill. 69 CONG. REC. 9623-35. At the outset of his speech, he restated the Arizona argument (*id.* at 9623):

> "That is the project which this bill authorizes. In addition, and as a separate and distinct part of the legislation, there is a provision for the ratification of a compact allocating waters between seven States and to which seven States are by the terms of the compact woven into the fabric of the compact upon the ratification of but six of the seven States.
>
> "The bill further provides for congressional amendments of State water codes. Further than that, it vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam.
>
> "The compact phase of the measure could be adequately taken care of by a resolution or an act providing for ratification. I point out to Members of the House that there are two very distinct and separable portions of the bill, the first providing for the construction of the project, and the second dealing with allocation of waters as between States."

Representative Swing responded to Mr. Douglas' long and detailed speech as follows (*id.* at 9635):

> "I only wish I had the time to go fully into each and every one of the contentions made by the gentle-

[4] 69 CONG. REC. 9486, 9490.

man from Arizona.[5] They ought to be answered. They can be answered. They have been answered in the investigations made of the project and in the hearings held on this bill."

With respect to the Arizona argument concerning the purported allocation made by the bill, Mr. Swing's obvious reference was to refutations of this argument by himself and other proponents during the recently concluded hearings as well as in hearings and debates in the previous session (*e.g., supra* pp. 36, 42-43, 44-45, 50-54, 55-56). Further refutations followed.

Representative Colton of Utah then spoke at length in opposition to the bill, asserting that Congress lacked the power to allocate water and that he viewed the Swing-Johnson proposal as an attempt to accomplish that end. Representatives Bankhead and White[6] both responded that the bill did not purport to make any such allocation (69 CONG. REC. 9648-49):

"Mr. COLTON. . . . So that when you say that the Government of the United States owns and controls waters within that State, can not you see that you strike at the very basis of our industrial life? You are saying that you are going to

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[5](Footnote ours.) A substantial part of the proponents' four hours under H.R. Res. 208 had expired. 69 CONG. REC. 9491-99, 9506-09, 9510-13.

[6]Mr. Bankhead supported the measure and voted for the bill. 70 CONG. REC. 837.

Mr. White was a member of the committee which considered the fourth Swing-Johnson bill (*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess., pt. 1, at II (1928)) and which reported favorably on the bill. H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1 (1928). He spoke in favor of the bill (69 CONG. REC. 9781) and voted against a motion to recommit, which would have defeated it (*id.* at 9989). He voted for the bill (as amended by the Senate), which became the Project Act. 70 CONG. REC. 837.

take it away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.

"Mr. BANKHEAD. *As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter.*

"Mr. COLTON. I will answer in this way: If the gentleman from Alabama were stating the proposition correctly, there would not be the slightest objection to this bill other than from the engineering and economic standpoint. I feel sure that it is not fully understood. We do not get full protection under this bill, for there is no seven-State compact. Arizona is not a party at all to this compact.

"She and her citizens may appropriate water at any time.

"Mr. DOUGLAS of Arizona. Arizona is a party to it, but Arizona has not ratified it.

"Mr. COLTON. Yes. The gentleman's statement is more accurate. Arizona can grant applications for water if my theory is correct, and

her citizens can acquire rights by prior usage to every bit of water belonging to the upper States. There is absolutely no protection against her and her citizens. The gentleman from Alabama [Mr. BANKHEAD] has stated the principle for which Utah is contending. We have been pioneers in the development of the Colorado River. We are anxious to see California prosper. This development, however, must not be made at the injury and expense of other States.

". . . .

". . . . And then this question is in my mind: Can Congress at this late date set aside the doctrine of first in use, first in right? Therefore, I say it is a serious question for us to allow this plant to use 10,500,000 acre-feet of water in the dam. Prior usage may give a right to it, and we may be estopped in the courts, at least, in asserting our right to it after it has been put to a beneficial use.

"Mr. ARENTZ. Mr. Chairman, will the gentleman yield?

"Mr. COLTON. Yes.

"Mr. ARENTZ. Following that line of 'first in use, first in right,' you know the land in Utah will not be subject to cultivation possibly for 50 years or 75 years. You want to stop the appropriation of water that should go to the land in Utah, and is there any other way of doing that except by a definite allocation of water to Utah, so that

you can hold it in perpetuity? I do not see what can be done.

"Mr. COLTON. *Congress can not allocate water.*

. . .

". . . .

"Mr. WHITE of Colorado. Will the gentleman yield?

"Mr. COLTON. Yes.

"Mr. WHITE of Colorado. *A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.*

"Mr. COLTON. *I think they have not that power.*

"Mr. WHITE of Colorado. *There is no attempt to do anything of that kind by this bill.* On the contrary, the bill expressly provides for a compact among six States, and the only State that has shown the slightest tendency to stay out of the compact is Arizona. Now, how can that affect a State that is not a member of the compact?

[9649]

"Mr. COLTON. It can not. Moreover, I admit we are somewhat protected so far as California is concerned, although even that is a question in my mind. As the gentleman from Arizona has stated, you have an interstate compact made by seven States, and I do not believe six States may make it binding on the other. I would like to hear the opinion of the gentleman from Virginia [Mr. MONTAGUE] on that. He is a good lawyer. That raises a serious question at least. Let me point

out to the gentleman just what this bill provides. In section 5 it is provided:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe—

"To do what?

> to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses.

"The CHAIRMAN. The gentleman has used 30 minutes.

"Mr. COLTON. I thank the Chair. If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I can not understand the English language, and, gentlemen, that is exactly what we are objecting to. We are saying the Federal Government is trespassing upon territory that does not belong to it whenever it attempts to regulate or control the waters of a river when it is not for the express purpose of navigation and commerce. That is the only power the Congress of the United States has over the water in the streams of this country, and the basic principle upon which Utah has rested its opposition to this bill is that the States control the water for all other purposes." (Emphasis added.)

Representative Winter of Wyoming, reiterating the views he had expressed with reference to the third Swing-Johnson bill in the previous Congress (*supra* pp. 47-48) spoke in support of the bill (69 CONG. REC. 9653, 9655):

"All of the States excepting Arizona have at one time or another ratified, either conditionally

or unconditionally, the seven-State compact and later the six-State compact, which was an agreement among six States to be bound by the terms of the seven-State compact and waiving that portion of that compact which required ratification by seven States. Arizona has seen fit to refuse to enter the compact. I recognize her right to so refuse. I do not recognize and deny her right to prohibit the other six States of the Colorado River Basin or other five States or any number of States to enter into a compact and support in Congress a bill which incorporates, recognizes, and will put into operation such compact. *Arizona will not be bound by any compact to which she is not a party.* That is the limit of her right.

". . . .

"The upper States are protected. This bill gives them substantial, if not complete, protection. If the bill fails, an opportunity to secure the rights of the upper States to that extent will have been lost. If the bill passes, we receive a great measure of protection, even though but six States are bound and one, Arizona, is not.

". . . .

"Regardless of the theories of State rights as to the bed of the stream and control of the use of the water of this stream by the States, it being navigable, with which I agree, the Government controls the public lands above high-water mark, where the dam will be built and the land flooded by a storage of the water, and the public lands over which the canals must run to divert the water

around the dam for power, or to distant areas for reclamation in California and Arizona. Hence the Government can require Arizona, before she perfects any water rights, even though she is out of and not bound by the compact, to conform therewith, which means that the rights of the upper States to their equitable division of the water will be protected. . . ."

On May 24, 1928, Mr. Colton proposed an amendment to the bill requiring that an opinion as to the constitutionality of the measure be received from the Attorney General before the Secretary of the Interior commenced construction of the project. 69 CONG. REC. 9777. He argued that the measure was unconstitutional because it sought to allocate the waters of the river. This proposed amendment was defeated.[7]

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[7]69 CONG. REC. 9777-78:

"Mr. COLTON. Mr. Chairman and members of the committee, this is one of the most important pieces of legislation that has been before this Congress in a generation. The gentleman from Colorado [Mr. TAYLOR] a while ago announced a doctrine, if I understood him correctly, which is absolutely new from a legal standpoint. He said there were three ways that the waters of this river could be allocated. First, by the Supreme Court of the United States; second, by a compact entered into between the States, and, third, under the provisions of this bill. If that means anything at all it means that the Congress of the United States can allocate the waters of that stream. Gentlemen, that is contrary to every principle upon which our whole body of irrigation law rests. If this bill does seek to [9778] divide or allocate the waters of the Colorado River, I maintain it is absolutely unconstitutional; that it is against all of the decisions of the court that have been made with reference to this question, and it declares an absolutely new policy.

"Congress has never heretofore in the history of this country undertaken to allocate the waters of a stream between the States. If this bill is passed and this measure becomes a law, certainly no expense should be incurred or any work commenced until the Secretary of the Interior has submitted it to the legal department of the Government and has found out whether or not it is constitutional.

"I am simply seeking by this amendment that this vital ques-

On May 25, 1928, Mr. Douglas' motion to recommit H.R. 5773 was defeated (69 CONG. REC. 9989), and the bill was passed (*id.* at 9990).

2. *Senate*

Senator Johnson had introduced S. 728 on December 6, 1927.[1] Following hearings in January 1928,[2] the bill was favorably reported from committee on March 20, 1928.[3] Senator Ashurst of Arizona filed minority views.[4] Senator Johnson spoke in support of the meas-

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tion, which embarks the Government and the Congress upon a new policy with reference to the allocation of the waters of a stream, be submitted to the legal department of the Government. In the Western States we have maintained, and have maintained from the beginning, that the right to the ownership of the water is in the States. This undertakes to turn over the right to impound these waters, and section 5 provides that the Secretary of the Interior may arrange to distribute or deliver the water lower down the river and also under the canal that is provided for in this bill. That being true, we declare in effect that the water may be allocated by the Secretary of the Interior, and we declare further that the water may be controlled by him. That means that the Congress and the executive department are now embarking upon the policy of controlling, distributing, and allocating the waters of this river. If that is true, I say that before that new policy is adopted it should be submitted to the legal department of this Government for an opinion as to its constitutionality. In the case of Colorado against Kansas it was plainly held that the right to the water was in the States. The Government has no control except for navigation purposes. The gentleman's argument, pushed to its logical conclusion, is dangerous to the rights of all the States.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from Utah.

"The question was taken; and on a division (demanded by Mr. COLTON) there were—ayes, 28, noes 45.

"So the amendment was rejected."

[1]S. 728, 70th Cong., 1st Sess., is Calif. Ex. 201 (Tr. 7712).

[2]*Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. (1928). S. 1274, requiring seven-state ratification of the Compact, had been introduced by Senator Phipps of Colorado.

[3]S. REP. No. 592, 70th Cong., 1st Sess., pt. 1 (1928).

[4]*Id.* pt. 2.

ure on April 26,[5] and Senator Smoot of Utah answered with a two and one half hour speech in opposition,[6] in the course of which he voiced opposition to the purported federal allocation which he argued would be accomplished by the bill's approval of the Compact on a six-state ratification basis (see *infra* pp. 99-101). The proponents of the bill were unable to obtain Senate action on the measure prior to adjournment of the first session on May 29, 1928.

During debate on May 28, just prior to the Arizona filibuster which closed out the session, Senator King of Utah spoke on the proposal to make the Compact effective on six-state ratification. Senator Reed of Missouri[7] was unable to understand how Arizona could be bound by the Compact if she refused to ratify. Senator King explained that in his view Arizona's rights might not be adequately protected under the bill, a contention which Senator Kendrick of Wyoming[8] promptly denied (69 CONG. REC. 10265):

> "Mr. REED of Missouri. Then, as I understand, the Senator claims that the building of these works under the terms of this bill would result in the appropriation of the water by the

[5] 69 CONG. REC. 7245-53.

[6] *Id.* at 7515-44.

[7] Senator Reed voted for the bill. 70 CONG. REC. 603.

[8] Senator Kendrick was a member of the committee which held hearings on the second, third, and fourth Swing-Johnson bills. *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. facing p. 1 (1925); *Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. II (1925); *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. II (1928). He was the author of the committee amendment to the bill requiring a limitation on California uses (70 CONG. REC. 386), and supported the bill and voted for its passage. *Id.* at 603.

construction of the dam which is farther down, and that a State which has not assented to the arrangement would be left without any protection? Suppose the State went on and used the water; suppose this proposed dam should be built and then after a while Arizona should herself build a dam, not having consented to this, could she not protect herself?

"Mr. KING. As I see the situation, there are two propositions involved. As I have stated, there are some who contend that the Government is not bound by any compacts among the States concerning the waters of the river, and that it may make such developments as it desires and such use of the water as it wishes if there is no inference with vested rights. Under this view, if the Government builds a dam and impounds water and utilizes a portion to generate power, neither Arizona nor any other State could prevent such action by the United States unless prior appropriations were interfered with. Arizona might be deprived of any further use of the waters of the river and vast areas of her fertile lands be thus condemned to perpetual sterility.

"If Arizona's rights are not protected by treaties or compacts to which the United States and all the States concerned in the river are parties, then appropriations made either by the Government or the States would jeopardize Arizona's right to use any of the waters of the river not heretofore appropriated by her. She could not even within her own borders divert water from the river for use by the State or the people of Arizona if such

diversion interfered with the appropriations so made by the Government or the States referred to.

"Mr. KENDRICK. Mr. President, will the Senator from Utah yield?

"The PRESIDING OFFICER. Does the Senator yield?

"Mr. KING. Yes.

"Mr. KENDRICK. *Mr. President, in answer to the question asked by the Senator from Missouri* [*Mr.* REED], *I desire to say that, as one of those who favor the Swing-Johnson bill, I do not concede that under the provisions of the bill there is any interference at all with the waters of Arizona. In so far as I know, the bill has no such provision and no such intention.*

"As a precautionary measure the committee within less than a month, in passing upon the Senate bill, included an amendment requiring California to agree by legislative act that she would not divert an amount in excess of that provided in the agreement entered into at one time by the States but not ratified by their legislatures. That was done in order to safeguard Arizona's share of the water. That amendment was agreed to by the Senator from California and accepted by the committee without a dissenting vote, as I recall, except that of the Senator from Arizona. It is not intended by this bill to impose any coercion upon the State of Arizona." (Emphasis added.)

Congress reconvened on December 5, 1928. During debate that day Senator Borah of Idaho[9] made it

[9]Senator Borah supported the bill and voted for passage of the measure. 70 CONG. REC. 603 (1928).

clear to Senator Hayden, who had been discussing upper basin hopes for seven-state ratification of the Compact, that the proposed legislation did not prejudice Arizona's interests in any way (70 CONG. REC. 70):

"Mr. BORAH. The Senator has reached a point in which I am very much interested. *Does the State of Arizona contend that any act of Congress can affect its rights in any way in case it does not consent to this compact?*

"Mr. HAYDEN. The State of Arizona positively contends that the Congress of the United States has no jurisdiction over appropriations of waters and that the Congress can not by any enactment in any manner affect the rights of that State or the jurisdiction of that State over the waters of its streams.

"Mr. BORAH. As a proposition of law, let us assume the Senator is correct; but, if that is true, are not the advocates of the bill taking the risk here and not the State of Arizona?

"Mr. HAYDEN. That is a correct assumption; but the last thing that the State of Arizona wants to do, and the last thing that the people of any of the seven States want to do is to throw this controversy into long-drawn-out litigation in the courts. . . .

"Mr. BORAH. I understand the Senator's position now. *I had the impression that the Senators from Arizona felt that legislation here might prejudice their rights, or in some way interfere with their rights; but it did not seem to me that*

that was the correct position. I understand now that it is simply the desire of the Senator to avoid long litigation.

"Mr. HAYDEN. Exactly so. . . ." (Emphasis added.)

On December 11, 1928, Senators Hayden and Borah resumed their discussion of whether the bill's approval of the Compact with only six-state ratification purported to make a "federal allocation" binding on Arizona. Senator Hayden attacked the bill as an attempted assertion of unwarranted federal power; Senator Borah totally rejected Arizona's characterization of the bill (70 CONG. REC. 390, 390-91, 391-92):

"Mr. HAYDEN. Mr. President, the State of Arizona feels that a gross injustice would be done to that State by the passage of an act of Congress which would provide that six States may divide the waters of a stream which belong to seven States without the consent of the seventh. No such bill should be introduced in Congress unless it were upon the assumption that Congress had the right and the power to divide the waters of the stream. . . .

". . . .

"That is what this bill does with respect to the Colorado River compact. It states that, whereas the legislatures of all of the seven States have not approved of the compact, nevertheless the Congress shall approve it and measures shall be taken to put that compact into effect whether the seven States have approved it or not.

". . . .

". . . . Therefore an assertion in this bill that the compact shall be approved, not when ratified by seven States but when ratified by six States, is a wrong and a wholly improper procedure for the Congress of the United States to follow. Therefore I have moved to strike out of the amendment offered by the Senator from Colorado the provision that the Colorado River compact shall be approved by the Congress of the United States to go into effect when ratified by six States and not by seven States.

". . . .

"Mr. BORAH. Mr. President—

"Mr. HAYDEN. I yield to the Senator from Idaho.

"Mr. BORAH. I merely wish to ask a question. Does the Senator from Arizona contend that the passage of this bill will affect any rights which Arizona has as a State or her citizens have by reason of being citizens of the State? Does he contend the passage of the bill could take away those rights, notwithstanding she has not entered into the pact?

"Mr. HAYDEN. We do not know. We look upon the passage of the bill as an assault upon the sovereignty of the State of Arizona. It could be based upon no other theory than that Congress has the right to apportion the waters of the Colorado River and its tributaries in accordance with a certain document, regardless of the wishes of the State of California. It seeks to impose the terms of the Colorado River compact upon the State of Arizona without the consent of that State. There-

fore we resist it. Whether all that we fear could be accomplished or not we do not know. I think the Senator from Idaho would be inclined to take the view that such a thing could not be done; the Supreme Court of the United States would not permit anything of that kind. To pass a bill of this kind, however, places the burden upon the State of Arizona of filing suit and of arguing it before the Supreme Court of the United States. No one can tell in advance what the decision of the Supreme Court will be. Therefore we feel justified in opposing the passage of any proposed legislation that in any manner may seek to divide the waters of the Colorado River, in which the State of Arizona has an interest, without the consent of that State.

"Mr. BORAH. *Mr. President, I do not desire to argue the question, but lest I may be misunderstood in the future—because this question is likely to come back here in another form with reference to some other bill—when I shall vote for* [391] *this bill I shall vote for it upon the supposition that a mere act of Congress cannot take away any rights of the State of Arizona.*[10]

". . . .

"Mr. BORAH. *I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial*

[10](Footnote ours). Senator Borah voted for the bill. See note 9 *supra.*

use in other States, she might lose her rights. She would not lose them, however, [392] *by reason of this legislation, but by reason of the acts of appropriation.*

". . . .

"Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it way from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legistion in the sense that the acts carrying it out would result in appropriations by others. *It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.*" (Emphasis added.)

The fourth Swing-Johnson bill was passed by the Senate on December 14, 1928, by a vote of 65 to 11, only 9 Senators joining Senators Hayden and Ashurst in opposing passage. 70 CONG. REC. 603.

The foregoing Hayden-Borah colloquy well illustrates the divergence of view between the opponents and proponents of the Swing-Johnson bills. Arizona feared that approval by Congress of the Compact without Arizona's ratification would constitute a "federal allocation" of the waters of the basin in violation of Arizona's sovereign interest. The arguments of the pro-

ponents, exemplified by Senator Borah's remarks, stressed that Congress could not make such a federal allocation and that the bill did not purport to do so. It is in this context that Arizona's assertion in her answering brief that "the bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the States" and that "the defenders of the bills argued vigorously for their constitutionality" (Ariz. Ans. Br. 35) must be viewed.

In the Hayden-Borah debate, Senator Hayden expressed uncertainty as to whether Arizona's fears were well grounded. Asserting that "whether all that we fear could be accomplished or not we do not know," he suggested that Senator Borah was "inclined to take the view that such a thing could not be done; the Supreme Court of the United States would not permit anything of the kind." 70 CONG. REC. 390. Senator Borah agreed that Congress could not do so, and the Swing-Johnson bills did not purport to do so.

Whether or not Congress could have done so, Senator Borah's assertions as to the scope of the Swing-Johnson bills were confirmed by this Court in its decision on Arizona's challenge to the constitutionality of the Project Act. In *Arizona v. California,* 283 U.S. 423 (1931), Mr. Justice Brandeis stated the Arizona argument as follows (p. 458):

> "The further claim is that the mere existence of the Act will invade quasi-sovereign rights of Arizona by preventing the State from exercising its right to prohibit or permit under its own laws the appropriation of unappropriated water flowing within or on its borders."

He rejected it with the following explanation (p. 462):

> "The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein 'shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified' by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired."[11]

[11]Immediately preceding this statement of its holding, the Court had pointed out (283 U.S. at 464): "Arizona has, of course, no constitutional right to use, in aid of appropriation, any land of the United States, and it cannot complain of the provision conditioning the use of such public land."

APPENDIX C

THE LEGISLATIVE HISTORY ITEMS SELECTED BY ARIZONA DO NOT RELATE TO ANY FEDERAL ALLOCATION WITHIN THE LOWER BASIN, BUT RATHER TO SUBSTANTIAL EFFECTUATION OF THE COLORADO RIVER COMPACT'S APPORTIONMENT TO THE UPPER BASIN WITHOUT ARIZONA'S RATIFICATION

Arizona asserts (Ariz. Ans. Br. 35):

> "The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states."

Arizona does not identify "this federal allocation" which she asserts engendered opposition to the Swing-Johnson bills. However, the quoted assertion is made with reference to Arizona's argument that section 5 directed the Secretary of the Interior to make a compact-like allocation among Arizona, California, and Nevada. Arizona then quotes some 14 excerpts from the legislative history (*id.* at 35-43), pointing out that they "are but a few of the many which could be quoted" (*id.* at 43) in support of her argument. Over 60 citations to additional portions of the legislative history of the third and fourth Swing-Johnson bills are provided in a footnote. *Id.* at 43 n.56. Arizona contends that these numerous excerpts "all demonstrate a clear recognition that the Swing-Johnson bills, if enacted, would impose complete federal control over the water of the Colorado River in the Lower Basin and would provide

for a federal allocation of that water among the Lower Basin states."[1]

In fact, none of the extracts relate to the mandatory allocation Arizona finds in sections 5 and 4(a), only a few relate to section 5,[2] and all the rest are grossly misleading. The excerpts quoted by Arizona are primarily concerned with two questions: Does the United States own the unappropriated waters of the Colorado River basin, with the consequence that Congress could allocate those waters by statute, obviating the need for a compact? Would approval of the Colo-

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[1]Ariz. Ans. Br. 43-44. In light of Arizona's alternative positions purportedly in support of the Special Master's Report, we are not certain whether Arizona uses the phrase "water of the Colorado River in the Lower Basin" to refer to the Special Master's "mainstream" (Lake Mead and below) or to the main Colorado River from Lee Ferry to the Mexican border. Under either alternative, we assume Arizona really means that the "federal allocation" was to be only among Arizona, California, and Nevada rather than the "Lower Basin states" (which would also include New Mexico and Utah).

[2]Arizona quotes (Ariz. Ans. Br. 40 & n.49) language from H. R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 11 (1926), that "all rights respecting water or power under the project are, under the terms of the bill, to be disposed of by contract by the government." The report undoubtedly refers to § 5, which provides that *stored water* may not be used without a contract with the Secretary of the Interior. The quoted language from the report must be read in light of the extensive legislative history which we treat in this and accompanying appendixes. See, particularly, the remarks of Rep. Smith of Idaho, chairman of the reporting committee and author of the report quoted by Arizona, made in debate after the bill had been reported (pp. 45-46 *supra*).

Elsewhere in her brief Arizona does quote statements by Delph Carpenter, upper basin spokesman, and Representative Colton of Utah which are directed specifically to § 5. Ariz. Ans. Br. 31-32, 33-34. Mr. Carpenter's remarks, which make clear that the language in § 5 upon which Arizona relies was prompted solely by upper basin considerations, are treated in appendix B *supra* pp. 37-41. Rep. Colton's arguments as to the purported assertion of federal power in § 5 were refuted by the proponents of the bill. Calif. Ans. Br. 51-53; see also app. B *supra* pp. 61-67.

rado River Compact with less than seven-state ratification be an unconstitutional "federal allocation"? It was the latter "federal allocation" which was the basis of the Arizona and Utah opposition to the Swing-Johnson bills, and to which most of the Arizona excerpts refer.[2a]

These two controversies which provide the context for the excerpts quoted by Arizona resulted from Arizona's refusal to ratify the Colorado River Compact, which had been executed at Santa Fe, New Mexico, on November 24, 1922, and unconditionally approved in 1923 by the legislatures of all of the Colorado River basin states except Arizona. Meanwhile, the first and second Swing-Johnson bills had been introduced in Congress in 1922 and 1923 providing for a dam at or near Boulder Canyon and construction of an all-American

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[2a] A substantial majority of the extracts quoted or cited by Arizona to identify "this federal allocation" are statements by opponents of the bills, which, as we have pointed out (Calif. Ans. Br. 51) are entitled to little weight. For example, Arizona quotes in text statements of the major opponents of the bill in the House—Representatives Hayden and Douglas of Arizona and Leatherwood and Colton of Utah. Ariz. Ans. Br. 33-34, 38-39. In addition, the majority of the citations provided by Arizona in note 56 on pages 43-44 of her answering brief are to statements by opponents of the bill. For example, at least five of Arizona's ten citations to *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1926), are to statements by Mr. Hayden. *Id.* at 15, 17, 19, 105, and 188-89. Similarly, at least 11 of Arizona's 21 citations to *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong.. 1st Sess. (1928), apparently are to statements by Arizona and Utah opponents of the bill. *Id.* at 39-40, 53, 64-67, 105-07, 120-21, 127, 144, 147-48, 152-54, 159-62, and 222-23. Finally, at least 11 of the 21 Arizona citations to *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. (1928), are the opponents' views. *Id.* at 45, 56-59, 120, 123, 128, 206-08, 212-13, 215, 228, 415-16, and 418-20.

We detail the refutation of these opponents' arguments by the proponents of the bill in appendix B.

canal. However, the upper basin states, fearing the priorities that would be acquired by the lower basin as a result of the increased uses made possible by the project, opposed the Swing-Johnson proposals in the absence of seven-state approval of the Compact. When it became increasingly apparent that Arizona would not ratify the Compact, the proponents of the Boulder Dam bill turned their efforts to ways and means to afford the upper basin states the protection of the Compact despite Arizona's refusal to ratify.

Three proposals to accomplish this objective resulted. The first proposal, that Congress simply allocate the unappropriated nonnavigable waters of the basin to achieve the interbasin allocation specified in the Compact, was expressly rejected; indeed, it was never seriously considered. The second proposal, that Congress condition the use of federal facilities and lands to the Compact provisions, was ultimately embodied in the Swing-Johnson bills. The third proposal, that the conditioning of federal facilities and lands be accompanied by at least six-state ratification of the Compact (including California), was adopted by Congress, but only after it had been implemented by requiring California to enact a limitation if Arizona should fail to ratify the Compact (Rep. 165).

Alleged Government Ownership of Unappropriated Nonnavigable Waters

The first proposal was advanced by Ottamar Hamele, counsel for the Bureau of Reclamation. He urged that the United States owned all of the *unappropriated nonnavigable* waters in the Colorado River basin and thus might allocate these unappropriated waters as it saw

fit. Consequently, he suggested that Congress simply allocate unappropriated nonnavigable waters in a manner producing an allocation between the basins in conformity with the provisions of the Colorado River Compact.

Arizona accurately quotes (Ariz. Ans. Br. 37) a portion of Mr. Hamele's testimony during hearings on the second Swing-Johnson bill in 1924, but omits that part of his statement explaining the basis of his theory, which we emphasize below:[8]

> "Mr. HAYDEN. Then, if it is possible by the language that you have suggested to effect an apportionment between the upper and lower basins without the approval of the compact, is it also within the power of the Congress to apportion the waters allocated to the lower basin by the compact between the States of Arizona, Colorado, and Nevada by a similar limitation?
>
> "Mr. HAMELE. I think it is. In order to understand that answer it might be well to amplify it with some comment on the different doctrines concerning the use of water in the arid West.
>
> *"There are two theories that are pertinent to this discussion. One is that the right to the use of water from innavigable streams in the arid West arises from the State; that the appropriator gets his right from the State. The other theory is that the right comes from the Federal Government; that the Federal Government still owns all of the unappropriated innavigable water of the arid West and, therefore, has the power to dispose of it.*

[8] *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 882 (1924).

"The latter position is the position that has been taken for a good many years by the Federal Government. It has been under that theory that various developments have been carried on by the Bureau of Reclamation.

"Mr. LEATHERWOOD. You are carrying this only to streams designated innavigable?

"Mr. HAMELE. Yes. I am speaking of innavigable streams; and that is the position taken by the Department of Justice in the Wyoming-Colorado case.

"If that position be good, there certainly can be no question about the power of Congress to direct the use of this water without reference to the Colorado River compact." (Emphasis added.)

Hamele's premise was rejected by opponents and proponents of the Swing-Johnson proposals alike, particularly the representatives of the upper basin, who challenged the validity of the theory of federal ownership of unappropriated western waters. The position of the upper basin states on Hamele's proposal was set forth in a letter of April 7, 1924, from L. Ward Bannister, Denver attorney, to Representative Leatherwood of Utah:[4]

"Proposition 1. The rights of the upper States could be safeguarded by adding to section 8 of the pending bill a provision to the effect that all contracts made under the bill with water users should be subject to the Colorado River compact, whether ratified or not.

"Answer. Underlying this proposition by Mr. Hamele is the assumption that the Federal Gov-

[4] *Id.* at 900, 901, 908.

ernment had riparian rights prior to statehood and therefore still has a right of a property nature to make use of the unappropriated waters and therefore is in a position to say that such part of the unappropriated waters as the upper States would be entitled to under the compact could be allocated to the upper States without the necessity of a compact. Six of the seven States take the view that the Federal Government never had any riparian rights and therefore does not now possess any property right in respect to the use of the unappropriated waters. The Department of Justice at times has claimed, and Mr. Hamele claims, that the Federal Government had and has such rights as a matter of property, but the United States Supreme Court held in Kansas against Colorado[4a] that it is within the power of States to say whether the appropriation system rather than the riparian shall exist and not within the power of the Federal Government to say it shall not exist; and this case comes closer than does any other to a decision of the great question. The upper States can not run the risk of Mr. Hamele's underlying premise being sound.

". . . .

"Proposition 15. The Government probably could fix a division among Arizona, California, and Nevada of the use of the water from the Boulder Canyon project.

"Answer. Of this proposition Mr. Hamele is not sure. He simply says, 'Well, I rather think so.' 'I think that is rather a big question.' It is indeed a 'big question,' but it is no bigger than his

[4a] (Footnote ours.) Kansas v. Colorado, 206 U.S. 46 (1907).

plan to have the Government, so far as the Boulder Canyon project is concerned, divide the water of the river between the upper and the lower States, and it is attended by the same reasons pro and con as to the authority of the Government to do this and by the same grave doubts. The upper States can not afford to run the risk involved in these doubts, and therefore can not afford to let the pending bill pass in advance of the ratification of the compact."

Two years later, presenting the upper basin amendments to the third Swing-Johnson bill during the House hearings, Delph Carpenter forcefully stated the upper basin's views of Mr. Hamele's suggestion:[5]

"Mr. CARPENTER. In our proposed amendments we are trying to fortify against any claim that may be asserted upon any theory of law. *All the upper States concur in the view that the assertion* [201] *made by the United States attorney to the effect that the United States owns all the unappropriated waters of the West and that they are wholly removed from State control, is absolutely untenable, unconstitutional, and unconscionable,* but nevertheless the assertion is being made—is now being pressed by the attorneys for the Department of Justice before every Federal court in the West wherever a case can be brought before that court that could possibly involve that issue.

"Lest some court might so hold, and in the event the Federal courts decide that such is the rule, then

[5] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 200-01 (1926).

we insist that the provisions of this bill be strong enough and clear enough so that the upper States are protected in this—that these attorneys for the departments of government in their zeal and ambition to override State authority, can not come in later and say, 'Yes, you sought to provide protection in this bill, but it did not bind the interests of the United States—the United States owns all these waters, therefore your efforts to protect your upper basin States are futile.'

"This is one of the paragraphs it is proposed to use to offset any such argument. I recall reading the discussion contained in the previous hearings to which you have referred, and my recollection is that the answers there were addressed to the theory of law advanced by Mr. Hamele to the effect that because the Government in his bureaucratic judgment is the proprietor and sovereign and controller of all the waters of the western streams, therefore a mere assertion of a waiver or provision to the effect that the United States is bound by the provisions of the Colorado compact would be a complete solution of the question and would impress that compact upon the river with full effectiveness, overriding all of the States and making the compact of complete force and effect both as to State and national jurisdiction.

"Upon that theory the Federal Power Commission advanced the idea that by putting provisions in the power licenses the rights of the upper States could be completely protected. It was to the matter of completeness of protection that the remarks of Mr. Bannister were addressed, and of

course we concur in his views in that respect. But, be that as it may, section (c)[6] is for the purpose of controlling the situation if it be held that the views of all the States of the West and all the courts of the States and the views expressed by the Supreme Court of the United States up to the present time are all wrong, and it should later be decided that the United States is the owner of the water.

"Mr. WINTER. And you might add the reclamation law itself.

"Mr. CARPENTER. Yes; section 8."

Then, as now, the federal-state controversy over ownership and control of unappropriated waters in the western states raged heatedly. It is clear, however, that whatever the merits of the Hamele contention, the Swing-Johnson proposals did not proceed on that

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[6](Footnote ours.) Mr. Carpenter was referring to an amendment which the upper basin proposed to add to the bill as § 8-(c). It provided:

"The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses and contracts shall so provide." *Id.* at 117. This paragraph is now § 8(a) of the Project Act, Rep. app. 389.

Its purpose was stated by Mr. Carpenter to be "to make the compact binding upon the property and interests of the United States and those claiming by and under the United States and on all users of water stored, diverted, carried, or distributed by the works authorized by this bill." *Id.* at 197.

theory.[7] This is made abundantly clear in an exchange between Mr. Bannister and Senator McNary,[8] chairman of the Senate Irrigation and Reclamation Committee, during hearings on the Swing-Johnson proposals in 1925. Mr. Bannister had been arguing that Congress did not have the power to divide water among the states,[9] when Senator McNary interrupted and this col-

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[7]The Department of Justice still adheres to the view that the federal government owns all of the unappropriated waters upon the public lands. *Hearings on Federal-State Water Rights Before the Senate Committee on Interior and Insular Affairs,* 87th Cong., 1st Sess. 47-48 (1961). Though this theory apparently is the basis of the argument presented in support of the Master's decision with respect to water rights for federal reservations (U.S. Ans. Br. 61-65), it is not the argument advanced by the United States to support its assertions that Congress authorized the Secretary of the Interior to allocate the stored waters conserved by Hoover Dam. See U.S. Op. Br. 38 n.15; U.S. Ans. Br. 22-26.

[8](Footnote ours.) Arizona quotes (Ariz. Ans. Br. 38) a statement of Senator McNary during hearings on the second Swing-Johnson bill that "under a certain section of this bill, as I recall it, the Secretary of the Interior could allocate these waters among the different States for the purpose of irrigation." *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. 155 (1924). Senator McNary does not specify, nor does Arizona suggest, the section of the bill to which he referred. The language of § 5, upon which Arizona and the Special Master rely as the basis for the Secretary's authority to make a contractual allocation among Arizona, California, and Nevada, did not appear until almost two years later, during hearings on the third Swing-Johnson bill.

[9]Arizona relies upon Mr. Bannister's 1924 statement that if the stream is navigable "then the Federal Government may do anything on that stream necessary to promote navigability; in other words, it may require the release of all waters from the upper States and the lower States both." Ariz. Ans. Br. 36, quoting from *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 181 (1924). Arizona's use of this statement, which is irrelevant in this context, is misleading.

There can be no quarrel with Mr. Bannister's statement of the power of Congress to control navigable waters for navigation purposes. *Cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950), quoted in Calif. Ans. Br. 119-20. Arizona omits, however, Mr. Bannister's pronouncement a few pages

loquy ensued:[1]

"The CHAIRMAN [McNary]. Well, Mr. Bannister, we are not asserting that power anywhere down the line. We are perfectly familiar with the statement you are making. It is not a part of this controversy. We are going upon the theory that your States are going to do that by a compact.

"Mr. BANNISTER. Very well, Mr. Chairman, I will not continue with that part.

"The CHAIRMAN. Yes; certainly; it is purely academic. It is not a part of this controversy.

"Mr. BANNISTER. Yes. Well, I had heard some contention to the contrary by attorneys in the Department of Reclamation.

"The CHAIRMAN. *Oh, well—*

"Mr. BANNISTER. And there will be no such authority to divide predicated upon the theory of

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later on the issue which is central to the Arizona position (*Hearings on H.R. 2903, supra* at 194-95):

"When we fall back upon the fundamental premise that Congress has simply the powers either expressly delegated or delegated by implication by the Constitution, we run up against the question of where is the power mentioned in the Constitution, which either by express language or by implication, gives to Congress the right to effect a division of water between States? . . . [T]here is nothing in the Constitution that says that the Federal Government has jurisdiction over an interstate stream.

". . . .

"So, gentlemen, there is nothing in the Federal Constitution upon which to base the power of the Federal Government to divide this water among the States. . . .

". . . .

"If then, Congress has no authority to effect a division, it follows that nothing can be put in this bill that would confer that authority upon Congress and make the provision thus inserted valid and binding."

Accord, id. at 207, 1962.

[1] *Hearings Pursuant to S. Res. 320, 68th Cong., 2d Sess., Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 753-54 (1925).

ownership of water, Mr. Chairman. I will not develop that.

"The CHAIRMAN. *No such thought ever entered the imagination of any Member of the Congress.*

"Mr. BANNISTER. I am glad to hear that, for some of the attorneys to whom I have referred have taken the opposite view. . . ."

Conditioning Use of Government Property Upon Compliance With Colorado River Compact

A second proposal was that the federal government employ its power to attach reasonable conditions to the use of federal property, so that all water rights acquired through the federal facilities provided for in the Swing-Johnson bills, as well as all privileges respecting use of the public domain convenient or necessary for the use of waters of the Colorado River, be made expressly subject to the terms of the Colorado River Compact. Consequently, users in Arizona who wished to use the stored water made available by the proposed dam would have to agree to subject such uses to the Compact. Similarly, the Government would condition use of needed rights of way across the public domain in Arizona on an agreement to subject uses of water to the Compact.[1a]

This proposal was advanced during hearings on the second Swing-Johnson bill by William J. Carr, a California attorney, a portion of whose testimony in support of his proposal Arizona quotes in her answering brief. Ariz. Ans. Br. 36-37. However, Arizona omits the vital passages from Mr. Carr's testimony

[1a] See Project Act §§ 8(a), 13(b), (c), and (d) (Rep. app. 389, 393-94). See also Arizona v. California, 283 U.S. 423, 464 (1931), quoted *supra* p. 78 n.11.

which clearly demonstrate that he based his proposal solely on the power of the federal government to impose conditions on the use of federal property, particularly the proposed dam and the public domain. Mr. Carr expressly disavowed any assertion of a general federal power to allocate the waters of the basin:[2]

> "Mr. LEATHERWOOD. And it would be your contention that Congress has power to allocate the waters of this river as between the Colorado River States?
>
> "Mr. CARR. *I do not say that.* I said that the Congress in this legislation, by reason of this being a Government project, by reason of the Government's control of uses of water derived from the project, and by reason of the fact that title to water rights in California is derived from the Government, by reason of Government appropriations and by reason of the fact that appropriations of [571] water will require use of the public domain, can attach conditions binding upon the lower basin that will protect the upper basin to the same extent that the compact would. In brief, the Government will occupy a strategic position by reason of the project and its ownership of the public domain, such that it may and should so limit rights which will grow out of the project that they will not infringe on rights of upper States, just as such limitations are customarily made in the case of permits issued under the Federal water power act.
>
> ". . . ."

[2] *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 570-71 (1924).

"Mr. HAYDEN. . . . If Congress has the power to make the apportionment, why have the compact?

"Mr. CARR. There might be conditions where they could not do it.

"Mr. HAYDEN. What are those conditions?

"Mr. CARR. In States, for instance, where there was very little public domain it might not be possible; but where there is such a tremendous amount of public domain, which is something Congress has control over, they can reach all water rights that will be touched in the lower States; but I think your question is really directed to a question of the broad, general policy as to whether Congress in exercise of a broad policy should undertake to do anything like that, and I think Congress would not ordinarily undertake to divide water rights; but here is a case where the matter has been very fully considered, where six out of the seven States have ratified, where, as I understand it, in the other State they lacked one vote of ratification, where apparently there is a pretty general consensus of opinion as to what the fair and equitable division is." (Emphasis added.)

Arizona quotes the following portion of the testimony of Charles L. Childers, then the attorney for Imperial Irrigation District, during hearings on the fourth Swing-Johnson bill (Ariz. Ans. Br. 41-42):

"It is somewhat doubtful if a compact respecting these questions, solemnly approved by the legislatures of the several States and by the Congress, would of itself be so effective as a means

of allocating and administering the allocation of water as an act of the Congress. Compacts for this purpose have not been adjudicated, just how rights will be affected are not known, and the question of State and Federal control has not been settled."

Arizona asserts that by the quoted testimony Mr. Childers conveyed his view "that he believed Congress could and should provide for an allocation of water *in the Lower Basin.*" *Id.* at 41. (Emphasis added.)

Had Arizona provided the context of Mr. Childers' testimony, it would have revealed that he was discussing (1) the Colorado River Compact and (2) the upper basin proposal to have Congress subject lower basin uses to the Compact by conditioning federal rights of way over the public domain.

Mr. Childers' statement immediately following the quotation selected by Arizona reveals that he was discussing the Colorado River Compact:[3]

> "California has been and is willing to be bound by the compact, but if the compact can not be had is there any reason why the Congress, who has the power to do this job in an equitable way, should not proceed to do it? We had hoped, and still hope, to have a seven-State compact. When that seemed impossible we were willing to have a six-State compact and to give protection to upper-basin States, **[445]** the authors of the bill gladly accepted the amendment to the effect that nothing could be done under the bill until at least six States had approved. When the bill began to make prog-

[3] *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 444-45 (1928).

ress Utah withdrew her six-State approval, and now her governor comes forward and states that they will not be satisfied with a six-State compact and makes the same demands that are made by Arizona. California is willing to have a seven-State compact, but that apparently can not be had. She is willing to have a six-State compact. That apparently can not be had; she is willing to be bound by a five or four State compact, but gentlemen of the highest integrity state to your committee that they will not be satisfied with less than a compact binding six States.

"With these conditions seeming wholly impossible and with Congress having the power to proceed and do equity to all the States, we feel that Congress should find some way to proceed."

Just before he made the foregoing statement, Mr. Childers expressed his approval of the proposal to have Congress employ its power over the public lands to effectuate the Colorado River Compact:[4]

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[4] *Id.* at 444. Earlier in his testimony, Mr. Childers, in discussing § 12(c) of the bill (now 13(c)) with Mr. Douglas of Arizona, had made the same point (*id.* at 438):

"Mr. DOUGLAS. So that the effect not only of your ratification but of this section (c) or subsection (c) of section 12 is to use the power of Congress to force the terms of the Colorado River compact upon a State that does not or may not choose to enter into that compact?

"Mr. CHILDERS. It is to impress the compact upon the United States and the public lands. Now, if anyone in Arizona or elsewhere wants to use the property of the United States, it should not object to the terms that the United States imposes. If that should be the Colorado River, all well and good.

"Mr. DOUGLAS. In other words, if the State of Arizona should apply additional storage to any of its lands on any of its tributaries, it would have to come into the Colorado River compact.

"Mr. CHILDERS. No, sir; it would not be obliged to come into the compact at all; but if it used the property of the United States, the water user would have to agree that his water, if taken, is taken in accordance with the terms of the compact."

"It is stated that Congress has no authority or power to apportion the use of water between the States. As such, this may or may not be true. Without entering into a legal argument as to the control and disposition of unappropriated waters, there is no doubt that Congress has plenary power and supreme sovereignty and jurisdiction over the public lands. . . . The United States owns substantially all of the lands on either side of the Colorado River from its source to the Mexican line. It is doubtful if any structure of any kind can be placed upon the main stream or upon the main portions of the tributaries of the Colorado River without the consent of the United States, and it is equally doubtful if any water or power can be taken from the main stream of the river or its major tributaries without crossing Government property."

Conditioning Effectiveness of Bill on Six-State Compact Ratification

The third proposal originated with the spokesmen for upper basin states. Considering that neither the Hamele proposal, which they considered unsound and objectionable, nor the Carr proposal could adequately protect their interests, they turned to a third alternative. They proposed that the Project Act be authorized when the Compact had been ratified by six states, without awaiting action by Arizona. In furtherance of this plan, Colorado, New Mexico, Utah, Wyoming, and Nevada in 1925 reratified the Compact and waived the requirement of seven-state ratification. California, however, conditioned its six-state ratification in 1925 on Congress' authorizing the construction of a dam pro-

viding at least 20,000,000 acre-foot storage capacity.

Consequently, the third Swing-Johnson bills introduced in the 69th Congress authorized a reservoir of 26 million acre-foot capacity and approved the Colorado River Compact when it had received six-state ratification.[5] The upper basin representatives then proposed a number of amendments to the bill designed to give them added protection if Arizona refused to ratify. These amendments were based on the federal government's power to condition the use of federal property and privileges, along the lines previously suggested by Mr. Carr in connection with the second Swing-Johnson bill (*supra* pp. 91-93), and were designed to subject to the Compact all future uses in Arizona to the extent possible by this means.

Arizona viewed the proposal to grant federal approval to the Compact when ratified by only six of the seven basin states as an unconstitutional attempt to allocate the waters of the basin, including those from the Gila in Arizona, in accordance with a Compact which Arizona had not ratified.[6]

Utah, having become disenchanted with six-state ratification of the Compact and having repealed her ratification waiving seven-state approval (Rep. 25), also opposed the proposal. Utah spokesmen asserted Congress could not allocate the basin waters by approving the Compact without Arizona's consent. Thus Arizona would be free to make appropriations which, added to California's appropriations, would exceed the lower ba-

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[5]H.R. 9826 (Calif. Ex. 197, Tr. 7709) and S. 3331 (Calif. Ex. 198, Tr. 7760), §§ 1 and 12.

[6]See the statements of Senator Hayden and Rep. Douglas quoted in app. B *supra* pp. 41 n.10, 58, 73-74.

sin's Compact allocations.[7] Most of the extracts cited by Arizona are taken from the discussions in the hearings and debates on the third and fourth Swing-Johnson bills relating to this controversy. The Utah and Arizona opponents of the six-state compact proposal argued that federal consent to the Compact when less than all seven of the states had ratified constituted an attempt to effectuate a "federal allocation" of the waters of the Colorado River system which was beyond the constitutional powers of Congress.

That it was such a "federal allocation" that the opponents of the bill were concerned with is amply illustrated by the statements of Governor Dern and Senator Smoot of Utah made during the hearings and debates on the fourth and final Swing-Johnson bill and which Arizona quotes only in part in her answering brief.

For example, Arizona quotes part of the statement of Governor Dern of Utah during the House hearings on the third Swing-Johnson bill (Ariz. Ans. Br. 40-41). Even the portion cited by Arizona indicates on its face that the Gove nor was talking about approval of the Colorado River Compact under the six-state ratification alternative provided for in that bill. The part of his statement following the portion quoted by Arizona makes this abundantly clear. We emphasize it in the following quotation:[8]

> "Under the Johnson bill the essence of the compact idea is almost removed, and the Federal Government is given outright authority to divide the water of the river. That the division is to be

[7] See the explanation given by Representative Leatherwood of Utah, *supra* pp. 43-44. See also Rep. 165.

[8] *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. 215 (1928).

made according to the terms of the Colorado River compact is a mere incident. The scheme is Federal division of the water, and the compact is no longer a compact but merely a formula. If Congress at this session can divide the river according to this formula, then a future Congress, again succumbing to the pressure of intensive propaganda, may amend the law and divide the river according to some other formula without consulting the States at all.

> *"The Swing and Johnson bills pretend to allocate to the upper basin States in perpetuity the amount of water specified in the compact; but what authority has Congress to allocate water? . . ."* (Emphasis added.)

Governor Dern later supplied the answer to his rhetorical question "what authority has Congress to allocate water?" He stated that he did not believe that Congress possessed the power to make the federal allocation which he considered inadequate even if valid:[9]

> "We agree that there are but two methods to divide the water, either by interstate agreement or by action in the United States Supreme Court. That is the very reason why we hold that Congress is not competent to legislate on this subject, and should not be asked to meddle with strictly state business. We are of the opinion that Congress has no authority whatever to undertake to divide the water of the Colorado River."

Arizona also quotes (Ariz. Ans. Br. 43), without the context, remarks by Senator Smoot of Utah on the

[9] *Id.* at 221.

floor of the Senate in opposition to the Swing-Johnson bill (69 CONG. REC. 7538):

> "The bill is predicated upon the assumption that the Federal Government has very much greater rights in the Colorado River and older streams generally in the country than has ever been recognized by any judicial tribunal. Indeed, the theory upon which this bill must be upheld, if it is upheld at all, is that the Federal Government is sovereign over the Colorado River, and that Congress may determine how the waters of the Colorado should be divided between the States."

Senator Smoot's remarks immediately following those quoted by Arizona also demonstrate that the "federal allocation" which he was discussing was the proposal to approve the Compact with less than full seven-state ratification *(ibid.)*:

> "Now, the bill provides that it shall become effective only upon the ratification by six of the States in the Colorado River Basin of the Colorado River compact. There are, however, seven States in the Colorado River Basin, and it was originally intended that the Colorado River compact should be a compact between these seven States. The fact that one of the States is now left out of the compact, and that the rights of this State are to be determined not by its consent given in a compact or otherwise but by an agreement between six other States and the Federal Government, violates every principle for which the compact idea was originated. In other words, it makes no difference whether one State, two States, three States, or four

States are left out of the compact, the principle that the Federal Government controls the waters of the Colorado River is established just as much by one case as by the other.

". . . .

"Now, however, an entirely different idea is substituted. Because it has been difficult, and thus far impossible, to secure ratification of this seven-State compact by the State of Arizona, it is now proposed to shift to the position that the Federal Government and not the States shall control the waters, and that six of the States and the Federal Government may enter into a compact under which the amount of water which Arizona may take from the stream will be limited and determined."

Most dangerously misleading, however, is Arizona's quotation (Ariz. Ans. Br. 42-43) from Senator Johnson's majority report on the fourth Swing-Johnson bill, in which he asserts that the bill presents a unified plan "for the allocation among the States desiring that allocation of the waters of a great river to which all are entitled."[10] A reading of the report leaves no doubt that Senator Johnson was referring to the "allocation" made by the Colorado River Compact between the upper and lower basins. His description of the "allocation" as "among the States desiring that allocation" is an obvious reference to the controversy over whether any nonratifying state would be bound by the Compact. Later in his report, Senator Johnson devotes three pages to a discussion of the Colorado River basin controversy and the Compact.[11] Here he amplifies the obvious

[10] S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 7 (1928).
[11] *Id.* at 14-16.

frame of reference of the extract quoted by Arizona when he reports that "the passage of the bill, it is thought, will very early make the compact effective and settle an interstate controversy of long standing."[12]

The foregoing illustrations are typical of what Arizona has characterized as the "true" and "actual" legislative history (Ariz. Ans. Br. 13, 17) and presented to this Court in support of her argument that section 5 of the Project Act authorized the Secretary of the Interior to make a compact-like contractual allocation of "mainstream" water among Arizona, California, and Nevada.

We think it may be safely assumed that Arizona chose to place in the text of her answering brief those extracts lending most semblance of support to her argument. The context we have provided for most of those extracts, in this appendix as well as in others, clearly demonstrates that they do not support the Arizona assertion. We have examined the many extracts Arizona says (Ariz. Ans. Br. 43 & n.56) could be quoted in support of her argument (but are not), and think it fair to state that they are even less reliable and persuasive than those which we have treated.

[12] *Id.* at 16.

APPENDIX D

THE LEGISLATIVE HISTORY REFUTES ARIZONA'S CONTENTION THAT THE PROPONENTS AND OPPONENTS OF THE SWING-JOHNSON BILLS BELIEVED THE PROJECT ACT WOULD ABROGATE INTERSTATE PRIORITY PRINCIPLES WITHIN THE LOWER BASIN

Arizona attacks California's argument that "the Project Act preserved priority of appropriation and equitable apportionment in the 'mainstream' and in every other part of the Colorado River system in the lower basin." Calif. Op. Br. 159. California's "historiographers" are chided for relying on "only a few isolated statements culled out of the voluminous historical record" which "can hardly be dignified as 'legislative history.'" Ariz. Ans. Br. 17. The "few isolated statements" which Arizona disparages are the views of both of the authors of the bill (Representative Swing and Senator Johnson) and of the author of section 18 (Senator King of Utah), one of the most important provisions supporting our contention.[1] Calif. Op. Br. 146-47, 148-49.

After chastising California, Arizona presents to the Court what she characterizes as "the true legislative history." Ariz. Ans. Br. 17. Arizona's offer consists in major part of statements of Representative Swing and Senator Johnson (*id.* at 18-20) which, purportedly,

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[1]Moreover, we do not rely only upon statements in congressional hearings and debates. The plain language of the statute, the purposes Congress was trying to achieve in the Project Act, the policy underlying the universal adoption of the priority principles in the arid West, and the congressional understanding of its constitutional power also sustain our position. See our reply brief, pt. III *supra*.

"[show] overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation *in the Lower Basin* of the doctrines of prior appropriation and equitable apportionment." *Id.* at 17-18. (Emphasis added.) In fact, those statements do not relate to the question of *intra*basin priorities at all. The context of those excerpts from "the true legislative history" is provided by the portions of the statements which Arizona does not quote; that context clearly demonstrates that the Swing and Johnson statements relate solely to the question of *inter*basin rights as between the upper and lower basins under the *Colorado River Compact*.[2]

What the legislative history does reveal is that both proponents and opponents of the Swing-Johnson bills were in agreement that priority of appropriation would survive enactment of the Project Act and retain its interstate applicability in the lower basin except as modified by interstate agreement. The pertinent legislative history was engendered by two themes dominating the consideration of the Swing-Johnson bills. First was the upper basin concern with the threat to its future development if Arizona refused to ratify the Colorado River Compact. Second was Arizona's apprehensions with respect to California's priorities in the absence of a tri-state compact. The recognition that principles of priority of appropriation would retain interstate applicability was the reason why the upper basin was reluctant to give its support to the bill in the absence of a seven-state compact and why Arizona refused to ratify the Compact and opposed the Swing-Johnson bills in the absence of a tri-state compact modifying

[2]We provide that context *infra* pp. 121-27.

those priority principles. Both propositions are illustrated by the following statement of Governor Dern of Utah during hearings on the fourth Swing-Johnson bill. Governor Dern stated, in effect, that California would appropriate most of the lower basin main stream supply and that a nonratifying Arizona would not be prevented from asserting her priorities against the upper basins:[3]

> "California is a State of quick development. It is ready to use its water in the near future, and use all the water that is allocated to the lower basin before Arizona begins. When Arizona commences to take water the lower-basin water will all be gone, and the water that Arizona takes will come out of water allocated to the upper basin by the compact, but not as yet used by the upper basin."

Arizona's spokesmen repeatedly asserted that, absent a tri-state compact, California would both expand her existing appropriative rights and also acquire new prior rights. Thus, Arizona feared that California would preempt the lower basin's main stream supply, to Arizona's detriment. The Arizona view was emphatically stressed during the House hearings on the third Swing-Johnson bill,[4] when it had become apparent that the upper basin states, with the possible exception of Utah, were prepared to accept the bill with six-state ratification of the Compact. In Representative Hayden's opening statement in opposition to the bill, he force-

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[3] *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 244 (1928).

[4] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1926).

fully stated the need for a tri-state compact to protect Arizona against California priorities:[5]

> "My position has always been that whenever the Colorado River compact is approved by my State Arizona should insist that there be no development on that river in the lower basin until a supplemental compact had been agreed to by the States of Arizona, California, and Nevada. The compact contemplates and provides a means for the negotiation of just such agreements. Arizona stands in even greater need for protection against prior appropriations in California than do the States of the upper basin and has the same reasons for blocking development until her future is provided for and protected."

During the testimony of Secretary of Commerce Hoover, Mr. Hayden reiterated Arizona's apprehensions:[6]

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[5] *Id.* at 17.

[6] *Id.* at 49. Nevada spokesmen shared Mr. Hayden's view. For example, Arizona cites (Ariz. Ans. Br. 39) an exchange between Representative Leatherwood and Charles P. Squires, a member of the Colorado River Commission of Nevada, during hearings on the third Swing-Johnson bill, to show that both men understood that the bill would vest control of the water in the federal government. A close reading of the colloquy indicates that it does not have the far-reaching implications Arizona suggests. Most important, however, we quote here the immediately preceding portion of that exchange (not quoted by Arizona) which clearly demonstrates that, whatever the views of Messrs. Squires and Leatherwood may have been as to the extent of federal authority provided for by the bill, Mr. Squires assumed that, absent a compact among Arizona, California, and Nevada, priority of appropriation would control rights among those three states. Representative Leatherwood did not disagree (*Hearings on H.R. 6251 and H.R. 9826, supra* note 4, at 43):

> "Mr. LEATHERWOOD. Does your State believe in the doctrine of prior appropriations?
>
> "Mr. SQUIRES. We have such a doctrine in force within the State.

"There is a strong feeling in Arizona that unless we have a thorough understanding with California and Nevada prior rights will be acquired to the use of the water, particularly in California, which will prevent development within the State of Arizona."

Arizona quotes a statement made during these hearings by S. G. Hopkins, Colorado River Commissioner of Wyoming (Ariz. Ans. Br. 39-40), which concludes that "if the Government constructs this reservoir you have only to go to the Government and obtain your water contracts and irrigate your land" (Ariz. Ans. Br. 40). The Arizona extract is taken from a colloquy between Mr. Hopkins and Representative Hayden who was again explaining how California would acquire water rights through the project which would be prior to Arizona's. Mr. Hopkins did not deny Senator Hayden's assertion that California users would acquire priorities as a result of any uses made possible by the dam. Furthermore, Mr. Hopkins made clear that the contracts were to protect the upper basin's Compact apportionment. Here is Arizona's extract, set in its context:[7]

"Mr. HAYDEN. We believe our rights will be jeopardized for the reason that the land in Cali-

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"Mr. LEATHERWOOD. Does your State undertake to control and dispose of the unappropriated water within the boundary of the State?

"Mr. SQUIRES. We recognize the right of prior appropriation.

"Mr. LEATHERWOOD. Do you believe in that right?

"Mr. SQUIRES. I believe it is a right that can be properly carried out.

"Mr. LEATHERWOOD. Do you think it ought to be preserved to the States?

"Mr. SQUIRES. If there is no compact between the three States, or between the seven States or the six States, the prior appropriation would naturally still remain."

[7] *Hearings on H.R. 6251 and H.R. 9826, supra* note 4, at 108.

fornia is easily susceptible of irrigation and the cost of diversion would not be excessive. There is a large area of land in the Imperial Valley, the Coachella Valley, and the Palo Verde Valley. All of it can be irrigated below the Boulder Canyon dam. In addition to that, filings have been made by the City of Los Angeles for a domestic water supply which will take a large quantity of water from the Colorado River.

"Being neighbor to a rich State and one that is ready to proceed, *we in Arizona believe that the California lands will be put under cultivation first and thereby acquire water rights which would be prior to ours.* Consequently when the time came to reclaim lands in Arizona there may be no water left for them, any more than there would be for the States of the upper basin without the Colorado River compact.

"Mr. HOPKINS. This reservoir will be a great benefit to Arizona in the irrigation of her lands below the reservoir. There is nothing in the bill which would prevent Arizona from taking water from the reservoir and utilizing it on her land. *The only thing is that the water will be subject to the terms of the compact.* The water is appropriated now, and you can not irrigate the Parker project with the present flow of the stream. If the Government constructs this reservoir you have only to go to the Government and obtain your water contracts and irrigate your land." (Emphasis added.)

Senator Hayden made the same point in explaining Arizona's position to Delph E. Carpenter, upper basin

spokesman who presented the upper basin amendments to the bill:[8]

> "Mr. HAYDEN. I am trying to point out the logic of the situation. The four States of the upper basin say that because there is to be immediate development for the benefit of California which will result in the acquisition of water rights prior to any they may acquire, they are compelled to oppose any such legislation unless granted the protection afforded by the Colorado River compact. Is there any inconsistency on the part of the State of Arizona in setting up the same state of facts and asking that nothing be done until her rights are protected?
>
> "Mr. CARPENTER. There may be strong arguments presented, but I would not care to enter into them. I will have to ask to be excused.
>
> "Mr. HAYDEN. I can see no inconsistency in the position of the State of Arizona. *Without some agreement between them California will acquire a prior right to the use of water and power from Colorado River, leaving but little or none for the future needs of Arizona.* You, as an official of the State of Colorado, are trying to protect the interests of your State. In doing that you must remain neutral toward the lower basin States. However, I think you must concede that Arizona has the same right to protect herself as has the State of Colorado." (Emphasis added.)

Mr. Hayden continued to press his argument, finally eliciting the following comment from Mr. Carpenter:[9]

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[8] *Id.* at 158.
[9] *Id.* at 162-63.

"Mr. HAYDEN. Without an understanding with the States of California and Nevada, should this bill pass, the water will be first applied to a beneficial use in California, and when the time comes for development in Arizona, my State may have no water.

"Mr. CARPENTER. What you have said is true in part, but I must respectfully disagree with any thought that, physically, California could legitimately beneficially use all the water of the river. There is too much. It is also true that, under this bill, *the Secretary of the Interior could contract with water users in the State of Ari-* [163] *zona for the use of water or power without let or hindrance,* except that the party contracting with the United States would agree that his particular claim should be subordinate to the Colorado River compact, *not subordinate to the rights of the State of California*—simply subordinate to the rights of the upper States as defined in the compact." (Emphasis added.)

We emphasize that portion of Mr. Carpenter's reply also emphasized by Arizona when she argues that, according to Carpenter, the lower basin states would be "free to contract with the Secretary for stored water on a basis of equality and regardless of prior appropriative rights." Ariz. Ans. Br. 32. In context, however, Mr. Carpenter's reply is clear (1) that he did not deny the premise of Mr. Hayden's assertion that California would acquire priorities against Arizona by reason of prior beneficial use, and (2) that he disagreed only with Mr. Hayden's suggestion that Calj-

fornia could physically appropriate all of the water in the river so as to leave none for Arizona.[10]

Arizona asserts that her interpretation of Mr. Carpenter's answer was shared by Mr. Swing. In support of this contention Arizona relies on the following statement by the author of the bill:[1]

> "The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California."

Mr. Swing's reference to the fact that Arizona would be able "to secure water on the same terms" as Nevada and California obviously meant only that Arizona would not be discriminated against in any way. It cannot be distorted to support Arizona's inference that Mr. Swing intended his bill to shear California's existing rights of their priorities and to obliterate the only existing system of law for the determination of interstate water rights as between those states. Mr. Swing repeatedly asserted that the contracts provided for in his bill were not to be a source of title to water rights and that any rights acquired under such contracts would derive from state law.[2] Priority of appropriation was

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[10]Mr. Carpenter subsequently reiterated this point in response to a question from Rep. Hudspeth of Texas (*id.* at 165):

> "Mr. HUDSPETH. Suppose California should appropriate all of the water, would not that all go to her to the detriment of the State of Arizona?
>
> "Mr. CARPENTER. The best answer to that question is that it can not be done. California could not possibly appropriate all of that water if she tried to do so. She would drown herself out. Physical inhibitions would come into play."

[1]Ariz. Ans. Br. 33, quoting *id.* at 163.

[2]See Mr. Swing's explanations of his bill quoted *supra* pp. 36, 42-43, 55-57.

and is the prevailing law in Arizona, California, and Nevada. See Rep. 22.

The Arizona spokesmen voiced the same fears in their subsequent arguments in opposition to the fourth Swing-Johnson bill two years later.

Mr. Mulford Winsor, in presenting the views of the Colorado River Commission of Arizona and the Governor of Arizona during the hearings on the fourth Swing-Johnson bill, viewed the proposed legislation as imposing no restrictions on California's ability to acquire appropriative priorities to Arizona's detriment:[3]

> "Under the terms of the compact the water allotted to the lower basin is allotted not to any State but to the several States of the basin collectively, and in the absence of recognition of what we consider to be the law of the land—that is, the right of the State to control the appropriation of water within their boundaries—and in the absence of an agreement dividing the water between the lower States, there would be nothing to prevent California, if this act should become effective and this storage were created, from taking all of the allocation to the lower basin. There would be nothing to prevent the depletion of the water by Mexico and there would be nothing to keep Arizona from being left holding the bag."

Respresentative Lewis W. Douglas, who had succeeded Mr. Hayden in the House, elicited agreement from Governor Emerson of Wyoming that under the

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[3]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 51 (1928).

proposed legislation California would acquire priorities against Arizona:[4]

> "Mr. DOUGLAS. If this bill should be enacted into law, it would permit the State of California to appropriate to beneficial use in the absence of an agreement between the States of California and Arizona and Nevada the waters of the Colorado River faster than it would permit the State of Arizona to apply to beneficial use water from the Colorado River?
>
> "Governor EMERSON. That is probably true.
>
> ". . . .
>
> "Mr. DOUGLAS. You have heard that this bill, in the absence of a treaty between the lower basin States, permits the State of California to apply to beneficial use the waters of the Colorado faster than it would permit the State of Arizona to apply to beneficial use the water of the Colorado?
>
> "Governor EMERSON. That is undoubtedly true."

Mr. Douglas later asserted that, absent a tri-state agreement, Arizona's only possible protection against California's priorities would be litigation.[5]

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[4] *Id.* at 324.

[5] *Id.* at 429-30: "Mr. DOUGLAS. . . . If California applies to beneficial use in the absence of a compact between Arizona and California, the 7,500,000 acre-feet of water allocated to the lower basin States, there will be no water available in the Colorado River under the terms of California's ratification—and California's ratification does not become effective until those terms have been accepted—there will be no water in the Colorado available in the main stream for use in Arizona.

"Mr. HUDSPETH. Mr. Douglas, if six States ratify and your State does not, how are you going to protect yourself against California? I don't mean to say that California would 'hog' this water, but how is your State going to protect itself if the State of California should take more than she is entitled to?

Senator Hayden restated the Arizona position during final debate on the bill on December 11, 1928:[6]

> "In the lower basin, however, both in Arizona and in California, particularly in the latter State, there is immediate prospect that the water will be placed to beneficial use. So, with an apportionment to the lower basin as a whole, and without any division of water between the States in the lower basin,

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"Mr. DOUGLAS. By the physical conditions there would be no protection.

"Mr. HUDSPETH. Is there a tribunal to go into, any court?

"Mr. CHILDERS. Of course, you could go into the courts, naturally.

"Mr. HUDSPETH. But that would be your only resort?

"Mr. CHILDERS. That would be the only recourse. [430].

"Mr. SWING. And that has been suggested.

"Mr. DOUGLAS. In fact, if this bill is passed by the Congress and signed by the President—that is, this bill in its present form—the State of Arizona will go into court, and that litigation will probably take six or seven years.

"Mr. HUDSPETH. That is what I had in mind when I asked you if there was any possibility of the States getting together.

"Mr. DOUGLAS. I should think the Supreme Court could issue an injunction."

[6]70 CONG. REC. 388. Rep. Douglas had made a similar statement of Arizona's position during the House debates on H.R. 5773 in the previous session (69 CONG. REC. 9782):

"The State of Arizona since then has been attempting to negotiate with California. It wants a compact with California before it signs the seven-State compact for this reason. It is in the same position with respect to California that the upper basin States are with respect to the lower-basin States. California can apply to beneficial use the waters of the Colorado infinitely faster than can Arizona. California's ratification of the compact was conditional upon the construction of a storage dam on the Colorado, the construction of which, by the nature of the topography of the country and of the appropriations in the act and the works to be constructed would give the waters of the Colorado, to California, and Arizona simply said to California, 'You make an equitable agreement with us relative to an allocation of water between us and also give us a right to tax power which is to be developed by the use of the fall within our State, and of our undivided interest in the Colorado, which power you are going to use in your State to increase the industries of your State, to increase the taxable wealth of your State, and then we will sign the Colorado River compact.'"

the State of California could immediately appropriate and put to use the major portion of the water. We were greatly alarmed in the State of Arizona to learn that the State of California had made filings, had given notice to the world that they intended to appropriate out of the Colorado River all of the water apportioned to the lower basin, which would leave absolutely no water from the main stream for the State of Arizona.

"If the filings made by the State of California have the value assigned to them by the senior Senator from California, if they do establish perfected rights as he has asserted, then, without an agreement between the States of Arizona and California, if those filings are valid, there would be absolutely no water left in the Colorado River for the State of Arizona. . . ."

Senator Borah agreed that the interstate applicability of the principles of priority of appropriation might produce that result (70 CONG. REC. 391-92):

"I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial use in other States, she might lose her rights. She would not lose them, however, [392] by reason of this legislation, but by reason of the acts of appropriation."

Senator Hayden rejoined that the Project Act would indirectly aid in producing that result, in that the construction of Hoover Dam pursuant to the act would facilitate the acquisition of priorities by California pur-

suant to contracts that might be executed by the Secretary of the Interior (*id.* at 392):

> "That is exactly what we fear—that if, subsequent to the passage of this legislation, a great dam is erected in the Colorado River without the consent of the State of Arizona, the water impounded behind that dam will be claimed and controlled by the Federal Government, and the State of Arizona will have no jurisdiction over it. The Secretary of the Interior may then enter into contracts to permit the use in California of a much larger quantity of water out of that dam than is fair to the State of Arizona.[6a] The State of Arizona will be helpless unless it does proceed, as the Senator suggests, by

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[6a] (Footnote ours.) In repeatedly asserting Arizona's fears of California's priorities, Senator Hayden made no distinction between the priorities that already attached to California's natural flow rights and those that would attach to rights acquired in stored water as a result of uses made pursuant to contracts. His recognition that priorities attached to prior uses, whether of natural flow or stored water, accords with the view held by other members of Congress.

For example, during hearings on the third Swing-Johnson bill before the House Rules Committee, Rep. Colton of Utah, in reply to a question from Rep. White, asserted that priority of appropriation would control the rights of Arizona's users of Colorado River waters, whether of natural flow or stored water. *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 54-55 (1927):

"Mr. WHITE. Let me ask you a question there. *Does your law in Utah and in your surrounding States make any distinction between the right to use the natural flow of a stream and the right to use the impounded waters?*

"Mr. COLTON. *Well, no, not so far as use is concerned,* if I understand your question correctly, Mr. White. We do not recognize the doctrine of riparian rights at all.

"Mr. WHITE. I will illustrate what I mean in this way. I take it that the citizens of Arizona living up above the site of this proposed dam, under your rules of law, have a right to divert the water of the Colorado River for beneficial uses. Now, they may do that with [55] the waters that naturally flow in the stream, but if there should be a dam built and a lake created of stored water, impounded water, do they have the

filing a suit in the Supreme Court of the United States to determine its rights."

Senator Borah agreed, but asserted that such was the consequence of "living under the doctrine of prior appropriation" *(ibid.)*:

> "Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it away from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legislation in the sense that the acts carrying it out would result in appropriations by others. It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.
>
> "Mr. HAYDEN. Mr. President, that is why we oppose the passage of a bill which authorizes large appropriations of money to construct a dam and other works which will inevitably lead to appropriations of water which are adverse to the State of Arizona, unless and until there is an agree-

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right to use that impounded water, that stored water, in the same way that they would the water naturally flowing in the stream?

"Mr. COLTON. Yes, sir. *It is prior appropriation for the use of the water that counts,* and wherever there is any surplus water that is not being used our citizens may acquire the right to use it, whether it is stored or whether it is flowing."

ment between Arizona and California apportioning those waters. We desire an agreement so that if Arizona is not in position to use her share of the water immediately, it will be reserved for her. In other words, Arizona's position in this matter is exactly and identically on all fours with the position of the States of the upper basin. We ask no more and no less in the way of protection from immediate development in California than do the States of the upper basin."

Both of the foregoing problems—(1) California could appropriate the bulk of the lower basin's Compact allocation and (2) a nonratifying Arizona could assert her future claims against the Compact apportionment of the more slowly developing upper basin—were resolved by requiring, as a condition precedent to effectiveness of the act absent seven-state ratification within six months, that at least six states (including California) ratify the Compact and that California agree to a specified limitation.[7] The Master accurately states this congressional purpose in requiring the limitation of California (Rep. 165-66):

"The reason that Congress imposed this limitation on California's consumptive use of mainstream water in the event that all seven states did not agree to the Colorado River Compact within six months of the date of enactment of the Project Act is apparent from the statutory language itself. It was for the benefit of the other six states.

"Absent seven-state ratification of the Compact, the Upper Basin required protection against appro-

[7]In addition, §§ 8(a) and 13(b), (c), and (d) of the act subject to the Compact all uses of federal facilities and lands under either alternative.

priations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the nonratifying state.

"Similarly, Arizona and Nevada were concerned that California's rapid development would enable that state to appropriate most of the mainstream water available in the Lower Basin. The California limitation afforded these states protection against this eventuality. Unless California agreed with them to an acceptable division of mainstream water such as that suggested in the second paragraph of Section 4(a), they could, simply by delaying ratification for six months, bring the limitation into effect."[8]

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[8]There was little doubt that, failing an agreement with California, Arizona would delay ratification in order to bring the limitation into effect. During final debates on the fourth Swing-Johnson bill, Senators Phipps and King engaged in a discussion of the pending Pittman-Hayden amendment authorizing a tri-state compact. Senator Phipps had just explained that there would be no limitation on California in the event of seven-state ratification. Senator King prophesied that Arizona would not be inclined to ratify the Compact since, absent a tri-state agreement, she would then have no protection against existing and proposed California appropriations which would be facilitated by the project (70 CONG. REC. 389):

"Mr. KING. But, as I understand the statement just made by the Senator, the limitation of 4,400,000 acre-feet is based solely upon the 6-State compact, and if there is a 7-State compact there is no limitation.

Arizona argues that Congress resolved the controversy by "the imposition of a mandatory formula for allocation created by the interaction of §§ 4(a), 5, and 8(b)" (Ariz. Ans. Br. 43). The Master has rejected the Arizona argument that sections 5 and 4(a) provided a mandatory formula which the Secretary was bound to follow.[9]

If the Arizona argument concerning the effect of sections 5 and 4(a) were accurate, Senator Hayden should have rejoiced after the adoption of the amendments adding the "conform to" language to section 5 and the Pittman-Hayden tri-state compact authorization to section 4(a). If, as Arizona says, the effect of these amendments was to require the Secretary to make contractual compact-like allocations to Arizona, California, and Nevada which would stand on a parity, all Arizona fears of California priorities should have been erased with their adoption. The feebleness of the Arizona argument is amply demonstrated by the fact that both Arizona Senators voted *against* the bill as amended. 70 CONG. REC. 603. Further, Representative Douglas of Arizona never received the good news when the amended bill was sent back to the House. Asserting that he remained "as bitterly opposed to the project authorized in the Senate amendment as I was

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"Mr. PHIPPS. That is correct.

"Mr. KING. Then if there is no limitation what advantage is there to Arizona if she does ratify the compact? California is in a superior position to appropriate the water and Arizona might get no water. California might then appropriate all of the 7,500,000 acre-feet allocated to the lower basin and Arizona, when ready to appropriate water from the river, and finding her share used by California might come to the upper basin States and make demands upon them."

[9]Rep. 162-63, 202. We treat the legislative history refuting Arizona's argument in appendix E.

to the project authorized by the House bill" (*id.* at 836), he voted against the measure. *Id.* at 837.

Statements of Senator Johnson and Representative Swing Quoted by Arizona

Arizona quotes portions of several excerpts from the legislative history, primarily statements by Representative Swing and Senator Johnson, purporting to support her argument that "the true legislative history shows overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation in the Lower Basin of the doctrines of prior appropriation and equitable apportionment." Ariz. Ans. Br. 17-18.

We here provide the context for the statements by Swing and Johnson quoted by Arizona to demonstrate that they were limited *solely* to the question of California's rights *as against the upper basin* under the Colorado River Compact.[1]

The colloquy between Representatives Raker and Swing quoted by Arizona (Ariz. Ans. Br. 18-19) reveals on its face that the discussion related to interbasin priorities as affected by the Compact, particularly Article VIII.[2] This context is also provided by the full statement of Arthur P. Davis, Director of the Reclamation Service (a portion of which is quoted by

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[1]The statement of Governor Dern of Utah quoted by Arizona (Ariz. Ans. Br. 20) should be viewed in the same context. See *supra* pp. 98-99.

[2]The citation provided by Arizona to support her assertion that "Mr. Swing repeated these views in the Senate committee hearings on the pending legislation" (Ariz. Ans. Br. 19 & n.18) does not sustain Arizona's proposition, *i.e.*, that all appropriative

Arizona (Ariz. Ans. Br. 19) as expressing his understanding of Mr. Swing's statement):[3]

> "In case of water shortage in the lower valleys, under the principles of the Supreme Court decision in the Wyoming-Colorado case, the Imperial Valley farmers would have the right to cause to be closed during the period of shortage all the headgates of canals above them which are junior to their appropriations of 1900 and earlier. This would include all three of the Government projects *in the upper basin*—two in Colorado, and one in Utah—and many private enterprises as well, which have hard enough struggle at best without adding water shortage and litigation.
>
> "The irrigators *in the lower basin* do not desire litigation, as is shown by their avoidance of it in the past shortages. If a large reservoir is built and the water regulated, there will be plenty of water for them so there will be no litigation. The representative from Imperial Valley has testified that the district is willing to yield all claim to the low water flow in exchange for a right in the reservoir, and no doubt all irrigators served from the reservoir would do the same." (Emphasis added.)

Arizona then quotes portions of Representative Swing's statements in connection with the third and fourth Swing-Johnson bills (Ariz. Ans. Br. 19-20). Mr. Swing's statement before the House Rules Com-

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rights in the lower basin were allegedly superseded; on the contrary, Mr. Swing's remarks before the Senate Committee are consistent only with our interpretation.

[3] *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation*, 68th Cong., 2d Sess. 81 (1925).

mittee during its hearings on the third Swing-Johnson bill expressly related to California's water rights as affected by the Colorado River Compact, as the following context shows:[4]

"Mr. GARRETT. You do not mean to say that California has unconditionally ratified it [the Colorado River Compact]?

"Mr. SWING. California did unconditionally ratify it, and then subsequently made it conditioned.

"Mr. GARRETT. It repealed it?

"Mr. SWING. Yes. It stands now on the conditional ratification that if it has to give up its vested water rights to the upper-basin States, which it is willing to do if it is supplied with storage water, because water is water, whether it comes out of a reservoir or out of the flow of the stream. In the interests of peace on the river, all it asks is that it be afforded storage to take the place of its present rights in and to the natural flow of the river. So, the construction of this dam can not possibly interfere with the rights of Utah under the Colorado River compact, because the terms of the Colorado River compact cover this project by express declaration. And, in addition to that, all contracts to be made by the Secretary of the Interior for the beneficial use of either water or power out of this project, are to be governed by the restrictions and limitations of the compact which are put into the contracts, and those same restrictions and limitations must go into

[4] *Hearings on H.R. 9826 Before the House Committee on Rules*, 69th Cong., 2d Sess. 107 (1927).

every contract, and the beneficiary of the contract must recognize the superior right of the upper-basin States, to that extent."

Mr. Swing's statement before the Rules Committee in the next Congress is equally clear that he was discussing California's rights as affected by the Colorado River Compact. This is amply demonstrated by the part of his statement Arizona quotes:[5]

> "California can not afford to support such a proposal, because *under the Colorado River compact,* California must surrender her present water rights to the natural flow of the river and look to storage instead." (Emphasis added.)

The most misleading extract employed by Arizona is one taken from Senator Johnson's explanation of the fourth Swing-Johnson bill on the floor of the Senate in 1928. Arizona provides the Court with only this much of Senator Johnson's statement:[6]

> "Ah, you see in the days to come what will happen in that river if no protection be accorded *those people* and the appropriation law of the West be permitted to obtain. Then will be demonstrated the utter futility of the position that is now maintained by some." (Emphasis added.)

By "those people," Senator Johnson meant "those upper basin people."

The quoted extract is taken from a long statement by Senator Johnson explaining how his bill provided the maximum possible protection to the upper basin against lower basin appropriations, failing seven-state

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[5]Ariz. Ans. Br. 19-20, quoting *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 80 (1928).
[6]Ariz. Ans. Br. 20, quoting 69 Cong. Rec. 7251 (1928).

ratification of the Compact. The Arizona assertion (Ariz. Ans. Br. 20) that Senator Johnson "was explaining the provisions, then in § 5 of the bill" when he made the quoted statement is misleading. Senator Johnson had just finished explaining the protective provisions for the upper basin contained in sections 4 and 5 (section 5 then contained the limitation provision) of the bill. Here is Senator Johnson's statement repeated, with the context immediately preceding the quotation used by Arizona (69 CONG. REC. 7250-51):

> "I repeat and repeat how we have endeavored to protect these upper basin States. We write the bill around the compact, we make every drop of water that comes from the storage and the regulation of the Colorado River under this scheme subject to the compact. We write, then, that California shall use perpetually only a specific amount of water, naming the maximum amount which may be used.
>
> "All these things are done in the good-faith endeavor to protect in every possible way the States of the upper basin and those who claim that they want protection under the Colorado River compact. Yet some of them would prefer to let this water continue to flow down to the sea for an indefinite period, to go to waste in the Gulf of California, the land remain in drought to the detriment of people in southern Arizona and southern California, to permit that to be done indefinitely, rather than to permit the measure of protection—and it is a full measure of protection that is accorded them—under this bill.
>
> ". . . ."

"I submit, sir, that under the provisions which have been written in this measure at the instance of the Senator from [7251] Wyoming, under the provisions all through this bill by which we take care of the Colorado River compact, remembering that practically all the land there upon the banks of the Colorado River is land that is owned by the United States of America, from the site of the dam practically down to the international boundary; remembering all that, how can it be said that there is any State in the upper basin or any other place that is not amply protected by the provisions of this bill?

"In addition to that, yielding to the demands that have been made that profit and revenue should come from this measure, the Committee on Irrigation and Reclamation has accorded them the same percentage of profit that is accorded in the existing laws to-day, and they have done it on a project that is paid for by the United States of America in the first instance and that is paid for by the people of California in the second instance. I do not complain of it, but I do complain when any men here say that the upper-basin States are not protected or that we have taken something that does not belong to us. Here we have done everything that can be done by a people in order to have their protection and to give them what they are entitled to.

"Ah, you will see in the days to come what will happen in that river if no protection be accorded those people and the appropriation law of the West be permitted to obtain. Then will be demonstrated

the utter futility of the position that is now maintained by some."

Arizona also relies on a colloquy between Senators Walsh and Johnson to support her contention that Senator Johnson recognized that the Secretary of the Interior, under the bill, "could dispose of the stored water without regard to appropriative rights" (Ariz. Ans. Br. 45). Arizona belabors us for describing that colloquy as confused and then quotes a portion of that colloquy as "a clear and unconfused declaration by one of the bill's sponsors that it would wipe out appropriative rights and that the only way anyone could get any water was under a contract with the Secretary."[7] While Senator Johnson did assert, in accordance with the plain language of the last sentence of the first paragraph of section 5, that a contract would be required for all uses of "stored water," his statements cannot, by any stretch of the imagination, be construed as a declaration that the bill "would wipe out appropriative rights." The full Walsh-Johnson colloquy (70 CONG. REC. 167-68) is set out in Arizona's legislative history volume at 37-38, 40-43. Here is the portion (70 CONG. REC. 168) which Arizona quotes in her answering brief (Ariz. Ans. Br. 45-46):

> "Mr. WALSH of Montana. If the city of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation of an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that

[7]Ariz. Ans. Br. 46. Arizona asserts that Rep. Swing "expressed similar views" and provides a cross reference to the statements of Mr. Swing which we treat *supra* pp. 121-24.

it must yield up that amount of water to the city of Los Angeles?

"Mr. JOHNSON. I rather think so, just exactly as if it were a perfected right for irrigation purposes.

"Mr. WALSH of Montana. Yes; but I always understood that the interest that stores the water has a right superior to prior appropriations that do not store.

"Mr. JOHNSON. Possibly so. What is the point?

"Mr. WALSH of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.

"Mr. JOHNSON. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.

"Mr. WALSH of Montana. A contract with whom?

"Mr. JOHNSON. With those who utilize and take and appropriate the water.

"Mr. WALSH of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

"Mr. JOHNSON. Yes; under the terms of this bill."

Here is the immediately following portion of the colloquy, clearly demonstrating that Senator Johnson was trying to explain that the contract requirement was

merely an added condition to whatever right Los Angeles might possess, and that, whatever the source of the right to use "stored water," appropriation or contract, priority would be a principal incident of that right (70 CONG. REC. 168):

"Mr. WALSH of Montana. Then how can it be said that the city of Los Angeles has a perfected interest?

"Mr. JOHNSON. It has a perfected right there unquestionably, but the bill requires the city of Los Angeles to conform to it, and the city of Los Angeles is perfectly willing to conform to it just exactly as if it had no perfected right.

Mr. WALSH of Montana. *Am I correct in the assumption that the Government of the United States must distribute the water to the various appropriators in accordance with their several appropriations?*

"Mr. JOHNSON. *If they contract.*

"Mr. WALSH of Montana. Yes; but to contract means a liberty of contract. That is what I want to know. Can the Secretary give the water to them or withhold it from them as he sees fit?

"Mr. JOHNSON. Certainly, because before he begins work upon the dam he has to have the contract in his possession for its payment, and he is the one who is to fix the sums that are to be paid.

"Mr. WALSH of Montana. Yes, but that is quite contradictory. It seems to me that the city of Los Angeles has no rights by virtue of this appropriation.

"Mr. JOHNSON. Certainly it has, but those rights unquestionably will be controlled by this bill.

"Mr. WALSH of Montana. I should like to have a very much clearer understanding about that than I have.

"Mr. JOHNSON. I fear I can not make it any clearer to the Senator. I would like to do so if I were able." (Emphasis added.)

Senator Walsh then asked whether the Secretary would be obliged to contract with the city of Los Angeles, to which Senator Johnson's reply may have been somewhat vague and ambiguous *(ibid.)*:

"Mr. JOHNSON. No; he is not obliged to do so, but he is obliged to contract with somebody that makes the same claims to the same waters, and unless the contract is by mutuality agreed upon then he will not build the dam. That is the condition precedent to the construction of the dam.

"Mr. WALSH of Montana. Then he is at liberty to contract with the city of Los Angeles, which has an appropriation, or with some one else that has not an appropriation?

"Mr. JOHNSON. Yes; he is at liberty to contract with the city of Los Angeles, which has an appropriation.

"Mr. WALSH of Montana. *But can he disregard the city of Los Angeles?*

"Mr. JOHNSON. *I doubt very much if he can.*

"Mr. WALSH of Montana. *And contract with some one else who has no appropriation?*

"Mr. JOHNSON. *I doubt very much, first, if he would, and I doubt, secondly, if he could.*

". . . .

"Mr. WALSH of Montana. I directed the inquiry merely for the purpose of trying to find

out, if I can, under what kind of obligation the Government of the United States, should it build this dam, would be to those who have the appropriations.

"Mr. JOHNSON. The Government would be under no obligations until it makes its terms. I seem unable to make that plain. But here is everything in this scheme, plan, or design: Everything is dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction, and he is not to undertake any expenditure nor to undertake any construction until that shall have been accomplished.

"Mr. WALSH of Montana. Let us suppose the Arizona people are perfectly willing to meet the requirements and that the Los Angeles people are perfectly willing to meet the requirements, and other people who have not even attempted to make any appropriation are perfectly able and willing to meet the requirements. Who then has the right?

"Mr. JOHNSON. The Secretary of the Interior and the Government have the right.

"Mr. WALSH of Montana. *The Secretary of the Interior may utterly ignore those appropriations?*

"Mr. JOHNSON. *Possibly so.*

"Mr. WALSH of Montana. *That is what I am curious to find out about.*" (Emphasis added.)

Here is how Senator Johnson was understood by Senator Walsh (70 CONG. REC. 169 (1928)):

"Mr. WALSH of Montana. . . . [I]f, as contended apparently by the Senator from California, the city of Los Angeles has a right, inchoate in character, in process of perfection, which

entitles it to a certain amount of water out of the Colorado River, if we allocate so much of the water to the State of Arizona as interferes with its rights, would we not be taking property from the people of Los Angeles without due process of law?

"Mr. HAYDEN. If the right were of a character that must be recognized, I would agree with the Senator.

"Mr. WALSH of Montana. That, I understand, is the contention of the Senator from California, that the hands of the Government are tied; that if we shall erect a dam there at all we shall have to give enough water out of that dam to the city of Los Angeles to satisfy its appropriation.

"Mr. HAYDEN. But I am quite sure, if I understood correctly the Senator from California, that he qualified that statement by saying that, after all, the Secretary of the Interior could allow the city of Los Angeles to have such quantity of water as might be determined by contract."

Immediately thereafter, Senator Phipps added his observation that priority of appropriation principles should control competing claims to the stored water (whether rights were based on appropriation or contract) *(ibid)*:

"Mr. PHIPPS. It seems to me that in resolving such a difficulty, should it arise, there would be taken into consideration the fact that water for domestic use should take priority over water intended for purposes of irrigation. Aside from that, those filings are first in point as compared with those to which the Senator from Arizona referred. They are for a superior use, and, in addition thereto, the applicant who has made the filing [the city

of Los Angeles] has pursued the proper course in developing the manner of appropriation or the manner of diverting the water and putting it to the highest beneficial use. I do not anticipate any difficulty on that score in resolving the question of priority by the Secretary of the Interior."

APPENDIX E

THE LEGISLATIVE HISTORY OF THE SECTION 5 REQUIREMENT THAT WATER DELIVERY CONTRACTS EXECUTED PURSUANT THERETO SHALL "CONFORM TO" SECTION 4(a) REFUTES ARIZONA'S ARGUMENT THAT CONGRESS UNILATERALLY IMPOSED A FEDERAL ALLOCATION OF COLORADO RIVER WATERS UPON ARIZONA, CALIFORNIA, AND NEVADA

This appendix covers the legislative history of the requirement in section 5 of the Project Act that contracts executed pursuant to that section "shall conform to paragraph (a) of section 4 of this Act." Arizona argues that this language states Congress' intention to impose upon Arizona, California, and Nevada a federal allocation precisely as set forth in the second paragraph of section 4(a) (consenting to the terms of a tri-state compact never ratified by any state). *E.g.*, Ariz. Ans. Br. 12-13, 31-32 & n.35, 34 & n.41; Ariz. Op. Br. 84-99.

The legislative history confirms the literal and natural reading of the statute: That "conform to" language in section 5 does not impose any interstate allocation except as agreed upon by the states. The Master has rejected this Arizona contention.[1]

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[1]Rep. 162-63: "Arizona, while agreeing with the United States that the Project Act constitutionally delegates to the Secretary of the Interior the power to allocate mainstream water among the claimant states, argues that the second paragraph of Section 4(a) establishes a formula for the allocation which the Secretary is required precisely to follow, and that those clauses in her water delivery contract which deviate from the formula are void. This argument is premised on the language in Section 5 that 'contracts respecting water for irrigation and domestic uses . . . shall conform to paragraph (a) of section 4 of this act.' The second paragraph, Arizona points out, is included within Section 4(a). But the second paragraph of Section 4(a) is

A. Views of the Upper Basin Authors of the "Conform to" Language

1. *Lack of congressional power to make a federal allocation*

Senator Phipps and Representative Taylor, both from the upper basin State of Colorado and both proponents of the Swing-Johnson bill (69 CONG. REC. 9989-90 (1928), 70 CONG. REC. 603, 837 (1928)) were the authors of the language in section 5 requiring that contracts executed pursuant to that section "shall conform to paragraph (a) of section 4 of this Act." *Infra* pp. 138-39, 140-41. Both legislators held the view that Congress lacks the power to apportion water among the states because such an objective can only be accomplished by interstate agreement or litigation in this Court (*supra* app. A, pp. 18-20, 24-26).

It is unlikely that either man would vote for a bill which imposed any federal allocation; it is inconceivable that either would author language designed to achieve that result.

Mr. Taylor made clear his long-standing views opposing federal control of western waters in an exchange with Senator (then Representative) Hayden during hearings on the third Swing-Johnson bill:[2]

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plain in that it merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory. The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected."

[2] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 78-79 (1926).

"Mr. HAYDEN. Mr. Taylor was a member of this committee when I first came to Congress. He afterwards became its chairman. During that time many bills of various kinds were reported to the House, but during all the years that he had any connection with this committee, there was never any bill considered relating to the appropriation and use of water when Mr. Taylor did not insist that there be incorporated in it the provision which is a part of the reclamation act, that nothing in such act should affect the law [79] of any State with regard to the appropriation, use, and distribution of water. I would like to ask whether he now feels, as heretofore, that that principle should continue to be recognized?

"Mr. TAYLOR. Yes; I do, and I have put it into many acts. I feel that way now, and I do not think we ought to surrender any rights.

"Mr. HAYDEN. Then, you are opposed to the nationalization of rivers in the Western States?

"Mr. TAYLOR. Yes."

2. *Disinterest in intra-lower basin allocation*

Senator Phipps and Representative Tayor repeatedly disclaimed any interest in resolving the intra-lower

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Mr. Hayden had just asked Mr. L. Ward Bannister, prominent upper basin water attorney, whether he favored the precedent, purportedly being set by the Swing-Johnson proposals, "which might arise to haunt you on the next stream in Colorado that the Government desired to nationalize," to which Mr. Bannister had replied as follows (*id.* at 78): "I do not believe in the nationalization of the waters of the West, and I think that this bill can be so drawn that it would not mean their nationalization. We can limit the use of the water to the States that do ratify, and preserve all the autonomy of those States. We are not establishing the precedent."

basin dispute. Each sought only protection for the upper basin's apportionment under the Colorado River Compact. For example, on April 24, 1928, Representative Taylor asserted during hearings before the House Rules Committee on H.R. 5773, the fourth Swing-Johnson bill:[3]

> "Personally I am not concerned as to how these gentlemen of the lower three States divide the water between themselves, or what they do with it down in that lower country, or whether Uncle Sam builds the dam or whether private people build the dam. But I am immensely interested in the future development of these four upper States and in preserving their water rights for all time for this and succeeding generations when those States are developed. . . ."

Mr. Taylor reiterated these views during debate on May 24, 1928, the day before he offered the "conform to" language as an amendment to the bill (*infra* pp. 138-39) (69 CONG. REC. 9765):

> "The four upper States should be and three of them are willing to take their joint allotment of that 7,500,000 acre-feet and divide it among them-

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[3] *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 21 (1928). Mr. Taylor had expressed the same views before that committee the year before:

"Thirdly, let the four upper basin States divide between themselves the 7,500,000 acre-feet of water allotted to them by both the seven and six State compacts. . . .

"Also let the three lower basin States similarly divide between themselves the 8,500,00 acre-feet allotted to them by that compact. The three lower States have not yet been able to agree among themselves as to how they would divide that portion of the stream. That is none of the business of the four upper States. Our four upper States will agree among themselves somehow. . . ." *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 20 (1927).

selves afterwards. And the three lower basin States should be willing to do the same. But Arizona has never been willing to do so. In a word, what the upper States want by this legislation is to protect our water rights for future development, and also to prevent the present gigantic waste of flood waters that might be used, and also prevent Mexico from getting all of it. We are not otherwise directly concerned in this long and bitter strife between Arizona and California."

Senator Phipps shared Mr. Taylor's view. During debate on May 2, 1928, a few weeks before he submitted an amendment to section 5 containing the "conform to" language (*infra* p. 139), Senator Phipps asserted (69 CONG. REC. 7625):

> "I do not care to enter into a discussion as to an equitable division of water between California and Arizona, as that is a matter they could settle between themselves, and the more promptly that question can be disposed of I think the better off they will both be."

B. History of "Conform to" Language

1. *House of Representatives*

On May 25, 1928, Representative Taylor of Colorado proposed the addition of the "conform to" language to section 5 of H.R. 5773, the House version of the bill, as a "clarifying amendment." It was adopted after the following brief colloquy (69 CONG. REC. 9988):

> "Mr. TAYLOR of Colorado. Mr. Chairman, I ask unanimous consent to return to section 5 for the purpose of offering a brief amendment.
>
> "The CHAIRMAN. Is there objection?

"Mr. LEATHERWOOD. Mr. Chairman, reserving the right to object, on what subject?

"Mr. TAYLOR of Colorado. It is a clarifying amendment.

"Mr. DOUGLAS of Arizona. Mr. Chairman, I reserve the right to object.

"The CHAIRMAN. The Clerk will report the proposed amendment.

"The Clerk read as follows:

> Amendment offered by Mr. TAYLOR of Colorado: Page 6, line 22, after the word "service" strike out the period and insert: "and shall conform to paragraph (a) of section 4 of this act."

"The CHAIRMAN. Is there objection?

"There was no objection.

"The CHAIRMAN. The question is on agreeing to the amendment.

"The amendment was agreed to."

Section 4(a) of H.R. 5773, to which Representative Taylor's "conform to" language was directed, provided only for a six-state ratification of the Colorado River Compact.[4]

2. *Senate*

In the Senate, the phrase "and shall conform to paragraph (a) of section 4 of this Act," in section 5 first appeared in an amendment to S. 728, the fourth Swing-Johnson bill, printed on May 19, 1928, by Senator Phipps but never offered. That amendment proposed (1) to put a limitation provision on California into section 4(a), and (2) to add the phrase "and shall conform to paragraph (a) of section (4) of this Act," after the word "service" in section 5.[5]

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[4]See Calif. Ex. 2082 for iden. (Tr. 11,177), p. 5.

[5]Calif. Ex. 2004, Tr. 11,173. Calif. Ex. 2001, Tr. 11,173, is a copy of S. 728, to which that amendment was proposed.

On December 5, 1928, Senator Phipps printed another amendment to S. 728, which was identical to his earlier amendment except for the addition of an embargo on Federal Power Commission licenses on the Colorado River system until the act became effective.[6] This amendment was never offered.

That same day H.R. 5773, which had passed the House, was made the pending bill and its text was replaced by that of S. 728. 70 CONG. REC. 67-68.[6a]

Also on December 5, Senator Hayden printed an amendment to H.R. 5773, providing, *inter alia,* two paragraphs for section 4(a); the first paragraph provided for a limitation on California; the second paragraph provided for the ratification of a three-state compact among Arizona, California, and Nevada as a condition precedent to the act's taking effect.[7] On December 6, 1928, Senator Hayden offered his printed amendment. By agreement, this Hayden amendment was made the "pending amendment" to the bill. 70 CONG. REC. 176.

On December 7 (calendar day, December 8), 1928, Senator Phipps of Colorado printed an amendment to H.R. 5773, in terms identical to the amendment which he had previously printed on December 5, 1928, to the Senate bill, S. 728.[8] On December 10, 1928, Senator Phipps offered this amendment, which contained the "conform to" language, as an amendment to the pending Hayden amendment, which did not. 70 CONG. REC. 324.

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[6]Calif. Ex. 2009, Tr. 11,173.
[6a]See Calif. Ex. 2010, Tr. 11,173.
[7]Calif. Ex. 2011, Tr. 11,173.
[8]Calif. Ex. 2012, Tr. 11,173.

The Phipps amendment to the Hayden amendment to the bill was not subject to amendment; the Phipps amendment was an amendment in the second degree, and Senate rules forbade amendments in the third degree. On December 11, 1928, Senator Hayden withdrew his "pending amendment" so that Senator Phipps could reoffer his amendment, which he did. The Phipps amendment then became the "pending amendment" in the first degree and thus itself subject to amendment. 70 CONG. REC. 382. The Hayden amendment thereby lost all status. As noted above (*supra* p. 140), Senator Phipps' amendment contained only a limitation provision to be included in section 4(a), the "conform to" phrase for section 5, and the embargo on Federal Power Commission licenses for section 6.

After the Phipps amendment had been amended by changing the limitation from 4,600,000 to 4,400,000, and by eliminating the Gila River system from the Federal Power Commission embargo, Senator Hayden proposed a second paragraph to section 4(a) as an amendment to the Phipps amendment. His amendment would have required, as a condition precedent to the effectiveness of the act, that California ratify the prescribed tri-state compact.[9]

On December 12, 1928, Senator Pittman suggested (1) that the Hayden amendment be changed to make it permissive, authorizing Arizona, California, and Nevada to enter into a tri-state compact, rather than requiring such a compact as a condition precedent to the effectiveness of the Project Act; and (2) that the tri-state compact should not become effective until Ari-

[9]Calif. Ex. 2014, Tr. 11,173.

zona, California, and Nevada had ratified the Colorado River Compact. Senator Pittman stated (70 CONG. REC. 469):

"This is what I propose, to strike out all of the agreement between the three States, and let them enter into it if they want to, but if they do not want to, let them stay out of it. That is not coercing a State.

"This is what I propose, to strike out all of the Hayden amendment down to and including the word 'agree,' on page 1, in line 6, and in lieu thereof insert the following:

> The States of Arizona, California, and Nevada are authorized to enter into an agreement, which shall provide.

"Then go ahead and put down the provisions of the Hayden amendment, and at the end of the Hayden amendment put in a seventh paragraph, which shall read:

> Said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

"The Constitution requires that before States may enter into an agreement they shall be authorized by Congress to enter into the agreement. I start out by having Congress, by this act, authorize an agreement. I make the agreement specific by reason of the fact that otherwise it might be held that they would have to come back to Congress for approval of the agreement they entered into. They approve a specific agreement in advance and authorize it. The terms are set out. It does not take effect unless all three States ratify the Colorado River compact.

"Mr. HAYDEN. It should not.

"Mr. PITTMAN. It should not. It does not require California to enter into that agreement. It does not require Arizona to enter into that agreement. It does not require Nevada to enter into that agreement. If they do not enter into that agreement, then we have the bill as it stands. Whatever States do not ratify are not bound by this measure. That, then, becomes an optional matter and not a coercive matter.

"I am confident, however, that if the State of Arizona were willing to enter into such an agreement she would, of course, ratify the Colorado River compact, and if she were not willing to ratify the Colorado River compact she would not want California bound by these conditions, because she would not be in the 7-State compact, and would have nothing to do with it.

"Therefore I say that the fair and practical way is to set out the terms of an agreement which the Congress of the United States would be satisfied for the States to enter into, and say that if they see fit to enter into it they may, but it shall not become effective as a subsidiary agreement to the main 7-State compact until those three States do ratify the 7-State compact.

"I offer that as a suggestion. I do not want to interfere with the vote on this amendment, but I would like very much to have it in a voluntary agreement, rather than impose it upon California as a condition of the ratification.

"Mr. HAYDEN. Mr. President, I am not at all insistent that my amendment be adopted in the

exact language in which it is offered. The suggestion made by the Senator from Nevada is entirely satisfactory to me.

"Mr. PITTMAN. Then I offer it.

"The PRESIDING OFFICER. The amendment would be an amendment in the third degree, and it would not be in order.

"Mr. HAYDEN. Have I the privilege of perfecting my amendment so as to carry out the suggestion of the Senator from Nevada?

"The PRESIDING OFFICER. The Senator can do that.

"Mr. HAYDEN. Then I am pleased to do that."

Senator Pittman then explained to Senators Bratton and Shortridge the effect of his amendment (*id.* at 470):

"I have simply changed the form of the amendment. Instead of making it a condition of ratification on the part of California, I have simply provided that the States of Arizona, California, and Nevada may or may not enter into an agreement 'in the following words, to wit,' and so forth; that if they do enter into that agreement it shall take effect when each of those States has ratified the Colorado River compact. The only legal question involved is whether or not Congress passing a bill and setting out the agreement into which they must enter, they would have to come back and have Congress say it was all right.

". . . .

"What I objected to, as I said once before, was that these conditions or terms of an agreement, involving her ratification of the 6-State compact,

were imposed upon California as a condition of the going into effect of this legislation. I contend that it is not a matter that should be imposed upon any State as a condition of ratification of this legislation. I believe that it is a very proper statement of an agreement between these States when we leave it to the States to adopt or not as they see fit. I think it is entirely proper to provide, as a condition of such an agreement coming into effect, that the three States shall have ratified the 7-State compact before it comes into effect, because the main object of the agreement is to bring about an agreement among the seven States.

"It is supposed to be a subsidiary agreement to the general agreement among the seven States, and no subsidiary agreement, taking the benefits of another agreement, should be permitted until those getting the benefits of the subsidiary agreement have become parties to the main agreement. So that is in the amendment as it is now accepted and modified by the Senator from Arizona himself."

Senator Pittman clearly stated what he conceived to be the Senate's function with respect to the lower basin controversy in this exchange with Senator Waterman of Colorado *(ibid.)*:

"Mr. WATERMAN. Is it not true that the entire controversy now pending in this body arises out of the fact that the three States of the lower basin can not agree as to the subsidiary arrangement under the 7-State compact?

"Mr. PITTMAN. That is entirely correct.

"Mr. WATERMAN. Then, ought we not to use every effort and ever endeavor to so bring about legislation that there is a reasonable probability that Arizona and California may come into accord?

"Mr. PITTMAN. I think it is our duty. I have not anything further to say. I have explained my ideas. The amendment is in its present form because it has been modified by the Senator from Arizona. I can not see why any one of the three lower States should object to such an amendment. It is not imposed as a condition of ratification. It is purely optional with them whether they want to agree to it or not."

Senator Bratton then asserted that he believed the tri-state compact authorization, even in its permissive form, unduly hampered the sovereignty of the states involved (see *supra* pp. 8-10), to which Senator Pittman replied as follows (*id.* at 471):

"Mr. PITTMAN. Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason.

". . . .

"We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that. We have already agreed that the 7-State pact shall be binding."

Senator Pittman's reply is relied on by Arizona as evidencing his understanding that the Congress was allocating the water in accordance with the terms of the tri-state compact. Ariz. Ans. Br. 47. Although those particular statements of Senator Pittman may, in isolation, carry an inference that he assumed Congress was dividing the waters, his repeated remarks both before and after the quoted statement wholly negative that inference.

Senator Pittman's objective is amply demonstrated by the exchange between Senator Pittman and Senator Johnson immediately following Senator Pittman's remarks relied on by Arizona. During that exchange, Senator Pittman made it clear that he was merely trying to facilitate ratification of the tri-state compact by giving congressional approval in advance to the particular compact terms set out. *Id.* at 471. He stated (*ibid.*):

"I think that we would save months of time by this amendment. If California and Nevada and Arizona do not like this agreement, they do not have to approve it. If they want to amend it they can do so, and ask approval of the amended agreement."

Senator Johnson and Senator Pittman then engaged in the following colloquy which conclusively establishes that the tri-state compact authorization cannot

have the mandatory effect Arizona argues for (*id.* at 471-72):

> "Mr. JOHNSON. Here is the difficulty which strikes me in the matter: First of all, we are authorizing the doing of something that already the States have the right to do. Secondly, we are stating the things that the three States are to do, and we are making a sort of Procrustean bed upon which they must [472] lie in the determination of matters that are suggested within this amendment, without any elasticity, without any opportunity to alter phraseology or possibly terms. What is done by the amendment is to put the impress of the Federal Government upon the necessity of agreement, and, if one of the States should not agree, leave that State in a position which would not be particularly enviable.
>
> "With the distinct understanding that this authorization is one that is after all an authorization that is wholly unnecessary, because the parties may, in any fashion they desire, meet together and contract and subsequently come to Congress for ratification of that contract; that there is no impress of the Congress upon the terms, which might be considered coercive to any one of those States, I am perfectly willing to accept the amendment.
>
> "Mr. PITTMAN. There is nothing necessary at all, of course, so far as the adoption of this amendment is concerned, unless the element of time is considered valuable. If it should happen, mind you, that two weeks from now the legislatures of the three States, being in session, should

be perfectly satisfied with the terms of this proposed agreement and should ratify it, they could on the next day also ratify the 7-State agreement. On the other hand, if we do not adopt this amendment now, but allow the three States to meet together and agree and they should agree, then it will be necessary for them to come to Congress next fall; and we might find that Congress next fall would not ratify the agreement entered into by the three States, might we not?

"Mr. JOHNSON. That is possible.

"Mr. PITTMAN. Suppose, for instance, a majority of the Senate found there were certain things in the agreement it did not like.

"Mr. JOHNSON. That is all right; *but what I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.*

"Mr. PITTMAN. *Exactly, not.*

"Mr. JOHNSON. *Very well, then.*

"Mr. PITTMAN. *It is not the request of Congress.*

"Mr. JOHNSON. *I accept the amendment, then.*" (Emphasis added.)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*
vs.
STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*
UNITED STATES OF AMERICA, *Intervener,*
STATE OF NEVADA, *Intervener,*
STATE OF NEW MEXICO, *Impleaded,*
STATE OF UTAH, *Impleaded.*

REPLY BRIEF FOR THE STATE OF NEVADA, Intervener

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September 27, 1961

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REPLY BRIEF FOR THE STATE OF NEVADA, Intervener

REPLY BRIEF FOR THE STATE OF NEVADA

Since the respective contentions of the United States and the States of Arizona, California and Nevada and the respective answers thereto have been stated and re-stated in the Opening and Answering Briefs, Nevada believes that a Reply Brief in the usual sense is unnecessary. Neither the United States, Arizona nor California urge any contentions or raise any issues in their

Answering Briefs to which Nevada has not already answered either in her Opening Brief or in her Answering Brief.

Accordingly, this Reply Brief, with few exceptions, will be confined, for the Court's convenience, to a summary of the issues and Nevada's position thereon.

SUMMARY OF ARGUMENT

I.

By her first Exception, Nevada asks that the final decree herein be clear and definite that the Colorado River Commission of Nevada is the proper entity to contract for Lake Mead storage and that further subcontracts with individual users are not required. By her second Exception, she requests that because of the relatively small quantity of water awarded her and because of the fact that substantially all of it will be used for domestic and municipal purposes, that the decree provide that Nevada need not contribute to present perfected rights in other States in short water years or that there be a minimum of 250,000 acre-feet annually below which her rights shall not be cut. Nevada's uses are not the type which can be altered and changed in short water years in the way that the irrigation uses can be altered in the case of the principal users in Arizona and California, neither of whom have objected to this request by Nevada. By her third Exception, Nevada asks that because of a possible conflict of interest among entities under the Secretary of the Interior, that an independent Commissioner under the control of this Court be appointed to hereafter control the operation of the Colorado River in the Lower Basin and the delivery of water therefrom. By her fourth Exception, Nevada requests that whatever official operates the Colorado River under the decree herein shall be required to promulgate detailed Rules and Regulations concerning the manner, method and plan of operation.

II.

The United States has not presented any argument seriously challenging that the Special Master was in error in holding that the provision in Article 5(a) of the Nevada contract with the United States (and a similar provision of the Arizona contract) providing that her allocation should be reduced by upstream tributary uses was invalid. On the contrary, as pointed out in detail in the Master's Report, such a provision is contrary to Sections 5 and 18 of the Boulder Canyon Project Act and is inconsistent with the provisions of Section 4(a) of the same Act limiting California's use of water. The legislative history of that Act clearly demonstrates that Nevada should be entitled to 300,000 acre-feet of Lake Mead storage and there was never the slightest hint that this should be diminished by her upstream tributary uses.

There is likewise no merit in the contention of the United States that in addition to the existing contracts with the Colorado River Commission of Nevada, the statutorily designated agent of the State, there should be other contracts with individual users. This Commission is a legal entity. The Nevada contracts provide throughout that deliveries of water shall be made to, be controlled by, and be paid for by the State; in fact, the whole contract is definitely a contract between the United States and the State. This is entirely different from the Arizona contract which, by its terms, provides for individual contracts with separate users and contains no provisions for deliveries of water to, or payments from the State.

III.

California's repetitious argument as to an unconscionable shortage in the supply available to her is based on invalid assumptions and somewhat tricky arithmetic. She tries to convert the limit of 4,400,000 acre-feet of water annually imposed on her by the

Project Act and her own statute into a guarantee of that amount. Neither the United States nor any of the other sovereign States ever guaranteed her any amount. Her assumptions as to water supply are incorrect because she overlooks the fact that the total tributary supply in the Lower Basin is not subject to control by the Upper Basin and the amount provided by nature from that source will always be available, together with 7,500,000 acre-feet average annually at Lee Ferry from the Upper Basin. The Upper Basin must release water not required for domestic and agricultural uses when needed in the Lower Basin and the Upper Basin use under existing and authorized projects will not exceed 3,840,000 acre-feet per annum. The only time the 8,500,000 acre-feet of Lower Basin depletion becomes critical would be whenever it became necessary to compute the contributions of the two Basins to the Mexican supply. At that time, the controlling figure would be the total Lower Basin beneficial consumptive use, computed at the lower-most dam in the United States (Imperial Dam), and this would not necessarily be the arithmetic total of the separate beneficial consumptive uses. California's shortage argument is not persuasive.

IV.

Nevada concurs with the United States that the Master's interpretation of Section 4(a) of the Project Act is correct and that it created a contractual allocation scheme which has been properly carried out by the Secretary of the Interior in the contracts he has made for Lake Mead storage water. The Recommended Decree is entirely proper on this theory. But, in addition to this, if it should be determined that, contrary to the Master's Report, the Court should make an equitable apportionment of the Colorado River mainstream water, a decree substantially identical with that recommended by the Master would be proper.

The United States, having taken control of all of the waters of this navigable river at Lake Mead, has prior and superior rights thereto. All former natural-flow rights in California were converted into contract rights for such storage. No independent natural-flow rights have been recognized in any way since the completion of Hoover Dam.

In any allocation the *res* must be the storage water in Lake Mead. The existing contracts are valid in every way. The Colorado River is unique as compared with all other prior equitable apportionment suits because here storage water must be apportioned. Consequently, the contracts have the same characteristics and standings as the Court has found appropriation rights to have in other equitable apportionment suits. An award of 2,800,000 acre-feet to Arizona, 4,400,000 acre-feet to California and 300,000 acre-feet to Nevada, out of the first 7,500,000 acre-feet of mainstream water, is in accordance with the contracts and meets every test of an equitable apportionment suit. This is particularly true because the Recommended Decree provides for those rights which were "present perfected rights" on June 25, 1929. It also requires contributions to fill them from other States in short water years, along with a general provision for proration of the supply in such years. Even if we concede, *arguendo*, that there must be an equitable apportionment as California contends, the decree herein complies with every rule that has been established by prior decisions as to such apportionment and should be upheld.

V.

Nevada is entitled to a decree awarding her the right to the beneficial consumptive use of 300,000 acre-feet of Lake Mead storage annually, undiminished by her upstream tributary uses, under any theory that may be adopted in the decision of this case.

ARGUMENT

I. NEVADA'S EXCEPTIONS TO THE MASTER'S REPORT

Nevada filed only four Exceptions to the Master's Report and Recommended Decree, all of which are more or less of a perfecting nature.

Exception I requests apt language in the final decree herein to make it clear that in Nevada the basic contract with the State, acting through the Colorado River Commission of Nevada, is sufficient and that additional subcontracts between the Secretary of the Interior (hereinafter Secretary) and the actual users are not necessary. The Special Master points out in his Report (page 210) that the Nevada contract, different from that of Arizona, does not require such subcontracts. Nevada's argument in support of this Exception appears at pages 52–55 of her Opening Brief. The United States takes issue with Nevada on this point. This will be commented upon later, *infra*, pp. 13–15.

Exception II requests that the provisions of the Recommended Decree be amended to provide that no part of Nevada's allocation of water be used to supply so-called "present perfected rights" in Arizona and California in years when the allocations of such States are not sufficient to supply such rights. Or in the alternative, Nevada asks that a minimum figure (she suggests 250,000 acre-feet) be fixed below which Nevada's allocations should not be reduced to make contribution to others. This is necessary because the principal uses of Nevada will be domestic uses and industrial uses in the nature of the sustenance of life and the continuation of business. They are not of the nature that can be temporarily suspended in years of short supply. Nor does Nevada have any large quantity of perfected rights on the mainstream. On the other hand, the two other States, each of whom have large quantities of perfected rights use the major portion of their water for irrigation use, a type of use which can be reduced

or even suspended in short water years. Nevada's argument in support of this Exception appears at pages 56–58 of her Opening Brief.

Neither the United States, Arizona nor California, in their Answering Briefs, challenged the correctness of Nevada's position on this point. California's only comment (Answering Brief, page 31) is that since Nevada takes this position (to which California does not disagree), Nevada assumes the existence of shortage. This inference is unwarranted.

Exception III requests that the Court appoint a Commissioner with power to supervise the operation of the Colorado River in the Lower Basin and to control the delivery of the waters thereof. The Master recommends that these duties be imposed upon the Secretary. Nevada believes that it is more just and equitable to have such an independent Commissioner, subject to the control of this Court. The Secretary operates in many capacities and there is much chance of a conflict of interest between the proprietary water demands of the many agencies under him and those of other water users. This would not seem to be a desirable situation.

Exception IV requests that the Decree provide that whichever official is given the management and control of the Lower Colorado River he be required to promulgate Rules and Regulations setting forth in detail the manner, method and plan that will be followed in operating the river in determining annual allocations and scheduling deliveries. Absent a set of Rules and Regulations such as this, the various water users would be left in constant uncertainty and there would be an invitation to unnecessary controversy.

Nevada's argument in support of these Exceptions appears at pages 59–61 of her Opening Brief. Neither the United States, Arizona nor California take issue with Nevada in respect to these two requests. In fact, California, in her briefs before the Master, made a similar recommendation.

II. ISSUES BETWEEN NEVADA AND THE UNITED STATES

There are two specific issues between Nevada and the United States. The Master found in his Report at pages 237–247 that the provision in Article 5(a) of the amended Nevada contract (Report, p. 420) with the United States (and a similar Article 7(d) in the Arizona contract (Report, p. 401)) providing that her allocation of 300,000 acre-feet of water from the mainstream should be reduced by deducting therefrom the amount of her upstream tributary uses, was invalid and void. Nevada and Arizona agree with the Special Master. The United States disagrees.

Likewise, Nevada contends, and the Master has found in his Report (page 210), that the contract between the United States and the Colorado River Commission of Nevada, a statutorily created entity of the State of Nevada created for the express purpose of contracting for, receiving, paying for and controlling the distribution of all Colorado River water to which Nevada is entitled, is sufficient and that additional subcontracts between the Secretary and the individual users, such as is required in the Arizona contract, are unnecessary. The United States disagrees.

Nevada's argument on these issues is found at pages 48–49, 52–55 of her Opening Brief and pages 49–61 of her Answering Brief.

In brief summary, on the first issue, the Master advances three principal reasons why that provision in Article 5(a) of the amended Nevada contract, and Article 7(d) of the Arizona contract, charging tributary uses, are in violation of the Boulder Canyon Project Act[1] (hereinafter Project Act) and are unenforceable (Report, pages 237–247).

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[1] 45 Stat. 457, 43 U.S.C. 617.

(1) Since Section 5 of the Project Act requires contracts for permanent service, the contract provision referred to above would be in violation of this section.

(2) These contract provisions also violate Section 18 of the Project Act which provides, in effect, that State law shall govern water rights and priorities intra-state, and

(3) These contract provisions are inconsistent with the Section 4(a) limitation on California's use of mainstream water and would result in an allocation out of harmony with the California limitation, and, indeed, would defeat the basic purpose of the delivery contracts themselves.

There are reasons other than those relied upon by the Master why his decision is proper and sound. The legislative history of Section 4(a) of the Project Act demonstrates clearly that Congress intended that Nevada should have an undiminished 300,000 acre-feet of beneficial consumptive use on the mainstream. There is nothing in it even remotely suggesting that this amount should be reduced by tributary uses in Nevada above Lake Mead.

There is nothing in the Project Act that authorized, directed or permitted the Secretary to limit Nevada's allocation of water from Lake Mead by deducting therefrom tributary uses in Nevada nor could any act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed.[2]

There is nothing in the Brief of the United States which seriously challenges the soundness and correctness of the Master's decision on this point.

On the second issue, the Nevada contract is entirely consistent

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[2]Pertinent also is Arizona's Argument on this point (pages 152–162, Answering Brief) in which Nevada fully concurs.

with Section 5 of the Project Act. Nevada is a "person"[3] as used in that section and therefore entitled to have the use of the water contracted for. The Nevada contract was drafted in the light of circumstances peculiar to Nevada. Existing and future uses will be for industrial and municipal use. It would be ridiculous to require individual and duplicate contracts for each industrial and municipal user of Lake Mead water. It is logical and sensible that the water delivery contracts be with the State of Nevada, acting through its Colorado River Commission of Nevada, an entity created by law specifically for this purpose.

Additionally, it should be added, as the Master points out (Report, page 210), that the Nevada contract is distinctly different from the Arizona contract.

With respect to the delivery of water by the United States, the Arizona contract provides (Article 7(a)) that "the United States shall deliver, and Arizona, *or agencies or water users therein*, will accept * * *."

The Nevada contract provides (Article 4(a)) that "the United States *shall deliver to the State* * * *."

Also, Article 5(a) provides "water agreed to be delivered to the State * * *." Article 6 provides "the State shall receive the water * * *."

Article 7(1) of the Arizona contract provides:

> "Delivery of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political sub-divisions therein of Arizona *as may contract therefor with the Secretary*."

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[3]The United States and Nevada are defined as "persons" in Nevada Revised Statutes governing the appropriation and beneficial use of waters within the State. NRS 533.010 and NRS 533.325.

The Nevada contract does not contain this provision or anything comparable to it.

Also, with respect to the charges for the delivery of water, Article 9 of the Arizona contract provides:

> "A charge of 50 cents per acre shall be made for all water actually diverted from Lake Mead during the Boulder Dam cost repayment period, *which said charge shall be paid by the users of such water.*"

Also in the same Article, it provides:

> "Charges for the storage or delivery of water diverted at a point or points below Boulder Dam * * * shall be as agreed upon between the Secretary *and such users* at the time of execution of contracts therefor, and shall be paid *by such users.*"

In contrast, the Nevada contract (Article 9), provides:

> "A charge of 50 cents per acre-foot shall be made for the diversion by or delivery of water to the State * * *. Charges shall be made against the State * * *."

Also, in Article 10, it provides that:

> "The State shall pay monthly for all water delivered to it hereunder * * *."

Also, Article 8 provides that the State "shall make full and complete written monthly reports," and Article 11 provides that "all deliveries to the State shall be refused in the event of default."

The Arizona contract does not contain comparable provisions.

There is nothing in the briefs of the United States that challenges the correctness of the Master's decision (page 210), "that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior."

III. COMMENTS ON CALIFORNIA'S ANSWERING BRIEF

A large portion of California's Answering Brief is devoted to arguing, over and over again, that there is something inherently wrong in the Master's Recommended Decree because, as she says, it creates "a built-in shortage." There are several assumptions used in California's argument which are not valid. The conclusions reached are as erroneous as these assumptions.

One of these is the implied assumption that in some way she was *guaranteed* 4,400,000 acre-feet every year. But the fact is that she was not guaranteed any amount of water whatsoever. Her rights at all times had been, and must of necessity always continue to be, dependent upon the presence of the necessary amount of water in the stream. Likewise, they had been at all times, and must now be, considered to be subject to the rights of the other two sovereign Lower Basin States, as and when their equitable shares had been determined. California had not always had 4,400,000 acre-feet of water annually available prior to the construction of Hoover Dam. Although in our opinion she greatly exaggerates the case, there may be times in the future when she may not get that amount although, as the Master pointed out in detail, this seems highly unlikely. No one by any Compact, statute, or any other document has guaranteed that amount of water to California every year. Certainly Arizona and Nevada must not be considered to have placed themselves in the status of second-class States and to have agreed to surrender water which they might otherwise be entitled to use, in order to always keep a full 4,400,000 acre-feet of water annually available to California. It is only an act of legerdemain to attempt to convert the *limit*, which was placed on California to prevent her from taking an undue amount of water, into a *guarantee* that no matter how short the supply she would always have that amount. The guarantee of her present perfected rights, which were in the order of

3,010,827 acre-feet (Appendix III, Nevada's Opening Brief, page 110), gives California the maximum protection which she could ask of a Court in this regard. The additional requirement that the other States must contribute from their share, if necessary, to supply this amount gives her as great security as she could ask for under any theory.

Another unsupportable assumption is the frequently repeated statement that the three Lower Basin States are going to be limited to 6,500,000 acre-feet of mainstream water (beneficial consumptive use). California arrives at this figure by some tricky arithmetic. She assumes a total water supply in the whole Lower Basin System of 8,500,000 acre-feet (exclusive of Mexican delivery) and then by deducting assumed tributary uses of 2,000,000 acre-feet, arrives, in sort of a backward manner, at a mainstream supply of 6,500,000 acre-feet. This is a purely synthetic figure, one that in all probability will seldom, if ever, occur. The actual physical facts are that there will always be available the total of (1) the actual tributary flows and (2) the amount of water passing Lee Ferry, *giving effect to all of the provisions of the Compact and the reasonably foreseeable upstream uses.*

The flow in the tributaries joining the Colorado River below Lake Mead cannot, of course, be reduced by the upstream States in any way, nor by the Secretary or any other official. The tributary flow will always be there in the Lower Basin. The total of this tributary flow will not be limited by the total beneficial consumptive use—and in most years will exceed that amount. Additionally, regardless of the development in the Upper Basin, under the provisions of Article III(d) of the Compact there will always be available in the mainstream at Lee Ferry an annual average of 7,500,000 acre-feet (derived from the 10-year guaranteed total of 75,000,000 acre-feet therein provided for). California has indicated this combination of flows in her quotation

from the answers of Honorable Herbert Hoover to questions submitted to him by the then Representative Hayden (Footnote 6, page 81, California's Answering Brief).

Also, the Upper Basin is required by Article III(e) of the Compact not to withhold water not reasonably required for "domestic and agricultural uses."[4] The Master noted (Report, page 115) that to date the Lee Ferry depletion under existing and presently authorized projects would not exceed 3,840,000 acre-feet per annum. And as he points out, the possibility of there being sufficient upstream depletion to reduce the mainstream flow to the figure assumed by California in her frantic argument is so remote as to be improbable. Actually, in practical effect, and taking the above-mentioned factors into account, the total of 8,500,000 acre-feet of consumptive use on the combined mainstream and tributaries will probably only be needed to be taken into account in determining the relative contributions of the two Basins to the Mexican supply, if that problem is ever reached.

It should be further noticed that if and whenever the issue is raised between the two Basins, as to whether the Lower Basin is exceeding the beneficial consumptive use awarded it, that the question will be what is the *total* Lower Basin beneficial consumptive use. As mentioned above, since this will most likely come into play, if ever, in determining contributions to the Mexican supply, the place where this total Lower Basin use should be determined is at Imperial Dam, the lowest point of diversion for use in the United States. This total use will not necessarily

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[4]Article III(e) provides: "The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

be the sum of the various separate uses in the Lower Basin. Because of the salvage of river losses in the Lower Basin and many other factors, the net total Lower Basin depletion measured at Imperial Dam will undoubtedly be less than the arithmetic total of the separate beneficial consumptive uses. This is particularly true with respect to diversions from the mainstream. This is another factor of error in California's bland assumption that there will only be 6,500,000 acre-feet of beneficial use available for the three Lower Basin States out of the mainstream below Lake Mead.

To test the legal correctness of the Master's Recommended Decree by the assumptions and arithmetic continuously used by California is fallacious.

Regardless, however, of the correctness or incorrectness of California's water computations, the basic fact remains that the Court must, in this action, decree an allocation of water among the Lower Basin States. The specific water to be so allocated is, of course, the water stored in Lake Mead. Nevada urges that the allocation of this water must be consistent with Section 4(a) of the Project Act. As has been mentioned in Nevada's Opening Brief, whatever else may be derived from the legislative history, the one point which stands out as crystal clear is that the members of Congress thought that, by Section 4(a) of the Project Act, they were determining the relative shares of the three Lower Basin States in and to 7,500,000 acre-feet of mainstream water. It is important, in view of the argument in California's Answering Brief, to point out that neither this section of the Act nor any of the debates indicate any intention to guarantee that the stream would flow this quantity. At the most, the members of Congress assumed that it was reasonable to expect that there would be 7,500,000 acre-feet annually available, and the record to date

indicates that this is, and for a long time in the future will be, a reasonable assumption. Accordingly, Nevada believes that a determination of this action upon an interpretation of Section 4(a) of the Project Act is proper.

Nevada concurs with the United States in the position that the interpretation of Section 4(a) arrived at by the Master is logical and proper. Certainly, none of the opposing parties have been able to select and designate from the great mass of legislative history any conclusive and positive evidence that destroys the Master's interpretation, or that conclusively supports a different or contrary interpretation.

While most of the parties now support the proposition that so-called III(b) water is surplus or excess, it is Nevada's position that the determination of this point is inseparably connected with the determination of other questions as to whether Section 4(a) and the California Limitation Act[5] are deemed to apply to mainstream water or system water. If the Master's solution is followed and it is deemed that only mainstream water has been allocated by the Secretary's contracts, then there is no vice in describing all or any part of the million acre-feet of III(b) water in the mainstream as excess or surplus, which shall go one-half to California and one-half to Arizona (less only 4 percent thereof for Nevada). But if the determination of this question is otherwise, and it is held that Section 4(a) and the Limitation Act apply to the waters of the entire system, then it is illogical and improper to consider the III(b) water as other than apportioned water, and it cannot be classified as excess or surplus water. Inasmuch as Nevada accepted the Master's decision on the basic question, she did not specifically except to his finding that III(b) water was excess or surplus. Nevertheless, this basic question is

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[5]Act of March 4, 1929; ch. 16, 48th Session; Statutes and Amendments to the Codes, 1929, pp. 38–39.

an integral part of this case and the classification of the III(b) water must be consistent with the determination of whether we are talking about mainstream water or system water.

However, the basic issue in the case is whether allocation of the waters of the river as made by the Special Master's Recommended Decree should be upheld. Nevada states again that this allocation, based upon the secretarial contracts, should be sustained for the reasons given in the Master's Report. But, the basic allocation determined by him need not necessarily rest solely upon the theory announced by the Master.

For it seems to Nevada that an allocation of Colorado River water among the Lower Basin States, identical with that recommended by the Special Master, can be upheld without the necessity of determining many of the questions voluminously discussed in the briefs herein.

California urges strenuously that there must be an equitable apportionment of the waters of the Colorado River among the Lower Basin States. As Nevada has mentioned in prior briefs herein (Opening Brief, page 49; Answering Brief, pages 23, 41–43), as this proposition is presented by California, she only gives lip service to this theory. What is really proposed is that there be an adjudication of mainstream water rights on a priority basis so as to in effect award the major share of the water to California. But if the matter is approached on the basis of making a true equitable apportionment of the mainstream waters among these three sovereign States using established principles and factors (*Nebraska* v. *Wyoming*, 325 U.S. 580, 618; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Kansas* v. *Colorado*, 206 U.S. 461 (1907) 185 U.S. 146 (1902), what do we find?

First, we find that the Congress has authorized and the United States has built Hoover Dam and Lake Mead Reservoir and

the accompanying complex of downstream dams and has taken physical control of all the water of the main Colorado River from Lake Mead to the Mexican Border. This being a navigable stream, and the basic dam and reservoir having been built specifically in connection with the control of navigation, there was and could be no right on the river which, under the previous decisions of this Court, could have priority over the water rights appurtenant to these reservoirs and structures. Accordingly, all of California's argument as to private rights fails.

If the Court should consider an equitable apportionment of the Colorado River waters among the three sovereign States of the Lower Basin, the factual situation is distinctly and controllingly different from that which existed in other equitable apportionment suits which have been decided by this Court. In these prior cases, there have been no overriding superior storage rights in the Federal Government such as exists here. On the contrary, there was presented and decided only the rights of the contesting States to the natural flow, and only rights evidenced by private appropriations made under State law.

In this connection, it should be noted that appropriations made under the law of any specific State cannot be considered as invading the portion of the water of any interstate stream which may then or thereafter be equitably apportioned to another State. At best, the appropriations under State law can only have full binding force and effect as among the claimants to that body of water to which their parent sovereign State is entitled. In the absence of a division between States by a Compact (and there is admittedly none here) the apportionment of the waters among sovereign States in the final analysis is a judicial function. This has been the basic position of Nevada from the commencement of this action.

The basic function of this litigation is to arrive at an apportionment of Colorado River water.[6] If this Court should decide to consider this as a suit to equitably apportion the waters of the Colorado River, we find a situation where the United States has taken into its control all of the waters of the main Colorado River reaching Lake Mead as well as other waters entering the mainstream between that point and the Mexican Border.

We also find in existence contracts made by the Secretary of the Interior with the States of Arizona and Nevada and with the various California entities claiming the rights to divert the waters of the Colorado River. No question as to either the existence or validity of these contracts is raised by any party. There can be no question but that under the Project Act the Secretary was directed to make such contracts. And the Congress provided a positive prohibition against delivering water except by and under such contracts. Under this state of facts, could any court in an

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[6]"We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 51 S.Ct. 286. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. * * * Both States have real and substantial interests in the River that must be reconciled as best they may. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas." *New Jersey* v. *New York*, 283 U.S. 336, 342.

equitable apportionment suit ignore the existence of these contracts or the rights of the parties thereunder?

In this case, these contracts have a standing and a function comparable to those appropriations made under State law which were recognized in cases such as *Nebraska* v. *Wyoming*, *supra*. It is under these contracts that all water deliveries have been made from the Colorado River since the advent of Hoover Dam and Lake Mead on the stream. Since that time, the Secretary has had complete control of the operation and management of all structures on the river starting with Hoover Dam and continuing on down to Imperial Dam, the last structure in the United States above the Mexican boundary. The Secretary, through his agents, has made all determinations and performed all functions relating to the storage, release from storage and diversion of Colorado River water during this period.

Here it might be parenthetically noted that contrary to the argument advanced by California (Answering Brief, page 114), the actual practice on the river during this period of nearly three decades has *not* been one of recognizing that any of the California parties had retained appropriative rights in the natural flow of the Colorado River which were unaffected by the rights of the United States resulting from the construction of Hoover Dam. On the contrary, the actual practice during this period is that all water deliveries *have been treated as deliveries of storage water* under and pursuant to contracts.

To this extent, the practice on the Colorado River has been contrary to that customary on other western rivers. The usual practice is similar to that indicated as existing on the North Platte River in *United States* v. *Tilley*, 124 F.2d 850 (C.C.A. 1941), cert. den. 316 U.S. 691 (1942). Namely, that after the construction of federally built reservoirs, those operating the stream have continued to recognize pre-existing appropriative rights to

the natural flow and to deliver water thereunder, and have stored in the reservoirs only surplus water over and above that required to fill the prior natural flow rights. This stored water has been delivered in addition to and as a supplement to these pre-existing normal flow rights. Here on the Colorado, the practice has been exactly to the contrary of this customary western practice. There is not an iota of evidence in the record that after the construction of Hoover Dam those in control of the river have ever at any time recognized that the pre-existing rights to the normal flow were still in existence. No such water has been allowed to flow through Lake Mead and past Hoover Dam, as unstorable water. Nor has there ever been any attempted measurement of water diverted into California canals as natural-flow water as distinguished from storage water. Nor have any separate river records been kept as to natural-flow diversions and supplemental storage-water diversions. On the contrary, *all water* which has been diverted into the California canals has been treated as storage water and as deliveries under the contracts. There is nothing in the evidence to indicate that California has ever objected to this procedure. To now assert the continued and continuing existence of those normal-flow rights, which were being diverted into her State prior to the construction of Hoover Dam, is of no avail. Against the paramount and superior rights which the United States has to take control of, store, and deliver, in accordance with authorized contracts, all of the waters of the river, the rights have long disappeared.

In the light of all of these circumstances, if the Court should determine to lay aside the troublesome question of interpreting Section 4(a) and instead treat this action as being one for equitable apportionment of the Colorado River waters, a decree substantially identical with that recommended by the Master would still be proper. Since the decree, in conformity with the

provisions of the Compact and the Project Act protects "present perfected rights" as of June 25, 1929, the same result is obtained as though existing appropriative priorities had been protected, as in the other equitable apportionment suits. And since the decree further provides that these perfected rights should be filled even if it was necessary, in time of shortages, to take water from the allotments of the other States, a similar result is reached here as was obtained in former cases by recognizing appropriative priorities in their chronological order regardless of State lines. The Recommended Decree meets all requirements in these respects.

Storage water must be allocated in this suit since that is in reality the only water supply available. By recognizing the contracts which, as we have noted heretofore, have the same characteristics as appropriative priorities on other streams, the Recommended Decree makes a true allocation among the States of the Lower Basin. If this allocation is decreed by this Court as an equitable apportionment, then it would seem the question as to whether Congress intended that the Secretary of the Interior should make interstate allocations, or whether the delegation of authority to do so is constitutional, and the question as to whether or not the Secretary's allocation is in conformity with the statute all become moot.

For we find in actual existence a contract providing for the use of storage water up to 2,800,000 acre-feet in Arizona, and another contract providing for the use of 300,000 acre-feet in Nevada. Collectively, the contracts with individual California water users provide for 5,362,000 acre-feet of storage. However, as a condition precedent to the passage of the Act to authorize the construction of great Hoover Dam and the All-American Canal, principally for her benefit, California had agreed that she would be limited to 4,400,000 acre-feet out of the first 7,500,000

acre-feet. If this Court apportions the water of the mainstream so that 2,800,000 acre-feet is awarded to Arizona, 4,400,000 acre-feet to California and 300,000 acre-feet to Nevada, in the exercise of its judicial power, all of the substantive rights of the parties will be protected. And the decree will be in harmony with the pattern followed in past equitable apportionment suits.

Additional support to the proposition that a decree founded upon the rules of equitable apportionment is proper here is the fact that even though the Master characterized his decree as being based upon a statutory contractual allocation, he still found it necessary to base it *in part* upon a theory identical with equitable apportionment. This he did when he provided that in years of shortage the supply should be prorated among the three Lower Basin States in the same proportion as he found their rights to be under their contracts. But beyond question it must be conceded that he found nothing in the Project Act (which he designated as the controlling document) which in any way provided for proration in times of shortage; or which provided anything whatsoever as a method of dividing water in years when there was not a full supply. The only exception to this general statement is the provision that present perfected rights should be protected. But beyond this, the question is entirely one for the Court to determine in the exercise of its judicial authority. At least subconsciously, the Master was exercising this judicial authority derived from the so-called Federal Common Law applicable to suits between States for the allocation of the waters of interstate streams when he provided for this pro-rata sharing in short years.[7] His basic

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[7]This Court, in reversing the Colorado Supreme Court in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, stated: "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

finding, upon which he founded his proration determinations, to the effect that the States, as sovereigns, stood on a parity of right, is entirely sound, and likewise, in conformity with the Federal Common Law rule.

In view of the foregoing, Nevada submits that even if we concede, *arguendo*, that the California contention is correct and that there can be no determination in this case other than upon the theory of equitable apportionment by judicial decree, nevertheless the Recommended Decree is still a proper one to be entered in this action.[8] When cognizance is taken of the different factual situation that prevails on the Colorado River from that prevailing on the rivers involved in other like suits, the Decree herein is consistent with the past rulings of this Court, and with the pattern of former decrees. The particular factor, unique in this case, is the fact that the *res* necessarily has to be storage water in Lake Mead and in other downstream reservoirs. The decree, in dividing the storage water, follows all the basic rules of prior equitable apportionment decisions. No decree substantially different therefrom could be entered in this suit even if all parties were to agree that this was the proper theory for the decision. In the last analysis, the lengthy argument by California to the effect

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[8]While the Master disclaims any reliance upon the doctrine of equitable apportionment (Report, p. 138), it may logically be argued that the Master has in effect made an apportionment of the beneficial consumptive use of the waters of the Colorado River to each of the sovereign States of Arizona, California and Nevada upon that doctrine, and has followed the principles laid down in prior decisions of this Court. *Kansas* v. *Colorado*, 206 U.S. 46 (1907), 185 U.S. 146 (1902); *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931); *New Jersey* v. *New York*, 283 U.S. 336 (1931); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938); *Nebraska* v. *Wyoming*, 325 U.S. 580 (1945).

that the decree is vastly in error because the Master ignored the theory of equitable apportionment is of no practical avail to her. The vice of the California position is her assumption that there are still in existence appropriative rights to natural-flow water when, as a matter of fact, all of them long ago were converted into contract rights for storage water. This is abetted by her further erroneous assumption that in some mysterious way she was guaranteed 4,400,000 acre-feet, come what may.

CONCLUSION

Nevada submits that the apportionment of mainstream water among the States of Arizona, California and Nevada proposed by the Master is a just and fair allocation and should be sustained.

Nevada, in her Opening Brief and in her Answering Brief, has established that the Master's proposed division of mainstream water can be sustained on any one of several legal theories. It can be sustained under the theory adopted by the Master that the provisions of the Project Act constituted a statutory contractual allocation. In the absence of the Project Act, the contracts made by the Secretary would have been valid and could be judicially sustained under the general Reclamation Law. Or if this Court should determine this case on the basis of equitable apportionment, it would be judicially proper to use the contracts made by the Secretary as a yardstick in arriving at an equitable apportionment.

There is nothing in the Answering Briefs of the United States, Arizona, or California which seriously challenges the correctness of the foregoing conclusions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

UNITED STATES OF AMERICA,
Intervener

STATE OF NEVADA,
Intervener

STATE OF NEW MEXICO,
Impleaded Defendant

STATE OF UTAH,
Impleaded Defendant

BRIEF OF ARIZONA IN OPPOSITION TO MOTION OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

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Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

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STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

BRIEF OF ARIZONA IN OPPOSITION TO MOTION OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

This brief is submitted by the State of Arizona in opposition to the motion of the Navajo Tribe of Indians for leave to intervene.

Several separate and independent reasons exist for the denial of intervention. First, the motion is untimely. Second, to grant the Navajo Tribe leave to intervene would in effect authorize a suit by the Indians against the State of Arizona without its consent. Finally, since the United States has elected to represent the interests of the Indians in this litigation, the Indians are without power to intervene and to adopt positions which would derogate from their complete representation by the United States.

ARGUMENT

I

The motion for leave to intervene should be denied as untimely.

This motion of the Navajo Tribe for leave to intervene comes almost nine years after the commencement of this suit by Arizona, more than five years after the commencement of the trial before the Master and almost a year after the issuance of the Master's Report. Coming at so late a date, the motion should be denied as untimely.

This action was commenced on January 19, 1953, when the Court granted Arizona's motion for leave to file its Bill of Complaint. 344 U. S. 919 (1953). On the same day the United States was granted leave to intervene. Both the United States' brief supporting its application for leave to intervene and its petition of intervention filed in December 1953 clearly indicated that the United States regarded the existence and extent of Indian water rights on the Colorado River and its tributaries to be in issue in the litigation. The Navajo Tribe in its brief upon this motion makes clear that it was aware of these facts and of the

intention of the United States to represent the interests of the Indians, including the Navajo Tribe, in the litigation.

Not until June 1956 did hearings begin before the Master. Nearly a month after the commencement of the trial, the Navajo Tribe, along with a number of other Indian tribes, filed a motion for leave to file a "representation of interest". No motion for leave to intervene was made, even though the Indians then asserted that their interests had not been, and would not be, adequately represented by the United States without the appointment of separate counsel to act on their behalf. The motion was referred by Mr. Justice Douglas to the Master, who heard argument and on July 18, 1956 delivered an oral opinion denying the motion.[1] The Master, however, authorized the movants to file a brief with him upon the conclusion of the trial stating their views of the issues affecting them.[2] In denying the application the Master also stated:

> "If any party wants to use this transcript as a basis for presenting the question to the Supreme Court I shall be glad to certify it."[3]

Neither the Navajo Tribe nor any of the other tribes that had sought leave to file a representation of interest took advantage either of the opportunity afforded them to file a brief at the close of trial or of the Master's suggestion that they present the question of their right to file a representation of interest to the Court.

Approximately two and one half years elapsed from the conclusion of the trial until the promulgation of the Master's Final Report. During all of this time the Navajo Tribe took no steps to obtain intervention in the action.

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[1] Tr. 2638-46.

[2] Tr. 2645.

[3] Tr. 2646.

Not until after all of the parties had filed their exceptions to the Master's Report, had filed their Opening and Answering Briefs with the Court and were about to file their Reply Briefs did the Navajo Tribe make this motion. Plainly, the Navajo Tribe has delayed much too long to be permitted to intervene at this juncture.

The Navajo Tribe seeks to excuse its delay by pointing to its efforts to obtain a representation of interest in 1956 and to its request made in February of this year to the Attorney General that the United States take exception to the Master's Report in various respects as it was thought to affect the Navajo's interests. But neither of these steps explains nor excuses the failure of the Navajo Tribe to seek intervention in the four years from the commencement of the action to the beginning of the trial or at the time the representation of interest was sought or during the five years that have elapsed since the denial of the motion for leave to file a representation of interest. Nor can the Navajo Tribe justify its failure to submit a brief to the Master, as he suggested, or to seek review in this Court of the Master's denial of the motion for leave to file a representation of interest. Finally, a letter written to the Attorney General only a few weeks before exceptions to the Master's Report were to be filed and after many years of litigation can hardly qualify as a sufficient effort to protect the interests of the Navajo Tribe.

Whether or not petitioner's application for leave to intervene in an original action in this Court is governed by Rule 24 of the Federal Rules of Civil Procedure and whether or not the application is regarded as of right or permissive, it is clear that the application should not be granted if it is untimely. *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 112 F. 2d 669 (2d Cir. 1940); 4 MOORE'S FEDERAL PRACTICE 97-100

(2d ed. 1950). Whether a motion to intervene is timely depends first upon the time that has elapsed and the legal proceedings that have taken place since the commencement of the action, see *Distinti* v. *Cunningham*, 272 F. 2d 528 (D. C. Cir. 1959), and second upon the extent to which the party seeking intervention has foregone the opportunity to protect his known interests by intervention earlier in the litigation. See *Kelley* v. *Summers*, 210 F. 2d 665, 673-74 (10th Cir. 1954); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co., supra; United States* v. *Schofield*, 175 F. Supp. 654, 656-57 (E. D. Pa. 1959).

Arizona does not dispute movant's many authorities which hold that timeliness must be determined by the particular facts and circumstances in each case. However, "where there has been much litigation by way of motions, depositions and discovery, taking of testimony before a Master, etc., tardy intervention will usually be denied." 4 MOORE'S FEDERAL PRACTICE at 99.

II

Petitioner's motion for leave to intervene should be denied, since the grant of intervention would authorize a suit by petitioner against the State of Arizona without its consent.

States of the Union are immune from suit in the federal courts without their consent except where that immunity has been surrendered by the adoption of the Constitution of the United States. There has been such a surrender of immunity by the states with respect to original actions in the Supreme Court only (1) by one state against another and (2) by the United States against a state. *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934); *Duhne* v. *New Jersey*, 251 U. S. 311 (1920); *Smith* v. *Reeves*, 178 U. S. 436 (1900); *Hans* v. *Louisiana*, 134 U. S. 1 (1890).

Since there has been no such surrender of immunity with respect to suits against a state by individual Indians or by Indian tribes, the sovereign immunity of the states extends to suits by Indians and Indian tribes. *United States* v. *Minnesota*, 270 U. S. 181, 193 (1926); *Cherokee Nation* v. *Georgia*, 30 U. S. (5 Pet.) 1 (1831); *cf. Skokomish Indian Tribe* v. *France*, 269 F. 2d 55, 560-62 (9th Cir. 1959).

Such immunity exists whether the Navajo Tribe is regarded as a citizen of the State of Arizona or as a citizen of New Mexico or of Utah or as a citizen of all or none of these states. If the Navajo Tribe is regarded as a citizen of a state other than Arizona, it is barred from prosecuting its claims against the State of Arizona by the Eleventh Amendment to the Constitution, which provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . ." See *Ford Motor Co.* v. *Treasury Department*, 323 U. S. 459, 464 (1945). If the Navajo Tribe is regarded as a citizen of the State of Arizona, this Court is without jurisdiction to entertain its suit against Arizona because the judicial power of the federal courts does not extend to a suit brought against a state without its consent by its own citizens. *Hans* v. *Louisiana*, 134 U. S. 1 (1890). If the Navajo Tribe is regarded as not being a citizen of any state, it may not prosecute a suit against the State of Arizona because the "States of the Union, still possessing attributes of sovereignty, . . . [are] immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the' " Constitution. *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322-23 (1934) (quoting from THE FEDERALIST No. 81 (Hamilton)). No such surrender has been made respecting suits in the federal courts by Indian tribes.

That an Indian tribe cannot be a party litigant in any case within the original jurisdiction of the Supreme Court has been recognized by leading authorities on Indian law. Thus, Professor Cohen stated:

> "As already seen, the Indian tribes within the territory of the United States, while having some of the attributes of sovereignty usually possessed by independent communities, have been declared by the Supreme Court not to be either states of the Union or foreign nations within the meaning of Article III, Section 2, of the United States Constitution giving original jurisdiction to the Supreme Court in controversies in which a state of the Union or a citizen thereof, and a foreign state or subjects and citizens thereof are parties. Consequently, an Indian tribe as such cannot sue, be sued, or intervene in any case where the original jurisdiction of the Supreme Court is invoked." COHEN, HANDBOOK OF FEDERAL INDIAN LAW 371 (1945) (footnotes omitted); see also UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 341 (1958).

It is clear that intervention by the Navajo Tribe in this litigation would constitute a suit against the State of Arizona. Whether or not a suit is one against a state is not to be determined by niceties of the law of parties but by the actual effect a judgment in favor of the private litigant would have against the state. "[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers*, 123 U. S. 443, 490-99; *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296-98." *Ford Motor Co.* v. *Treasury Department*, 323 U. S. 459, 464 (1945).

By its petition for intervention the Navajo Tribe seeks a determination that it is entitled to large quantities of

water for use on its reservation. It requests a decision that its rights to water are prior in time and hence superior to those of other users in the State of Arizona. It further seeks a determination that its allotment of water is to be independent of and not drawn from the water apportioned to Arizona pursuant to the Boulder Canyon Project Act.[4] In seeking this relief the Navajo Tribe asserts interests directly in conflict with the interests of all other users, represented by Arizona as *parens patriae*. Only an affirmative judgment in favor of the Navajo Tribe and against the State of Arizona, as representative of its other water users, will accomplish the purposes of the Navajo's prayer for relief. Such a judgment would, in essence, be one in favor of the Navajos, as plaintiffs, and against the State of Arizona, as defendant.

III

Since the United States has elected to represent the interests of the Indians in this litigation, the Navajo tribe is without power to intervene.

The United States is authorized by law and obligated by long-standing custom to represent the interests of the Indians and the Indian tribes in litigation in the courts of the United States. Both Congress and the courts have recognized this traditional moral obligation to the Indians and have embodied it into law. Thus, Congress has provided that "in all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity."[5]

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[4] 45 Stat. 1057 (1928), 43 U. S. C. §§617-617u (1958).

[5] Act of March 3, 1893, 27 Stat. 631, 25 U. S. C. §175 (1958).

Similarly, this Court has recognized when the United States has elected to prosecute or intervene in a suit on behalf of individual Indians or of an Indian Tribe, it is entitled to exercise complete and exclusive control over the litigation to the exclusion of the Indians themselves. *Heckman* v. *United States,* 224 U. S. 413 (1912).

In the *Heckman* case Mr. Justice Hughes, writing for the Court, stated:

> "There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.
>
> "When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the act of Congress they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not

> compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States." 224 U. S. at 444-45.

Since the decision in the *Heckman* case, the right of the United States to "enter its appearance and take over the general management of the case without consulting" its Indian wards has been acknowledged by the lower federal courts on numerous occasions. *E.g., Sadler* v. *Public National Bank & Trust Co.*, 172 F. 2d 870, 874 (10th Cir. 1949); *United States* v. *Adamic*, 54 F. Supp. 221 (W. D. N. Y. 1943). This right of the Government has also been recognized by the leading treatise writers. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 370 (1945); UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 336 (1958). Questions of intervention by Indians, similar to that presented here, have been raised and decided adversely to the intervenor. Thus, in *Pueblo of Picuris* v. *Abeyta*, 50 F. 2d 12, 14 (10th Cir. 1931), the right of an Indian pueblo to intervene and present contentions inconsistent with those of the United States was denied, the court stating:

> "The statutory power of the United States to initiate actions for the Pueblo Indians necessarily involves the power to control such litigation. If the private attorneys of the pueblo could dictate the averments of the bill, or could prevail in questions of judgment in the introduction of evidence, there would be no substance to the guardianship of the United States over the Indians. There cannot be a divided authority in the conduct of litigation; divided authority results in hopeless confusion. If the United States has power to dismiss with prejudice prior to trial, as has been held, it certainly has power to decline to appeal after trial, if it believes the decision of the trial court is without error."

Earlier in this litigation the Navajos and other Indian tribes sought to file a representation of interest, discussed earlier. The Master regarded the application as one seeking intervention in all but name and held that it should be denied. He stated:

> "The trusteeship of the United States in behalf of the Indians is the creation of a plenary legislative power. It is beyond the power of the courts to disqualify this trustee. The relationship between this trustee and its Indian wards is not 'circumscribed by rules which govern private relations,' Heckman v. U. S., 224 U. S. 413. It rests on the presumption that 'The United States will be governed by such considerations of justice as will control a christian people in their treatment of a (n) * * * dependent race,' Missouri, Kansas & Texas Railway Company v. Roberts, 152 U. S. 114, 117.
>
> "The foregoing considerations lead to these conclusions.
>
> "1. The unconventional status sought by the petitioners in this litigation is one not likely to promote the orderly development of the issues and proof and the forging of a suitable decree. This is underscored by the circumstance that a substantial portion of the proofs has already been taken on the issues as framed by the pleadings; and the magnitude of the case is such that permission to take part in the case without a substantial adjournment to permit adequate preparation would amount to an empty ritual.
>
> "2. The legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action."[6]

---

[6] Tr. 2644-45.

Thus, all of the authorities make clear that intervention by the Navajo Tribe in the circumstances of this case would be beyond the power of the Court to authorize, a fact which the Indian tribes themselves appear to have recognized at the time that leave to file a representation of interest was sought.[7]

Moreover, the grant of a right of intervention in these circumstances would be unwise as well as unauthorized. Not only might conflict arise between the views of the Government and those of its Indian wards, but such intervention would also necessarily imply the right on the part of the Indians to reach a settlement or compromise of the litigation without the consent of the United States.

Further, acknowledgment of the right of the Navajo Tribe to intervene in this litigation could precipitate the filing of many more applications for intervention by other tribes claiming the right to the use of water of the main stream or of tributaries of the Colorado River and having perhaps different or conflicting views from those of the Navajos. Plainly, the United States as the traditional guardian of Indian rights is the only party who can properly represent the interests of all of these Indian tribes.

---

[7] See Tr. 2639.

CONCLUSION

The motion of the Navajo Tribe for leave to intervene should be denied.

Respectfully submitted,

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RESPONSE OF THE CALIFORNIA DEFENDANTS TO THE MOTION FOR LEAVE TO INTERVENE, TENDERED BY THE NAVAJO INDIAN TRIBE, SEPTEMBER 25, 1961

October 30, 1961

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REQUEST FOR 90 DAYS TO ANSWER NAVAJO PETITION AND EXCEPTIONS, IF NAVAJO MOTION IS GRANTED

If the Court grants the motion for leave to intervene tendered by the Navajo Indian Tribe on September 25, 1961,[1] and orders filed its petition of intervention annexed thereto and accompanying exceptions to the Special Master's Report, the California defendants request at least 90 days to respond to the proposed petition and exceptions of the Navajo Indian Tribe.

Unless this request is granted, the inexcusable and substantial delay of the Navajo Indian Tribe in presenting its contentions made in the foregoing documents would result in substantial prejudice to the California defendants.

STATEMENT IN SUPPORT OF REQUEST

The following facts support the foregoing request of the California defendants:

1. *Indian motion of June 28, 1956, denied by Special Master*[2]

On June 28, 1956 (during the first month of the trial before the Special Master (Rep. 3)), Mr. Justice Douglas referred to the Special Master a motion presented to the Justice by the Navajo Indian Tribe, as well as by six other Indian tribes and communities within the lower Colorado River basin.[3] Tr. 2638,

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[1]Cited hereafter as "Navajo Motion of September 25, 1961."

[2]For the convenience of the Court, a copy of the Master's opinion and ruling from the transcript is appended hereto (cited hereafter as "app.").

[3]"Motion for Leave To File Representation of Interest and Representation of Interest," submitted by seven Indian tribes and communities, cited hereafter as "Indian Motion of June 28, 1956."

2640-41 (app. at A1, 2-4). That motion requested, in effect, that the Special Master require the Attorney General of the United States, because of a purported conflict of interest, to appoint separate and independent counsel to represent the Indian petitioners. Indian Motion of June 28, 1956, pp. 10-11; Tr. 2640-42 (app. at A3-4). The motion also recited in part that "there is doubt whether petitioners may intervene as separate parties since their interests are committed to adjudication by the intervention of the United States . . . ." Indian Motion of June 28, 1956, p. 2, par. 6. Counsel for the Navajo Indian Tribe was Norman M. Littell, Esq., who is one of counsel on the pending application.

After receiving a brief from the United States and hearing oral argument, the Master denied the 1956 motion. Tr. 2638-46 (app. hereof). No attempt was made by the Navajo Indian Tribe or by any of the

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The Navajo Indian Reservation is located above Lake Mead "within the northeast corner of Arizona, the northwest corner of New Mexico and the southeast corner of Utah" and thus is "in part located within the drainage basin of the Colorado River and of the Little Colorado River, a tributary of the Colorado River" within the lower basin. Navajo Motion of September 25, 1961, pp. 1-2, par. I.

The other six Indian petitions in 1956 (and their general locations) were: Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California (on the Colorado River below Lake Mead); Gila River Pima-Maricopa Indian Community, Arizona (on the Gila River system, a lower basin tributary of the Colorado River); Hualapai Indian Tribe of the Hualapai Reservation, Arizona (on the Colorado River between Lee Ferry and Lake Mead); Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona (on the Gila River system); San Carlos Apache Tribe, Arizona (on the Gila River system); and Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona (on the Gila River system).

See U.S. Ex. 100 (Tr. 12,493), a map showing Indian irrigated lands and proposed ultimate development within the lower Colorado River basin, March 1956.

other Indian petitioners to secure a review of the Master's ruling by this Court. See Tr. 2646 (app. at A-7). The Special Master also ruled that the Indian petitioners could file a brief with the Special Master after the hearings. Tr. 2645 (app. at A-6). Neither the Navajo Indian Tribe nor any of the other Indian petitioners filed any such brief during the 10 months from the end of the trial (August 28, 1958) until the matter was finally submitted to the Special Master (July 1, 1959) after the parties had exchanged three rounds of briefs, together with their proposed findings and conclusions. Rep. 3.

The United States proposed findings and conclusions and supporting brief before the Special Master, submitted in April 1959, made most of the contentions about Indian water rights to which the Navajo Indian Tribe now objects. *Compare* Navajo Exceptions II-IV (pp. 3-7) *with* (*1*) U.S. Findings 4.0.2 (p. 51) and 4.2.1 through 4.2.10 (pp. 57-59); Conclusions 4.2 (p. 61), 11.1(c) (p. 227), and 11.5 through 11.8 (pp. 230-35); (*2*) U.S. Brief in Support of Findings of Fact and Conclusions of Law Proposed by the United States (April 1959), pp. 22-31.

2. *Draft Report of Special Master*

On May 5, 1960, the Special Master released a Draft Report which he circulated among the parties for their comments. Rep. 3. The Draft Report contained the same determinations which the Navajo Indian Tribe now attacks. See DR 219-20, 221-56, 265-67, 275-76, 279-87, 316 (Decree art. VII(B)).

3. *Comments on Draft Report*

On June 10, 1960, the comments on the Draft Report submitted by the United States did not object to determinations which the Navajo Indian Tribe now attacks. The Navajo Indian Tribe did not submit to the Special Master any comments on the Draft Report.

4. *Oral argument before Special Master on Draft Report*

On August 17-19, 1960, oral argument was held in New York City on the Draft Report. Rep. 3; Tr. 22,-594-23,113. No time for argument was even requested by the Navajo Indian Tribe.

5. *Report of Special Master*

On December 5, 1960, the Report of the Special Master, which makes no material changes in the decision proposed by the Draft Report, was submitted to this Court, and was received and ordered filed by the Court on January 16, 1961 (364 U.S. 940). The schedule for filing exceptions, and opening, answering, and reply briefs was established in the notice accompanying that order of the Court.[4]

6. *Exceptions to Special Master's Report*

On February 27, 1961, all parties submitted to this Court their exceptions to the Report of the Special Master. The Navajo Indian Tribe tendered no exceptions.

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[4]The schedule was: exceptions on February 27, 1961; opening briefs on May 22, 1961; answering briefs on August 14, 1961; and reply briefs on October 2, 1961.

California Exception IV-5 (p. 25) excepted to the Master's determinations of (1) the quantities of water reserved by the United States for Indian reservations (Rep. 254-87) and for other federal lands and purposes (Rep. 291-300), (2) the priorities accorded to such federal reservations, and (3) the bases upon which the Report predicated water rights for such federal reservations. However, we also announced (Calif. Exceptions, p. 25 n.9) that although we disagreed in principle with these determinations of the Master, we did not plan to brief the point for two reasons:

First, the quantities of Indian water in dispute in California are relatively small.

Second, the Master correctly decided (Rep. 247-48) that federal uses in Arizona and Nevada are chargeable to those states out of water from which California users are excluded by the California Limitation Act. As the Master said, "All of the parties seem to agree to this accounting . . . ." Rep. 247.

We further stated that if this latter decision were attacked by any party, we reserved our challenge to the determinations which sustain the federal claims. Calif. Exceptions, p. 25 n.9.

No party excepted to the Master's determination that federal rights and uses are chargeable to those states in which the use is made (Rep. 247-48) or to his corollary determination that the federal rights within each state are limited by the interstate allocation to each state (Rep. 300-02). See also Rep. 312-13 and proviso to Decree art. II(C) (Rep. 353).

7. Opening briefs

On May 22, 1961, opening briefs in support of their exceptions were filed by the parties. The Navajo Indian Tribe tendered no brief.

No party challenged therein the Master's determination that federal rights and uses are chargeable to and limited by the allocation to the state in which the use is made. California's opening brief repeated the reasons given in our exceptions why we did not brief the Indian issues although we disagreed with those determinations. Calif. Op. Br. 31 n.6, 283-84.

8. Answering and reply briefs

On August 14, 1961, answering briefs filed by the parties made no change in the situation described above; nor did the reply briefs filed October 2, 1961. The Navajo Indian Tribe tendered none.

9. Pending application of Navajo Indian Tribe

On September 25, 1961, the pending application tendered by the Navajo Indian Tribe contended that allocations to Indian tribes should be made separate and apart from any allocation to the states. See Navajo Motion of September 25, 1961, pp. 5-6; Brief in Support of Motion, pp. 36-41; Navajo Petition of Intervention, p. 51, par. V; Navajo Exception III, pp. 4-5.

In conjunction with the foregoing contention, the application of the Navajo Indian Tribe also claimed a super-senior aboriginal priority to a quantity of water which is indefinitely expansible in the future. See Navajo Motion of September 25, 1961, pp. 4-5, 6; Brief in Support of Motion, pp. 30-36, 41-46; Navajo Peti-

tion of Intervention, pp. 50-51, pars. II-IV; Navajo Exceptions II, pp. 3-4, and IV, pp. 5-7.

Presumably, the foregoing contentions would be applicable to all Indian tribes throughout the entire Colorado River basin. *Cf.* U.S. Ex. 100 (Tr. 12,493), a map showing Indian irrigated lands and proposed ultimate development within the lower Colorado River basin, March 1956.

10. *Delay by Navajo Indian Tribe and prejudice to California defendants*

The Navajo Indian Tribe has inexcusably failed to brief its claims before the Special Master for his recommendation to this Court.

The Navajo Indian Tribe has inexcusably delayed in presenting its claims to this Court; those claims should have been submitted consistently with the schedule for exceptions and briefs established by the Court in this cause. (See notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961, summarized p. 4 *supra* note 4.)

The California defendants have not briefed the Indian issues; but, given timely notice of the contentions of the Navajo Indian Tribe that the Indian allocations should be separate and apart from the allocations to each state, we would have briefed all Indian issues extensively. Consequently, the inexcusable and substantial delay of the Navajo Indian Tribe in presenting its contentions have prejudiced California's rights by, in effect, preventing our briefing of the Indian issues, which have become even more important because of the extremity of the present contentions of the Navajo Indian Tribe.

11. *Merits of the Navajo Indian Tribe's contentions*

The water right claimed by the Navajo Indian Tribe (see item 9 *supra* pp. 6-7) is based on unsound premises and cannot be sustained. All arguments and contentions on the merits are reserved.

12. *Status of Navajo Indian Tribe to intervene*

We do not consider herein the question whether the Navajo Indian Tribe can intervene as a separate party in this suit in which, in effect, it already is a party represented by the United States acting as guardian for Indian tribes. See Indian Motion of June 28, 1956, p. 2, par. 6, quoted *supra* p. 2; *cf.* Tr. 2643-45 (app. at A5-7).

The State of California does not waive any immunity from suit in the original jurisdiction of this Court by the Navajo Indian Tribe. See U.S. CONST. amend. XI; *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Texas-Cherokees & Associate Bands v. Texas,* 257 U.S. 615 (1921) (per curiam order denying motion for leave to file original bill of complaint, upon authority of *Cherokee Nation v. Georgia, supra*); U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, FEDERAL INDIAN LAW 341 (1958). *Cf. New Jersey v. New York,* 345 U.S. 369, 372 (1953).

CONCLUSION

For the foregoing reasons, if the Court grants the motion of the Navajo Indian Tribe, the Court should grant to the California defendants not less than 90 days within which to file their responses to the petition of intervention and exceptions of the Navajo Indian Tribe.

Dated: October 30, 1961

Respectfully submitted,

[Signatures follow.]

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APPENDIX

Opinion and Ruling of Special Master Denying Indian Motion of June 28, 1956 (Tr. 2638-46)

Morning Session—Wednesday, July 18, 1956—
10 A.M.

THE MASTER: I should like first to make an informal disposition of the application which has been argued on behalf of the Indian Tribes. I will read it into the record.

An application on behalf of the Colorado River Indian tribes of the Colorado River Indian Reservation in Arizona and California; the Gila River Pima-Maricopa Indian community, Arizona; Hualapai Indian Tribe of the Hualapai Reservation, Arizona; the Navajo Tribe of Indians of the Navajo Reservation, Arizona and New Mexico; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; the San Carlos Apache Tribe, Arizona; and the Fort McDowell Mohave-Apache Indian Community of Fort McDowell Reservation, Arizona.

There has been presented by their respective attorneys an application for leave to file a "representation of interest." Accompanying this application is a petition on behalf of the same Indian Tribes submitted by the respective attorneys. The petition in part alleges:

That the petitioners are American Indian tribes, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its tribe. Each of the tribes resides within the lower Colorado River Basin and is the beneficial owner of land and the right to the use of [2639] water within the basin.

That this case; that is, Arizona v. California, et al., presents for adjudication the relative rights of the parties litigant and of petitioners and other Indian wards of the United States to divert water from the Lower Colorado River Basin.

That Indian rights in the water stem from treaties with Indian tribes, executive action, the creation of Indian reservations and various acts of Congress.

That the United States has intervened in this case and has placed the rights of petitioners in issue. As a result, petitioners are precluded from asserting their rights in their own names and on their own behalf. They have no control over the course of the suit nor any participation in the trial.

That the United States has interests which are in conflict with the interests of the petitioners. These conflicting interests arise out of its treaty with Mexico and out of its contractual obligations to deliver water and electricity. The conflict is emphasized by the circumstance that the Attorney General is under the obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by the Indian tribes seeking compensation for loss of water rights. (It is not clear whether such suits are now pending or whether such [2640] suits are a future possibility. The latter is the probable intention of the allegation.)

Additional allegations give illustrations of the operation of the conflict in the prosecution of this case.

So much for the allegations.

The prayer for relief is as follows:

Wherefore Petitioners pray as follows:

1. That cognizance be taken of this representation in view of the helpless position in which these petitioners find themselves;

2. That the Attorney General be called upon to explain his unauthorized amendment of the petition of intervention.

3. That the Special Master be instructed as follows: (a) To determine whether a conflict exists between the Indian interests and the interests of the United States apart from those of the Indian; (b) to determine whether the Indian interests are or can be adequately represented by the Attorney General of the United States; (c) to recommend whether the interests of justice and fair dealing require separate and independent counsel for the Indians.

On June 28, 1956, the application and the accompanying petition were presented to Mr. Justice Douglas, who endorsed them "Referred to the Special Master, Honorable Simon Rifkind, [2641] for appropriate action."

On the request of the petitioners, argument on the petition before the Special Master was adjourned to July 6th. In the course of the argument, counsel for the petitioners particularized the relief sought by the petitioners as follows:

1. To order the Attorney General to reinstate the pleading withdrawn from the Supreme Court file.

2. To request the Attorney General to arrange for private counsel for the Indians.

3. Such private counsel should have the status of special assistant to the Attorney General with full power to act on behalf of the Indians and with instructions from the Attorney General which would give him independence of action.

4. The fees of such private counsel and his expenses to be paid by the Attorney General.

5. That the Court might privately and informally recommend such a course of action to the Attorney General.

6. That the petitioners have time for preparation for trial, and

7. To have during the trial the right of examination and cross-examination of witnesses.

It was made clear beyond doubt that the petitioners [2642] did not seek or desire to intervene as parties.

In opposition to the application and the petition, the United States filed a brief. Therein it relies upon its plenary power conferred by statute to manage the affairs of Indians. It contends that the manner of exercising this power, which is political and administrative in nature, is a question for the legislative branch to determine and is not one for the courts. It cited many precedents to support its position and relies especially on Heckman v. The United States, 224 U.S. 413.

The other parties expressed varying views of the petition.

In its petition for intervention, the United States has assigned the Indian claims as one of the interests

it seeks to protect and further in this litigation. In the actual prosecution of these hearings before the Special Master, the United States has appeared by a number of attorneys. How the several responsibilities of the United States have been distributed among the several lawyers has not been disclosed to the Special Master, nor, indeed, whether there has been any allocation of function. [2643]

The petitioners do not seek the independent status of parties. They disavow any desire for intervention. They would have the Attorney General designate another lawyer upon whom would devolve a special concern for the claims of the Indians. Such a lawyer would still be the agent of the Attorney General. In effect, the Attorney General would speak with several voices and might occupy conflicting positions. It is unnecessary to elaborate upon all the anomalies, some or all of which would be encountered in such a trial. The Attorney General might at once concede a fact and withhold its concession. In one role he might be content with the testimony of a witness and refrain from cross-examination. In his other role he would be moved to impeach both the witness and the testimony.

In short, the petitioners would in every sense behave like parties but remain non-parties. It may well be that conflict between the general interest of the United States and the special interest of the Indians is inevitable. Indeed, in any single representation by the United States of a general and a special interest there is almost bound to be conflict for in a sense the special interest is always at war with the general interest. Such conflict if governed by the usual rules which obtain between trustee and ward would at times disqualify the trustee,

or would in [2644] any case justify separate intervention on behalf of the ward, but this is not the ordinary case of private trustee and ward.

The trusteeship of the United States in behalf of the Indians is the creation of a plenary legislative power. It is beyond the power of the courts to disqualify this trustee. The relationship between this trustee and its Indian wards is not "circumscribed by rules which govern private relations," Heckman v. United States, 224 U.S. 413. It rests on the presumption that "The United States will be governed by such considerations of justice as will control a Christian people in their treatment of a(n) * * * dependent race," Missouri, Kansas & Texas Railway Company v. Roberts, 152 U.S. 114, 117.

The foregoing considerations lead to these conclusions.

1. The unconventional status sought by the petitioners in this litigation is one not likely to promote the orderly development of the issues and proofs and the forging of a suitable decree. This is underscored by the circumstance that a substantial portion of the proofs has already been taken on the issues as framed by the pleadings; and the magnitude of the case is such that permission to take part in the case without a substantial adjournment to permit adequate preparation would amount to an empty ritual.

2. The legal power of the Attorney General to [2645] represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action.

There is, nonetheless, some room for accommodation. First, if the petitioners are in possession of evidence which would buttress their claims to water I assume that the Attorney General would not reject its proffer to him and that he would not withhold it from the trial. No allegation to the contrary is made in the petition. If this assumption is valid, as I believe it is, the record of this trial should, at its conclusion contain all the substantial evidence which the special representation of the petitioners would produce.

Second, there may however be disagreement between petitioners and the Attorney General concerning the interpretation of the evidence and concerning the rules of law which govern the relief to be awarded in the light of the evidence. I think it is within the judicial power to receive from one not a party a brief which may be helpful to a court in deciding a controversy. The practice of receiving briefs from amici curiae is well established. Indeed, the Supreme Court has at times invited briefs from non-parties.

The appropriate action which, in my opinion, is responsive to this petition is that the petitioners be authorized to file a brief with the Special Master upon the conclusion of the hearings. [2646]

I have given consideration to several arguments advanced by the other parties to this litigation. They are addressed to marginal aspects of this problem and require no further comment.

That disposes of the application. If any party wants to use this transcript as a basis for presenting the question to the Supreme Court I shall be glad to certify it.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 8 Original

STATE OF ARIZONA, Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants,

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners

STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.

STATEMENT OF NEW MEXICO RELATING TO MOTION ON BEHALF OF NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE.

STATE OF NEW MEXICO,
EARL E. HARTLEY,
Attorney General,
THOMAS O. OLSON,
CLAUD S. MANN,
DUDLEY CORNELL,
Special Asst. Attorneys General.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

STATE OF ARIZONA, Complainant, v. STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants, THE UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners, STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.	No. 8 Original

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STATEMENT OF NEW MEXICO RELATING TO MOTION ON BEHALF OF NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE.

Comes now the State of New Mexico and for its response to the Motion on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, for Leave to Intervene, Brief in Support Thereof and Petition of Intervention, respectfully advises this Honorable Court:

(1) That respondent New Mexico has no objection to the Motion for Leave to Intervene filed on behalf of the Navajo Indian Tribe and does not object to the same.

(2) New Mexico does, however, reserve its right to answer the Petition of Intervention and file briefs relating to the issues raised as to the claims and arguments of the Navajo Tribe of Indians in the event their Petition of Intervention is allowed by this Court.

Respectfully submitted,

STATE OF NEW MEXICO,

EARL E. HARTLEY,
Attorney General,

THOMAS O. OLSON,

CLAUD S. MANN,

DUDLEY CORNELL,
Special Asst. Attorneys General.

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No. 8 Original

In the Supreme Court of the United States

OCTOBER TERM, 1961.

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

RESPONSE OF THE UNITED STATES TO THE MOTION ON BEHALF OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

ARCHIBALD COX,
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

RESPONSE OF THE UNITED STATES TO THE MOTION ON BEHALF OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

INTRODUCTORY STATEMENT

The Motion for Leave to Intervene on Behalf of the Navajo Tribe is similar to an application filed by the Navajo and other Indian tribes for separate representation in the trial of this case. That application was filed early in the trial proceedings before the Special Master and was referred to and disposed of by him (Tr. 2638–2646; Transcript of July 18, 1956). Although the relief there sought, unlike the present application, did not extend to intervention of the Indian tribes as parties,[1] the effect of granting

[1] One of the grounds for the earlier application was "6. There is doubt as to whether petitioners may intervene as separate parties since their interests are committed to

their application would have been tantamount to their intervention. This was recognized by the Special Master who stated, "In short, the petitioners would in every sense behave like parties but remain non-parties" (Tr. 2643). Accordingly, the reasoning by which the Special Master denied that application applies here—"The legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action" (Tr. 2644–45). The United States resists the present motion as it resisted the earlier one.

It should be noted that the Special Master makes no adjudication of the water rights of the Navajo Indian Reservation. The Special Master's Report does not affect rights or priorities of Indian reservations for which no specific provision is made (see Article VIII, subdivision (C), of the Recommended Decree on page 360 of the Report), except as legal principles enunciated therein may apply on the basis of *stare decisis*. Nothing has been taken from the Navajo Indians and their complaint is that their rights have not been affirmatively recognized.

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adjudication by the intervention of the United States * * *" (p. 2, Motion for Leave to File Representation of Interest by the Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California; Gila River Pima-Maricopa Indian Community, Arizona; Hualapai Indian Tribe of the Hualapai Reservation, Arizona; Navajo Tribe of Indians of the Navajo Reservation, Arizona and New Mexico; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; the San Carlos Apache Tribe, Arizona; and the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona).

ARGUMENT

I

THE UNITED STATES IS AUTHORIZED EXCLUSIVELY TO REPRESENT THE INDIAN TRIBES IN LITIGATION AFFECTING THEIR PROPERTY RIGHTS

The representation of Indian tribes by the United States is an aspect of the plenary power of the United States to manage the affairs of Indians and Indian tribes. *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375; *United States* v. *Ramsey,* 271 U.S. 467. "The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 308; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565; *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 311.

Congress has generally delegated to the Secretary of the Interior the management of Indian property and to the Attorney General the conduct of litigation affecting that property. Thus, as to the authority of the Secretary of the Interior, it was said in *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.A. 10) certiorari denied, 324 U.S. 844, 628–629:

> We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his

> subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection. [Cases omitted.] In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indian and his property, whether in the nature of lands or restricted funds. While exercising the powers and duties imposed by law, he is clothed with sovereign immunity, and ordinarily is not amenable to judicial processes, or bound by judicial decrees absent legislative consent. * * * It is not the judicial function to administer the affairs of incompetent Indians, and courts should be at pains not to invade the trust or encroach upon the prerogative which has been traditionally assigned to the Secretary of the Interior.

The authority of the Attorney General to control litigation affecting Indian property is equally broad. This is, of course, necessary in order to effectuate the responsibility of the Secretary of the Interior. It is provided in 28 U.S.C. 507(b) that "[t]he Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party * * *."[2] See also *United States* v. *Winston*,

[2] "In all States and Territories where there are reservations or allotted Indians the United States Attorney shall represent them in all suits at law and in equity." Act of March 3, 1893, 27 Stat. 631, 25 U.S.C. 175. See also Act of June 22, 1870, 16 Stat. 164, as amended September 3, 1954, 68 Stat. 1229, 5 U.S.C.

170 U.S. 522, 525. "If the United States is entitled to institute an action on its own behalf and on behalf of the Indians, the Indians cannot determine the course of the suit or settle it contrary to the position of the Government." Cohen, *Handbook of Federal Indian Law* (1942), p. 370; *Federal Indian Law,* Department of the Interior (1958), p. 336. *Conner* v. *Cornell,* 32 F. 2d 581, 584–585 (C.A. 8); *McGugin* v. *United States,* 109 F. 2d 94 (C.A. 10); *White* v. *Sinclair Prairie Oil Co.,* 139 F. 2d 103, 106–107 (C.A. 10); *United States* v. *Adamic,* 54 F. Supp. 221, 223 (W.D. N.Y.).

This Court recognized the complete control of the United States over Indian litigation in *Heckman* v. *United States,* 224 U.S. 413, where the United States sued to set aside conveyances of allotted lands by restricted Indians, as follows (pp. 444–446):

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in

306; Executive Order No. 6166 of June 10, 1933 (Reorganization of Executive Agencies), Section 5, 5 U.S.C., following Section 132; Reorganization Plan No. 2 of May 24, 1950, 64 Stat. 1261, as amended July 5, 1952, 66 Stat. 121, 5 U.S.C., following Section 292.

> legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.
>
> * * * * *

It is then clear that the United States, acting through the Attorney General, has full authority to represent the various Indian tribes in the pending litigation. It is equally clear that the action of the Attorney General in doing so is binding upon those tribes. For instance, in the action entitled *Pueblo of Picuris* v. *Abeyta,* 50 F. 2d 12 (C.A. 10), the court dismissed an appeal taken by the Pueblo after the Attorney General had decided not to appeal, stating at page 13 that "a decree rendered in a suit brought by the pueblo does not bind the United States, while a decree rendered in a suit brought by the United States does bind the pueblo." In *Mars* v. *McDougal,* 40 F. 2d 247 (C.A. 10) certiorari denied, 282 U.S. 850, a suit brought by an Indian was dismissed because an earlier suit involving the same claim brought in the name of the United States had been dismissed with prejudice on motion of the Attorney General.

In this case the Attorney General, acting for the United States, has undertaken representation of the interests of the several Indian tribes[3] and it "is to be

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[3] In the Lower Basin of the Colorado River there are 25 Indian Reservations. Evidence of the water rights of each of them, and Proposed Findings of Fact and Conclusions of Law and briefs in support thereof, were submitted by the United States to the Special Master. See particularly Findings of Fact and Conclusions of Law Proposed by the United States, pp. 37, 42, 45, 51–125, 227, 230–235, 237. The decisions which

presumed" that "the United States will be governed by such considerations of justice as will control a Christian people in their treatment of [a] * * * dependent race." *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U.S. 114, 117. It is plain that there is no basis for intervention by the Navajo Tribe either as a matter of right or as a matter of judicial discretion.

II

BECAUSE THE NAVAJO TRIBE HAS HERETOFORE HAD AMPLE OPPORTUNITY TO MAKE REPRESENTATIONS RESPECTING ITS INTEREST IN THE LITIGATION, ITS UNTIMELY MOTION FOR LEAVE TO INTERVENE NOW IS WITHOUT JUSTIFICATION

Even were it not clear that intervention by the Navajo Tribe is precluded by the United States' exclusive authority, there is in the circumstances of this case no justification for the motion at this stage of the proceeding.

The controversy respecting allocation of the waters of the Lower Colorado River has plagued the States of the basin, the United States, and the people of the

---

have been made respecting the extent to which the United States should accept and the extent to which it should except to the Master's Report have necessarily involved an exercise of judgment as to what will best serve the interests of all the Indian reservations involved. If the Navajo Tribe were to be permitted to intervene because of disagreement with the Attorney General's judgment it would follow that each of the tribes inhabiting the 24 other reservations should have the same opportunity. Thus the force of the authorities which deny the right of an Indian tribe to intervene in a case where the representation of its interests has been undertaken by the United States is multiplied in the instant case.

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entire region for nearly half a century. After earlier unsuccessful attempts to bring the matter before this Court, *Arizona* v. *California,* 283 U.S. 423, *Arizona* v. *California,* 292 U.S. 341, *Arizona* v. *California,* 298 U.S. 558, this case was initiated in 1952. The United States' Petition in Intervention was filed in December, 1953. Hearings before the Special Master began on June 14, 1956, and continued intermittently until August 28, 1958. Proposed findings of fact and conclusions of law, and briefs in support thereof, answering briefs, and reply briefs were submitted to the Special Master during the period ending July 1, 1959. On May 5, 1960, the Special Master submitted his draft report to the several parties. In August, 1960, the Special Master heard oral argument by the parties with respect to his draft report and on January 16, 1961, the Special Master's report dated December 5, 1960, was received and ordered filed by the Court. Exceptions of the several parties to the report were filed on February 27, 1961, and briefs in support of exceptions, answering briefs and reply briefs have now been submitted to the Court. After nearly nine years, during which the first Special Master appointed by the Court died and was replaced, and the second Special Master suffered a heart attack from which he fortunately recovered, the case is now ready for argument to and consideration by the Court.

A decision of the great issues which for many years have impeded full development of the water resources of the southwestern region of the United States, and hence the full development of the other resources of the region, is now imminent. Even were there merit

to the subject motion, which we deny, we respectfully submit that that decision should not be delayed by the intervention now of additional parties. It is too late to consider whether additional parties, who are clearly neither necessary nor indispensable, should now be given leave to enter the case.[4]

The Tribe's review of "Past efforts of Navajo Tribe to Secure Adequate Representation," in its argument to establish timeliness of its motion, does not disclose all of the pertinent facts. While it is true, as above noted, that it and other tribes did petition the Court to require the Attorney General to designate separate counsel to represent their interests, the Special Master, to whom the petition was referred, as a part of his mentioned ruling, encouraged the applicants to proffer to the Attorney General, and the Attorney General to consider for presentation in the case, any relevant evidence in their possession. He also specifically authorized the applicants to file an *amicus curiae* brief with him upon conclusion of the hearings and he expressly invited an application to the Court for review of his ruling.

Neither the Navajo Tribe nor any other tribe of the Lower Colorado River Basin sought review of the Master's decision or availed itself of the opportunity

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[4] We suggest that the contention that allowance of the motion would not make necessary referral of the case back to the Special Master or otherwise delay decision by the Court is frivolous. If the "void" which the Tribe would fill consists of the absence of evidence, a point on which the motion and the supporting documents is peculiarly vague, it cannot be filled without the taking of additional evidence.

to file an *amicus* brief with the Special Master. All interested tribes were invited to review the evidence being prepared by the United States with regard to the claims for water rights for the respective reservations inhabited by them. The Navajo Tribe accepted this invitation and its representatives who made the examination found no fault and made no adverse comment with regard to such evidence. Neither did the Tribe nor its General Counsel suggest or proffer any additional evidence. On the contrary, the Chairman of the Tribal Council, by letter of March 5, 1957, to the Solicitor, Department of the Interior,[5] stated that, after its review by the Tribe's Assistant General Counsel and its consulting engineers, he was "entirely satisfied" with the preparation of evidence "to show Indian water rights on the Navajo Reservation."[6]

A copy of the letter of February 2, 1961, addressed by the General Counsel for the Tribe to the Attorney General, referred to in the motion and the brief in support thereof, is attached as Appendix B. It is to be noted that in that letter the only reference to any of the five areas in which it is stated in paragraph IV of the motion that "The United States

[5] Copy of the letter is annexed as Appendix A.

[6] In support of the claim asserted in the United States' Petition of Intervention with respect to the Navajo Indian Reservation (see Appendix II to the Petition) the evidence was designed to establish the reserved rights to use specific quantities of the waters of certain tributary streams for agricultural, domestic, stock watering and similar purposes on the reservation. See Findings of Fact and Conclusions of Law Proposed by the United States before the Special Master, Findings 4.0.2, 4.0.3, 4.2.1–4.2.13, Conclusion 4.2.

has failed vigorously to assert" the interests of the Navajo Indians is the request that exception be taken to the Report's adoption of irrigable acreage on an Indian reservation as a basis for measurement of the quantities of water reserved for use on the reservation. In a telephone conversation between a member of tribal counsel's staff and a representative of the Department of Justice which preceded the letter[7] it was explained that, notwithstanding our agreement with the proposition that irrigable acreage is not the sole basis for measuring the quantum of the waters reserved for use on an Indian reservation (see fn. 28, p. 80, of our Answering Brief), we did not consider the language of the Report in this respect an appropriate subject for exception. This conclusion was predicated on (1) the Special Master's express recognition (Rept. 265) that, with respect to the five reservations to which the Recommended Decree applies, the basis for measurement which he adopted does not mean that the reserved waters may not be used for purposes other than agricultural and related uses, (2) the absence of prejudice to any claim which might later be made with respect to the Navajo reservation in view of the Master's exclusion of that reservation from the area of adjudi-

[7] The letter was written in response to our suggestion during that conversation that counsel's views respecting exceptions to be noted by the United States, orally indicated during the conversation, should be put in written form for our further consideration. In light of the purpose of the letter and in light of counsel's intention stated during the telephone conversation to arrange a conference at a later date, it was assumed that written response to the letter was not expected.

cation, and (3) the fact that the evidence of water rights appurtenant to the Navajo reservation presented to the Master, with the full approval, as above noted, of the Tribe's Assistant General Counsel, its consulting engineer, and the Chairman of the Tribal Council, had employed irrigable acreage as the appropriate and principal basis for measuring the quantum of the rights reserved. Except for repeating this request in the letter of February 2, 1961, counsel for the Tribe made no further effort to demonstrate to the Attorney General or his representatives that the exception should be noted notwithstanding these circumstances.

We respectfully submit that in all this there is nothing to justify a reopening of the case to permit counsel for the Navajo Tribe to support his present views at this late stage in the case.

III

THE CHARGE OF "INADEQUATE REPRESENTATION" IS WITHOUT MERIT

Even were the motion of the Navajo Tribe legally cognizable and appropriate at this time, it should be denied for the reason that at their strongest the assertions of "inadequate representation" present nothing more than the question whether the judgment of the Attorney General or the judgment of tribal counsel is better, concerning the manner in which the rights of the United States with respect to the Navajo and other Indian reservations in the Lower Basin can best be asserted and protected. This is evident from

the motion and supporting documents. It is at least partially demonstrated by what has already been said in this response. But even though we wish to avoid arguing against any claim of right which the United States may possibly have in behalf of the Navajo and other Indian tribes, we feel that it is appropriate to make at least a brief response to the Navajo Tribe's enumeration of "five areas of major importance" in which it is charged the United States "has failed vigorously to assert" the Tribe's interests.

A. THE JUSTICIABILITY OF TRIBUTARY USES

The first of the enumerated "areas" involves the United States' omission to except to the Special Master's refusal to adjudicate its claims of right with respect to the Navajo Indian Reservation. It is true that in the Government's Petition of Intervention a necessity for determination of its rights with respect to the Navajo and all other Indian Reservations was alleged. It is also true that before the Special Master we urged that the rights to use water from available sources on the Navajo Reservation and all other Indian reservations within the Lower Basin should be adjudicated by the decree in this case. (See *e.g.*, Tr. 13000–13016.) In our submissions to the Special Master we proposed findings of fact and conclusions of law for the adjudication of all such rights on the basis of our evidence respecting the same, including those appurtenant to the Navajo Reservation (*supra*, p. 6, fn. 3, and p. 10, fn. 6).

But on August 23, 1957, the Special Master had announced his intention to receive evidence from the

United States of its claims of right to use tributary waters on the several Indian reservations, but to defer the taking of evidence of possibly conflicting claims on the same tributaries until after report to and action by the Court with respect to other issues in the case. The rationale for this ruling appears at pp. 13796 to 13805 of the transcript. No limitation with respect to the trial of mainstream Indian reservation rights was imposed. Tr. 13809. Although we disagreed then,[8] and continue to disagree, with the Master's suggestion that the several States lack power in their capacities as *parens patriae* to bind the claimants in those States of conflicting rights, we concluded on reflection that for the other reasons given, relating to the practical management of the litigation, neither the Court nor the Special Master on reconsideration would be disposed to reverse the ruling. Either because of absence of proof of conflicting claims or in reliance on the ruling, the States generally refrained from challenging the evidence submitted by the United States with respect to its claims of right to use water from tributary sources on the several Indian reservations.

The Special Master's determination that mainstream and tributary uses above Lake Mead are not accountable in the allocation of mainstream water if approved would make irrelevant an adjudication at

[8] Counsel for the Government advised the Special Master at the time that review of the ruling, either by request to him for reconsideration or by application to the Court, would probably be sought (Tr. 13806).

this time of the rights to use water on the Navajo Reservation as against users of mainstream water. If the Court agrees with our first and second exceptions to the report where we oppose this determination, it will then be necessary to determine the appropriateness of an application, under Article IX of the Recommended Decree and the Special Master's ruling of August 23, 1957, for adjudication of those rights.[9] Under the same authority, application can be made for adjudication of those rights if, contrary to the Master's determination at page 324 of the Report, actual conflict between the claims asserted by the United States and other water users from the tributaries involved is demonstrable. But in the present posture of the case, we submit that

[9] On the record made before the Special Master the extent of conflict between tributary uses on the Navajo Reservation and downstream uses of mainstream waters is uncertain. See Tr. 12817; 12819–20. If, as suggested in the letter of February 2, 1961, from the General Counsel for the Navajo Tribe to the Attorney General, there is possible basis for a claim of right to use water from the mainstream on the Navajo Reservation, this is a matter of which the Court can properly be asked to take cognizance only by an application to receive additional evidence after decision on the pending exceptions to the Special Master's report. It is not an appropriate subject for exception now because no pleading, no evidence and no argument to support such a claim has been submitted to the Court or to the Special Master. Apparently in recognition of this situation and of the Tribe's acquiescence in and approval of the Government's limitation of its claims with respect to the Navajo Reservation to tributary uses, the Tribe has not charged that the omission heretofore to assert a claim of right to use mainstream waters on the reservation constitutes "inadequate representation."

the United States' decision not to except to the Master's omission to adjudicate the rights to use tributary waters on the Navajo and other Indian reservations represents a reasonable exercise of judgment and that any other course would be ill-advised, unwise, and not in the best interest of any of the Indian tribes, the United States, or the efficient administration of the litigation.

B. ABORIGINAL RIGHTS OF THE NAVAJO TRIBE

The second of the areas of "inadequate representation" enumerated in the motion relates to the theory of reservation by the United States of rights to the use of water on Indian reservations advocated by the United States and adopted by the Special Master. Complaint is made that the United States has not asserted aboriginal rights in the Navajo Indian Tribe to the use of water on the Navajo Reservation and that such rights are paramount and superior to all other claims of right in the same source of water supply.

We submit that the doctrine of reservation by the United States of rights to use water on Indian resercations established on lands withdrawn from the public domain is in no way inimical to the Navajo Indians or to Indians inhabiting the other reservations with respect to which we have advocated the doctrine in this case. Where there is evidence of use and occupancy on which a claim of aboriginal title might be based, there is nothing in the doctrine to pre-

clude a further claim based on aboriginal title. However, the extent of the rights based on such title which might be claimed with respect to the Indian reservations in the Lower Basin is extremely limited, if such rights exist at all, while the doctrine on which we have primarily relied is all embracing.

For example, without regard to what the Navajo Indians may claim in litigation with the United States before the Indian Claims Commission or elsewhere respecting their aboriginal title to the lands on which they roamed before they were confined to their reservation, the fact is that under Article IX of the Treaty of 1868 (U.S. Exhibit 201) the Navajo Tribe expressly relinquished "all right to occupy any territory outside their reservation, as herein defined," reserving only the right to hunt on unoccupied lands contiguous to the Reservation. The reservation as defined by the Treaty consisted of only a relatively small area in the eastern portion of the reservation as it now exists (U.S. Exhibit 293, last page). There were a large number of additions by subsequent Executive Orders and acts of Congress (*Ibid.*). Only four of the eighteen areas of water use with respect to which specific proof was prepared and submitted to the Special Master are located within, or partly within, the original Treaty reservation (U.S. Proposed Finding of Fact 4.2.10). Obviously, lands outside the reservation created by the Treaty of 1868 were open to settlement and the surplus nonnavigable waters thereon were subject to appropriation under the

Desert Land Act of 1877 (43 U.S.C. 321) until such lands were reserved by later executive order or statute. So far as rights to use water on the original Treaty reservation are concerned, we believe that the priority date as of the date of creation of the reservation, June 1, 1868, is sufficient to protect the interests of the Navajo Tribe against any claims of conflicting rights in the water sources on that area.[10]

Moreover, the doctrine of reservation of rights to the use of water by the United States for use on Indian reservations as announced by the Special Master was presented and argued extensively in the United States' submissions to the Special Master. The Navajo Tribe did not take exception to that presentation by filing an *amicus curiae* brief with the Master or otherwise. We note also that in the letter of February 2, 1961 addressed by General Counsel for the Tribe to the Attorney General, no mention of this point was made. We submit that even if the record before the Master warranted a claim of right in behalf of the Navajo Tribe based on aboriginal title, the omission to assert such claim before the Special Master has in no way prejudiced the interests of the Tribe and does not in any manner support the charge of "inadequate representation."

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[10] If in this case or in other litigation it should appear that there are conflicting claims of priority dates earlier than June 1, 1868, there is nothing in the Report of the Special Master to preclude a claim in behalf of the Indians of aboriginal title if the facts warrant such a claim being made.

C. LACK OF SEPARATE APPORTIONMENTS TO INDIAN TRIBES

The third and fourth "areas" enumerated in the motion to support the charge of "inadequate representation" relate to the United States omission to except to the Special Master's determination that uses of water on the several Indian reservations are chargeable to the State allocations and his failure to make separate apportionments to "indian users." The contention seems to be that in acquiescing in the Master's decision the United States has "consented * * * that the indians must * * * look to the states for their share of water." (Motion, pp. 5–6.)

The United States has never in this litigation contended for separate apportionments to the Indian Tribes. Early in the proceedings it did contend that a separate apportionment should be made to the United States, as against the several States. However, long before the hearings before the Special Master were concluded, the United States took the position that consumptive uses under rights claimed by the United States, except those involving international obligations, should be chargeable to the allocations to the respective States in which the uses were made. We further contended, however, that the United States' reserved rights which are in no way dependent on State authorization, and particularly its rights for use on the various Indian Reservations, are not limited by State allocations. This position was submitted to (see Findings of Fact and Conclusions of Law Proposed by the United States, Conclusion 11.5), and briefed before, the Special Master. Deci-

sion not to except to the Special Master's determination that the United States' claims of right with respect to the Indian reservations are limited by State allocations was predicated on the particular facts of this case and the realization that the ruling would work no prejudice because of (1) the preferred status given such rights under the Master's interpretation of the provision for satisfaction of "present perfected rights" in the Boulder Canyon Project Act, (2) the Master's determination that rights reserved for use on such reservations have priority as of the dates of creation of the reservations, and (3) the availability of uncommitted water within the allocations to those States in which are situated reservations which do not have very early priority dates. We submit that the judgment so exercised is reasonable and is no basis for the charge of inadequate representation.

The assertion by the Navajo Tribe that the United States has consented that the Indians must look to the States for their share of water misconceives the effect of the Master's ruling with respect to the chargeability of uses on the Indian reservations. On the contrary, the Master has clearly recognized that the right to make these uses does not depend upon consent or authorization by the respective States.

D. BASIS FOR MEASUREMENT OF THE QUANTITY OF WATER RESERVED FOR USE ON INDIAN RESERVATIONS

The fifth "area" of complaint enumerated in the motion in support of the charge of "inadequate representation" relates to the omission of the United States to except to the Special Master's determination

that, with respect to the Indian reservations for which he has determined that water rights should be adjudicated, the quantum of the reserved water rights is "sufficient water to irrigate all of the practicably irrigable lands in a reservation and to supply related stock and domestic uses." At pages 11 and 12, *supra*, we have explained our reasons for not accepting the suggestion of the General Counsel for the Navajo Tribe that exceptions be taken to this determination in the Report. Beyond this, we question the standing of the Navajo Tribe even to suggest an exception to this determination by the Special Master which does not relate to the Navajo Reservation.

Nevertheless, if there is definitive evidence not yet brought to the attention of the Attorney General of substantial present or potential uses of Lower Basin water on the Navajo Indian Reservation additional to those with respect to which evidence has thus far been presented, we believe it will be incumbent upon the United States to bring such evidence before the Court if and when it is determined that the water rights pertaining to the Navajo Reservation are to be adjudicated in this case, and to make every reasonable argument in support of the inclusion of such uses within the reserved right.[11] However, we submit that

[11] In the case of one other Indian reservation (See Findings of Fact and Conclusions of Law Proposed by the United States, Finding 4.17.8 and Conclusion 4.17.2), evidence was introduced of the quantitative requirements of a project for commercial recreation and it was argued before the Special Master that use for such purpose was included in the reservation of rights to the use of water to accomplish the purposes

the Master's acceptance of that for which the United States has contended, on the basis of the evidence introduced with respect to the Indian reservations on the mainstream below Hoover Dam, is not basis for exception by the United States and it is not basis for exception by the Navajo Tribe. Neither is it basis for the charge that the United States has not adequately represented the Navajo Tribe's interest.

CONCLUSION

Because the Navajo Tribe is without right to intervene in this case, because granting of its motion for leave to intervene would further delay decision by this Court of the issues now before it, and because there is no basis for the Navajo Tribe's charge of "inadequate representation" of its interest by the United States, we urge that the motion for leave to intervene be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DAVID R. WARNER,
WALTER KIECHEL JR.,
WARREN R. WISE,
Attorneys.

NOVEMBER 1961.

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of the reservation (United States Brief before the Special Master in Support of Findings of Fact and Conclusions of Law, pp. 45–46).

APPENDIX A

THE NAVAJO TRIBE,
Window Rock, Arizona, 5 March 1957.

Mr. J. REUEL ARMSTRONG
Solicitor, United States Department of the Interior
Washington 25, D.C.

DEAR MR. ARMSTRONG: By your letter of December 21, 1956, you invited me and my representatives to contact Mr. Geraint Humpherys, Field Solicitor of the Department of the Interior, in order to review the evidence of Indian water rights on the Navajo Reservation prepared for presentation in the trial of *Arizona* v. *California* before a Special Master of the Supreme Court.

Accordingly, accompanied by Laurence Davis, Assistant General Counsel of the Navajo Tribe, I visited Phoenix on January 17, 1957, and in the company of Mr. Humpherys and his staff, reviewed the material that had been prepared. Both Mr. Davis and I were very favorably impressed, but we did not wish to express any opinion in writing concerning the evidence until it had been reviewed by Dean H. T. Person, Consulting Engineer for the Navajo Tribe. Mr. Person visited Mr. Humpherys' office on February 1 and 2 of this year and reviewed the material. A copy of his letter to me dated February 25, 1957, is enclosed. As you can see, Dean Person completely approves of the evidence that has been prepared to date.

Therefore, permit me to state that I am entirely satisfied with the preparation of evidence done by

the Department of the Interior under the direction of Mr. Humpherys for the case of *Arizona* v. *California* to show Indian water rights on the Navajo Reservation. I only hope that the Department of Justice will coordinate completely with the Department of the Interior and make proper use of this material before the Special Master.

Thank you very much for giving us the opportunity to review the preparation by the Department of the Interior of evidence concerning our rights involved in the Arizona-California litigation before trial.

Sincerely yours,

/s/ Paul Jones
PAUL JONES, Chairman
Navajo Tribal Council.

cc: Mr. Norman M. Littell
Mr. Dean Person
Mr. G. B. Keesee
Mr. G. Warren Spaulding
Mr. Geraint Humpherys

[Copy]

PERSON & MCGAW—ENGINEERS,
Engineering Building,
Laramie, Wyoming, February 25, 1957

Mr. PAUL JONES
Chairman, Navajo Tribal Council
Window Rock, Arizona.

DEAR MR. JONES:

In accordance with your wire of January 20, 1957, I visited the office of the Bureau of Indian Affairs at Phoenix on February 1 and 2 to review the data and exhibits which are being prepared for presentation in

the Arizona-California Colorado River suit before the United States Supreme Court.

Our findings resulting from this visit and review of data and exhibits are summarized below:

1. The irrigated and potentially irrigable acreages on the Navajo Reservation in the Lower Colorado River Basin as determined by the Bureau of Indian Affairs, agrees with our findings as submitted in our report to you in August, 1956.

2. The water requirements for presently irrigated and potentially irrigable Navajo lands as determined by the Bureau of Indian Affairs conforms substantially with our estimates of water requirements.

3. During our visit to Phoenix we examined the exhibits that had been prepared and discussed what the Bureau of Indian Affairs contemplated for exhibits which had not yet been prepared. We believe the exhibits will clearly show the situation in connection with the Navajo water rights in the lower Colorado River Basin.

4. It is our opinion that the Bureau of Indian Affairs is doing a conscientious and good job to present a clear and accurate picture of the Navajo water rights and water requirements in the lower Colorado River Basin.

Respectfully submitted.

[s] H. T. Person
H. T. PERSON

HTP:lm
cc Lawrence Davis

[Copy]

APPENDIX B

LAW OFFICES
NORMAN M. LITTELL
1824–26 JEFFERSON PL., N.W.
WASHINGTON 6, D.C.
FEDERAL 8–1895

FEBRUARY 2, 1961.

Re: *Arizona* vs. *California,* U.S. Supreme Court No. 9 Original, October Term, 1960

The Honorable ROBERT F. KENNEDY
Attorney General
Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL:

The Supreme Court has received the report of the Special Master in the above entitled cause between the states of Arizona and California over the waters of the Colorado River, and has set February 27, 1961 as the date for filing exceptions to the Special Master's report. The Special Master has made a number of proposed findings which are gravely prejudicial to the position of the Navajo Indian Tribe. This is to request that exceptions be taken to the report of the Special Master and that any other action be taken that may be necessary to protect and preserve the position of the Navajo Indian Tribe which is represented in this cause by the Department of Justice.

I have particular reference to the following proposed findings set forth in the Special Master's report:

1. *Main Stream of the Colorado River:* While the Special Master allocates water from the

main stream of the Colorado to five Indian tribes (see Master's report p. 267 et seq.) no allocation whatsoever is made for the Navajo Indian Tribe. If the Special Master's report is adopted this will mean that the Navajo Indian Tribe will not have any rights to water from the main stream of the Colorado River notwithstanding the fact that a substantial portion of the western boundary of the Navajo Reservation is formed by the Colorado River. This grave loss to the tribe will preclude future development of the reservation and otherwise prevent the beneficial development of the reservation intended by the Congress. If the evidence in the record does not merit an exception then I respectfully suggest that this phase of the case be completely re-examined and a request made to reopen the case for the purpose of submitting the necessary evidence. For example, one point that should be examined is whether or not consideration was given to the fact that there are now multipurpose reclamation projects on the Colorado River, and will be others in the near future, which have altered, or will alter, the elevation of the river such that it will be feasible to pump water from the river, an operation which may not have been considered feasible at previous river elevations.

2. *Winters Doctrine:* In his discussion of *Winters* vs. *United States,* 207 U.S. 564 (1908) and subsequent cases discussed in the Special Master's report in Section IV commencing on page 254, the Special Master takes the position that the reservation of water for the future needs of Indian reservations is based upon expanding agricultural and related water needs. With respect to those Indian tribes allocated water by the Special Master, water was reserved on the basis of practicably irrigable lands on those reservations and related stock and domestic uses. I respectfully request that

you take exception to this interpretation on the grounds that the so-called Winters doctrine is not so limited. It is true that water was reserved for Indian tribes for agricultural, stock, and domestic uses, but it was also reserved for any other use that Indian tribes might make of the reservations set aside for them by the United States Government. For example, on the Navajo Reservation there has been industrial development and we contemplate greatly expanded industrial development in the near future. This development will require water in substantial quantities and no recognition for such use is given in the Special Master's report. While the tribes allocated water by the Master may not have contemplated industrial development on their reservations, this construction of the Winters doctrine could be fatal to many tribes who depend on industrial development.

3. *Definition of Navajo and Hopi Reservations:* The description and discussion of the Navajo Reservation and the Hopi Reservation, appearing in the Special Master's report on pages 80 and 82 respectively, overlooks completely the fact that there is presently under litigation a dispute between the Navajo and Hopi tribes as to the ownership of the area which the Special Master refers to as the Hopi Reservation. As a consequence of this error the Special Master further errs in describing the Navajo Reservation as one of approximately 14,000,000 acres (p. 80) and in stating that some 6,000 Navajos occupied the "Hopi Reservation" (pp. 80–81).

The area referred to as the Hopi Reservation by the Special Master was in fact set aside by Executive Order of December 16, 1882 and pursuant to the Act of July 22, 1958 (P.L. 85–547; 72 Stat. 402) the Navajo and Hopi tribes are presently litigating

the title to this area before a specially constituted three-judge Federal District Court sitting at Prescott, Arizona (Healing et al vs. Jones, No. Civil 579. Prescott, U.S.D.C., Ariz.). The trial of this litigation was only recently completed and counsel for the Navajos and Hopis are in the process of submitting proposed findings of fact. The references in the Special Master's report to the "Hopi Reservation" which are both in error and severely prejudicial to the position of the Navajo Tribe should be corrected.

Respectfully submitted.

/s/ Norman M. Littell,
NORMAN M. LITTELL,
General Counsel, Navajo Tribe.

NML:rw
cc: The Honorable Stewart L. Udall
Simpson Z. Cox, Esquire
The Honorable Paul Jones
Joseph F. McPherson, Esquire

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 8 Original

STATE OF ARIZONA, Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants,

UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners,

STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.

MOTIONS BY NAVAJO INDIAN TRIBE FOR RECONSIDERATION OF ITS MOTION FOR LEAVE TO INTERVENE AND FOR ORDER TO UNITED STATES TO SHOW CAUSE WHY IT SHOULD NOT BE ORDERED TO ACCOUNT TO THE COURT AS TO THE ADEQUACY OF ITS REPRESENTATION OF NAVAJO INTERESTS; BRIEF IN SUPPORT OF MOTIONS.

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IN THE

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No. 8, Original

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UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners,

STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.

MOTIONS BY NAVAJO INDIAN TRIBE FOR RECONSIDERATION OF ITS MOTION FOR LEAVE TO INTERVENE AND FOR ORDER TO UNITED STATES TO SHOW CAUSE WHY IT SHOULD NOT BE ORDERED TO ACCOUNT TO THE COURT AS TO THE ADEQUACY OF ITS REPRESENTATION OF NAVAJO INTERESTS.

COMES NOW the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, and respectfully moves this Court for a reconsideration of its Motion for Leave to Intervene and for an order to the United States to show cause why it should not be ordered to account to this Court as to the adequacy of its repre-

sentation of the Navajo Indian Tribe in this litigation, and as reason therefor states the following:

I.

That after the Navajo Indian Tribe filed its Motion for Leave to Intervene and its supporting brief, responses in opposition to the motion were received by the Court from Arizona, California and the United States. These responses set forth two defenses to the motion which raised important legal issues not previously discussed in the Navajo Brief. These defenses pertained (1) to the states' alleged immunity from suit in an original jurisdiction action and (2) to the alleged exclusive control over the litigation by the United States so far as indian interests are concerned. After receiving these responses, but before a Navajo Reply Brief could be prepared, the Court denied the motion. The denial may have been founded upon the defenses so asserted. We respectfully submit that it is imperative that the Court reconsider the Motion for Leave to Intervene in light of the strong legal arguments which may be raised, and which are in fact raised in the brief which follows here, against the said defenses, which defenses are not valid as a bar to the proposed Navajo intervention.

II.

That the Navajo Indian Tribe set forth in its initial brief a detailed analysis of the inadequate representation given to its interests by the United States in this litigation. Nothing said in the responding brief filed by the United States effectively explains or mitigates the said inadequacy of representation. Such arguments as were asserted by the United States are answered in the brief

which follows here. There remains a lack of proper explanation to the Court by the United States concerning the reasons and justification for its wilful neglect in this litigation of indian interests and in particular those of the Navajo Indian Tribe. If, as the United States contends, it is the guardian of said indian interests here, it is incumbent upon it as a fiduciary to give to the Court a full accounting of the actions it has taken and the policies it has followed pursuant to that alleged capacity.

WHEREFORE, the Navajo Indian Tribe respectfully moves the Court in accordance with the motions as above stated.

FREDERIC L. KIRGIS,
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Denver 2, Colorado,

NORMAN M. LITTELL,
1824-26 Jefferson Pl., N. W.,
Washington 6, D. C.,

JOSEPH F. McPHERSON,
Window Rock, Arizona,
Attorneys for Navajo Indian Tribe.

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STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.

BRIEF OF THE NAVAJO INDIAN TRIBE IN SUPPORT OF ITS MOTIONS FOR RECONSIDERATION OF ITS MOTION FOR LEAVE TO INTERVENE AND FOR ORDER TO UNITED STATES TO SHOW CAUSE WHY IT SHOULD NOT BE ORDERED TO ACCOUNT TO THE COURT AS TO THE ADEQUACY OF ITS REPRESENTATION OF NAVAJO INTERESTS.

This brief will not repeat the arguments made in the earlier Navajo brief, but will rather discuss the two new issues raised by Arizona and the United States in their briefs as defenses to the Navajo intervention. These issues are: (1) The contention that the Navajos cannot intervene in this action because such intervention would constitute a violation of the immunity of the states, particularly of Arizona and California, from suit, as such

immunity is provided by the Eleventh Amendment to the United States Constitution; (2) The contention that the intervention cannot be allowed because it would derogate from the "exclusive" control of the United States over the litigation insofar as indian interests are concerned. In addition, this brief will attempt to place in proper perspective the United States reply to the Navajo contention that the United States has failed adequately to represent Navajo interests in this litigation.

I. Navajo Intervention as Not Violating States' Immunity from Suit Without Their Consent.

The California defendants have made only a brief reference, on page 8 of their Response to the earlier Navajo brief, to "immunity from suit in the original jurisdiction of this Court by the Navajo Indian Tribe," but Arizona has stated the view most elaborately that the Navajo intervention, if granted, would violate the states' immunity from suit. (Pages 5 through 8, inclusive, of Arizona's brief in opposition to the original Navajo motion.)

A careful analysis of the several authorities cited by Arizona indicates that such support as they may offer for the Arizona contention is indeed very weak.

The United States Constitution grants original jurisdiction to this Court in instances in which suit is brought by one state against another or by the United States against a state. To the extent of this grant of jurisdiction, the state sued possesses no immunity. It is equally clear, however, particularly in light of the Eleventh Amendment to the Constitution, that the judicial power of the United

States does not extend to suits against one of the states by citizens of another or of a foreign state. In addition, it is axiomatic that a state cannot be sued in its own courts without its consent.

This doctrine of immunity was the major premise upon which Arizona relied. Its minor premise, stated on page 7 of its answering brief, was that "intervention by the Navajo Tribe in this litigation would constitute a suit against the State of Arizona." An additional implicit element in its support of its minor premise must necessarily have been that Arizona has not consented to the "suit" by the Navajo Tribe and has not waived its immunity as to the tribe.

Would the intervention in fact constitute a suit against Arizona or any other state involved in this action? In support of its affirmative view, Arizona quoted from Felix S. Cohen, Handbook of Federal Indian Law, page 372, where it is said that "consequently, an Indian tribe as such cannot sue, be sued, or intervene in any case where the original jurisdiction of the Supreme Court is invoked."

The Navajo Indian Tribe has already demonstrated its respect for Mr. Cohen in its earlier brief, where favorable reference was made to his Handbook. It is respectfully submitted, however, that the statement quoted above is of somewhat greater breadth than logic or supporting cases cited would justify. Clearly the Navajo Indian Tribe, or any other tribe, could not initiate an action against a state and thereby invoke the original jurisdiction of this Court. Indeed, even if a state were to sue the Indian tribe itself, that would not, standing alone, satisfy the constitutional prerequisites for original jurisdiction.

But this does not compel a conclusion that where one state has in fact created original jurisdiction by suing another in the Supreme Court, an indian tribe cannot intervene in such an action to protect its own vital interests which may be profoundly affected and prejudiced by the lawsuit. It is difficult to see how the Supreme Court would be ousted from its already existing jurisdiction by such an intervention, or in what manner the constitutional provision as to original jurisdiction limits the right to intervene. The statement quoted by Arizona states that an indian tribe may not intervene in such a case. The logic of the law does not demand or support such a conclusion.

Indeed, logic supports just the opposite conclusion. The Constitution provides for an action within the original jurisdiction of the Supreme Court. It is not lightly to be supposed that the Constitution itself contemplates an original jurisdiction proceeding conducted in a manner which would otherwise violate the Due Process Clause of the Fifth Amendment. This could easily result if it were held than an action within the original jurisdiction of the Court, once begun, could not involve parties other than states or the United States. Perhaps nothing could be more determinative of the property rights and future development of the indians of Arizona than the judgment of the Court in this case. To proceed and to bind the petitioner by the ultimate judgment without permitting participation in the suit would be to use the original jurisdiction of this Court to impair legal rights without proper legal process.

In analogous cases, it has sometimes been contended by a state, after beginning an action against a private party, that its sovereign immunity from suit creates a bar

against counterclaims by the defendant pertaining to the subject-matter of the suit. The West Virginia Supreme Court, in *State v. Ruthbell Coal Co.*, 56 S.E. 2d 549 (1949), forcefully answered this contention with the following language:

> "We think it would be unconscionable and contrary to the due process clauses contained in the Fourteenth Amendment to the Constitution of the United States, and Article III, Section 10, of the West Virginia Constitution, to permit the State, as a plaintiff, to bring a citizen into court for the purpose of asserting liability against such citizen, and then strip that citizen of all the procedural rights and defenses which he would have if the state had not been a party plaintiff. We, therefore, are of the opinion that the counterclaim set up in the amended special plea is not a suit against the state within the meaning of the . . . Constitution of this State. . . ."

The same unconscionable result violative of the principles of due process would result if it were to be held that a person vitally affected by an action within the original jurisdiction of the Supreme Court could not in any case intervene in the action because the person so affected is neither a state nor the United States. Instead, the Constitution is properly to be read as establishing the parties which are necessary to create jurisdiction for such a suit and as leaving other procedural matters, such as intervention, to be conducted according to ordinary and proper legal processes. The logic of the Constitution compels this conclusion.

The statement which Arizona has quoted to the con-

trary finds no support in the cases. In its footnote to the statement, the Handbook cites only *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 47 S. Ct. 142 (1926). The Yankton case, however, does not in any way pertain to the question of whether an indian tribe, or any other private party, can intervene in an original action in the Supreme Court. It merely states, by way of a dictum, that the United States could not invoke the original jurisdiction of the Supreme Court by a suit not involving a state, a proposition which the Navajo Indians readily admit. No question of intervention was present in the Yankton case, nor did the Court even discuss such an issue.

Arizona's brief does not itself supply the cases that are necessary to fill the void underlying its contention. It states that intervention would constitute a suit against Arizona, but then relies on several cases which merely affirm the doctrine that "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding." In this connection, Arizona cites *Ex parte Ayers*, 123 U.S. 443, 8 S. Ct. 164 (1887); *Ex parte New York*, 256 U.S. 490, 41 S. Ct. 588 (1921); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S. Ct. 185 (1937); and *Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 65 S. Ct. 347 (1945).

But *Ex parte Ayers, supra*, had nothing to do with intervention or with indian rights. The question was, rather, whether a suit against state officers would have in law constituted a suit against the state, an issue very much unlike that which we face here.

Ex parte New York centered around a similar issue

to that raised in *Ex parte Ayers,* the issue being whether a libel in admiralty against the Superintendent of Public Works in New York would constitute a suit against the State of New York. *Worcester County Trust Co. v. Riley,* involved an identical question as to a suit against the tax officers of two states. This is true, also, of *Ford Motor Co. v. Treasury Department.* All of the cases cited by Arizona to support its contention bear on a question which is not even analogous to that raised in the present instance, and none involve a statement, or even lend themselves to the inference, that intervention would constitute a "suit" for immunity purposes.

The issue of whether intervention is to be considered a "suit" under the sovereign immunity doctrine seems seldom to have been discussed by the authorities. Considerable discussion has been made, however, of a closely related type of problem, the question there being whether, after a state has itself begun a suit against a private party, the private party can counterclaim or cross-claim against the state as to matters involved in the subject-matter of the state's own suit. Would such a counterclaim or cross-complaint be a "suit" against the state and subject to sovereign immunity?

This question is analogous to the present one because in both the counterclaim and the intervention situations it is the state itself which has initiated the litigation, as has Arizona in the present instance, and placed before the court the rights of the respective parties for judicial determination. It is certainly to be conceded that even here a counterclaim, cross-complaint or intervention going beyond the subject-matter of the state's own suit might legitimately be considered a "suit" subject to immunity. But

where the private party seeks merely to assert rights integrally involved in the very matters raised by the state itself, can it be said to be within the contemplation of the historic immunity doctrine or of the Constitution to bar the making of such assertion? Surely a negative answer to this question is called for, either because the counterclaim, cross-complaint or intervention is not to be considered a "suit" in the technical language of the doctrine, or because the state is to be taken to have waived its immunity to this extent by its having started the action in the first place.

We have already quoted from *State v. Ruthbell Coal Co.*, 56 S.E. 2d 549 (W. Va. 1949), in which it is stated by the West Virginia Supreme Court that it would be "unconscionable" and "contrary to due process" to deny a counterclaim in such a case because of a misconceived notion of sovereign immunity. It is also important to note certain further language in that court's opinion which bears on the fact that the state, by initiating the action in the first place, has waived its immunity. The court stated: "This Court, however, has indicated that where, in the first instance, the State has instituted a suit or action against a citizen, *it thereby lays aside its sovereignty* and is subject to all procedural rules which govern any other party litigant." (Emphasis added)

The same view as to the inapplicability of sovereign immunity to counterclaims or cross-complaints germane to the matter in controversy is to be found in *State v. Hartford Accident & Indemnity Co.*, 136 Conn. 157, 70 A. 2d 109 (1949); *Reilly v. State*, 175 A. 582 (Conn. 1934); *Commonwealth of Massachusetts v. Davis*, 160 S.W. 2d 543 (Tex. Civ. App. 1942); *Anderson, Clayton & Co. v.*

State, 62 S.W. 2d 107 (Tex. Comm. App. 1933); and *State v. King*, 84 S.E. 902 (W. Va. 1915). The law has been succinctly stated in *State v. Hartford Accident & Indemnity Co., supra*, as follows:

> "If the state itself invokes the jurisdiction of the court to secure affirmative relief, it subjects itself to any proper cross-demand involved in the subject-matter of the action." 70 A. 2d at 110.

As to a state involved as a defendant in an action within the original jurisdiction of the Supreme Court, the concept of "waiver of immunity" present in the counterclaim cases does not apply. In regard to such states, rather, there is no proper immunity in an original jurisdiction case precisely because the Constitution, in providing for such a case, must be taken to contemplate that doctrines, even though applicable elsewhere, cannot carry over which would warp the litigation into an instrument of injustice by denying participation to persons whose interests have been brought up for judicial appraisal. Thus, even those states that are defendants in a case within the original jurisdiction of the Court cannot complain under sovereign immunity when legitimate parties seek to participate in the litigation.

It is the view of the Navajo Indian Tribe, therefore, that since the vitally significant issue of water rights in the Lower Basin of the Colorado River has been raised by Arizona and made subject by it to judicial determination in an action within the original jurisdiction of this Court, sovereign immunity does not bar the Navajo Indians from asserting their interests respecting those water rights which Arizona has thus placed in legal jeopardy.

II. The United States as Not Having Such "Control" Over the Litigation as to Bar Intervention by the Navajo Indian Tribe if the Representation is Inadequate.

The briefs of both Arizona and the United States have argued that the Attorney General is vested with "exclusive control" in a case in which indian interests are represented and that, therefore, the Navajo Indians cannot derogate from this control by becoming a party to this action.

It would seem from an analysis of the cases and other authorities that this broad and pervasive doctrine of "exclusive control" is the "mighty oak" which has grown out of the proverbial "little acorn". The doctrine is attractive in its breadth and simplicity, and in its exclusive effect, to those who would prefer to hear the indian voice subordinated, but it is a doctrine which in the form set forth by Arizona and the United States is the product of an oversimplified extension of a much narrower doctrine.

Those who assert the "exclusive control" rule rely almost entirely upon *Heckman v. United States*, 224 U.S. 413, 32 S. Ct. 424 (1912) and the small complex of cases which have since applied its doctrine. Both Arizona and the United States have quoted sizable portions from the Heckman case.

Certainly there is no dispute as to the validity of the principles set forth in the Heckman case. The real question pertains to precisely what those principles are and how broadly they may be taken to exclude indian partici-

pation in suits of every kind, especially where the representation given the indians is shown, as here, to have been inadequate. The United States interprets the Heckman doctrine to mean that "when the United States has elected to prosecute or intervene in a suit in behalf of . . . an indian tribe, it is entitled to exercise complete and exclusive control over the litigation to the exclusion of the Indians themselves." (United States Response, page 9) A close reading of the decision, however, does not bear out so broad a generalization.

In the Heckman case the United States filed a bill in equity to cancel certain conveyances made by members of the Cherokee Nation. A statute had placed restrictions upon the alienability of indian lands. The argument was raised that the indians, whose conveyances were to be set aside, should have been made parties to the suit. The Court considered this position untenable. It considered that the United States was representing the very indian grantors whose conveyances it sought to cancel. It held that they "were precluded from taking any position in the legal proceedings instituted by the government to enforce the restrictions which would render the proceedings ineffectual or give support to the prohibited acts."

The Heckman case involves, then, an action under a protective statute the very purpose of which was to protect the indians from their own indiscretion so far as the alienation of lands was concerned. The suit was to overturn something the indians themselves had done and, in doing so, to protect them against themselves. Surely in such a case, under such a statute, the indians who had committed the indiscretion and whose conveyances were to be canceled could not have been given charge of the

litigation, since to give them such charge as parties or otherwise would have been to defeat the purposes of the statute. If the statute, being protective in its nature, declares them incompetent to alienate land in the first instance, it would seem strange to permit them to take over any litigation designed to assert their statutory incompetence.

After saying that in such a case the indians were "precluded from taking any position in the legal proceedings," the Supreme Court went on to say that "This is involved necessarily . . . *in the nature and purpose of the suit.*" (Emphasis added) It is to be thought, then, that the Heckman opinion did not intend to formulate a broad, spacious rule applying to all indian litigation, but intended to state a rule governing the type of protective-statute situation that was then before the Court. If the rule is to go beyond the circumstances of the Heckman case itself, the broadening should in any event be accomplished through a sophisticated extension and certainly not through an oversimplified blanket exclusion.

Arizona and the United States have together cited six cases applying the Heckman doctrine. (Arizona brief, page 10; U.S. Response, page 5) In terms of their facts, all of these cases lie within the area legitimately within the scope of the Heckman case. Although one of them arose under a statute providing for the quieting of title, the other cases all pertained either to leasing or other land alienation problems. The first case, *Connor v. Cornell*, 32 F. 2d 581 (8th Cir. 1929), involved, as in the Heckman case, a suit by the United States to set aside a warranty deed executed in violation of the inalienability of land provisions of the federal statute. The result in the

case was considered res judicata as to a later suit brought by the indian himself. This case was certainly within the limited area covered by the Heckman case. The next case was *Pueblo of Picuris v. Abeyta,* 50 F. 2d 12 (10th Cir. 1931), which arose under a statute giving the Attorney General the power to sue in behalf of the indians in quieting title to certain land. Here again, the case involved a specific statute of a protective nature pertaining to real property. *McGugin v. United States,* 109 F. 2d 94 (10th Cir. 1940) pertained to restrictions on the alienation of land by an indian and had to do with the recovery of certain United States bonds which had been transferred by the indian after having been purchased with the royalties from an oil and gas lease. *United States v. Adamic,* 54 F. Supp. 221 (D.C.W.D.N.Y. 1943) was a suit by the United States to have certain indian leases declared null and void. The next case to arise was *White v. Sinclair Prairie Oil Co.,* 139 F. 2d 103 (10th Cir. 1944). This case involved a suit by the United States on behalf of an indian to obtain an accounting for royalties under certain leases. The decision in the case brought by the United States was considered res judicata in a later suit brought by the indian. The most recent case cited by either Arizona or the United States is *Sadler v. Public National Bank & Trust Co. of New York,* 172 F. 2d 870 (10th Cir. 1949). The Sadler case involved an action for cancellation of an oil and gas lease.

Each of these cases, then, was closely analogous to the Heckman case in its factual situation. There can be seen in these cases no extension of the doctrine of "exclusive control of the litigation" beyond the area covered by protective statutes dealing with indian leasing, convey-

ancing and real property situations. A broader generalization dealing with litigation in other areas is certainly not justified on the basis of these cases.

As to the many other areas of litigation which might arise, two propositions seem clear. They are that (1) an indian tribe constitutes a sufficient legal entity to conduct litigation in its own behalf, and (2) the duty placed on the Department of Justice by federal statute to represent the indians in their litigation is solely for the purpose of securing them adequate representation and is not intended to be of such a mandatory nature as to preempt the indians from any participation in their litigation, particularly where the purpose of the statute providing for the representation is not satisfied because the indians are not being adequately represented.

The capacity of indian tribes to conduct litigation has been discussed in Cohen, Handbook of Federal Indian Law, pages 283-285. After referring to various statutes which themselves allow suits by or against indian tribes, Mr. Cohen stated the following as to the capacity of an indian tribe to sue in the absence of a statute:

> "Although a tribe, as a municipality, is not subject to suit without its consent, it may be argued that a tribe has legal capacity to consent to such a suit. The power to consent to such suit must be regarded as cognate with the power to bring suit.
>
> Some support for the view that an indian tribe is capable of appearing in litigation as a plaintiff or voluntary defendant is found in the statement of the Supreme Court in *United States v. Candelaria*:

'It was settled in *Lane v. Pueblo of Santa Rosa,*' 249 U.S. 110, that under territorial laws enacted with Congressional sanction each pueblo in New Mexico — meaning the Indians comprising the community — became a juristic person and enabled to sue and defend in respect of its lands.'

This statement, standing by itself, could be given a limited scope on the grounds that the Pueblos are statutory corporations. The fact remains, however, that the Supreme Court has entertained suits in which Indian tribes were parties litigant, without any question of legal capacity being raised. An outstanding case in point is the case of *Cherokee Nation v. Hitchcock.* This was a suit brought by an Indian tribe against the Secretary of the Interior. Although judgment was rendered for the defendant, no question was raised, apparently, as to the capacity of the principal plaintiff (individual members were joined as parties plaintiff) to bring the suit."

The capacity of an indian tribe to sue is readily inferable from the principles stated by this Court in *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344 (1922), in which the Court held that labor unions constitute such an entity as may be sued in view of the legislative recognition given to them as subjects of rights and duties. As with labor unions, indian tribes have extensively been made subject to legal rights and duties. Both upon the logic set forth in the quotation above and upon the doctrine of the Coronado case, then, it would seem clear that an indian tribe constitutes such a legal entity as may sue in its own name. This conclusion finds further support in *Makah Indian Tribe v. McCauly,* 39 F.

Supp. 75 (D.C.N.D. 1941), where an indian tribe was the plaintiff and the court stated that "They may . . . . institute and prosecute an action to enforce their rights under the Constitution, laws and treaties of the United States." In *United States v. United States Fidelity & Guaranty Company,* 106 F. 2d 804 (10th Cir. 1939) the court referred to an indian tribe as a "sovereign" and expressed the view that indian tribes are themselves immune from civil suit except where they consent. Certainly the doctrine of "sovereign immunity" would not need to be extended to indian tribes if they were not legal entities capable of being sued.

An argument that an indian tribe lacked capacity to sue would be difficult to sustain. Indeed, the parties to this litigation, in their responses, have not contended that the intervention should be denied on the ground of such a lack of capacity.

It has been important to stress the legal capacity of an indian tribe to conduct litigation, because it would seem most reasonable to suppose that this capacity is the general rule, except where limitations have been placed upon it in an area such as that covered by the Heckman doctrine, which itself actually springs from a statutory limitation. There is nothing upon which a general inhibition of the indian right to protect itself in the courts can be founded, unless such an inhibition is to be found in federal statutes or treaties.

In this connection, see *Siniscal v. United States;* 208 F. 2d 406 (9th Cir. 1953). The Ninth Circuit Court of Appeals referred to the statutory provisions appearing at 25 U.S.C.A. §175, which provides that "In all states

and territories where there are reservations or allotted indians the United States District Attorney shall represent them in all suits at law and in equity." The court stated:

> *"We think 25 U.S.C.A., §175, is not mandatory and that its purpose is no more than to insure the indians adequate representation in suits to which they might be parties."* (Emphasis added)

This language indicates strongly that the statute does not establish an invariable rule requiring Justice Department representation, and that the representation, even where given, is for the purpose of insuring adequate representation. Further, with reference to the indian appellants, the court stated that "They are sued as persons acting individually and not with reference to any right in which the United States or any officer thereof is in the position of trustee or guardian. They were ably represented by counsel. It is not a situation requiring for them a guardian ad litem." We find in this statement a recognition of the distinction between an ordinary situation and a protective, guardian type of circumstance, such as was present in the Heckman case and other inalienability of land cases.

If, then, the general rule is one of indian capacity to sue and the representation by the Justice Department, except in peculiarly protective situations defined by statute, is not mandatory and is only to insure adequate representation, it is reasonable to conclude that in the general situation Rule 24(a) of the Federal Rules of Civil Procedure would apply. This rule pertains to "intervention as of right" in cases where "the representation of the

applicant's interest by existing parties is or may be inadequate . . . ."

Justice Department representation having been provided solely for the purpose of securing adequate representation to the indians, intervention by an indian tribe in its own right would be proper where it is shown that the representation given has in fact been extremely inadequate. If the statute providing for Justice Department representation were construed to exclude intervention in such a case, such a construction would militate against the very purpose of the statute itself. It would, in addition, make the representation mandatory so far as the indians are concerned, something which the Ninth Circuit Court of Appeals has said the statute does not do.

By an oversimplified extension of a doctrine of exclusion which is actually proper only in the area in which it was intended, the briefs of Arizona and the United States have argued that the Navajo Indian Tribe must as a matter of law be denied intervention. The result would be a paternalism which, like so may paternalisms where unduly extended beyond the needs or natural relations of the parties, would cease to be truly paternalistic and would be no more than an excuse for restrictive limitation and oppression.

The intervention is lawful precisely because the "paternalism" does not extend so far.

III. Response to the Argument that the Navajo Motion is Untimely and that the United States Representation Has Been Adequate.

The Navajo Indian Tribe reviewed the question of timeliness extensively in its original brief precisely because it anticipated that a contention as to its untimeliness would be raised. The earlier Navajo brief set out at length the past efforts of the Navajo Indian Tribe to secure adequate representation. (See Brief in support of original Navajo motion, pp. 18 to 25.) It was to be expected that those who sought to minimize the ultimate legal recognition of indian water rights in the Colorado River would oppose the motion for intervention and would seek to disparge the past efforts of the Navajo Tribe to be heard in this case. We doubt whether a continued and protracted discourse among the parties as to letters written, telephone calls made, and the like, will be of significant assistance to the Court beyond what has been said by the parties thusfar. Such a discourse could only serve to obscure the larger issues in a mass of minutia.

Therefore the Navajo Indian Tribe wishes merely to reiterate that those who allege untimeliness must implicitly assume that the inadequacy of the United States representation was sufficiently manifest at an earlier stage in the proceeding as to render necessary the raising of the serious charge of inadequate representation by an earlier motion to intervene. But such a charge cannot lightly be made, and so long as it appeared that the representation might prove to be satisfactory, the Navajo Indian Tribe could not have thought it wise to seek intervention. Its dissatisfaction at one earlier point caused it, together with other indian tribes, to apply to the Special Master for the

appointment of special counsel to represent indian interests, but when this was denied by the Special Master it was to be hoped that the dissatisfaction theretofore manifested by the several indian tribes would provide an incentive to the Department of Justice to press with greater vigor the legal position of the indians. Whatever may have been the conduct of the Department of Justice in the past, it was not to be assumed that after the Special Master's decision it would turn a deaf ear to the remonstrances theretofore made. The full inadequacy of the representation given did not and could not, as has been pointed out in the original Navajo brief, become apparent until after the exceptions to the Special Master's report were filed by the United States.

When those exceptions were filed, it became apparent that the United States had, in the five significant areas referred to in the earlier Navajo brief, taken so accomodating and "reasonable" a position as to fail to represent Navajo interests at all. In its response to the Navajo brief, the United States has argued that the positions it has taken have been "reasonable". They have not been reasonable. They have been worse than neglectful, passive and supine; they have affirmatively downgraded and depressed the position of the client which the Department of Justice is supposed to defend by deleting from the original petition for intervention by the United States the basic allegation based upon the doctrine of *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908), although this allegation or its equivalent had for many years been included in every pleading filed by the Department of Justice in which it acted for indian interests where indian water rights were involved.

Advocacy and an impotent "reasonableness" are not to be confused. A good advocate must, of course, assume a reasonable position, but it must also be a virile position, fully asserting the rights of those whom he presumes to represent. It is submitted that from such a perspective the representation given the Navajo Indian Tribe has been grossly inadequate. It is strained indeed to suggest that the Navajo Indian Tribe is somehow at fault for not having realized this before the exceptions to the Special Master's report were filed.

IV. Reconsideration of Earlier Motion is Justified by Presence of Issues Not Previously Briefed; Order to Show Cause is Both Desirable and Legally Appropriate.

The courts have often stated that a motion may be reconsidered, or re-argued, where there are decisions or principles of law which the court has not considered and which might exercise a controlling effect. *Fawcett Publications, Inc. v. New World Club, Inc.*, 72 N.Y.S. 2d 768 (1947); *People v. Dellamura*, 28 N.Y.S. 2d 584 (1941); *In re Hooker's Estate*, 18 N.Y.S. 2d 107, 173 Misc. 515 (1940); *J. I. Case Company v. McDonald*, 76 Idaho 223, 280 P. 2d 1070, 1073 (1955). In the present instance, at the time it decided the original Navajo Motion for Leave to Intervene, the Court had not yet had opportunity to consider the authorities and legal principles set out above in this brief pertaining to the two new issues raised by the brief of Arizona and the United States. Only through the consideration, and consequent legal recognition, of these principles may a correct decision be made upon the motion.

The motion for the order to show cause is both desirable and legally appropriate. It has often been stated by this Court that the indians are wards of the United States and that the United States has a duty to them as a guardian. *Seminole Nation v. United States*, 316 U.S. 286; *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119; *United States v. Ramsey*, 271 U.S. 467; *Jaybird Mining Co. v. Weir*, 271 U.S. 609; *United States v. Minnesota*, 270 U.S. 181; *Cramer v. United States*, 261 U.S. 219; *Barker v. Harvey*, 181 U.S. 481.

That a court of equity has inherent power to obtain from a fiduciary, such as a guardian, an accounting of the action taken under the fiduciary relation has often been stated by the courts. "Courts of equity have inherent jurisdiction to require accountings and settlement by guardians. (21 Cyc. 155) . . . ." *Schindler v. Spackman*, 16 F. 2d 45, 48 (8th Cir. 1926). See also *In re Deming's Guardianship*, 192 Wash. 190, 73 P. 2d 764 (1937); *Haudenschilt v. Haudenschilt*, 129 W. Va. 92, 39 S.E. 2d 328 (1946).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

EVOLUTION OF SECTIONS 4(a) AND 5 (1st PARAGRAPH) OF THE BOULDER CANYON PROJECT ACT (FOR USE BY ARIZONA ON ORAL ARGUMENT)

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Section 5 of S. 3331, as introduced in the 69th Congress, 1st Session, provided:

SEC. 5. That the said Secretary is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and delivery at the switchboard to municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenues accruing to the said subfund under the reclamation law or hereunder, will cover operation and maintenance expense of works constructed hereunder, interest on bonds after completion of the works, and provide for the amortization of said bonds within fifty years. Contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators.

As reported out in the 69th Congress by the Senate Committee on Irrigation and Reclamation, section 5 of S. 3331 read as follows:

SEC. 5. That the said Secretary is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and delivery at the switchboard to municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing [to the said subfund] under the reclamation law [or hereunder] *and under this Act,* will *in his judgment* cover *all expenses of* operation and maintenance [expense of] *incurred by the United States on account*

of works constructed [hereunder, interest on bonds after completion of the works, and provide for the amortization of said bonds within fifty years] *under this Act and the payments to the United States under subdivision (b) of section 4.* Contracts respecting water for *irrigation and* domestic uses [may] *shall* be for permanent service [but subject to rights of prior appropriators]. *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*[1]

During the floor debate of S. 3331 in the 69th Congress Senator Ashurst proposed the following amendment to section 5:

Provided, That the Secretary of the Interior in the delivery of water shall limit the amounts used in Arizona and California so that neither of said States shall use in excess of one-half of the water available in the lower basin out of the main Colorado River after 300,000 acre-feet has been deducted for use within the State of Nevada.[2]

Section 5 of S. 728, introduced in the 70th Congress in the form shown above, as reported out by the Committee on Irrigation and Reclamation, provided as follows:

SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon,

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[1] Bracketed words omitted and italicized words added by the Committee to S. 3331 as introduced into the Senate. Section 5 appeared in this amended form when S. 728 was introduced in the 70th Congress, 1st Session.

[2] 68 Cong. Rec. 4763 (February 25, 1927).

for irrigation and domestic uses, *and generation of electrical energy* and delivery at the switchboard to *States,* municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service: *Provided, however, That said contracts shall not provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the Lower Basin by the Colorado River compact mentioned in section 12 and one-half of the unallocated, excess and/or surplus water: Provided, further, That no such contracts shall be made until California, by act of its legislature, shall have ratified and approved the foregoing provision for use of water in said State.* No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.[3]

Discussing section 5, as amended in Committee in the 70th Congress, Senator Johnson of California stated:

Section 5 provides that the contract must be general for storage and delivery of water and the Secretary shall fix charges to meet the revenue requirements, and that contracts for irrigation and domestic uses must be for permanent service. An amendment has been inserted there at the request of the upper basin

[3] Italicized words added in Committee. See S. REP. No. 592, 70th Cong., 1st Sess. (1928).

States, offered, I think, in the committee, by the Senator from Wyoming which provides that—

Provided, however, That said contracts shall not provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the lower basin by the Colorado River compact mentioned in section 12 and one-half of the unallocated, excess, and/or surplus water: *Provided further,* That no such contracts shall be made until California, by act of its legislature, shall have ratified and approved the foregoing provision for use of water in said State.

That is another rigorous provision, a rigorous provision to which those who represented California were willing to consent in order that legislation might be accorded, but binding California perpetually and forever to a use not to exceed 4,600,000 acre-feet of water.[4]

An amendment to section 5, printed but not offered by Senator Waterman, in the 1st Session of the 70th Congress, after S. 728 had been reported out of Committee, provided:

On page 7, line 9, strike out the words "That no", together with the following lines numbered 10, 11, and ending with the words in line 12, to wit "in said State", and insert in lieu thereof: "That no such contracts nor any contract whatever, of any kind, shall be made under any provision of this Act until and unless the State of California, by a valid and binding act of its legislature, approved by its governor, shall have first ratified and approved all the provisions of this section of this Act, in any way relating to the use of the waters of the main stream of the Colorado River within or by the State of California, or by any person or corporation of said State, and shall also in and by such act of its legislature, solemnly declare and agree, as

[4] 69 Cong. Rec. 7250 (April 26, 1928).

an express covenant and in express consideration of the passage of this Act, that any and all water demanded and required, or lawfully appropriated and applied to a beneficial use by the State of Arizona or any of its inhabitants, including corporations, municipal or otherwise, or any of them, out of the main stream of the Colorado River at any time in excess of two million nine hundred thousand acre-feet, per annum, plus one-half of the said unallocated excess and/or surplus water, will be furnished and supplied by the said State of California exclusively out of the said four million six hundred thousand acre-feet of water and said one-half of the said unallocated water last aforesaid, so that in no event shall there ever be demanded or required, out of the main stream of the Colorado River, by the States of Arizona, California, and Nevada, or either of them, any water in excess of the amount apportioned to them by Article III of the Colorado River compact, to be delivered to them, or any of them, at Lee Ferry designated in said Colorado River compact or elsewhere.''[5]

Section 4(a) of S. 3331, as introduced into the Senate in the 69th Congress, provided:

SEC. 4. (a) No work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be initiated hereunder, until the respective legislatures of at least six of the signatory States mentioned in section 12 hereof shall have approved the Colorado River Compact mentioned in said section 12, and shall have consented to a waiver of the provision of the first paragraph of article 11 of said compact making the same binding and obligatory when it shall have been approved by the legislatures of each of the seven signatory States, and until the President, by public proclamation,

[5] 69 Cong. Rec. 5415 (March 27, 1928).

shall have declared that the said compact has been approved by and become binding and obligatory upon at least six of the signatory States.

As reported out by the Committee on Irrigation and Reclamation in the 69th Congress, section 4(a) provided:

SEC. 4. (a) No work shall be begun and no monies expended on or in connection with the works or structures provided for in this Act, and no water rights shall be *claimed or* initiated hereunder, and *no steps* shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works *or structures* until [the respective legislatures of at least six of the signatory states mentioned in section 12 hereof] *the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming* shall have approved the Colorado River compact mentioned in [said] section 12 *hereof* and shall have consented to a waiver of the provisions of the first paragraph of Article XI of said compact, [making] *which makes* the same binding and obligatory *only* when [it shall have been] approved by [the legislatures of] each of the seven [signatory] States *mentioned in said section 12, and shall have approved said compact without condition save that of such six-State approval,* and until the President, by public proclamation shall have *so* declared [that the said compact has been approved by and become binding and obligatory upon at least six of the signatory States].[6]

Section 4(a) of S. 728, as reported onto the floor of the Senate in the 70th Congress, 1st Session, provided:

SEC. 4. (a) No work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights

[6] Bracketed words omitted and italicized words added by the Committee to section 4(a) of S. 3331 as introduced into the Senate.

shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures until the State of California and at least [three] *five* of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have approved the Colorado River compact mentioned in section 12 hereof and shall have consented to a waiver of the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States mentioned in said section 12, and shall have approved said compact without condition save that of such approval by the State of California and at least [three] *five* of the other States mentioned and until the President by public proclamation shall have so declared.[7]

An amendment to section 4(a), printed but not offered by Senator Bratton as a substitute for section 4(a), as reported onto the floor of the Senate in the 70th Congress, 1st Session, provided:

SEC. 4. (a) This Act shall not take effect, and no authority shall be exercised hereunder unless and until (1) the States of California, Colorado, Nevada, New Mexico, Utah, Arizona, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof and the President, by public proclamation, shall have so declared, or (2) if after one year from the date of the passage of this Act the said States shall fail to ratify the said compact; then if six States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the

[7] Italicized words substituted by the Senate Committee on Irrigation and Reclamation for the bracketed words, which appeared in S. 728 as introduced in the 70th Congress, 1st Session, by Senator Johnson. See S. REP. No. 592, 70th Cong., 1st Sess. (1928).

first paragraph of Article II of said compact, which makes the same binding and obligatory only when approved by each of the seven States mentioned in said section 12, and shall have approved said compact without conditions, save that of such six States' approval and the President, by public proclamation, shall have so declared: *Provided, however,* That if ratification should be upon a six-State basis, then California shall agree in the ratifying Act that the aggregate annual consumptive use in California of waters of the Colorado River shall never exceed 4,200,000 acre-feet and that the use by California of the excess or surplus waters unallocated by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters, such use always to be subject to the terms of the Colorado River compact.[8]

Another amendment to section 4(a) and to section 5, printed by Senator Phipps as a substitute for section 4(a) and as a modification in section 5, as reported onto the floor of the Senate in the 70th Congress, 1st Session, provided:

SEC. 4 (a). This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River Compact, mentioned in section 12 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this Act, then, until six

[8] 69 Cong. Rec. 7047 (April 24, 1928).

of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven states signatory thereto, and shall have approved said compact without conditions, save that of such six State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by Act of its legislature, shall agree with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual diversions of water of and from the Colorado River for use in the State of California, including all diversions under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million six hundred thousand acre-feet of the waters apportioned to the Lower Basin States by the Colorado River Compact and/or more than one-half of any excess or surplus waters unapportioned by said compact, such diversions always to be subject to the terms of said compact.

On page 7, strike out lines 4 to 12, inclusive, and insert in lieu thereof the following: "permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall."[9]

Another amendment to section 4(a), printed but not offered by Senator Pittman as a substitute for section 4(a), as reported onto the floor of the Senate in the 70th Congress, 1st Session, provided:

SEC. 4(a). This act shall not take effect and no authority shall be exercised hereunder, unless and until the States of Arizona, California, Colorado, Nevada,

[9] 69 Cong. Rec. 7591 (May 2, 1928).

New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proclamation, shall have so declared: *Provided,* That the ratification act of the State of California shall contain a provision agreeing that the aggregate annual consumptive use by that State of waters of the Colorado River shall never exceed 4,200,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of Article III of said compact, and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said Article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters; and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by the agreement described in the following paragraph, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes.

The said ratifying act shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada, and Arizona the foregoing limitations are accepted and approved as fixing the apportionment of water to California, then California shall and will therein agree (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 3,000,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) of the 1,000,000 acre-feet in addition which the lower basin has the right to use annually by paragraph (b) of said article there shall be

apportioned to the State of Arizona 500,000 acre-feet for beneficial consumptive use, and (3) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (4) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (5) that the waters of the Gila River and its tributaries shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico; but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters apportioned by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply one-half of any deficiency which must be supplied to Mexico by the lower basin, and (6) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water which can not reasonably be applied to domestic and agricultural uses, and (7) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact.[10]

Another amendment to section 4(a), offered by Senator Hayden in the 70th Congress, 2d Session, in lieu of all of section 4(a), as it then read, provided:

SEC. 4(a). This act shall not take effect and no authority shall be exercised hereunder, unless and until the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proclamation, shall

[10] 69 Cong. Rec. 10259-60 (May 28, 1928).

have so declared: *Provided,* That the ratification act of the State of California shall contain a provision agreeing that the aggregate annual consumptive use by that State of waters of the Colorado River shall never exceed 4,200,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of Article III of said compact, and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said Article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters; and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by the agreement described in the following paragraph, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes.

The said ratifying act shall further provide that if by tri-State agreement hereafter entered into by the States of California, Nevada, and Arizona the foregoing limitations are accepted and approved as fixing the apportionment of water to California, then California shall and will therein agree (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 3,000,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) of the 1,000,000 acre-feet in addition which the lower basin has the right to use annually by paragraph (b) of said article, there shall be apportioned to the State of Arizona 500,000 acre-feet for beneficial consumptive use, and (3) that the

State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (4) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (5) that the waters of the Gila River and its tributaries shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico, but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters apportioned by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply one-half of any deficiency which must be supplied to Mexico by the lower basin, and (6) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water which can not reasonably be applied to domestic and agricultural uses, and (7) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact.[11]

Another amendment to section 4(a), printed by Senator Bratton in the 70th Congress, 2d Session, as a substitute for section 4(a) as it then read, provided:

SEC. 4. (a) This Act shall not take effect and no authority shall be exercised hereunder, unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact mentioned in section 12 hereof, and the President, by public proc-

[11] 70 Cong. Rec. 162 (December 6, 1928).

lamation, shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared: Provided, That in either event the ratification act of the State of California shall contain a provision agreeing that the aggregate annual consumptive use by that State of waters of the Colorado River shall never exceed 4,400,000 acre-feet of the water apportioned to the lower basin by paragraph (a) of article III of said compact, and that the aggregate beneficial consumptive use by that State of waters of the Colorado River shall never exceed 500,000 acre-feet of the water apportioned by the compact to the lower basin by paragraph (b) of said article III; and that the use by California of the excess or surplus waters unapportioned by the Colorado River compact shall never exceed annually one-half of such excess or surplus waters; and that the limitations so accepted by California shall be irrevocable and unconditional, unless modified by mutual agreement subsequently entered into by all of the States affected, to wit: Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, nor shall said limitations apply to water diverted by or for the benefit of the Yuma reclamation project for domestic, agricultural, or power purposes except to the portion thereof consumptively used in California for domestic and agricultural purposes.[12]

[12] 70 Cong. Rec. 277 (December 8, 1928).

An amendment offered by Senator Phipps to the amendment of Senator Hayden to section 4(a) in the 70th Congress, 2d Session, and the colloquoy preceding introduction of the amendment, were as follows:

Mr. Phipps. I understand that the pending amendment is the one offered by the junior Senator from Arizona [Mr. Hayden]. I desire to offer an amendment to that amendment, which I believe is permissible under the rule in force.

The Presiding Officer. The Chair will ask the Senator from New Mexico whether he has submitted his amendment? Is it pending?

Mr. Bratton. It has been printed and is lying on the table, but has not been formally proposed.

The Presiding Officer. Then the amendment of the Senator from Colorado to the amendment will be in order.

Mr. Phipps. I ask to have my amendment to the amendment printed in the RECORD.

There being no objection, the amendment was ordered to be printed in the RECORD as follows:

On page 5, strike out all of lines 1 to 18, inclusive, and insert in lieu thereof the following:

"SEC. 4(a). This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 12 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within one year from the date of the passage of this Act then, until six of said States, including the State of Califor-

nia, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such 6-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,600,000 acre-feet of the waters apportioned to the lower-basin States by the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

On page 6, strike out line 25 and on page 7, lines 1 to 8, inclusive, and insert in lieu thereof the following: "permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall".

On page 12, after line 14, add the following paragraph to section 6:

"The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal water power act upon or affecting the Colorado River or any of its tributaries in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this act shall become effective, as provided in section 4 herein."[13]

[13] 70 Cong. Rec. 324 (December 10, 1928).

The problem of parliamentary procedure raised by the Phipps amendment to the Hayden amendment to section 4(a) was discussed on the floor of the Senate:

Mr. Hayden. Mr. President, I should like to have the attention of the Senate, that I may discuss the parliamentary situation as it exists and what I may do, if possible, to remedy it, in order that the amendment offered by the Senator from Colorado [Mr. Phipps] may be perfected.

As I understand the situation, the amendment offered by the Senator from Colorado [Mr. Phipps] is an amendment in the second degree, an amendment to the amendment which I have offered, and therefore not subject to amendment. The Senator's amendment contains three substantive propositions, upon which there is a difference of opinion between the States of Arizona and California, and we must vote upon all of them as one if his amendment is not subject to amendment. But if the Senator's amendment could be made subject to amendment the Senate could vote upon the various propositions separately. For example, the Senator has taken from another part of the bill a provision that the State of California shall have 4,600,000 acre-feet of water on the Colorado River. Arizona agrees that the State of California shall have 4,200,000 acre-feet of water.

I desire it arranged so that the Senate may vote upon the question of whether it shall be one figure or the other.

I should like to inquire of the President of the Senate, whether, if I should withdraw the amendment which I have offered, would then the amendment offered by the Senator from Colorado be an amendment in the second degree and subject to amendment?

The Vice President. Will the Senator state his question again?

Mr. Hayden. If I should withdraw the amendment which I have offered, to which the amendment of the Senator from Colorado is a substitute, will his amendment then be an amendment in the first degree and subject to amendment?

The Vice President. The amendment of the Senator from Colorado would have to go along with the amendment of the Senator from Arizona if the Senator from Arizona withdraws his amendment.

Mr. Hayden. Would it not then be possible for the Senator from Colorado to immediately reoffer his amendment?

The Vice President. The Senator from Colorado could do that.

Mr. Hayden. I want to state to the Senate that what I am trying to accomplish is to get a vote on the one particular question of whether the quantity of water which the State of California may divert from the Colorado River should be 4,200,000 acre-feet or 4,600,000 acre-feet. I can state in 15 or 20 minutes all the reasons why Arizona favors the lesser figure, and then the Senate may have a vote upon that question.

Mr. Phipps. Mr. President, will the Senator yield?

Mr. Hayden. I yield.

Mr. Phipps. I desire to call attention to the fact that 4,600,000 acre-feet was the figure adopted by the Senate committee and was written in the substitute bill offered by the Senator from California [Mr. Johnson]. Therefore it seems to me that the point comes right down to the question of 4,600,000 acre-feet as recommended by the Senate committee and 4,200,000 acre-feet as written in the amendment of the Senator from Arizona.

Mr. Hayden. And upon that particular issue and upon nothing else I desire to have a vote of the Senate at this time.

Mr. Phipps. The other item that is in the amendment to which the Senator calls attention, as I under-

stand, is the provision regarding the Federal Power Commission. That is the only other matter, is it not?

Mr. Hayden. My amendment as originally offered provides for a 7-State ratification of the Colorado River compact. The Senator from Colorado in his amendment provides for a 6-State ratification. That is another question upon which I should like to have the Senate take a vote. If the Senate will bear with me for a moment, I desire to say that it is only fair to the State of Arizona that the several substantive propositions which are contained in the amendment of the Senator from Colorado and in my amendment be voted upon, each upon its own merits by the Senate, and not grouped together in one particular amendment. If I am privileged to do so, Mr. President, I withdraw, without prejudice, the amendment I have offered.

The Vice President. The Senator has that right. The amendment of the Senator from Arizona to the so-called Johnson amendment is withdrawn.

Mr. Hayden. Now, if the Senator from Colorado [Mr. Phipps] will again offer his amendment just as it is, we can proceed to debate it, to amend it, and to vote upon it.

Mr. Phipps. Mr. President, I understand the Senator from Arizona has withdrawn his amendment. I desire again to offer my amendment as it is now before the Senate.

The Vice President. The question is on agreeing to the amendment offered by the Senator from Colorado [Mr. Phipps].

Mr. Hayden. I offer the following amendment to the amendment offered by the Senator from Colorado.

Mr. Smoot. Let the amendments be now read.

The Vice President. The clerk will state the amendment of the Senator from Colorado and the amendment of the Senator from Arizona to the substitute amendment.[14]

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[14] 70 Cong. Rec. 382 (December 11, 1928).

SUPREME COURT OF THE UNITED STATES

No. 8, ORIGINAL.—OCTOBER TERM, 1962.

State of Arizona, Plaintiff,
v.
State of California et al. } Complaint.

[June 3, 1963.]

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1952 the State of Arizona invoked the original jurisdiction of this Court [1] by filing a complaint against the State of California and seven of its public agencies.[2] Later, Nevada, New Mexico, Utah, and the United States were added as parties either voluntarily or on motion.[3] The basic controversy in the case is over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries. After preliminary pleadings, we referred the case to George I. Haight, Esquire, and upon his death in 1955 to Simon H. Rifkind, Esquire, as Special Master to take evidence, find facts, state conclusions of law, and recommend a decree, all

[1] "The judicial Power shall extend . . . to Controversies between two or more States . . . .

"In all cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." U. S. Const., Art. III, § 2. See also 28 U. S. C. § 1251 (a)(1).

Three times previously Arizona has instituted actions in this Court concerning the Colorado River. *Arizona* v. *California*, 283 U. S. 423 (1931); *Arizona* v. *California*, 292 U. S. 341 (1934); *Arizona* v. *California*, 298 U. S. 558 (1936). See also *United States* v. *Arizona*, 295 U. S. 174 (1935).

[2] Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

[3] 344 U. S. 919 (1953) (intervention by United States); 347 U. S. 985 (1954) (intervention by Nevada); 350 U. S. 114 (1955) (joinder of Utah and New Mexico).

"subject to consideration, revision, or approval by the Court."[4] The Master conducted a trial lasting from June 14, 1956, to August 28, 1958, during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled. Following many motions, arguments, and briefs, the Master in a 433-page volume reported his findings, conclusions, and recommended decree, received by the Court on January 16, 1961.[5] The case has been extensively briefed here and orally argued twice, the first time about 16 hours, the second, over six. As we see this case, the question of each State's share of the waters of the Colorado and its tributaries turns on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in 1928.[6] That meaning and scope can be better understood when the Act is set against its background—the gravity of the Southwest's water problems; the inability of local groups or individual States to deal with these enormous problems; the continued failure of the States to agree on how to conserve and divide the waters; and the ultimate action by Congress at the request of the States creating a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water.

The Colorado River itself rises in the mountains of Colorado and flows generally in a southwesterly direction for about 1,300 miles through Colorado, Utah, and Arizona and along the Arizona-Nevada and Arizona-California boundaries, after which it passes into Mexico and empties into the Mexican waters of the Gulf of California. On its way to the sea it receives tributary waters from Wyoming, Colorado, Utah, Nevada, New Mexico, and Arizona.

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[4] The two orders are reported at 347 U. S. 986 (1954), and 350 U. S. 812 (1955).

[5] 364 U. S. 940 (1961).

[6] Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U. S. C. §§ 617–617t (1958).

The river and its tributaries flow in a natural basin almost surrounded by large mountain ranges and drain 242,000 square miles, an area about 900 miles long from north to south and 300 to 500 miles wide from east to west—practically one-twelfth the area of the continental United States excluding Alaska. Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable. The Master refers to archaeological evidence that as long as 2,000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix, Arizona, and that American Indians were practicing irrigation in that region at the time white men first explored it. In the second half of the nineteenth century a group of people interested in California's Imperial Valley conceived plans to divert water from the mainstream of the Colorado to give life and growth to the parched and barren soil of that valley. As the most feasible route was through Mexico, a Mexican corporation was formed and a canal dug partly in Mexico and partly in the United States. Difficulties which arose because the canal was subject to the sovereignty of both countries generated hopes in this country that some day there would be a canal wholly within the United States, an all-American canal.[7]

During the latter part of the nineteenth and the first part of the twentieth centuries, people in the Southwest continued to seek new ways to satisfy their water needs, which by that time were increasing rapidly as new settlers moved into this fast-developing region. But none of the more or less primitive diversions made from the mainstream of the Colorado conserved enough water to meet

[7] "[The All-American Canal] will end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico . . . ." S. Rep. No. 592, 70th Cong., 1st Sess. 8 (1928).

the growing needs of the basin. The natural flow of the Colorado was too erratic, the river at many places in canyons too deep, and the engineering and economic hurdles too great for small farmers, larger groups, or even States to build storage dams, construct canals, and install the expensive works necessary for a dependable year-round water supply. Nor were droughts the basin's only problem; spring floods due to melting snows and seasonal storms were a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farm land and crops.

It is not surprising that the pressing necessity to transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply desperately needed in so many States began to be talked about and recognized as far more than a purely local problem which could be solved on a farmer-by-farmer, group-by-group, or even state-by-state basis, desirable as this kind of solution might have been. The inadequacy of a local solution was recognized in the Report of the All-American Canal Board of the United States Department of Interior on July 22, 1919, which detailed the widespread benefits that could be expected from construction by the United States of a large reservoir on the mainstream of the Colorado and an all-American canal to the Imperial Valley.[8] Some months later, May 18, 1920, Congress passed an Act offered by Congressman Kinkaid of Nebraska directing the Secretary of the Interior to make a study and report of diversions which

[8] Department of Interior, Report of the All-American Canal Board (1919), 23–33. The three members of the Board were engineers with long experience in Western water problems.

might be made from the Colorado River for irrigation in the Imperial Valley.[9] The Fall-Davis Report,[10] submitted to Congress in compliance with the Kinkaid Act, began by declaring that "the control of the floods and development of the resources of the Colorado River are peculiarly national problems . . . ." [11] and then went on to give reasons why this was so, concluding with the statement that the job was so big that only the Federal Government could do it.[12] Quite naturally, therefore, the Report recommended that the United States construct as a government project not only an all-American canal from the Colorado River to the Imperial Valley but also a dam and reservoir at or near Boulder Canyon.[13]

The prospect that the United States would undertake to build as a national project the necessary works to control floods and store river waters for irrigation was apparently a welcome one for the basin States. But it brought to life strong fears in the northern basin States that additional waters made available by the storage and canal projects might be gobbled up in perpetuity by faster growing lower basin areas, particularly California, before the upper States could appropriate what they believed to be their fair share. These fears were not without foundation, since the law of prior appropriation prevailed in

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[9] 41 Stat. 600 (1920).

[10] S. Doc. No. 142, 67th Cong., 2d Sess. (1922).

[11] *Id.*, at 1.

[12] The reasons given were:

"1. The Colorado River is international.

"2. The stream and many of its tributaries are interstate.

"3. It is a navigable river.

"4. Its waters may be made to serve large areas of public lands naturally desert in character.

"5. Its problems are of such magnitude as to be beyond the reach of other than national solution." *Ibid.*

[13] *Id.*, at 21.

most of the Western States.[14] Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time.[15] "First in time, first in right" is the short-hand expression of this legal principle. In 1922, only four months after the Fall-Davis Report, this Court in *Wyoming* v. *Colorado*, 259 U. S. 419, held that the doctrine of prior appropriation could be given interstate effect.[16] This decision intensified fears of Upper Basin States that they would not get their fair share of Colorado River water.[17] In view of California's phenomenal growth, the Upper Basin States had particular reason to fear that California, by appropriating and using Colorado River water before the upper States, would, under the interstate application of the prior appropriation doctrine,

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[14] This law prevails exclusively in all the basin States except California. See Weil, Water Rights in the Western States § 66 (1911); Hutchins, Selected Problems in the Law of Water Rights in the West 30–31 (1942) (U. S. Dept. of Agriculture Misc. Pub. No. 418). Even in California it is important. See 51 Cal. Jur. 2d Waters §§ 257–264 (1959).

[15] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 98 (1938); *Arizona* v. *California*, 283 U. S. 423, 459 (1931).

[16] The doctrine continues to be applied interstate. *E. g.*, *Nebraska* v. *Wyoming*, 325 U. S. 589, 617–618 (1945).

[17] "Delph E. Carpenter, Colorado River Commissioner for the State of Colorado, summarized the situation produced by that decision as follows:

"'The upper state has but one alternative, that of using every means to retard development in the lower state until the uses within the upper state have reached their maximum. The states may avoid this unfortunate situation by determining their respective rights by interstate compact before further development in either state, thus permitting freedom of development in the lower state without injury to future growth in the upper.'

"The final negotiation of the compact took place in the atmosphere produced by that decision." H. R. Doc. No. 717, 80th Cong., 2d Sess. 22 (1948).

be "first in time" and therefore "first in right." Nor were such fears limited to the northernmost States. Nevada, Utah, and especially Arizona were all apprehensive that California's rapid declaration of appropriative claims would deprive them of their just share of basin water available after construction of the proposed United States project. It seemed for a time that these fears would keep the States from agreeing on any kind of division of the river waters. Hoping to prevent "conflicts" and "expensive litigation" which would hold up or prevent the tremendous benefits expected from extensive federal development of the river,[18] the basin States requested and Congress passed an Act on August 19, 1921, giving the States consent to negotiate and enter into a compact for the "equitable division and apportionment . . . of the water supply of the Colorado River." [19]

Pursuant to this congressional authority, the seven States appointed Commissioners who, after negotiating for the better part of a year, reached an agreement at Santa Fe, New Mexico, on November 24, 1922. The agreement, known as the Colorado River Compact,[20] failed to fulfill the hope of Congress that the States would themselves agree on each State's share of the water. The most the Commissioners were able to accomplish in the Compact was to adopt a compromise suggestion of Secretary of Commerce Herbert Hoover, specially designated as United States representative.[21] This compromise divides the entire basin into two parts, the Upper Basin and the Lower Basin, separated at a point on the river in northern Arizona known as Lee Ferry. (A map show-

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[18] H. R. Rep. No. 191, 67th Cong., 1st Sess. (1921).

[19] 42 Stat. 171 (1921).

[20] The Compact can be found at 70 Cong. Rec. 324 (1928), and U. S. Dept. of Interior, Documents on the Use and Control of the Waters of Interstate and International Streams 39 (1956).

[21] H. R. Doc. No. 717, 80th Cong., 2d Sess. 22 (1948).

ing the two basins and other points of interest in this controversy is printed as an Appendix at p. 53.) Article III (a) of the Compact apportions to each basin in perpetuity 7,500,000 acre-feet of water [22] a year from the Colorado River System, defined in Article II (a) as "the Colorado River and its tributaries within the United States of America." In addition, Article III (b) gives the Lower Basin "the right to increase its beneficial consumptive use [23] of such waters by one million acre-feet per annum." Article III (c) provides that future Mexican water rights recognized by the United States shall be supplied first out of surplus over and above the aggregate of the quantities specified in (a) and (b), and if this surplus is not enough the deficiency shall be borne equally by the two basins. Article III (d) requires the Upper Basin not to deplete the Lee Ferry flow below an aggregate of 75,000,000 acre-feet for any 10 consecutive years. Article III (f) and (g) provide a way for further apportionment by a compact of "Colorado River System" waters at any time after October 1, 1963. While these allocations quieted rivalries between the Upper and Lower Basins, major differences between the States in the Lower Basin continued. Failure of the Compact to determine each State's share of the water left Nevada and Arizona with their fears that the law of prior appropriation would be not a protection but a menace because California could use that law to get for herself the lion's share of the waters allotted to the Lower Basin. Moreover, Arizona, because of her particularly strong interest in the Gila, intensely resented the Compact's inclusion of the Colorado River tributaries in its allocation scheme and was bitterly hostile to having

[22] An acre-foot of water is enough to cover an acre of land with one foot of water.

[23] "Beneficial consumptive use" means consumptive use measured by diversions less return flows, for a beneficial (nonwasteful) purpose.

Arizona tributaries, again particularly the Gila, forced to contribute to the Mexican burden. Largely for these reasons, Arizona alone, of all the States in both basins, refused to ratify the Compact.[24]

Seeking means which would permit ratification by all seven basin States, the Governors of those States met at Denver in 1925 and again in 1927. As a result of these meetings the Governors of the upper States suggested, as a fair apportionment of water among the Lower Basin States, that out of the average annual delivery of water at Lee Ferry required by the Compact—7,500,000 acre-feet—Nevada be given 300,000 acre-feet, Arizona 3,000,000, and California 4,200,000, and that unapportioned waters, subject to reapportionment after 1963, be shared equally by Arizona and California. Each Lower Basin State would have "the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty into the main stream," except that Arizona tributary waters in excess of 1,000,000 acre-feet could under some circumstances be subject to diminution by reason of a United States treaty with Mexico. This proposal foundered because California held out for 4,600,000 acre-feet instead of 4,200,000 [25] and because Arizona held out for complete exemption of its tributaries from any part of the Mexican burden.[26]

Between 1922 and 1927 Congressman Philip Swing and Senator Hiram Johnson, both of California, made three attempts to have Swing-Johnson bills enacted, authorizing

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[24] Arizona did ratify the Compact in 1944, after it had already become effective by six-state ratification as permitted by the Boulder Canyon Project Act.

[25] Hearings on H. R. 5773 before the House Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 402–405 (1928).

[26] *Id.*, at 30–31. Arizona also objected to the provisions concerning electrical power.

construction of a dam in the canyon section of the Colorado River and an all-American canal.[27] These bills would have carried out the original Fall-Davis Report's recommendations that the river problem be recognized and treated as national, not local. Arizona's Senators and Congressmen, still insisting upon a definite guaranty of water from the mainstream, bitterly fought these proposals because they failed to provide for exclusive use of her own tributaries, particularly the Gila, and for exemption of these tributaries from the Mexican burden.

Finally, the fourth Swing-Johnson bill passed both Houses and became the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057. The Act authorized the Secretary of the Interior to construct, operate, and maintain a dam and other works in order to control floods, improve navigation, regulate the river's flow, store and distribute waters for reclamation and other beneficial uses, and generate electrical power.[28] The projects authorized by the Act were the same as those provided for in the prior defeated measures, but in other significant respects the Act was strikingly different. The earlier bills had offered no method whatever of apportioning the waters among the States of the Lower Basin. The Act as finally passed did provide such a method, and, as we view it, the method chosen was a complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters. To protect the Upper Basin against California should Arizona still refuse to ratify the Compact,[29] § 4 (a) of the Act as finally passed

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[27] H. R. 11449, 67th Cong., 2d Sess. (1922); H. R. 2903, S. 727, 68th Cong., 1st Sess. (1923); H. R. 9826, S. 3331, 69th Cong., 1st Sess. (1926).

[28] Another purpose of the Act was to approve the Colorado River Compact, which had allocated the water between the two basins.

[29] The Upper Basin States feared that, if Arizona did not ratify the Compact, the division of water between the Upper and Lower Basins

provided that, if fewer than seven States ratified within six months, the Act should not take effect unless six States including California ratified and unless California, by its legislature, agreed "irrevocably and unconditionally . . . as an express covenant" to a limit on its annual consumption of Colorado River water of "four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact." Congress in the same section showed its continuing desire to have California, Arizona, and Nevada settle their own differences by authorizing them to make an agreement apportioning to Nevada 300,000 acre-feet, and to Arizona 2,800,000 acre-feet plus half of any surplus waters unapportioned by the Compact. The permitted agreement also was to allow Arizona exclusive use of the Gila River, wholly free from any Mexican obligation, a position Arizona had taken from the beginning. Sections 5 and 8 (b) of the Project Act made provisions for the sale of the stored waters. The Secretary of the Interior was authorized by § 5 "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses . . . ." Section 5 required these contracts to be "for permanent service" and further provided, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." Section 8 (b) provided

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agreed on in the Compact would be nullified. The reasoning was that Arizona's uses would not be charged against the Lower Basin's apportionment and that California would therefore be free to exhaust that apportionment herself. Total Lower Basin uses would then be more than permitted in the Compact, leaving less water for the Upper Basin.

that the Secretary's contracts would be subject to any compact dividing the benefits of the water between Arizona, California, and Nevada, or any two of them, approved by Congress on or before January 1, 1929, but that any such compact approved after that date should be "subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress."

The Project Act became effective on June 25, 1929, by Presidential Proclamation,[30] after six States, including California, had ratified the Colorado River Compact and the California legislature had accepted the limitation of 4,400,000 acre-feet [31] as required by the Act. Neither the three States or any two of them ever entered into any apportionment compact as authorized by §§ 4 (a) and 8 (b). After the construction of Boulder Dam the Secretary of the Interior, purporting to act under the authority of the Project Act, made contracts with various water users in California for 5,362,000 acre-feet, with Nevada for 300,000 acre-feet, and with Arizona for 2,800,000 acre-feet of water from that stored at Lake Mead.

The Special Master appointed by this Court found that the Colorado River Compact, the law of prior appropriation, and the doctrine of equitable apportionment—by which doctrine this Court in the absence of statute resolves interstate claims according to the equities—do not control the issues in this case. The Master concluded that, since the Lower Basin States had failed to make a compact to allocate the waters among themselves as authorized by §§ 4 (a) and 8 (b), the Secretary's contracts with the States had within the statutory scheme of §§ 4 (a), 5, and 8 (b) effected an apportionment of the waters of the mainstream which, according to the Master, were the

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[30] 46 Stat. 3000 (1929).

[31] California Limitation Act, Cal. Stat. 1929, c. 16, at 38.

only waters to be apportioned under the Act. The Master further held that, in the event of a shortage of water making it impossible for the Secretary to supply all the water due California, Arizona, and Nevada under their contracts, the burden of the shortage must be borne by each State in proportion to her share of the first 7,500,000 acre-feet allocated to the Lower Basin, that is, $\frac{4.4}{7.5}$ by California, $\frac{2.8}{7.5}$ by Arizona, and $\frac{.3}{7.5}$ by Nevada, without regard to the law of prior appropriation.

Arizona, Nevada, and the United States support with few exceptions the analysis, conclusions, and recommendations of the Special Master's report. These parties agree that Congress did not leave division of the waters to an equitable apportionment by this Court but instead created a comprehensive statutory scheme for the allocation of mainstream waters. Arizona, however, believes that the allocation formula established by the Secretary's contracts was in fact the formula required by the Act. The United States, along with California, thinks the Master should not have invalidated the provisions of the Arizona and Nevada water contracts requiring those States to deduct from their allocations any diversions of water above Lake Mead which reduce the flow into that lake.

California is in basic disagreement with almost all of the Master's Report. She argues that the Project Act, like the Colorado River Compact, deals with the entire Colorado River System, not just the mainstream. This would mean that diversions within Arizona and Nevada of tributary waters flowing in those States would be charged against their apportionments and that, because tributary water would be added to the mainstream water in computing the first 7,500,000 acre-feet available to the States, there would be a greater likelihood of a surplus, of which California gets one-half. The result of California's

argument would be much more water for California and much less for Arizona. California also argues that the Act neither allocates the Colorado River waters nor gives the Secretary authority to make an allocation. Rather she takes the position that the judicial doctrine of equitable apportionment giving full interstate effect to the traditional western water law of prior appropriation should determine the rights of the parties to the water. Finally, California claims that in any event the Act does not control in time of shortage. Under such circumstances, she says, this Court should divide the waters according to the doctrine of equitable apportionment or the law of prior appropriation, either of which, she argues, should result in protecting her prior uses.

Our jurisdiction to entertain this suit is not challenged and could not well be since Art. III, § 2, of the Constitution gives this Court original jurisdiction of actions in which States are parties. In exercising that jurisdiction, we are mindful of this Court's often expressed preference that, where possible, States settle their controversies by "mutual accommodation and agreement." [32] Those cases and others [33] make it clear, however, that this Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States. This case is the most recent phase of a continuing controversy over the water of the Colorado River, which the States despite repeated efforts have been unable to settle. Resolution of this dispute requires a determination of what apportionment, if any, is made by the Project Act and what powers are confer[redacted] by the Act upon the Secretary of Interior. Unless m[redacted] the issues presented

[32] *Colorado* v. *Kansas*, 320 U. S. [redacted], 392 (1943); *Nebraska* v. *Wyoming*, 325 U. S. 589, 616 (1945).

[33] *E. g.*, *Kansas* v. *Colorado*, 185 U. S. 125 (1902); *New Jersey* v. *New York*, 283 U. S. 336 (1931).

here are adjudicated, the conflicting claims of the parties will continue, as they do now, to raise serious doubts as to the extent of each State's right to appropriate water from the Colorado River System for existing or new uses. In this situation we should and do exercise our jurisdiction.

I.

Allocation of Water Among the States and Distribution to Users.

We have concluded, for reasons to be stated, that Congress in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress decided that a fair division of the first 7,500,000 acre-feet of mainstream water would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California would each get one-half of any surplus. Prior approval was therefore given in the Act for a tri-state compact to incorporate these terms. The States, subject to subsequent congressional approval, were also permitted to agree on a compact with different terms. Division of the water did not, however, depend on the States' agreeing to a compact, for Congress gave the Secretary of the Interior adequate authority to accomplish the division. Congress did this by giving the Secretary power to make contracts for the delivery of water and by providing that no person could have water without a contract.

A. *Relevancy of Judicial Apportionment and Colorado River Compact.*—We agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that

the Court has used the doctrine of equitable apportionment to decide river controversies between States.[34] But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an "equitable apportionment" for the apportionment chosen by Congress. Nor does the Colorado River Compact control this case. Nothing in that Compact purports to divide water among the Lower Basin States nor in any way to affect or control any future apportionment among those States or any distribution of water within a State. That the Commissioners were able to accomplish even a division of water between the basins is due to what is generally known as the "Hoover Compromise."

> "Participants [in the Compact negotiations] have stated that the negotiations would have broken up but for Mr. Hoover's proposal: that the Commission limit its efforts to a division of water between the upper basin and the lower basin, leaving to each basin the future internal allocation of its share." [35]

And in fact this is all the Compact did. However, the Project Act, by referring to the Compact in several places, does make the Compact relevant to a limited extent. To begin with, the Act explicitly approves the Compact and thereby fixes a division of the waters between the basins which must be respected. Further, in several places the Act refers to terms contained in the Compact. For example, § 12 of the Act adopts the Compact definition of

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[34] *E. g., Wyoming* v. *Colorado*, 259 U. S. 419 (1922); *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945).

[35] H. R. Doc. No. 717, 80th Cong., 2d Sess. 22 (1948).

"domestic," [36] and § 6 requires satisfaction of "present perfected rights" as used in the Compact.[37] Obviously, therefore, those particular terms, though originally formulated only for the Compact's allocation of water between basins, are incorporated into the Act and are made applicable to the Project Act's allocation among Lower Basin States. The Act also declares that the Secretary of the Interior and the United States in the construction, operation, and maintenance of the dam and other works and in the making of contracts shall be subject to and controlled by the Colorado River Compact.[38] These latter references to the Compact are quite different from the Act's adoption of Compact terms. Such references, unlike the explicit adoption of terms, were used only to show that the Act and its provisions were in no way to upset, alter, or affect the Compact's congressionally approved division of water between the basins. They were not intended to make the Compact and its provisions control or affect the Act's allocation among and distribution of water within the States of the Lower Basin. Therefore, we look to the Compact for terms specifically incorporated in the Act, and we would also look to it to resolve disputes between the Upper and Lower Basins, were any involved in this case. But no such questions are here. We must determine what apportionment and delivery scheme in the Lower Basin has been effected through the Secretary's contracts. For that determination, we look to the Project Act alone.

B. *Mainstream Apportionment.*—The congressional scheme of apportionment cannot be understood with-

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[36] " 'Domestic' whenever employed in this Act shall include water uses defined as 'domestic' in said Colorado River compact."

[37] The dam and reservoir shall be used, among other things, for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact."

[38] §§ 1, 8 (a), 13 (b) and (c).

out knowing what water Congress wanted apportioned. Under California's view, which we reject, the first 7,500,000 acre-feet of Lower Basin water, of which California has agreed to use only 4,400,000, is made up of both mainstream and tributary water, not just mainstream water. Under the view of Arizona, Nevada, and the United States, with which we agree, the tributaries are not included in the waters to be divided but remain for the exclusive use of each State. Assuming 7,500,000 acre-feet or more in the mainstream and 2,000,000 in the tributaries, California would get 1,000,000 acre-feet more if the tributaries are included and Arizona 1,000,000 less.[39]

California's argument that the Project Act, like the Colorado River Compact, deals with the main river and all its tributaries rests on § 4 (a) of the Act, which limits California to 4,400,000 acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact . . . ." And Article III (a), referred to by § 4 (a), apportioned in perpetuity to the Lower Basin the use of 7,500,000 acre-feet of water per annum "from the Colorado River System," which was defined in the Compact as "that portion of the Colorado River and its tributaries within the United States of America."

Arizona argues that the Compact apportions between basins only the waters of the mainstream, not the mainstream and the tributaries. We need not reach that question, however, for we have concluded that whatever waters the Compact apportioned the Project Act itself dealt only with water of the mainstream. In the first place, the Act, in § 4 (a), states that the California limitation, which is

[39] Also, California would reduce Nevada's share of the mainstream waters from 300,000 acre-feet to 120,500 acre-feet.

in reality her share of the first 7,500,000 acre-feet of Lower Basin water, is on "water of and from the Colorado River," not of and from the "Colorado River System." But more importantly, the negotiations among the States and the congressional debates leading to the passage of the Project Act clearly show that the language used by Congress in the Act was meant to refer to mainstream waters only. Inclusion of the tributaries in the Compact was natural in view of the upper States' strong feeling that the Lower Basin tributaries should be made to share the burden of any obligation to deliver water to Mexico which a future treaty might impose. But when it came to an apportionment among the Lower Basin States, the Gila, by far the most important Lower Basin tributary, would not logically be included, since Arizona alone of the States could effectively use that river.[40] Therefore, with minor exceptions, the proposals and counterproposals over the years, culminating in the Project Act, consistently provided for division of the mainstream only, reserving the tributaries to each State's exclusive use.

The most important negotiations among the States, which in fact formed the basis of the debates leading to passage of the Act, took place in 1927 when the Governors of the seven basin States met at Denver in an effort to work out an allocation of the Lower Basin waters acceptable to Arizona, California, and Nevada. Arizona and California made proposals,[41] both of which suggested giving Nevada 300,000 acre-feet out of the mainstream of the Colorado River and reserving to each State the exclusive use of her own tributaries. Arizona proposed that all remaining mainstream water be divided equally between

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[40] Not only does the Gila enter the Colorado almost at the Mexican border, but also in dry seasons it virtually evaporates before reaching the Colorado.

[41] See 69 Cong. Rec. 9454 (1928).

herself and California, which would give each State 3,600,000 acre-feet out of the first 7,500,000 acre-feet of mainstream water. California rejected the proposed equal division of the water, suggesting figures that would result in her getting about 4,600,000 out of the 7,500,000. The Governors of the four Upper Basin States, trying to bring Arizona and California together, asked each State to reduce its demands and suggested this compromise: Nevada 300,000 acre-feet, Arizona 3,000,000, and California 4,200,000.[42] These allocations were to come only out of the mainstream, that is, as stated by the Governors, out "of the average annual delivery of water to be provided by the States of the upper division at Lees Ferry under the terms of the Colorado River compact." The Governors' suggestions, like those of the States, explicitly reserved to each State as against the other States the exclusive use of her own tributaries. Arizona agreed to the Governors' proposal, but she wanted it made clear that her tributaries were to be exempted from any Mexican obligation.[43] California rejected the whole proposal, insisting that she must have 4,600,000 acre-feet from the mainstream, or, as she put it, "from the waters to be provided by the States of the upper division at Lee Ferry under the Colorado River compact."[44] Neither in the States' original offers, nor in the Governors' suggestions, nor in the States' responses was the "Colorado River System"—mainstream plus tributaries—ever used as the basis for Lower Basin allocations; rather, it was always mainstream water, or the water to be delivered by the upper States at Lee Ferry, that is to say, an annual average of 7,500,000 acre-feet of mainstream water.

With the continued failure of Arizona and California to reach accord, there was mounting impetus for a con-

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[42] See 70 Cong. Rec. 172 (1928).

[43] Hearings on H. R. 5773, *supra* note 25, at 30–31.

[44] *Id.*, at 402.

gressional solution. A Swing-Johnson bill containing no limitation on California's uses finally passed the House in 1928 over objections by Representatives from Arizona and Utah.[45] When the bill reached the Senate, it was amended in committee to provide that the Secretary in his water-delivery contracts must limit California to 4,600,000 acre-feet "of the water allocated to the lower basin by the Colorado River compact . . . and one-half of the unallocated, excess, and/or surplus water . . . ." [46] On the floor, Senator Phipps of Colorado proposed an amendment which would allow the Act to go into effect without any limitation on California if seven States ratified the Compact; if only six States ratified and if California legislature accepted the limitation, the Act could still become effective.[47] Arizona's Senator Hayden had already proposed an amendment reducing California's share to 4,200,000 acre-feet (the Governors' proposal), plus half of the surplus, leaving Arizona exclusive use of the Gila free from any Mexican obligation,[48] but this the Senate rejected.[49] Senator Bratton of New Mexico, noting that only 400,000 acre-feet kept Arizona and California apart, immediately suggested an amendment by which they would split the difference, California getting 4,400,000 acre-feet "of the waters apportioned to the lower basin States by the Colorado River compact," plus half of surplus.[50] It was this Bratton amendment that became part of the Act as passed,[51] which had been amended on the

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[45] H. R. 5773, 70th Cong., 1st Sess.; 69 Cong. Rec. 9989–9990 (1928).

[46] S. Rep. No. 592, 70th Cong., 1st Sess. 2 (1928).

[47] 70 Cong. Rec. 324 (1928).

[48] *Id.*, at 162.

[49] *Id.*, at 384.

[50] *Id.*, at 385.

[51] 45 Stat. 1057 (1928). Arizona's Senators Ashurst and Hayden voted against the bill, which did not exempt the Gila from the Mexican burden. 70 Cong. Rec. 603 (1928).

floor so that the limitation referred to waters apportioned to the Lower Basin "by paragraph (a) of Article III of the Colorado River compact," instead of waters apportioned "by the Colorado River compact." [52]

Statements made throughout the debates make it quite clear that Congress intended the 7,500,000 acre-feet it was allocating, and out of which California was limited to 4,400,000, to be mainstream water only. In the first place, the basin Senators expressly acknowledged as the starting point for their debate the Denver Governors' proposal that specific allocations be made to Arizona, California, and Nevada from the mainstream, leaving the tributaries to the States. For example, Senator Johnson, leading spokesman for California, and Senator Hayden, leading spokesman for Arizona, agreed that the Governors' recommendations could be used as "a basis for discussion." [53] Hayden went on to observe that the Committee amendment would give California the same 4,600,000 acre-feet she had sought at Denver.[54] Later, Nevada's Senator Pittman stated that the committee "put the amount in there that California demanded before the four governors at Denver," and said that the Bratton amendment would split the 400,000 acre-feet separating the Governors' figure and the Committee's figure.[55] All the leaders in the debate—Johnson, Bratton, King, Hayden, Phipps, and Pittman—expressed a common understanding that the key issue separating Arizona and

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[52] 70 Cong. Rec. 459 (1928). That this change was not intended to cause the States to give up their tributaries may reasonably be inferred from the fact that the amendment was agreed to by Senator Hayden, who was a constant opponent of including the tributaries.

[53] *Id.*, at 77.

[54] *Ibid.* Later, Senator Hayden said that his amendment incorporated the Governors' proposal. *Id.*, at 172–173.

[55] *Id.*, at 386.

California was the difference of 400,000 acre-feet,[56] precisely the same 400,000 acre-feet of mainstream water that had separated the States at Denver. Were we to sustain California's argument here that tributaries must be included, California would actually get more than she was willing to settle for at Denver.

That the apportionment was from the mainstream only is also strongly indicated by an analysis of the second paragraph of § 4 (a) of the Act. There Congress authorized Arizona, Nevada, and California to make a compact allocating to Nevada 300,000 acre-feet and to Arizona 2,800,000 plus one-half of surplus, which, with California's 4,400,000 and half of the surplus, would under California's interpretation of the Act exhaust the Lower Basin waters, both mainstream and tributaries. But Utah and New Mexico, as Congress knew, had interests in Lower Basin tributaries which Congress surely would have protected in some way had it meant for the tributaries of those two States to be included in the water to be divided among Arizona, Nevada, and California. We cannot believe that Congress would have permitted three States to divide among themselves water belonging to five States. Nor can we believe that the representatives of Utah and New Mexico would have sat quietly by and acquiesced in a congressional attempt to include their tributaries in waters given the other three States.

Finally, in considering California's claim to share in the tributaries of other States, it is important that from the

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[56] *Id.*, at 164 (King), 165 (Johnson, Bratton), 382 (Hayden, Phipps), 385 (Bratton), 386 (Pittman). Senator Hayden's statement is representative: "I want to state to the Senate that what I am trying to accomplish is to get a vote on the one particular question of whether the quantity of water which the State of California may divert from the Colorado River should be 4,200,000 acre-feet or 4,600,000 acre-feet." *Id.*, at 382.

beginning of the discussions and negotiations which led to the Project Act, Arizona consistently claimed that she must have sole use of the Gila, upon which her existing economy depended.[57] Arizona's claim was supported by the fact that only she and New Mexico could effectively use the Gila waters, which not only entered the Colorado River too close to Mexico to be of much use to any other States but also was reduced virtually to a trickle in the hot Arizona summers before it could reach the Colorado. In the debates the Senators consistently acknowledged that the tributaries—or at least the waters of the Gila, the only major Arizona tributary—were excluded from the allocation they were making. Senator Hayden, in response to questions by Senator Johnson, said that the California Senator was correct in stating that the Senate had seen fit to give Arizona 2,800,000 acre-feet in addition to all the water in the Gila.[58] Senator Johnson had earlier stated, "[I]t is only the main stream, Senators will recall, that has been discussed," and one of his arguments in favor of California's receiving 4,600,000 acre-feet rather than 4,200,000 was that Arizona was going to keep all her tributaries in addition to whatever portion of the main river allocated to her.[59] Senator Johnson also argued that Arizona should bear more than half the Lower Basin's Mexican burden because in addition to the 2,800,000 acre-feet allotted her by the Act she would get the Gila, which he erroneously estimated at 3,500,000 acre-feet.[60] Senator Pittman, who had sat in on the Governors' conference, likewise understood that the water was

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[57] *E. g.*, Report, Colorado River Commission of Arizona (1927), reprinted in Hearings on H. R. 5773, *supra* note 25, at 25–31; 69 Cong. Rec. 9454 (1928) (Arizona's proposal at Denver).

[58] 70 Cong. Rec. 467–468 (1928). See also *id.*, at 463–464, 465.

[59] *Id.*, at 237.

[60] *Id.*, at 466–467.

being allocated from "the main Colorado River." [61] And other interested Senators similarly distinguished between the mainstream and the tributaries.[62] While the debates, extending over a long period of years, undoubtedly contain statements which support inferences in conflict with those we have drawn, we are persuaded by the legislative history as a whole that the Act was not intended to give California any claim to share in the tributary waters of the other Lower Basin States.

C. *The Project Act's Apportionment and Distribution Scheme.*—The legislative history, the language of the Act, and the scheme established by the Act for the storage and delivery of water convince us also that Congress intended to provide its own method for a complete apportionment of the mainstream water among Arizona, California, and Nevada.

First, the legislative history. In hearings on the House bill that became the Project Act, Congressman Arentz of Nevada, apparently impatient with the delay to this much needed project, told the committee on January 6, 1928, that if the States could not themselves allocate the water, "there must be some power which will say to California 'You can not take any more than this amount and the balance is allocated to the other States.' " [63] Later, May 25, 1928, the House passed the bill,[64] but it did not contain any allocation scheme. When the Senate took up that bill in December, pressure mounted swiftly for amendments that would provide a workable method for apportioning the waters among the Lower Basin States

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[61] *Id.*, at 469. See also *id.*, at 232.

[62] See *id.*, at 463 (Shortridge); *id.*, at 465 (King).

[63] Hearings on H. R. 5773, *supra* note 25, at 50.

[64] 69 Cong. Rec. 9990 (1928).

and distributing them to users in the States. The session convened on December 3, 1928, on the fifth the Senate took up the bill,[65] nine days later the bill with significant amendments passed the Senate,[66] four days after that the House concurred in the Senate's action,[67] and on the twenty-first the President signed the bill.[68] When the bill first reached the Senate floor, it had a provision, added in committee, limiting California to 4,600,000 acre-feet,[69] and Senator Hayden on December 6 proposed reducing that share to 4,200,000.[70] The next day, December 7, Mr. Pittman, senior Senator from Nevada, vigorously argued that Congress should settle the matter without delay. He said,

> "What is the difficulty? We have only minor questions involved here. There is practically nothing involved except a dispute between the States of Arizona and California with regard to the division of the increased water that will be impounded behind the proposed dam; that is all. . . . Of the 7,500,000 acre-feet of water let down that river they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together." [71]

The day after that, December 8, New Mexico's Senator Bratton suggested an amendment splitting the difference between the demands of Arizona and California by limiting California to 4,400,000 acre-feet.[72] On the tenth, re-

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[65] 70 Cong. Rec. 67 (1928).
[66] *Id.*, at 603.
[67] *Id.*, at 837–838.
[68] 45 Stat. 1057.
[69] See S. Rep. No. 592, 70th Cong., 1st Sess. 2 (1928).
[70] 70 Cong. Rec. 162 (1928).
[71] *Id.*, at 232.
[72] *Id.*, at 277, 385.

flecting the prevailing sense of urgency for decisive action, Senator Bratton emphasized that this was not a dispute limited simply to two States:

> "The two States have exchanged views, they have negotiated, they have endeavored to reach an agreement, and until now have been unable to do so. This controversy does not affect those two States alone. It affects other States in the Union and the Government as well.
>
> "Without undertaking to express my views either way upon the subject, I do think that if the two States are unable to agree upon a figure then that we, as a disinterested and friendly agency, should pass a bill which, according to our combined judgment, will justly and equitably settle the controversy. I suggested 4,400,000 acre-feet with that in view. I still hold to the belief that somewhere between the two figures we must fix the amount, and that this difference of 400,000 acre-feet should not be allowed to bar and preclude the passage of this important measure dealing with the enormous quantity of 15,000,000 acre-feet of water and involving seven States as well as the Government." [73]

The very next day, December 11, this crucial amendment was adopted,[74] and on the twelfth Senator Hayden pointed out that the bill settled the dispute over Lower Basin waters by giving 4,400,000 acre-feet to California and 2,800,000 to Arizona:

> "One [dispute] is how the seven and a half million acre-feet shall be divided in the lower basin. The Senate has settled that by a vote—that California

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[73] *Id.*, at 333.

[74] *Id.*, at 387.

> may have 4,400,000 acre-feet of that water. It follows logically that if that demand is to be conceded, as everybody agrees, the remainder is 2,800,000 acre-feet for Arizona. That settles that part of the controversy." [75]

On the same day, Senator Pittman, intimately familiar with the whole water problem,[76] summed up the feeling of the Senate that the bill fixed a limit on California and "practically allocated" to Arizona her share of the water:

> "The Senate has already determined upon the division of water between those States. How? It has determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,00 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get . . . .
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> . . . . .
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> "As I understand this amendment, Arizona to-day has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River." [77]

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[75] *Id.*, at 467. See also *id.*, at 465.

[76] For example, Senator Pittman's active role in resolving the whole Colorado River problem was acknowledged by Senator Hayden on the Senate floor:

"When Congress assembled in December, 1927, no agreement had been made. The senior Senator from Nevada [MR. PITTMAN], in continuation of the earnest efforts that he has made all these years to bring about a settlement of the controversy between the States with respect to the Colorado River, invited a number of us to conferences in his office and these we talked over the situation." *Id.*, at 172.

[77] *Id.*, at 468–469.

The Senator went on to explain why the Senate had found it necessary to set up its own plan for allocating the water:

> "Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason." [78]

Not only do the closing days of the debate show that Congress intended an apportionment among the States but also provisions of the Act create machinery plainly adequate to accomplish this purpose, whatever contingencies might occur. As one alternative of the congressional scheme, § 4 (a) of the Act invited Arizona, California, and Nevada to adopt a compact dividing the waters along the identical lines that had formed the basis for the congressional discussions of the Act: 4,400,000 acre-feet to California, 300,000 to Nevada, and 2,800,000 to Arizona. Section 8 (b) gave the States power to agree upon some other division, which would have to be approved by Congress. Congress made sure, however, that if the States did not agree on any compact the objects of the Act would be carried out, for the Secretary would then proceed, by making contracts, to apportion water among the States and to allocate the water among users within each State.

In the first section of the Act, the Secretary was authorized to "construct, operate, and maintain a dam and incidental works . . . adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water . . ." for the stated purpose of "controlling the floods, improving navigation and regulating the flow

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[78] *Id.*, at 471. The Senator added, "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that." *Ibid.*

of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses . . . ," and generating electrical power. The whole point of the Act was to replace the erratic, undependable, often destructive natural flow of the Colorado with the regular, dependable release of waters conserved and stored by the project. Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and domestic uses . . . ." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." The supremacy given the Secretary's contracts was made clear in § 8 (b) of the Act, which provided that, while the Lower Basin States were free to negotiate a compact dividing the waters, such a compact if made and approved after January 1, 1929, was to be "subject to all contracts, if any, made by the Secretary of the Interior under section 5" before Congress approved the compact.

These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants

authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.[79] In this respect it is of interest that in an earlier version the bill did limit the Secretary's contract power by making the contracts "subject to rights of prior appropriators." [80] But that restriction, which preserved the law of prior appropriation, did not survive. It was stricken from the bill when the requirement that every water user have a contract was added to § 5.[81] Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any other time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" in § 6.

That the bill was giving the Secretary sufficient power to carry out an allocation of the waters among the States and among the users within each State without regard to the law of prior appropriation was brought out in a colloquy between Montana's Senator Walsh and California's Senator Johnson, whose State had at least as much reason as any other State to bind the Secretary by state laws. Senator Walsh, who was thoroughly versed in western water law and also had previously argued before this Court in a leading case involving the doctrine of prior

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[79] In the debates leading to the passage of the bill, Senator Walsh observed that "to contract means a liberty of contract" and asked if this did not mean that the Secretary could "give the water to them [appropriators] or withhold it from them as he sees fit," to which Senator Johnson answered "certainly." 70 Cong. Rec. 168 (1928).

[80] See Hearings on H. R. 6251 and 9826 before the Committee on Irrigation and Reclamation, 69th Cong., 1st Sess. 12 (1926).

[81] See *id.*, at 97, 115.

appropriation,[82] made clear what would follow from the Government's impounding of the Colorado River waters when he said, "I always understood that the interest that stores the water has a right superior to prior appropriations that do not store." He sought Senator Johnson's views on what rights the City of Los Angeles, which had filed claims to large quantities of Colorado River water, would have after the Government had built the dam and impounded the waters. In reply to Senator Walsh's specific question whether the Government might "dispose of the stored waters as it sees fit," Senator Johnson said, "Yes, under the terms of this bill." Senator Johnson added that "everything in this scheme, plan, or design" was "dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction . . . ." He admitted that it was possible that the Secretary could "utterly ignore" Los Angeles' appropriations.[83]

In this same discussion, Senator Hayden emphasized the Secretary's power to allocate the water by making contracts with users. After Senator Walsh said that he understood Senator Johnson to be arguing that the Secretary must satisfy Los Angeles' appropriations, Senator

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[82] *Bean* v. *Morris,* 221 U. S. 485 (1911). This case was relied on by Mr. Justice Van Devanter in *Wyoming* v. *Colorado,* 259 U. S. 419, 466 (1922).

[83] 70 Cong. Rec. 168 (1928). Other statements by Senator Johnson are less damaging to California's claims. For example, the Senator at another point in the colloquy with Senator Walsh said that he doubted if the Secretary either would or could disregard Los Angeles and contract with someone having no appropriation. *Ibid.* It is likely, however, that Senator Johnson was talking about present perfected rights, as a few minutes before he had argued that Los Angeles had taken sufficient steps in perfecting its claims to make them protected. See *id.*, at 167. Present perfected rights, as we have observed in the text, are recognized by the Act. § 6.

Hayden corrected him, pointing out that Senator Johnson had qualified his statement by saying that "after all, the Secretary of the Interior could allow the city of Los Angeles to have such quantity of water as might be determined by contract." Senator Hayden went on to say that, where domestic and irrigation needs conflicted, "the Secretary of the Interior will naturally decide as between applicants, one who desires to use the water for potable purposes in the city and another who desires to use it for irrigation, if there is not enough water to go around, that the city shall have the preference." [84] It is also significant that two vigorous opponents of the bill, Arizona's Representative Douglas and Utah's Representative Colton, criticized the bill because it gave the Secretary of the Interior "absolute control" over the disposition of the stored waters.[85]

The argument that Congress would not have delegated to the Secretary so much power to apportion and distribute the water overlooks the ways in which his power is limited and channeled by standards in the Project Act. In par-

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[84] 70 Cong. Rec. 169 (1928). At one point Senator Hayden seems to say that the Secretary's contracts are to be governed by state law: "The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts." *Ibid.* But, in view of the Senator's other statements in the same debate, this remark of a man so knowledgeable in western water law makes sense only if one understands that the "order of priority" being talked about was the order of present perfected rights—rights which Senator Hayden recognized, see *id.*, at 167, and which the Act preserves in § 6.

[85] 69 Cong. Rec. 9623, 9648, 9649 (1928). We recognize, of course, that statements of opponents of a bill may not be authoritative, see *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951), but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms.

ticular, the Secretary is bound to observe the Act's limitation of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water. This necessarily leave the remaining 3,100,000 acre-feet for the use of Arizona and Nevada, since they are the only other States with access to the main Colorado River. Nevada consistently took the position, accepted by the other States throughout the debates, that her conceivable needs would not exceed 300,000 acre-feet, which, of course, left 2,800,000 acre-feet for Arizona's use. Moreover, Congress indicated that it thought this a proper division of the waters when in the second paragraph of § 4 (a) it gave advance consent to a tri-state compact adopting such division. While no such compact was ever entered into, the Secretary by his contracts has apportioned the water in the approved amounts and thereby followed the guidelines set down by Congress. And, as the Master pointed out, Congress set up other standards and placed other significant limitations upon the Secretary's power to distribute the stored waters. It specifically set out in order the purposes for which the Secretary must use the dam and the reservoir:

> "First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power." § 6.

The Act further requires the Secretary to make revenue provisions in his contracts adequate to ensure the recovery of the expenses of construction, operation, and maintenance of the dam and other works within 50 years after their construction. § 4 (b). The Secretary is directed to make water contracts for irrigation and domestic uses only for "permanent service." § 5. He and his permittees, licensees, and contractees are subject to the Colorado

River Compact, § 8 (a), and therefore can do nothing to upset or encroach upon the Compact's allocation of Colorado River water between the Upper and Lower Basins. In the construction, operation, and management of the works, the Secretary is subject to the provisions of the reclamation law, except as the Act otherwise provides. § 14. One of the most significanct limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6. And, of course, all of the powers granted by the Act are exercised by the Secretary and his well-established executive department, responsible to Congress and the President and subject to judicial review.[86]

Notwithstanding the Government's construction, ownership, operation, and maintenance of the vast Colorado River works that conserve and store the river's waters and the broad power given by Congress to the Secretary of the Interior to make contracts for the distribution of the water, it is argued that Congress in §§ 14 and 18 of the Act took away practically all the Secretary's power by permitting the States to determine with whom and on what terms the Secretary would make water contracts. Section 18 states:

> "Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders . . . ."

Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the manage-

[86] See, *e. g.*, *Ickes* v. *Fox*, 300 U. S. 82 (1937); cf. *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334 (1963); *Boesch* v. *Udall*, No. 332 (May 27, 1963).

ment of the works except as otherwise provided, and § 8 of the Reclamation Act, much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation . . . ." [87] In our view, nothing in any of these provisions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the laws of prior appropriation, that control the apportionment of water among the States. Moreover, contrary to the Master's conclusion, we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U. S. 275 (1958), and reaffirmed in *City of Fresno* v. *California,* 372 U. S. 627 (1963). In *Ivanhoe* we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres. We said:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes

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[87] "Nothing in . . . [this Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing . . . [herein] shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U. S. C. § 383 (1958).

> necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects, it must give way before an inconsistent state system.' . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." *Id.*, at 291–292.

Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe,* hold that the Secretary must be bound by state law in disposing of water under the Project Act.

Nor does § 18 of the Project Act require the Secretary to contract according to state law. That Act was passed in the exercise of congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects,[88] and is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements.[89] Section 18 merely preserves such rights as the States "now" have, that is, such rights as they had at the time the Act was passed. While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river.[90] Where the Government, as here,

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[88] *Arizona* v. *California,* 283 U. S. 423 (1931).

[89] *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 738 (1950).

[90] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n,* 328 U. S. 152, 171 (1946). See *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 62–72 (1913); *United States* v. *Willow River Power Co.,* 324 U. S. 499 (1945).

has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws.[91] As in *Ivanhoe*, where the general provision preserving state law was held not to override a specific provision stating the terms for disposition of the water, here we hold that the general saving language of § 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by § 5.[92] Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights.[93] What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.[94]

Before the Project Act was passed, the waters of the Colorado River, though numbered by the millions of acre-feet, flowed too haltingly or too freely, resulting in

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[91] See *Arizona* v. *California*, 283 U. S. 423 (1931); *Nebraska* v. *Wyoming*, 325 U. S. 589, 615 (1945); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U. S. 152 (1946).

[92] *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), holds nothing to the contrary. There the Court found it unnecessary to decide what rights the United States had under federal law to the unappropriated water of the North Platte River, since the water rights on which the projects in that case rested had in fact been obtained in compliance with state law.

[93] See *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 175–176 (1946), where this Court limited the effect of § 27 of the Federal Power Act, which expressly "saved" certain state laws, to vested property rights.

[94] By an Act of September 2, 1958, 72 Stat. 1726, the Secretary must supply water to Boulder City, Nevada. It follows from our conclusions as to the inapplicability of state law that, contrary to the Master's conclusion, Boulder City's priorities are not to be determined by Nevada law.

droughts and floods. The problems caused by these conditions proved too immense and the solutions too costly for any one State or all the States together. In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake, Congress responded to the pleas of the States to come to their aid. The result was the Project Act and the harnessing of the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.

In undertaking this ambitious and expensive project for the welfare of the people of the Lower Basin States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works. Behind the dam were stored virtually all the waters of the main river, thus impounding not only the natural flow but also the great quantities of water previously allowed to run waste or to wreak destruction. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin. Today, the United States operates a whole network of useful projects up and down the river, including the Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, Morelos Dam, and the All-American Canal System, and many lesser works. It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used. All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of

square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.

II.

Provisions in the Secretary's Contracts.

A. *Diversions above Lake Mead.*—The Secretary's contracts with Arizona and Nevada provide that any waters diverted by those States out of the mainstream or the tributaries above Lake Mead must be charged to their respective Lower Basin apportionments. The Master, however, took the view that the apportionment was to be made out of the waters actually stored at Lake Mead or flowing in the mainstream below Lake Mead. He therefore held that the Secretary was without power to charge Arizona and Nevada for diversions made by them from the 275-mile stretch of river between Lee Ferry and Lake Mead [95] or from the tributaries above Lake Mead. This

[95] The location of Hoover Dam is a result of engineering decisions. As Senator Pittman pointed out, "There is no place to impound the flood waters except at the lower end of the canyon." 68 Cong. Rec. 4413 (1927).

conclusion was based on the Master's reasoning that the Secretary was given physical control over the waters stored in Lake Mead and not over waters before they reached the lake.

We hold that the Master was correct in deciding that the Secretary cannot reduce water deliveries to Arizona and Nevada by the amount of their uses from tributaries above Lake Mead, for, as we have held, Congress in the Project Act intended to apportion only the mainstream, leaving to each State its own tributaries. We disagree, however, with the Master's holding that the Secretary is powerless to charge States for diversions from the mainstream above Lake Mead. What Congress was doing in the Project Act was providing for an apportionment among the Lower Basin States of the water allocated to that basin by the Colorado River Compact. The Lower Basin, with which Congress was dealing, begins at Lee Ferry, and it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the States. Were we to refuse the Secretary the power to charge States for diversions from the mainstream between Lee Ferry and the dam site, we would allow individual States, by making diversions that deplete the Lower Basin's allocation, to upset the whole plan of apportionment arrived at by Congress to settle the long-standing dispute in the Lower Basin. That the congressional apportionment scheme would be upset can easily be demonstrated. California, for example, has been allotted 4,400,000 acre-feet of mainstream water. If Arizona and Nevada can, without being charged for it, divert water from the river above Lake Mead, then California could not get the share Congress intended her to have.

B. *Nevada Contract.*—Nevada has excepted to her inclusion in Paragraph II (B)(7) of the Master's recommended decree, which provides that "mainstream water shall be delivered to users in Arizona, California and Ne-

vada only if contracts have been made by the Secretary of the Interior, pursuant to § 5 of the Boulder Canyon Project Act, for the delivery of such water." While the California contracts are directly with water users and the Arizona contract specifically contemplates further subcontracts with actual users, it is argued that the Nevada contract, made by the Secretary directly with the State of Nevada through her Colorado River Commission, should be construed as a contract to deliver water to the State without the necessity of subcontracts by the Secretary directly with Nevada water users. The United States disagrees, contending that properly construed the Nevada contract, like the Secretary's general contract with Arizona, does not exhaust the Secretary's power to require Nevada water users other than the State to make further contracts. To construe the Nevada contract otherwise, the Government suggests, would bring it in conflict with the provision of § 5 of the Project Act that "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract [with the Secretary] made as herein stated." Acceptance of Nevada's contention here would not only undermine this plain congressional requirement that water users have contracts with the Secretary but would likewise transfer from the Secretary to Nevada a large part, if not all, of the Secretary's power to determine with whom he will contract and on what terms. We have already held that the contractual power granted the Secretary cannot be diluted in this manner. We therefore reject Nevada's contention.

III.

Apportionment and Contracts in Time of Shortage.

We have agreed with the Master that the Secretary's contracts with Arizona for 2,800,000 acre-feet of water and with Nevada for 300,000, together with the limitation

of California to 4,400,000 acre-feet, effect a valid apportionment of the first 7,500,000 acre-feet of mainstream water in the Lower Basin. There remains the question of what shall be done in time of shortage. The Master, while declining to make any findings as to what future supply might be expected, nevertheless decided that the Project Act and the Secretary's contracts require the Secretary in case of shortage to divide the burden among the three States in this proportion: California $\frac{4.4}{7.5}$; Arizona $\frac{2.8}{7.5}$; Nevada $\frac{.3}{7.5}$. While pro rata sharing of water shortages seems equitable on its face,[96] more considered judgment may demonstrate quite the contrary. Certainly we should not bind the Secretary to this formula. We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. And neither the Project Act nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. And the Secretary may or may not conclude that a pro rata division is the best solution.

It must be remembered that the Secretary's decision may have an effect not only on irrigation uses but also on other important functions for which Congress brought this great project into being—flood control, improvement of navigation, regulation of flow, and generation and distribution of electric power. Requiring the Secretary to prorate shortages would strip him of the very power of

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[96] Proration of shortage is the method agreed upon by the United States and Mexico to adjust Mexico's share of Colorado River water should there be insufficient water to supply each country's apportionment.

choice which we think Congress, for reasons satisfactory to it, vested in him and which we should not impair or take away from him. For the same reasons we cannot accept California's contention that in case of shortage each State's share of water should be determined by the judicial doctrine of equitable apportionment or by the law of prior appropriation. These principles, while they may provide some guidance, are not binding upon the Secretary where, as here, Congress, with full power to do so, has provided that the waters of a navigable stream shall be harnessed, conserved, stored, and distributed through a government agency under a statutory scheme.

None of this is to say that in case of shortage, the Secretary cannot adopt a method of proration or that he may not lay stress upon priority of use, local laws and customs, or any other factors that might be helpful in reaching an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation. It will be time enough for the courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including his obligation to respect "present perfected rights" as of the date the Act was passed. At this time the Secretary has made no decision at all based on an actual or anticipated shortage of water, and so there is no action of his in this respect for us to review. Finally, as the Master pointed out, Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes. Unless and until it does, we leave in the hands of the Secretary, where Congress placed it, full power to control, manage, and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Project Act.

IV.

ARIZONA-NEW MEXICO GILA CONTROVERSY.

Arizona and New Mexico presented the Master with conflicting claims to water in the Gila River, the tributary that rises in New Mexico and flows through Arizona. Having determined that tributaries are not within the regulatory provisions of the Project Act the Master held that this interstate dispute should be decided under the principles of equitable apportionment. After hearing evidence on this issue, the Master accepted a compromise settlement agreed upon by these States and incorporated that settlement in his findings and conclusions, and in Part IV (A)(B)(C)(D) of his recommended decree. No exceptions have been filed to these recommendations by any of the parties and they are accordingly accepted by us. Except for those discussed in Part V, we are not required to decide any other disputes between tributary users or between mainstream and tributary users.

V.

CLAIMS OF THE UNITED STATES.

In these proceedings, the United States has asserted claims to waters in the main river and in some of the tributaries for use on Indian Reservations, National Forests, Recreational and Wildlife Areas, and other government lands and works. While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian Reservations.

The Government, on behalf of five Indian Reservations in Arizona, California, and Nevada, asserted rights to water in the mainstream of the Colorado River.[97] The Colorado River Reservation, located partly in Arizona and partly in California, is the largest. It was originally created by an Act of Congress in 1865,[98] but its area was later increased by Executive Order.[99] Other reservations were created by Executive Orders and amendments to them, ranging in dates from 1870 to 1907.[100] The Master found both as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet, to be used on around 135,000 irrigable acres of land. Here, as before the Master, Arizona argues that the United States had no power to make a reservation of navigable waters after Arizona became a State; that navigable waters could not be reserved by Executive Orders; that the United States did not intend to reserve water for the Indian Reservations; that the amount of water reserved should be measured by the rea-

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[97] The Reservations were Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave.

[98] Act of March 3, 1865, 13 Stat. 541, 559.

[99] See Executive Orders of November 22, 1873, November 16, 1874, and May 15, 1876. See also Executive Order of November 22, 1915. These orders may be found in 1 U. S. Dept. of Interior, Executive Orders Relating to Indian Reservations 6–7 (1912); 2 *id.*, at 5–6 (1922).

[100] Executive Orders of January 9, 1884 (Yuma), September 19, 1890 (Fort Mohave), February 2, 1911 (Fort Mohave), September 27, 1917 (Cocopah). For these orders, see 1 *id.*, at 12–13, 63–64 (1912); 2 *id.*, at 5 (1922). The Chemehuevi Reservation was established by the Secretary of Interior on February 2, 1907, pending congressional approval.

sonably foreseeable needs of the Indians living on the reservation rather than by the number of irrigable acres; and, finally, that the judicial doctrine of equitable apportionment should be used to divide the water between the Indians and the other people in the State of Arizona.

The last argument is easily answered. The doctrine of equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties. An Indian Reservation is not a State. And while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctrine of equitable apportionment. Moreover, even were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations.

Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), and *Shively* v. *Bowlby*, 152 U. S. 1 (1894). Those cases and others that followed them [101] gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the

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[101] See, *e. g.*, *United States* v. *California*, 332 U. S. 19, 29–30 (1947); *United States* v. *Holt State Bank*, 270 U. S. 49, 54–55 (1926).

problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. Some of the reservations of Indian lands here involved were made almost 100 years ago, and all of them were made over 45 years ago. In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.[102]

Arizona also challenges the Master's holding as to the Indian Reservations on two other grounds, first, that there is a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them, and, second, that even if water was meant to be reserved the Master has awarded too much water. We reject both of these contentions. Most of the land in these reservations is and always has been arid. If the

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[102] See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469–475 (1915); *Winters* v. *United States*, 207 U. S. 564 (1908).

water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised. In the debate leading to approval of the first congressional appropriation for irrigation of the Colorado River Indian Reservation, the delegate from the Territory of Arizona made this statement:

> "Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life; and all they ask of you is to give them a few agricultural implements to enable them to dig an irrigating canal by which their lands may be watered and their fields irrigated, so that they may enjoy the means of existence. You must provide these Indians with the means of subsistence or they will take by robbery from those who have. During the last year I have seen a number of these Indians starved to death for want of food." Cong. Globe, 38th Cong., 2d Sess. 1321 (1865).

The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in *Winters* v. *United States*, 207 U. S. 564, decided in 1908. Much the same argument made to us was made in *Winters* to persuade the Court to hold that Congress had created an Indian Reservation

without intending to reserve waters necessary to make those reservations livable. The Court rejected all of the arguments. As to whether water was intended to be reserved, the Court said, at p. 576:

> "The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession."

The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States* v. *Powers*, 305 U. S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act was passed in 1929, are "present perfected rights" and as such are entitled to priority under the Act.

We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled

that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future uses will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.

We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Gila National Forest.

We reject the claim of the United States that it is entitled to the use, without charge against its consumption, of any waters that would have been wasted but for salvage by the Government on its wildlife preserves. Whatever the intrisic merits of this claim, it is inconsistent with the Act's command that consumptive use shall be measured by diversions less returns to the river.

Finally, we note our agreement with the Master that all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States.

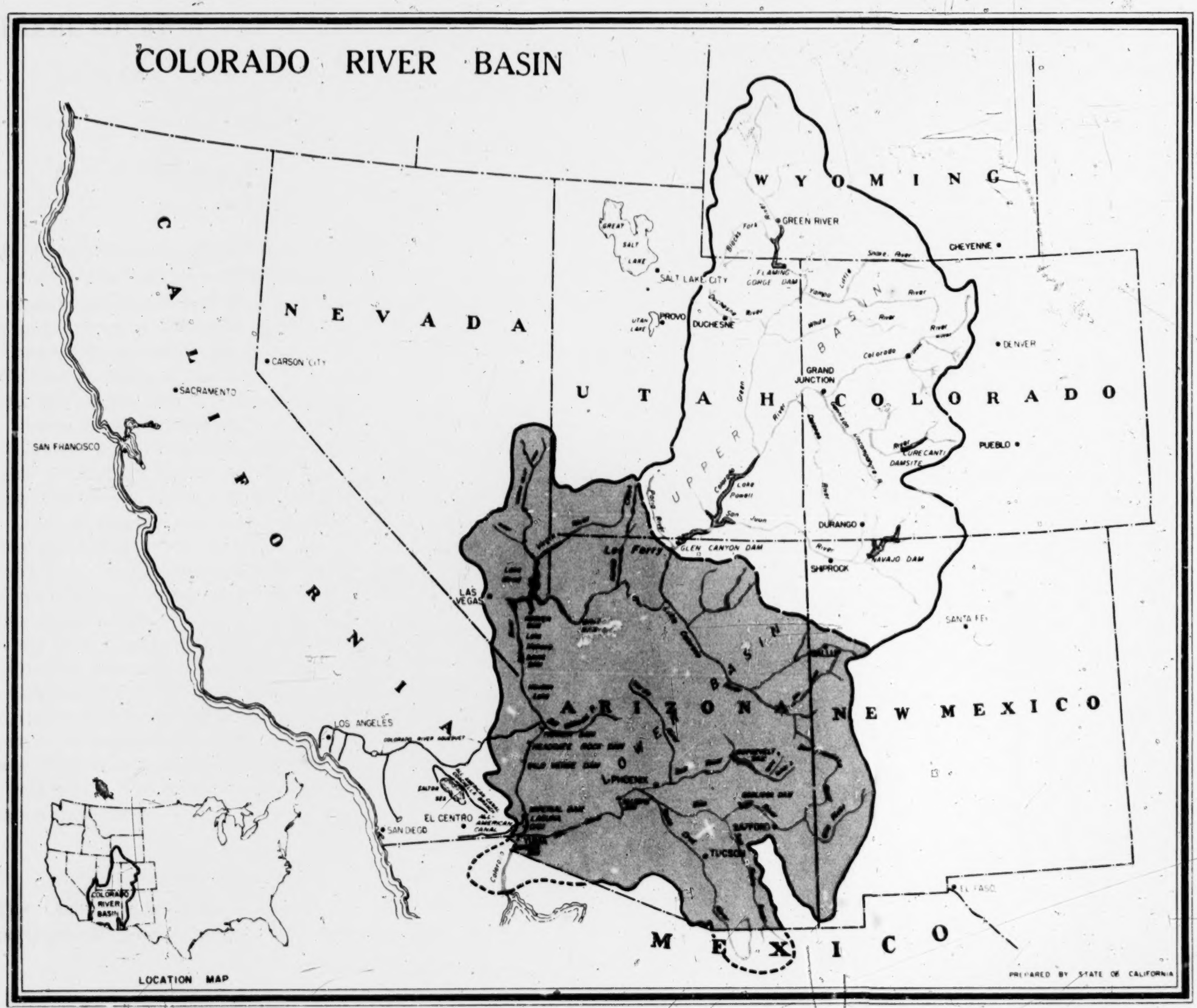
VI.

DECREE.

While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.


COLORADO RIVER BASIN
WYOMING
NEVADA
UTAH
COLORADO
CALIFORNIA
ARIZONA
NEW MEXICO
MEXICO
GREEN RIVER
CHEYENNE
SALT LAKE CITY
PROVO
DUCHESNE
CARSON CITY
SACRAMENTO
SAN FRANCISCO
DENVER
GRAND JUNCTION
PUEBLO
DURANGO
SHIPROCK
GLEN CANYON DAM
NAVAJO DAM
LAS VEGAS
LOS ANGELES
SANTA FE
PHOENIX
TUCSON
EL CENTRO
SAN DIEGO
EL PASO
LOCATION MAP
PREPARED BY STATE OF CALIFORNIA

SUPREME COURT OF THE UNITED STATES

No. 8, ORIG.—OCTOBER TERM, 1962.

State of Arizona, Plaintiff,
v.
State of California et al. } Complaint.

[June 3, 1963.]

MR. JUSTICE HARLAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, dissenting in part.

I dissent from so much of the Court's opinion as holds that the Secretary of the Interior has been given authority by Congress to apportion, among and within the States of California, Arizona, and Nevada, the waters of the mainstream of the Colorado River below Lee Ferry. I also dissent from the holding that in times of shortage the Secretary has discretion to select or devise any "reasonable method" he wishes for determining which users within these States are to bear the burden of that shortage. (In all other respects MR. JUSTICE STEWART and I—but not MR. JUSTICE DOUGLAS—agree with and join in the Court's opinion, though not without some misgivings regarding the amounts of water allocated to the Indian Reservations.)

In my view, it is the equitable principles established by the Court in interstate water-rights cases, as modified by the Colorado River Compact and the California limitation, that were intended by Congress to govern the apportionment of mainstream waters among the Lower Basin States, whether in surplus or in shortage. *A fortiori*, state law was intended to control apportionment among users within a single State.

I.

INTRODUCTION.

The Court's conclusions respecting the Secretary's apportionment powers, particularly those in times of

shortage, result in a single appointed federal official being vested with absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States. Such restraint upon his actions as may follow from judicial review are, as will be shown, at best illusory. Today's result, I venture to say, would have dumbfounded those responsible for the legislation the Court construes, for nothing could have been farther from their minds or more inconsistent with their deeply felt convictions.

The Court professes to find this extraordinary delegation of power principally in § 5 of the Project Act, the provision authorizing the Secretary to enter into contracts for the storage and delivery of water. But § 5, as is more fully shown below, pp. 13–19, *infra*, had no design resembling that which the Court now extracts from it. Rather, it was intended principally as a revenue measure, and the clause *requiring* a contract as a condition of delivery was inserted at the insistence not of the Lower but of the Upper Basin States in an effort to insure that nothing would disturb that basin's rights under the Colorado River Compact. There was no thought that § 5 would give authority to apportion water among the Lower Basin States. Indeed, during the hearings on the third Swing-Johnson bill when § 5 took its present form, one of its principal proponents, Delph Carpenter of Colorado, specifically stated that the proposed condition of a contract was intended to require

> "that the persons who receive the water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California.*" [1] (Emphasis added.)

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[1] Hearings before House Committee on Irrigation and Reclamation on H. R. 6251 and H. R. 9826, 69th Cong., 1st Sess. 163.

And Representative Swing, coauthor of the bill, made virtually the same point in explaining the provision before the House Rules Committee:

> "The act says [in § 5] 'The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water.' Whose water? It does not say. It might be a community like Imperial Valley that has already acquired a water right . . . or it may be someone who hereafter will acquire a water right, but that right will not be acquired under this bill; *not from the United States Government.* He will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use. *There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State.* As a matter of fact, the reclamation law is adopted by section 13 of this bill [now § 14], and section 8 of the reclamation act says that *what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.*" [2] (Emphasis added.)

The Court concedes, as indeed it must in the face of such unequivocal evidence, that this third Swing-Johnson bill, like its predecessors, established "no method whatever of apportioning the water among the States of the Lower Basin." *Ante,* p. 10. This concession, one would think, would end this aspect of the controversy, since § 5 as ulti-

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[2] Hearings before House Committee on Rules on H. R. 9826, 69th Cong., 2d Sess. 116. The bill then under consideration, as recommended by the House Committee on Irrigation and Reclamation, appears in H. R. Rep. No. 1657, 69th Cong., 2d Sess. 29–34.

mately adopted is virtually the same as that proposed in the third bill.[3] Yet a method of federal apportionment is discovered in the fourth Swing-Johnson bill as finally enacted, a method which ends by delegating to the Secretary of the Interior the awesome power over the "water" destiny of three States. To what provision does the Court attribute this startling metamorphosis? The fundamental change in approach is apparently found in § 4 (a), which as adopted contains provisions (1) conditioning the effectiveness of the Act on seven-state ratification of the Colorado River Compact or alternatively on California's agreement to limit its annual consumption of Colorado River water, together with six-state ratification of the Compact; and (2) giving permission to California, Arizona, and Nevada to enter a further compact apportioning certain waters to the latter two States pursuant to a stated formula.

It is manifest that § 4 (a), on which the Court so heavily relies, neither apportions the waters of the river nor vests power in any official to make such an apportionment. The first paragraph does not *grant* any water to anyone; it merely conditions the Act's effectiveness on seven-state ratification of the Compact or on six-state ratification, plus California's agreement to a limitation, *i. e.*, a *ceiling*, on her appropriations. The source of authority to make such appropriations must be found elsewhere. And the second paragraph of § 4 (a), suggesting a particular interstate agreement, similarly makes no apportionment of water among the States and delegates no power to any official to make such an apportionment. Indeed, it was accepted by the Senator from Cali-

[3] The only change that need be noted for present purposes is the addition of a clause requiring contracts to conform to § 4 (a), discussed below, as well as to the Compact.

fornia (Mr. Johnson) only after the following colloquy with its proponent, Senator Pittman of Nevada:

> "Mr. JOHNSON. . . . [W]hat I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.
>
> "Mr. PITTMAN. Exactly, not.
>
> "Mr. JOHNSON. Very well, then.
>
> "Mr. PITTMAN. It is not the request of Congress.
>
> "Mr. JOHNSON. I accept the amendment, then." 70 Cong. Rec. 472.

Senator Johnson would surely have been surprised to learn that the formula which was not even "the request of Congress" was in truth one which the Secretary was authorized to force down the throats of the States if they did not voluntarily agree to it.

Even this brief summary, I think, casts the gravest doubts upon the Court's construction of the Project Act as abolishing state law and accepted principles of equitable apportionment in effecting allocations of water among the States. A more detailed analysis will, I believe, demonstrate the incorrectness of the Court's conclusions on this score and will reveal the constitutional difficulties inherent in the uncontrolled delegation of power resulting from those conclusions.

II.

The Background of the Boulder Canyon Project Act.

Judicial apportionment of interstate waters was established long before the Project Act as an effective means of resolving interstate water disputes. *Kansas* v. *Colo-*

rado, 206 U. S. 46. Its acceptability had never been questioned. Priority of appropriation, the basic determinant of judicial apportionment as enunciated in *Wyoming* v. *Colorado,* 259 U. S. 419, was the law in six of the Colorado Basin States,[4] and senior appropriations were respected in the seventh.[5] The law of appropriation, which rests on the basic principle that a water right depends on beneficial use and which gives priority of right to the appropriator first in time, had been repeatedly declared to be indispensable to the development of the arid lands of the West.[6]

This backdrop of firm dedication to the principles of appropriation and of judicial apportionment is critical to an understanding of congressional purpose with respect to the Project Act. It is also critical to recognize that congressional compromise with these deeply respected principles was only partial; the problems facing Congress as a result of *Wyoming* v. *Colorado* were narrow. No Senator or Representative ever suggested that judicial apportionment was generally inappropriate; no Senator or Representative ever inveighed against the law of appropriation as such. The first problem was simply this: Interstate application of the doctrine of priority, unlim-

[4] Arizona: *Clough* v. *Wing,* 2 Ariz. 371, 17 P. 453; Colorado: *Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443; Nevada: *Jones* v. *Adams,* 19 Nev. 78, 6 P. 442; New Mexico: *Albuquerque Land & Irr. Co.* v. *Gutierrez,* 10 N. Mex. 177, 61 P. 357; Utah: *Stowell* v. *Johnson,* 7 Utah 215, 26 P. 290; Wyoming: *Moyer* v. *Preston,* 6 Wyo. 308, 44 P. 845.

[5] California: *Osgood* v. *El Dorado Water and Deep Gravel Mining Co.,* 56 Cal. 571.

[6] *E. g., Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443, 446–447, 449–450; *Stowell* v. *Johnson, supra,* 7 Utah 215, 225, 26 P. 290, 291; *Willey* v. *Decker,* 11 Wyo. 496, 515–524, 73 P. 210, 215–218. "Irrigation," said the Nevada court, ". . . would be strangled by the enforcement of the riparian principle." *Twaddle* v. *Winters,* 29 Nev. 88, 106, 85 P. 280, 284.

ited by equitable considerations, threatened to deprive the four Upper Basin States of their fair share of the Colorado River because they were not so quick as California in development. The purpose of the Compact was simply to limit traditional doctrines to the extent necessary to avoid this extreme and harsh result, and to eliminate long and costly litigation.

It was perfectly plain that the Colorado River Compact merely guaranteed to the upper States a specified quantity of water immune from priorities below, subject to stated delivery requirements; it did nothing whatever to interfere with the law of priorities or the principles of equitable apportionment among the States of the Lower Basin.[7] It was precisely because it did not that Arizona refused to approve either the Project Act or the Compact until something was done to safeguard her share of Lower Basin water.[8] Similarly, the upper States feared that in the absence of ratification by Arizona, California would be free to appropriate all the Lower Basin's share under the Compact, and Arizona, not limited by that document, would be free to appropriate, as against the upper States, water the Compact sought to apportion to the Upper Basin.[9]

The remaining problem, therefore, was that California's acquisition of priorities as against Arizona and the upper States had to be further limited. A ceiling had to be put on her interstate appropriative priorities. Solution of

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[7] Ward Bannister, Denver attorney and spokesman for the Upper Basin States, said that "[t]he pupose of the Compact is to provide the three lower States with a fund of water from which they may appropriate and the four upper States with a fund of water from which they may appropriate." Hearings before House Committee on Irrigation and Reclamation on H. R. 2903, 68th Cong., 1st Sess. 232.

[8] See the remarks of Senator Hayden, 70 Cong. Rec. 388.

[9] See, *e. g.*, H. R. Rep. No. 1657, 69th Cong., 2d Sess., pt. 2, 3–4; Hearings, *supra*, note 2, at 34–37.

this narrow problem likewise did not require complete abrogation of the principles of priority and interstate judicial apportionment.

Still another, and profoundly significant, factor in understanding the effect of the Project Act on the law of appropriation and judicial apportionment is the pervasive hostility that many westerners had to any form of federal control of water rights. Colorado's Delph Carpenter, who was as much responsible as any man for both the Compact and the contract requirement of § 5 of the Project Act, testified in 1925 to what he termed an insidious and calculated policy of the National Government, fostered particularly by the Departments of Interior and Justice, to encroach upon state prerogatives and supersede state authority with respect to the distribution of water. He made it clear, as did Wyoming's Senator Kendrick, that he deemed this policy oppressive, destructive, and deplorable.[10] Utah's Senator King made the same objection on the floor of Congress. 69 Cong. Rec. 10262. When it was suggested that Congress might legislate to meet the problem of California's threatened preemption of the river, a storm of doubt arose as to its

[10] Hearings before Senate Committee on Irrigation and Reclamation pursuant to S. Res. No. 320, 68th Cong., 2d Sess. 663–675. "It was the oppression of the National Government strangling development, preventing development in the States. . . . These two experiences and others taught Colorado, Wyoming, and New Mexico the extent to which a department of the United States would go in overriding State authority and oppressing whole communities. . . . Thus it came to the attention of the States, that the United States Government intended to supersede all State law and override State authority on that river. . . . [A]ny desire by a governmental bureau to ultimately, by insiduous [*sic*] or other methods, take over the control and dominion of the streams within the States and to override State authority at once becomes not only abhorrent but gives rise to a feeling of bitter resentment and sounds a call to arms for self-defense. . . ." *Id.*, at 663, 665, 671, 673. See also his remarks at Hearings, *supra*, note 1, at 146–157.

constitutional power to do so. Upper Basin and Arizona spokesmen—those who were to be benefited by limiting appropriations—repeatedly insisted that the only constitutional ways of apportioning the river were by suit in this Court or by interstate compact.[11] And Senator Brat-

[11] Senator KING: "If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes." 70 Cong. Rec. 169. The Senator in question was Carl Hayden; he denied that his statement, which concerned his authorization for a compact among the three lower States, meant any such thing.

Senator PHIPPS: "I am firmly convinced that there must be voluntary ratification on the part of each interested State in order to make the Compact effective. This is the only method of settling possible controversies permanently and of putting the water of the stream to its highest beneficial use. It is the only satisfactory method; it is the only legal method to avoid proceedings in the courts which would prove costly and almost interminable." 68 Cong. Rec. 4515.

Senator HAYDEN: "There are only two ways in which this controversy can be settled. Either the States can agree upon an equitable apportionment of waters of the Colorado River or, in the absence of a compact, the Supreme Court of the United States can determine what the rights of the various States are in on [*sic*] that stream. . . . *Arizona denies that it is within the power of Congress to apportion the waters of an interstate stream among the States.*" Hearings, *supra,* note 2, at 75, 76. (Emphasis added.)

Representative COLTON: "I have been informed that an attorney for the Reclamation Service of the United States claims that Congress has the power to allocate and apportion all of the Colorado River among the States regardless of their wishes in the matter. Such a theory is abhorrent to our whole plan of government and particularly to the theory on which our whole system of water rights has been built up." Hearings before House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess. 414.

Representative LEATHERWOOD: "[T]here are only two agencies that can allocate the waters of this great river, the States themselves

ton of New Mexico, hardly an opponent of the Project Act, objected that by merely suggesting in § 4 (a) the terms of a compact which the States were free to modify or to reject, Congress was infringing upon state sovereignty. 70 Cong. Rec. 470–471.

Congress' entire approach to the problems of prior appropriation was governed by this deep-seated hostility to federal dictation of water rights. When plans for development of the Lower Basin threatened the rights of the upper States, they did not seek the simple (and in my view constitutionally unobjectionable) solution of a legislative apportionment. They employed instead the cumbersome method of interstate compact, which required authorization by Congress and by seven state legislatures prior to negotiation and ratification by the same eight bodies thereafter. When it began to appear that Arizona would not ratify the Compact, Congress still did not legislate a general apportionment. It built the statute around the provisions of the Compact, insisting on ratification by as many States as possible, even at the cost of further delaying the already overdue Project Act. It simply conditioned the use of government property and of water stored behind the dam on compliance with the Compact. Attempts to divide the Lower Basin water

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by treaty ratified by the Congress of the United States, or by the judicial branch of the Government; for the Congress has no power to allocate any of the waters of this river or any other river where the doctrine of prior appropriation is in force." Hearings, *supra*, note 2, at 31.

WARD BANNISTER: "[T]here is nothing in the Federal Constitution upon which to base the power of the Federal Government to divide this water among the States. . . . [T]he same thing that would invalidate a provision inserted by Congress direct would invalidate any rule promulgated by the Secretary of the Interior under Congressional permission, and the upper States would find themselves utterly helpless." Hearings, *supra*, n. 7, at 195.

by interstate agreement continued through the Denver Conference called by the Upper Basin Governors in the summer of 1927—nearly five years after negotiation of the Compact. Yet it was not until 1927 that an amendment was first offered to protect Arizona by a statutory limitation on California's consumption, and it was not until 1928 that the proposal was adopted into the bill.[12]

Finally, when Congress ultimately resigned itself to the necessity of legislating in some way with respect to the division of Lower Basin waters, it used narrow words suitable to its narrow purpose and to its regard both for the system of judicial apportionment and appropriation and for the rights of the States. Even then Congress did not attempt to legislate an apportionment of Lower Basin water; it simply prescribed a ceiling for California. In the words of Senator Johnson, "We write, then, that California shall use perpetually only a specific amount of water, naming the maximum amount which may be used." 69 Cong. Rec. 7250. Even this, Congress was unwilling to do directly. As reported from committee, the bill contained a provision directing the Secretary of the Interior to limit California's consumption in the exercise of his power of contract.[13] But this was replaced by the present provision, which reached the same result not via the Secretary's contract authority but by the awkward device of requiring California's legislature to consent to the limitation as a condition precedent to the effectiveness of the Project Act. And this was not all; to end the tale Congress added to § 4 (a) specific authorization to Arizona, California, and Nevada to enter into an agreement to complete the division of the Lower Basin water—the same

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[12] 68 Cong. Rec. 4763; S. Rep. No. 592, 70th Cong., 1st Sess. 2.

[13] S. Rep. No. 592, 70th Cong., 1st Sess. 2.

cumbersome substitute for direct congressional apportionment that had been abortively mooted for six years.

This history bears recapitulation. *First,* the law of appropriation, basic to western water law, was greatly respected, and the solution of interstate water disputes by judicial apportionment in this Court was well established and accepted. *Second,* the problems created by these doctrines as applied in *Wyoming* v. *Colorado* were narrow ones, not requiring for their solution complete abrogation of well-tried principles; existing law was quite adequate to deal with all questions save those Congress expressly solved by imposing a ceiling on California. *Third,* Congress throughout the dispute exhibited great reluctance to interfere with the division of water by legislation, because of a deep and fundamental mistrust of federal intervention and a profound regard for state sovereignty, shared by many influential members. *Finally,* when Congress was forced to legislate with respect to this problem or face defeat of the entire Project Act, it chose narrow terms appropriate to the narrow problem before it, and even then acted only indirectly to require California's consent to limiting her consumption.

It is inconceivable that such a Congress intended that the sweeping federal power which it declined to exercise—a power even the most avid partisans of national authority might hesitate to grant to a single administrator—be exercised at the unbridled discretion of an administrative officer, especially in the light of complaints registered about "bureaucratic" and "oppressive" interference of the Department which that very officer headed.[14] It is utterly incredible that a Congress unwilling because of concern for States' rights even to limit California's maximum consumption to 4,400,000 acre-feet without the consent of her legislature intended to give

[14] See note 10, *supra,* and accompanying text.

the Secretary of the Interior authority without California's consent to reduce her share even below that quantity in a shortage.

III.

The Authority of the Secretary under Section 5 of the Project Act.

The Court holds that § 5 of the Project Act, which empowers the Secretary to contract for water delivery and forbids delivery of stored water without a contract, displaces the law of apportionment among the Lower Basin States, giving the Secretary power to divide the water by contract and to distribute the burden of shortages, without respecting appropriations.

But it does not follow that because no user is entitled to stored water without a contract the Secretary may award or withhold contracts independently of priorities. In fact, § 5 reflects no such intention. The Secretary's power to contract upon appropriate financial charges for water delivery, not included in the early bills, was added during the 1926 hearings in response to a request from Secretary of the Interior Work that users of water, as well as of power, be made to bear the cost of the project.[15] At the same time § 4 (b) for the first time provided that no work under the Act should begin until these revenues were assured by the Secretary's contracts. There was yet no provision prohibiting deliveries without contracts.[16]

Thus originally purely a financial tool, the contract power was later made to serve the additional purpose of enforcing the Compact's provisions against Arizona in the absence of her ratification. At the urging of the upper States § 8 had been amended to subject the United States

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[15] Hearings, *supra*, note 1, at 6, 46.

[16] H. R. 9826, 69th Cong., 1st Sess., § 5.

in operating the dam to the Compact, to condition the enjoyment of the dam's benefits on compliance with the Compact, and to require that contracts from the United States should so provide.[17] The upper States then insisted on inserting the requirement in § 5 that no one was to receive stored water without a contract, *expressly and solely for the purpose of tying the Compact's enforcement to the contract power.*[18] There was no intent to confer absolute power to grant or withhold. Indeed, to give effect to priorities in time of shortage, up to the maximum quantities permitted California by § 4 (a), tends to promote the stability of water uses, a policy Congress sought to further in § 5 itself by requiring that contracts be for permanent service. In short, disregard of appropriations in one State in favor of those in another, except as required by the inter-basin apportionment of the Compact or by the California limitation, was no part of the purpose of this section; it was designed to insure revenue and to enforce the Compact and the California limitation.[19]

When the provision for water delivery contracts was first inserted in the Swing bill in 1926, it prescribed that "Contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appro-

[17] S. 1868, 69th Cong., 1st Sess.; H. R. 6251, 69th Cong., 1st Sess.; H. R. 9826, 69th Cong., 1st Sess. This amendment, wrote Secretary Work in recommending the bill, "provides for the distribution and use of all water for irrigation, power and otherwise, in accordance with the Colorado River Compact." Hearings, *supra*, note 1, at 8.

[18] See notes 1, 2, *supra*, and accompanying text. Contracts were later made subject also to the California limitation in § 4 (a).

[19] It is significant to contrast the language giving the Secretary authority to enter water delivery contracts with that in § 5 (c), relating to the distribution of electrical power. The latter provision explicitly gives the Secretary authority to resolve conflicts in applications, referring him for the governing standards to "the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses."

priators." [20] Proponents of the bill later altered this provision to apply to irrigation contracts as well as to require, rather than simply to permit, that contracts be for permanent service.[21] At the request of the upper States, the phrase "subject to rights of prior appropriators" was deleted.[22] The Court concludes from this bit of history that Congress considered but rejected the suggestion that the law of appropriation govern the distribution of water stored in Lake Mead. But deletion or rejection of a proposed amendment is not strong evidence of legislative intention; the reasons for deletion may be any of a great number, not the least frequent of which is that the suggestion is redundant. Here it seems clear that there was a further reason for the change. The phrase was dropped at the same time the provision *requiring* each user to have a contract was added. Under the bill as it stood prior to this no contract was required, and new contracts were made junior to all prior appropriators, even those initiating or perfecting rights only after the statute became effective. As amended the bill required a contract of every user of stored waters, and the deleted clause was no longer in accord with the contractual plan. It is surely stretching things to suggest that deletion of this no longer accurate language signifies that the Secretary may award contracts on his own authority, without regard for priorities that would obtain under state law.

In support of its construction of § 5 the Court relies in large part upon an exchange between Senator Johnson and Senator Walsh of Montana. 70 Cong. Rec. 168. The only thing this colloquy seems to make clear is that Senator Johnson had not comprehensively analyzed the relationship between § 5 and the law of appropriation. First

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[20] Hearings, *supra*, note 1, at 12.

[21] *Id.*, at 115.

[22] *Id.*, at 97, 115.

he thought the Secretary would be required to deliver water to those who had appropriated it; then he said this would be required "[i]f they contract"; then he agreed the Secretary might withhold water "as he sees fit"; then he "doubt[ed] very much" whether the Secretary could disregard Los Angeles' appropriations; finally he said "possibly" the Secretary might utterly ignore appropriations. This shifting dialogue can scarcely be deemed an authoritative, or even useful, aid to construction of the statute.

Nor is there warrant for the Court's reliance on the statements of such opponents of the bill as Utah's Representative Douglas and Arizona's Representative Colton. Objections of opponents of a bill are seldom significant guides to its construction. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395. And in any event in this instance the opponents themselves were far from consistent in their views.[23]

Of far greater significance are the statements of the bill's supporters, which confirm that no power to ignore appropriations was given to the Secretary.[24] Representative Swing, author of the bill, responded to Mr. Hayden's assertion that such a power was given with an

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[23] Thus, almost in the same breath with which Representative Colton made his then seemingly dire prediction of national control, he declared that "Arizona is not a party at all to this compact. She and her citizens may appropriate water at any time." 69 Cong. Rec. 9648. Arizona, as has already been pointed out, was busily opposing the bill on the specific ground that it left California free to appropriate from the river.

[24] The one apparent exception to the unanimity of view among the bill's supporters is the statement in Representative Smith's report of the third Swing bill to the House: "All rights respecting water or power under the project are, under the terms of the bill, to be disposed of by contract by the Government. It is not reasonable to assume that the Government will do anything of an unfair or prejudicial nature to Arizona." H. R. Rep. No. 1657, 69th Cong., 2d Sess. 11.

emphatic denial: "the distribution will either be by agreement between the States or under their respective laws." House Hearings, *supra,* note 1, at 32. The following year he explained that the United States would not dispose of water rights under the bill; it would merely store water belonging to persons acquiring their rights under state law. See p. 3, *supra.* In 1928, defending the House bill against an Arizona witness' charge that California might appropriate the entire Lower Basin supply, Mr. Swing did not dispute the statement as to California's rights but reinforced it by declaring that Arizona was free to make appropriations too. House Hearings, *supra,* note 11, at 57–58. He later assured the House that notwithstanding the bill Arizona "still has the benefit of the law of prior appropriation, and she still has the right to the beneficial use of any of the water she is able to put to use." 69 Cong. Rec. 9781. Delph Carpenter, proponent of the § 5 contract requirement, said that it was designed to burden storage water with the Compact, and thus to protect the Upper Basin, and that "[i]t has nothing to do with the interstate relations between Arizona and California." [25] Senator Johnson, sponsor of the Senate bill, told the Senate the bill was made a part of the recla-

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[25] See note 1, *supra,* and accompanying text. Mr. Carpenter's remarks also included the following: "'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any person in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water." Hearings, *supra,* note 1, at 163.

mation law, which "specifically protects each State in its water rights and in the rights of the citizens of those States to water." 68 Cong. Rec. 4292. Senator Pittman insisted there was nothing in the bill (prior to the California limitation) to prevent either Arizona or California from appropriating all the water she could use.[26] Senator Phipps, whose amendment became the California limitation, declared that any dispute over the relative rights of Arizona and of Los Angeles would be resolved by the Secretary in accordance with priority of appropriation and the normal preference for domestic over agricultural use.[27]

Of further weight in supporting the view that Congress did not construe § 5 to destroy the law of appropriation and apportionment is the fact that the entire controversy over the California limitation took place *after* § 5 was added to the bill. Utah was so certain that Arizona remained free to appropriate water despite § 5 that she

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[26] "If a dam shall be built at Boulder Canyon it will impound certain waters and equate the flow below. The water below will be subject to appropriation and use by both California and Arizona .... In other words, there is nothing in this proposed legislation that could prevent Arizona from appropriating from the Colorado River within her borders all of the water she could use for irrigation." 68 Cong. Rec. 4412.

[27] "It seems to me that in resolving such a difficulty, should it arise, there would be taken into consideration the fact that water for domestic use should take priority over water intended for purposes of irrigation. Aside from that, these filings are first in point as compared with those to which the Senator from Arizona referred. They are for a superior use, and, in addition thereto, the applicant who has made the filing has pursued the proper course in developing the manner of appropriation or the manner of diverting the water and putting it to the highest beneficial use. I do not anticipate any difficulty on that score in resolving the question of priority by the Secretary of the Interior." 70 Cong. Rec. 169.

repealed her ratification of the six-state Compact thereafter.[28] While the original committee amendment to the Act would have required the Secretary to limit California's appropriations, the debates evidence no conviction that the Secretary had even a permissive authority to do so by virtue of the unamended § 5.

IV.

The Bearing of Other Provisions of the Project Act.

Nothing in the Project Act expressly gives the Secretary power to ignore appropriations so long as financial conditions are met and the Compact and limitations are observed. Senators Hayden and Pittman, as the Court notes, did indicate that § 4 (a) provided for an apportionment of the water, although even they did not suggest that § 4 (a) gave any authority to the Secretary to make an apportionment by his contracts or to allocate the burdens in time of shortage. But in any event, as already noted, pp. 4–5, *supra*, § 4 does not by its terms make an apportionment; rather it simply requires six-state ratification of the Compact and an agreement by California to limit her share as conditions on the effectiveness of the Act, and authorizes an apportionment by the States themselves. In the words of Senator Johnson, the provision

> ". . . does not divide the water between Arizona and California. It fixes a maximum amount beyond which California can not go." 70 Cong. Rec. 385.

Nor does § 6, which requires that the dam be operated for the satisfaction of "present perfected rights" among

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[28] See 68 Cong. Rec. 3064–3065; Hearings, *supra*, note 11, at 191, 193, 214–215.

other purposes, indicate by negative implication that the Secretary may ignore all other appropriations. This provision was drafted by the Upper Basin States in order to insure that the condition of the Compact had been met to relieve them from the claims of perfected users below.[29] That condition was the construction of an adequate storage reservoir against which those claims could be asserted; the Compact has nothing to do with whether rights perfected under state law since 1929 may be ignored by the Secretary in awarding contracts. Section 8 (b), which subjects the United States and all users of the Project to any compact allocating among the Lower Basin States "the benefits, including power, arising from the use of water accruing to said States," and subjects such an agreement, if made after January 1, 1929, to any delivery contracts made prior to its approval, is similarly no authority for the Court's conclusion. Legislative history is virtually silent as to the reason for giving such contracts precedence, but the provision seems simply to have been intended to promote the entering of contracts by insuring their permanence in accordance with the requirement of § 5.[30] There is no indication in § 8 (b) whether or not the Secretary is free in awarding contracts to ignore existing appropriations; it merely evidences a policy that rights so perfected as to have been reduced to a contract for delivery at a consideration, whatever the basis on which they should be awarded, ought not to be destroyed by a subsequent interstate agreement.

If the statute were completely silent as to whether the Secretary may disregard appropriations, the normal inference would be that Congress did not mean to displace

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[29] See Hearings, *supra*, note 1, at 98, 116, 117.

[30] Delph Carpenter said that the Secretary's contracts should be lagged for only a limited period of time in order to give the States complete freedom to agree. *Id.*, at 204.

existing law. Enough has been said of the statute's history to buttress this inference beyond question. Moreover, the statute is by no means silent on this matter. The references in § 8 (a) and (b) to "appropriators" of water stored or delivered by the Project, and in § 4 (a) to the taking of steps "to initiate or perfect any claims to the use of water" made available by the dam, are only the least evidence.[31] Section 14 provides that the Reclamation Law shall govern the operation of Hoover Dam except as the Project Act otherwise provides. Section 8 of the Reclamation Law, 32 Stat. 390, 43 U. S. C. § 383, directs the Secretary of the Interior in carrying out his duties under the Act to proceed in accordance with state and territorial laws and declares that nothing in the federal act "shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

Both Representative Swing and Senator Johnson emphasized that this provision was deliberately incorporated into the Project Act to safeguard from federal destruction the rights of the States to their shares of the water.[32] This Court made clear in *Wyoming* v. *Colorado,* 259 U. S. 419, 463, that by thus protecting the rights of any State in an interstate stream Congress intended to leave untouched the law of interstate equitable apportionment. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 291, despite its dictum that § 8 applies only to the acquisition of rights by the United States and not to its operation of

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[31] It should also be noted that, as the Master held, § 18, quoted *ante,* p. 35, clearly leaves each State free to apply its own law in determining rights among users within its borders. The Court's strained reading of this provision emasculates it entirely and sacrifices even matters of solely intrastate concern on the altar of federal supremacy.

[32] See pp. 3, 17–18, *supra.*

a dam, holds only that the clear command of § 5 of the Reclamation Law, 32 Stat. 389, 43 U. S. C. § 431—that water deliveries to each user not exceed the quantity required for 160 acres—prevails over state law, not that state law does not generally govern priorities in the use of water from federal reclamation projects under § 8.[33] The Court in *Ivanhoe* expressly stated that it was reaching its narrow conclusion:

> "[w]ithout passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field . . . ." 357 U. S., at 292.

This general question, with reference to what is undoubtedly the most important single water project in the United States, is precisely the question before us today. In view of the language of the Project Act, as well as its background and legislative history, there can, I think, be no doubt of the answer.

V.

The Lack of Standards Defining the Limits of the Secretary's Power.

The Secretary, the Court holds, has already apportioned the waters of the mainstream by his contracts with Arizona and Nevada and has done so in accordance with the formula suggested as a basis for an interstate agreement in § 4 (a). This holding may come as a surprise to those

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[33] Nor is anything said in *City of Fresno* v. *California*, 372 U. S. 627, relevant here, since the Court there stated only that if the Government exercises its power of eminent domain, "the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 372 U. S., at 630. *Fresno* did not consider the question now presented: the effect of § 8 in the *absence* of any exercise of the federal power of eminent domain.

responsible for a statement such as that in the Arizona contract, which provides that its terms are

> ". . . without prejudice to, any of the respective contentions of said states and water users as to . . . (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system . . . ."

But whether the quantum of the Secretary's apportionment was intentional or inadvertent, the Court holds that such an apportionment has been made, and the relevant question for the future is the one that is perhaps primarily responsible for this litigation: How is the burden of any shortage to be borne by the Lower Basin States? This question is not decided; the Court simply states that the initial determination is for the Secretary to make.

What yardsticks has Congress laid down for him to follow? There is, it is true, a duty imposed on the Secretary under § 6 to satisfy "present perfected rights," and if these rights are defined as those perfected on or before the effective date of the Act, it has been estimated that California's share amounts to approximately 3,000,000 acre-feet annually. This, then, would be the floor provided by the Act for California, assuming enough water is available to satisfy such present perfected rights. And the Act also has provided a ceiling for California: the 4,400,000 acre-feet of water (plus one-half of surplus) described in § 4 (a).

But what of that wide area between these two outer limits? Here, when we look for the standards defining the Secretary's authority, we find nothing.[34] Under the

[34] Nor, I submit, does the Court suggest any standards. Certainly, there is nothing in the enumeration of purposes in § 6 which will be of any assistance in helping the Secretary allocate the burden of shortages among competing irrigation and domestic uses within and among the Lower Basin States.

Court's construction of the Act, in other words, Congress has made a gift to the Secretary of almost 1,500,000 acre-feet of water a year, to allocate virtually as he pleases in the event of any shortage preventing the fulfillment of all of his delivery commitments.

The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. See *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 587–589. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution.[35] *First,* it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second,* it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

The absence of standards under the Court's construction is an instructive illustration of these points. The unrestrained power to determine the burden of shortages is the power to make a political decision of the highest order. Indeed, the political pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate. Furthermore, whatever the Secretary decides to do, this Court will surely be unable effectively to review his actions, since it will not know what guides were intended by Congress to govern those actions.

These substantial constitutional doubts do not, of course, lead to the conclusion that the Project Act must

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[35] See the discussion in Comment, 14 Stan. L. Rev. 372.

be held invalid. Rather, they buttress the conviction, already firmly grounded in the Act and its history, that no such authority was vested in the Secretary by Congress. Its purpose instead was to leave these matters to state law, and developed principles of equitable apportionment, subject only to the explicit exceptions provided in the Act.

For these reasons I respectfully dissent from the construction which the Court puts upon this aspect of the Act.

SUPREME COURT OF THE UNITED STATES

No. 8, ORIG.—OCTOBER TERM, 1962.

State of Arizona, Plaintiff,
v.
State of California et al. } Complaint.

[June 3, 1963.]

MR. JUSTICE DOUGLAS, dissenting.

I.

This case, I think, has been haunted by several irrelevancies. First, is the fact that the only points from which California can take the water of the Colorado River System are on the mainstream above Laguna Dam, there being no tributaries in that State. This fact, I think, leads the Court to the inference that the tributaries which come in below Laguna Dam contain waters to which California has no rights. The controversy does concern the waters of the lower tributaries, but only indirectly. California does not seek those waters. She merely seeks to have them taken into consideration in the formula that determines the allocation between her and Arizona.

Another irrelevancy is the fact that only 2½% of the Colorado River drainage basin is in California, although 90% of the water which California appropriates leaves the basin never to return. If we were dealing with problems of equitable apportionment, as we were in *Nebraska* v. *Wyoming*, 325 U. S. 589, that factor would be relevant to our problem. And it would be relevant in case we were dealing with litigation concerning waters in excess of the amount granted California under the Project Act. But it is irrelevant here because the only justiciable question that involves the volume of water is one that concerns the source of supply out of which California's

4,400,000 acre-feet will be satisfied—a matter which I think Congress resolved differently than has the Court.

Third, is a mood about the controversy that suggests that here, as in the cases involving multipurpose federal dams, federal control of navigable streams controls this litigation. The right of the Federal Government to the flow of the stream is not an issue here. We deal with a very unique feature of the irrigation laws of the 17 Western States.

The question is not what Congress has authority to do, but rather the kind of regime under which Congress has built this and other irrigation systems in the West. Heretofore those regimes have been posited on the theory that state law determines the allotment of waters coming through the irrigation canals that are fed by the federal dams.

Much is written these days about judicial law-making; and every scholar knows that judges who construe statutes must of necessity legislate interstitially, to paraphrase Mr. Justice Cardozo. Selected Writings (1949 Hall ed.), p. 160. The present case is different. It will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature. The present decision, as MR. JUSTICE HARLAN shows, grants the federal bureaucracy a power and command over water rights in the 17 Western States that it never has had, that it always wanted, that it could never persuade Congress to grant, and that this Court up to now has consistently refused to recognize. Our rulings heretofore have been consistent with the principles of reclamation law established by Congress both in nonnavigable streams (*Ickes* v. *Fox*, 300 U. S. 82, 94–96) and in navigable ones. *Nebraska* v. *Wyoming*, 325 U. S. 589, 612. The rights of the United States as storer of waters in western projects has been

distinctly understood to be simply that of "a carrier and distributor of water." *Ickes* v. *Fox, supra,* p. 95. As we stated in *Nebraska* v. *Wyoming, supra,* p. 614:

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i. e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use."

And that result was reached even though under those other projects, as under the present one, the Secretary had broad powers to make contracts governing the use and disposition of the stored water. See, *e. g.,* 43 U. S. C. §§ 389, 440.

The men who wrote the Project Act were familiar with western water law. *Wyoming* v. *Colorado,* 259 U. S. 419, had recently been decided, holding that priority of appropriation was the determining factor in reaching an equitable apportionment between two Western States. *Id.,* at 470. Yet, S. Rep. No. 654, 69th Cong., 1st Sess. 26–27, contains no suggestion that Congress, by § 5, was displacing a doctrine as important to these Western States as the doctrine of seizin has been to the development of Anglo-American property law. Instead, only 25 lines of that report are devoted to § 5, and those lines clearly support MR. JUSTICE HARLAN'S conclusion that the section was designed primarily as a financial tool.

The principle that water priorities are governed by state law is deepseated in western reclamation law. In spite of the express command of § 14 of the Project Act, which makes the system of appropriation under state law determine who has the priorities, the Secretary of Interior

is given the right to determine the priorities by administrative *fiat*. Now one can receive his priority because he is the most worthy Democrat or Republican, as the case may be.

The decision today, resulting in the confusion between the problem of priority of water rights and the public power problem, has made the dream of the federal bureaucracy come true by granting it, for the first time, the life-and-death power of dispensation of water rights long administered according to state law.

II.

At issue on the other main phase of the case is the meaning of the California limitation contained in § 4 (a) of the Project Act. The Court, however, does not use the present litigation as an occasion to determine Arizona's and California's rights under that Act, but as a vehicle for making a wholly new apportionment of the waters in the Lower Basin and turning over all unresolved problems to the Secretary of the Interior. The Court accomplishes this by distorting both the history and language of the Project Act.

The Court relies heavily on the terms and history of a proposed tri-state compact, authorized by § 4 (a) *but never adopted by the States concerned, viz., Arizona, California and Nevada.* The proposed tri-state compact provided for a division of tributary waters identical to that made by the Court, insofar as the Gila is awarded to Arizona. The Court in reality enforces its interpretation of the proposed tri-state compact and imposes its terms upon California.

The Court, however, cannot find in the proposed tri-state compact (the one that was never approved) an allocation of the tributaries other than the Gila; and in order to justify their allocation to Arizona it is forced to turn to the terms of "proposals and counter proposals over the

years," instead of to the language of the Project Act. The result is the Court's, not that of Congress, whose intent we have been called upon to discover and effectuate. The congressional intent is expressed in § 4 (a), which provides that California shall be limited to the use of 4,400,000 acre-feet "of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact" (the compact that was approved) and to not more than half of "any excess or surplus waters unapportioned by said compact." [1] These waters are defined in the Colorado River Compact as *system* waters, and not as waters in the mainstream. Yet the Court restricts California to *mainstream waters*. That is the essence of the difference between us.

III.

As I read the Colorado River Compact and § 4 (a) of the Project Act, California is entitled to add all uses of system waters by Lower Basin States in the tributaries to those waters available in the mainstream to determine (1) how much water she can take out of the first 7,500,000 acre-feet apportioned to the Lower Basin States by Article III (a), and (2) whether there are excess or surplus system waters, including Article III (b) waters, of which California has a right to no more than one-half.

I disagree with the Court's conclusion that § 4 (a) of the Project Act refers only to the water flowing in the mainstream below Lee Ferry. The Project Act speaks clearly, and only, in terms of the waters apportioned to the Lower Basin States by Article III (a) of the Compact, *viz.* California may take no more than 4,400,000 acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River

[1] The relevant provisions of the Project Act, the California Limitation Act, and the Colorado River Compact are set forth in the Appendix.

Compact." Article III (a) of the Compact apportions "from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum." The term "Colorado River System" is defined in Article II (a) as including the entire mainstream and the tributaries.[2]

There is, moreover, not a word in Senate Report No. 592, 70th Cong., 1st Sess., reporting the Project Act, that indicates, suggests, or implies that the Colorado River is to be divided and California or any other Lower Basin State restricted to mainstream water. The Report indeed speaks of "enthroning the Colorado River Compact" (*id.*, p. 16), which embraces the entire river system in the United States, not just the mainstream. See Article II (a). Arizona's fears that California would take 5,400,000 acre-feet from the first 7,500,000 acre-feet, if the entire system were used as the source are, I think, unfounded. Out of the first 7,500,000 acre-feet of system water California would be entitled only to 4,400,000 acre-feet. Out of the balance or 3,100,000 acre-feet, California would be excluded.

How much of this 3,100,000 acre-feet should go to Arizona and how much to Nevada, New Mexico, and Utah cannot be determined on this record, the relevant findings not being made in light of the construction which has been given to the Project Act, the Compact, and the Limitation Act. We cannot take as a guide the provisions in the second paragraph of § 4 (a) of the Project Act, *viz.*, the 300,000 acre-feet proposed for Nevada and the 2,800,000 acre-feet proposed for Arizona, *because those provisions come into play only if Arizona, California, and Nevada enter a compact, which to date they have not done.* The division of 3,100,000 acre-feet should, I think, be made

[2] See the Appendix for the relevant portions of Article III.

among Arizona, Nevada, New Mexico, and Utah pursuant to the principles of equitable apportionment. *Nebraska* v. *Wyoming*, 325 U. S. 589.

The evidence is clear that the dependable Lower Basin supply does not exceed 8,000,000 acre-feet if the river system is taken as a whole. By Article III (b) of the Compact the Lower Basin States can increase their beneficial use by 1,000,000 acre-feet, *if additional water is available.* By § 4 (a) of the Project Act California is entitled to not more than one-half of any excess that is "unapportioned by said compact." The amount apportioned to the Lower Basin States by the Compact is 8,500,000 acre-feet, *viz.*, Article III (a) waters in the amount of 7,500,000 "in perpetuity" plus Article III (b) waters, which are highly contingent. After the Upper Basin is given its 7,500,000 acre-feet, the "unapportioned" excess described in Article III (b) would be available. As noted, the present permanent supply for the Lower Basin would not exceed 8,000,000 acre-feet from the mainstream and the tributaries. As I read the Compact and the Project Act, California would get out of the 8,000,000 acre-feet 4,400,000 acre-feet *plus* not more than one-half of Article III (b) waters which, under the foregoing assumption, would amount to one-half of 500,000 acre-feet. If there is a further surplus (either in the sense of Article III (b) or in the more remote sense in which § 4 (a) of the Project Act uses that word)[3] the division between the Lower Basin

[3] It is said that the § 4 (a) language referring to surplus or excess waters, one-half of which is to go to California, the other to Arizona, is meaningless if read literally. That turns on the meaning of the words "excess or surplus waters unapportioned" by the Compact. They mean, it is said, all waters unapportioned by Article III (a) and (b), because Article III (c) defines or speaks of surplus in such manner as to indicate that surplus is only that water over and above Article III (a) and (b) water. This is true, at least for the limited purpose of Article III (c). From that premise it

States should follow the principles of equitable apportionment which we applied in *Nebraska* v. *Wyoming,* 325 U. S. 589. If § 4 (a) is to be read as referring to system waters, California's total rights is available Lower Basin waters would amount to not more than 4,650,000 acre-feet annually (4,400,000 plus 250,000). She would also have a right, albeit highly contingent, to any additional Article III (b) waters that become available to the Lower Basin and to such share of the waters in both Basins over 16,000,000 acre-feet (7,500,000 to Upper Basin, 7,500,000 to Lower Basin under Article III (a), plus 1,000,000 to Lower Basin under Article III (b)) as is equitable. *Nebraska* v. *Wyoming, supra.*

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is reasoned that § 4 (a), literally construed, would allow Arizona and California to split equally all waters over 16,000,000 acre-feet, that is after 7,500,000 acre-feet went to each of the Basins, and after the Lower Basin received an additional 1,000,000 acre-feet under the provisions of Article III (b). If that is true and if California and Arizona were allowed to divide up the rest, the Upper Basin States would forever be limited to their initial 7,500,000 acre-feet, something not contemplated by Article III (f), which specifically provides for apportionment of waters in excess of 16,000,000 between the Upper and Lower Basins. Thus, it is argued that the words "excess or surplus waters" as used in § 4 (a) are meaningless and in hopeless conflict with the terms of the Compact if read literally.

This interpretation is ill-founded. The first paragraph of § 4 (a) contains only a limitation; it apportions no water. The tri-state compact authorized by the second paragraph of § 4 (a) has never been made. But, even if it had been made it could affect only the rights of its signatories *vis-à-vis* each other. For § 4 (a) explicitly provides "that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact."

The words "excess or surplus waters unapportioned by said compact" mean, I think, Article III (b) waters plus all waters in the entire System in excess of 16,000,000 acre-feet. Not only does this interpretation allow the Project Act and the Colorado River Compact to be construed as a harmonious whole, but it is also compelled by the legislative history. See 70 Cong. Rec. 459–460.

Under the Court's reading of § 4 (a), however, a far different division is made. The Court says that the language of § 4 (a) limiting California to 4,400,000 acre-feet "of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact" (7,500,000 acre-feet per annum) is just a "shorthand" way of saying that California is limited to 4,400,000 acre-feet of the water available in the mainstream. According to the Court, California has no rights in system waters, as this would include rights in the tributaries, and the Court has decided that the tributaries belong exclusively to Arizona. Thus, if California is to obtain any "excess or surplus" waters, the surplus must be flowing in the mainstream. That is, California can assert her right to "surplus" waters only when the flow of the mainstream is more than 7,500,000 acre-feet per year. But if, as the evidence shows, the dependable Lower Basin supply of *system* waters is only 8,000,000 acre-feet per annum, 2,000,000 of which are in the tributaries, California can look only to 6,000,000 acre-feet in the mainstream. Thus, California will never be entitled to any of the additional Article III (b) waters (500,000 acre-feet) in the Lower Basin system. Those "surplus" waters would necessarily be in the tributaries, and under the Court's interpretation they belong exclusively to Arizona, § 4 (a) to the contrary notwithstanding.

As a practical matter, the only place California can get system waters is from the mainstream, there being no tributaries of the Colorado River in California. The question to be decided is whether or not under § 4 (a) of the Project Act California can take into consideration Arizona's uses on her tributaries in determining her (California's) right to divert water from the mainstream. The Court says California cannot, because when the Project Act refers to her rights in *system* waters as the measuring rod, it really means her rights in mainstream waters. With due respect the majority achieves that

result by misreading the Colorado River Compact, the Project Act, and by misreading the legislative history leading up to the California Limitation Act. An analysis of the legislative history will show, as already noted, that the Court's analysis is built mainly upon statements made by the various Senators in arguing the terms of a proposed tri-state compact that was never made.

IV.

The Project Act needs the Compact to achieve a settlement of the issue of the apportionment of water involved in this case. It is argued that an apportionment, constitutionally, can be achieved only in one of two ways—by an interstate compact or by a decree of equitable apportionment. That proposition need not, however, be resolved here, because (apart from a contingency not relevant here) the Project Act by the express terms of § 4 (a) is dependent on the ratification of the Compact.[4] If the Compact is ratified, it and the Project Act are to supply the measure of waters which California may claim.[5]

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[4] Under § 4 (a) of the Project Act it is provided that if all seven States fail to ratify the Compact in six months (which in fact they did fail to do), the Project Act shall not take effect until six of the States, including California, ratify the Compact and waive the provisions of Article XI of the Compact (which required approval of all seven States) and the President has so declared by public proclamation. A further condition was the passage of California's Limitation Act. The Presidential Proclamation is dated June 25, 1929. 46 Stat. 3,000; and California's Limitation Act was approved March 4, 1929, and became effective August 14, 1929.

[5] The Colorado River Compact is referred to many times in the Project Act—§ 1, § 4 (a), § 6, § 8, § 12, § 13, § 18, and § 19.

By § 18 the rights of the States to waters within their borders are not interferred with "except as modified by the Colorado River Compact or other interstate agreement."

By § 8 (a) "all users and appropriators" of water are "subject to and controlled by said Colorado River Compact . . . anything in this Act to the contrary not withstanding . . . ."

The overall accounting of the waters is provided for in Article III of the Compact. By Article III (a) "the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum" is apportioned "in perpetuity to the Upper Basin and to the Lower Basin, respectively," meaning that each basin gets 7,500,000 acre-feet. By Article III (b) the Lower Basin is given the right to increase its beneficial consumptive use by 1,000,000 acre-feet per annum. By Article III (c) any deficiency owed Mexico "shall be equally borne by the Upper Basin and the Lower Basin." The Lower Basin by definition includes California. Article II (g). Tributary uses in Arizona diminish California's right under Article III (c) to require the Upper Basin States to supply water to satisfy Mexico. California is to be charged with water from the Gila when the accounting is made with Mexico. That is, California is presumed to enjoy the waters from the Lower Basin tributaries for purposes of Article III (c) of the Compact. It is manifestly unfair to charge her with those waters under Article III (c) of the Compact and to say that she is entitled to none of them in computing the 4,400,000 acre-feet which the Limitation Act and the Project Act give her out of the waters of Article III (a) of the Compact.

Section 1 of the Project Act authorizes the Secretary of the Interior to construct and operate the Boulder Dam "subject to the terms of the Colorado River *compact*." By § 4 (a) the Project Act is not to be operative unless and until the seven States "shall have ratified the Colorado River *compact*"; and if they do not, then "the provisions of the first paragraph of Article XI of said *compact*" must be waived. Moreover, the 4,400,000 acre-feet allotted to California by § 4 (a) are described in terms "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River *compact*."

Section 4 (a) describes the "excess or surplus" waters in terms of those "unapportioned by said *compact*"; and it makes all "uses always to be subject to the terms of said *compact*." The *compact* is, indeed, the underpinning of the Project Act.

The Compact apportions the waters "from the Colorado River System" which by definition includes the mainstream and its tributaries in the United States. And California's Limitation Act, containing the precise language of the allocation of waters in § 4 (a) of the Project Act, describes the 4,400,000 acre-feet in terms "of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado River *compact*." [6]

So it seems that the Compact is the mainspring from which all rights flow. The 7,500,000 acre-feet of water apportioned by Article III (a) of the Compact "from the Colorado River System" to the Lower Basin is the supply out of which California's 4,400,000 acre-feet is to be taken.

To repeat, the words "excess or surplus waters unapportioned by said compact," as used in § 4 (a) of the Project Act, mean, in my view, all waters available in the Lower Basin in excess of the first 7,500,000 acre-feet covered by Article III (a) of the Compact.[7]

The additional 1,000,000 acre-feet described in Article III (b) was added to the Compact "to compensate for the

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[6] It was indicated in *Arizona* v. *California*, 292 U. S. 341, 357, that the Limitation Act incorporates the Compact:

"It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under Article III (b). But the Act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the Compact. The Act merely places limits on California's use of waters under Article III (a) and of surplus waters; and it is 'such' uses which are 'subject to the terms of said compact.'"

[7] See note 3, *supra*.

waters of the Gila River and its tributaries being included within the definition of the Colorado River System." *Arizona* v. *California,* 292 U. S. 341, 350–351; and though Arizona has long claimed those 1,000,000 acre-feet as hers, that construction of Article III (b) of the Compact was rejected long ago. *Arizona* v. *California, supra,* p. 358.

V.

While the legislative history of the California limitation contained in § 4 (a) looks several ways, much of it is legislative history made with a view to its favorable use in the future—a situation we have noticed on other occasions. See *Schwegmann Bros.* v. *Calvert Corp.,* 341 U. S. 384. I think an objective reading of that history shows that the tri-state compact authorized by § 4 (a) of the Project Act (a compact never made) was *the one and only way* visualized by that Act through which Arizona could get the *exclusive use* of the waters of the Gila River. For the second paragraph of § 4 (a) of the Project Act states that the tri-state compact, *if made,* shall give Arizona "the exclusive beneficial consumptive use of the Gila River and its tributaries" within the boundaries of Arizona. Fears that this appropriation would injure New Mexico are not relevant to our problem, since the proposed tri-state compact would not hurt New Mexico unless she agreed to it. The legal rights of States not parties to the Compact would be unimpaired, as *Arizona* v. *California,* 283 U. S. 423, 462, holds. The same applies to any concern that Upper Basin rights would be imperiled by the tri-state compact.

After much discussion, the amendment allocating 4,400,000 acre-feet to California by § 4 (a) of the Project Act was finalized by Senator Phipps, Chairman of the Committee on Irrigation and Reclamation, who identified those 4,400,000 acre-feet as system waters. He made it unmistakably clear by adding to § 4 (a) the words "by

paragraph (a) of Article III" of the Compact which in his words "show that that allocation of waters refers directly to the seven and one-half million acre-feet of water" described by Article III (a) of the Compact. 70 Cong. Rec. 459. That amendment was agreed to without a roll call. 70 Cong. Rec. 473. Prior to that time Senator Phipps had proposed that California receive 4,600,000 acre-feet. *Id.*, p. 335.

The following colloquy took place:

> "Mr. HAYDEN. Under the circumstances I should like to inquire of the Senator from Colorado how he arrives at the figure 4,600,000 acre-feet of water instead of 4,200,000 acre-feet as proposed in my amendment?
>
> "Mr. PHIPPS. It was just about as difficult for me to arrive at 4,600,000 acre-feet as it would have been to arrive at 4,200,000 acre-feet. The arguments pro and con have been debated in the committee for quite a period of time. The contentions made by the Senators from Arizona have not been conclusive to my mind. For instance, I will refer to the fact that *Arizona desires to eliminate entirely all waters arising in the watershed and flowing out of the Gila River.*
>
> "Mr. HAYDEN. There is nothing of that kind in the Senator's amendment.
>
> "Mr. PHIPPS. There is nothing of that kind in the Senator's amendment, but that has been one of the arguments advanced by California as being an offset to the amount to which Arizona would try to limit California.
>
> "Mr. HAYDEN. If the Senator thought there was force in that argument, I should think that he would have included in his amendment a provision eliminating the waters of the Gila River and its tributaries, as my amendment does.

"Mr. PHIPPS. I do not consider it necessary because the bill itself, not only the present substitute measure but every other bill on the subject, *ties this question up with the Colorado River compact.*

"Mr. HAYDEN. My amendment does that.

"Mr. PHIPPS. Yes; that is true, but under estimates of engineers—one I happen to recall being made, I think, by Mr. La Rue—notwithstanding all of the purposes to which water of the Gila may be put by the State of Arizona, at least 1,000,000 acre-feet will return to the main stream. Yet Arizona contends that that water is not available to California; whereas to-day and for years past at least some of the waters from the Gila River have come into the canal which is now supplying the Imperial Valley.

"It is not a definite fixed fact that with the enactment of this proposed legislation the all-American canal is going to be built within the period of seven years; as a matter of fact, it may not be built at all; we do not know as to that. *But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.*" (Italics added.)

It is plain from this colloquy that Senator Phipps thought that his amendment, limiting the amount California can claim, "ties this question up with the Colorado River Compact" and that the Gila River (below Lake Mead) should be "counted in as being a part of the basic supply of water" which California is entitled to have included in the computations for the Lower Basin States.

The word of Senator Phipps, who was chairman of the committee and who offered the amendment, is to be taken as against those in opposition or those who might be

making legislative history to serve their ends. *Schwegmann Bros.* v. *Calvert Corp., supra,* pp. 394–395: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

If California were restricted by the Project Act to the use of 4,400,000 acre-feet out of the mainstream, it is difficult to believe that Senator Ashhurst of Arizona would have expressed his bitter minority views in the Report on the Project Act. S. Rep. No. 592, 70th Cong., 1st Sess., pt. 2. He said that the bill "sedulously and intentionally proposes to sever Arizona's jugular vein" (*id.*, p. 3), that "the amount of water apportioned to California . . . is not warranted in equity, law, justice, or morals" (*id.*, p. 4), that the bill is "a reckless and relentless assault upon Arizona." *Id.*, p. 38. He apparently never imagined that the proposed legislation would confine California to mainstream water. He indeed charged that the bill "authorizes California, which comprises only 2½ per cent of the Colorado River Basin and contributes no water, to appropriate . . . over 38 per cent of the estimated constant water supply available in the main Colorado River for all seven States in the basin and for Mexico." *Id.*, p. 5.

Like Senator Ashhurst and like the Chairman of the Senate Committee, Senator Phipps, I too read the Project Act to speak in terms of the entire Colorado River system in the United States.

APPENDIX.

Section 4 (a) of the Project Act provides in relevant part:

"This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocaby and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four mil-

lion four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

"The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and . . . (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact . . . ."

By § 1 of the California Limitation Act it was provided that when the seven States approved the Compact and its approval is proclaimed by the President that:

". . . the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said 'Boulder canyon project act' that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said 'Boulder canyon project act,' and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

Article III of the Compact provides in relevant part:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

"(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United

States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."